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## Brown, Governor of California et al v. Plata et al.

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## ***Brown, Governor of California et al v. Plata et al***

### **Introduction**

The case of *Brown, Governor of California et al v. Plata et al* (hereinafter *Plata*) is one of the most eye-catching decisions of the Supreme Court of the United States in recent times. The result in itself – the upholding of an order of a Californian District Court to reduce the state’s prison population by up to 46,000 prisoners – would warrant attention. The reasoning of the Court and the differences between the majority and minority are also, however, most significant. The willingness of the Court to uphold the drastic measure of ordering a sizeable reduction in the Californian prison population (the first time such an order has been imposed) and the delicate navigation of the separation of powers thereby entailed makes *Plata* a decision of significance for the protection of prisoners’ rights and the interpretation of the controversial Prison Litigation Reform Act 1995 but also in the Court’s canon of constitutional law. While there is much that makes *Plata* a crucial decision in the history of prisoners’ litigation in the United States of America, it may not signal a radical shift in penal policy by itself.

### **Background to the case: overcrowding, health care and the Eighth Amendment**

At present around 144,000 people are incarcerated in California’s prisons, having fallen back from a peak of 172,000 in 2006.<sup>1</sup> The prison population in California has risen by 750% since the 1970s,<sup>2</sup> with particularly dramatic rises during the 1990s and 2000s. The reasons for this increase include the expansion of determinate sentencing, the rise of mandatory minimum and ‘three strikes’ legislation, an increasing number of sentences passed by the courts, the reluctance of parole bodies to release prisoners who have served even very long terms of

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<sup>1</sup> <http://www.nytimes.com/2011/10/09/us/california-begins-moving-prisoners.html> (accessed October 11 2011). In 2009 its rate of incarceration in prisons, rather than jails, was 458/100,000. <http://www.sentencingproject.org/map/statedata.cfm?abbrev=CA&mapdata=true>. For the USA as a whole, the rate is 743 per 100,000 population. The current rate of incarceration in England and Wales is 156 per 100,000 population. In Scotland it is 155 per 100,000 population. In Northern Ireland it is 92 per 100,000. Source, *World Prison Brief*: [http://www.prisonstudies.org/info/worldbrief/wpb\\_about.php](http://www.prisonstudies.org/info/worldbrief/wpb_about.php) (accessed October 13 2011).

<sup>2</sup> *Coleman et al v. Brown et al* No. CIV S-90-0520 LKK JFM P and *Plata et al v. Brown et al* No. C01-1351 THE, April 8 2009, p. 181.

imprisonment on the grounds of public safety, and the high numbers of prisoners re-entering prison because of violations of the terms of their parole.<sup>3</sup>

At the time of the judgment of the Supreme Court in *Plata*, the prison population of California stood at around 160,000. Its prisons were, however, designed to hold nearly half that number and the issue of overcrowding and its effects was at the heart of the decision of the majority. California was no longer in a position to build its way out of this crisis, experiencing, as it was and still is, very severe budgetary cuts and economic peril.<sup>4</sup> Prison spending has risen to 10% of the State's budget, having been about 4% in the mid 1980s.<sup>5</sup>

The case of *Plata* arose from two class actions, *Coleman v. Brown* and *Plata v. Brown* dating from 1990 and 2001 respectively, which concerned inadequate care for prisoners with serious mental illnesses and deficient medical care respectively. After numerous court interventions and much delay, the plaintiffs in *Plata* and *Brown* then moved for the convening of a three-judge court under the terms of the Prison Litigation Reform Act 1995. The plaintiffs argued that a remedy for unconstitutional medical and mental health treatment could not be achieved without reducing overcrowding. Under the Prison Litigation Reform Act, a court may order reductions in the prison population, but only a three-judge court may do so. The judges in both *Plata* and *Brown* agreed with the plaintiffs' requests and granted the order to convene such a court, before which both actions were heard together.

The three-judge court ordered California to reduce its prison population to 137.5% of its design capacity within two years. The court found that the prison population would have to be reduced if the State could not increase capacity through construction. It ordered the State to formulate a plan for complying with the court order and to submit the plan for court approval. The State appealed to the Supreme Court.

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<sup>3</sup> See further M Tonry, *Sentencing Matters* (Oxford: Oxford University Press, 1996), M Tonry "The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings", 38 *Crime and Justice* 65 (2009); R Hartley, 'Sentencing Reforms and the War on Drugs: An analysis of sentence outcomes for narcotics offenders adjudicated in US District Courts on the Southwest Border'. (2008) 24 *Journal of Contemporary Criminal Justice* 437-462.

<sup>4</sup> Estimates vary, but the latest Budget from the Governor of California refers to a budget deficit of 26.6 billion dollars. <http://www.ebudget.ca.gov/pdf/Enacted/BudgetSummary/Introduction.pdf>

<sup>5</sup> <http://www.economist.com/node/21531490?frsc=dg%7Cb>. Imprisonment in California: From Prison to Jail.

## **Population Reduction Orders under U.S. Law**

### *The Prison Litigation Reform Act 1995*

The Prison Litigation Reform Act 1995 regulates the manner of litigation by prisoners and the remedies which courts can impose, which include the appointment of special masters, consent decrees and population limits, the order at issue here. As might be expected, there are a number of requirements which must be complied with before a court can impose this remedy. First, it must be necessary in order to remedy the violation of constitutional rights and overcrowding must be the primary cause of the violation. Less intrusive relief must have previously been ordered which has failed to remedy the deprivation of the right and the defendant must have had a reasonable time to comply with previous orders. Furthermore, any prospective relief granted under the PLRA the order must be the only one which will provide a remedy, be narrowly drawn, extend no further than necessary to correction the violation of the Federal right and be the least intrusive means to do so. In addition, the court is obliged to give “substantial weight” to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

In *Plata* the Supreme Court held that by a majority of 5:4 that the population limit mandated by the three-judge court was necessary to remedy the violation of the constitutional rights of prisoners under the Eighth Amendment’s prohibition on cruel and unusual punishments and, further, that the order was authorised under the Prison Litigation Reform Act. Kennedy J delivered the opinion of the majority with which Ginsburg, Bayer, Sotomajor and Kagan JJ concurred. Scalia J filed a dissenting opinion in which Thomas J joined. Alito J also dissented, in which opinion Roberts C.J. joined.

### **The decision of the majority**

The order made by the three-judge court required the reduction in the Californian prison population by up to 46,000 persons. Kennedy J recognised that such a possibility was “of undoubted, grave concern.”<sup>6</sup> The order was of “unprecedented sweep and extent”,<sup>7</sup> but the

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<sup>6</sup> *Plata*, p. 2.

<sup>7</sup> *Plata*, p. 3.

Court did not balk at it, finding that the “continuing injury and harm resulting from these serious constitutional violations” was also of unprecedented sweep and extent. In its view, medical and mental health care in Californian prisons had fallen short of minimum constitutional requirements and failed to meet prisoners’ basic health needs, stating, quite barely, “needless suffering and death have been the well-documented result”.<sup>8</sup>

In the view of the majority:

Overcrowding has overtaken the limited resources of prison staff; imposed demands well beyond the capacity of medical and mental health facilities; and created unsanitary and unsafe conditions that make progress in the provision of care difficult or impossible to achieve.<sup>9</sup>

Prisoners with serious mental illness were found by the Court to not be receiving minimal, adequate care. There was a shortage of treatment beds and suicidal inmates were liable to be held for prolonged periods in cages the size of telephone boxes without toilets.<sup>10</sup> In a remarkable feature of the judgment, the Court included photographs of these cages in an appendix.

Waiting lists for mental health care were as long as 12 months. Physical health care was also found to be severely deficient, again due to the overcrowding problem, with medical staff having only half the clinical space necessary to treat the population. This also led to significant delays in accessing care, with examples given by the court of preventable deaths, prolonged illness and unnecessary pain occurring with delay a factor.<sup>11</sup>

### *The rights of prisoners*

The majority opinion affirmed that prisoners may be deprived of rights that are fundamental to liberty, but both the law and US Constitution “demand” recognition of certain other rights. “Prisoners retain the essence of human dignity inherent in all persons”, held Kennedy J, referring to *Atkins v. Virginia*'s<sup>12</sup> statement that the basic concept

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<sup>8</sup> *Plata*, p. 3.

<sup>9</sup> *Plata*, p. 3.

<sup>10</sup> *Plata*, p. 5.

<sup>11</sup> *Plata*, p. 8.

<sup>12</sup> 536 US 304 311 (2002).

underlying the Eighth Amendment is nothing less than the dignity of man.<sup>13</sup> The majority noted that a prison's failure to provide sustenance for inmates may "actually produce physical torture or lingering death", drawing parallels between the lack of provision for food and medical care,<sup>14</sup> referring to the case of *Estelle v. Gamble* (hereinafter *Estelle*) which originally gave rise to this principle.<sup>15</sup>

Such a prison is, in the majority's view, incompatible with the concept of human dignity and "has no place in civilized society".<sup>16</sup> Tellingly, in light of the objections levelled by Scalia J referred to below, Kennedy J held "courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration".<sup>17</sup>

#### *Plata and the Supreme Court's jurisprudence on the Eighth Amendment*

The decision in *Plata* gives rise to some potentially interesting consequences from its interpretation of the nature of prisoners' rights as well as on the test of when rights under the Eighth Amendment are breached.

*Plata* offered the Supreme Court the opportunity to revisit its jurisprudence on prisoners' rights and limit them significantly or, indeed, to revert to the 'hands off' doctrine favoured prior to the 1960s<sup>18</sup> and reinvigorated during the 1980s and 1990s. During those periods the Court placed a great deal of emphasis on the difficulties of running prisons and the need for security and order, becoming more reluctant to accede to the claims of prisoners.<sup>19</sup> By contrast, the Supreme Court's approach in the 1960s and 1970s was significantly more interventionist, holding that prisoners retained their constitutional rights during

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<sup>13</sup> *Plata*, p. 12.

<sup>14</sup> *Estelle v. Gamble* 429 US 97 103 (1976).

<sup>15</sup> *Ibid.*

<sup>16</sup> *Plata*, p. 13.

<sup>17</sup> *Plata*, p. 13.

<sup>18</sup> Exemplified in *Ruffin v. Commonwealth of Virginia* (1871) 62 Va (21 Gratt) 790 and later in *Banning v. Looney* 213 F.2d 771 (10<sup>th</sup> Cir. 1954).

<sup>19</sup> *Jones v. North Carolina Prisoners' Labour Union Inc.* (1977) 433 US 119; *Bell v. Wolfish* (1979) 441 US 520; *Hudson v. Palmer* 468 US 517(1984); *Turner v. Safley* 482 US 78 (1987); *Wilson v. Seiter* 501 US 294 (1991).

incarceration,<sup>20</sup> and were not entirely bereft of constitutional protection during imprisonment.<sup>21</sup>

In this respect, Kennedy J's opinion is important for its reaffirmation of the basic but important principle that prisoners do enjoy the protection of the Eighth Amendment by virtue of their dignity as human beings. In upholding a decision to impose a population cap, the Court has also shown that it continues to endorse the possibility of judicial oversight of the running of prisons. *Plata* is therefore significant for what it did not do, i.e. revert to the caselaw of the 1980s and 1990s. The cases Kennedy J cites to ground his judgment regarding the rights of prisoners come from the 1970s,<sup>22</sup> and the language he draws on is that of judicial responsibility to remedy the failures of the State, holding that the Courts must not shirk from their obligations to protect the rights of all, including prisoners.<sup>23</sup> Kennedy J chose not to cite the much more restrictive caselaw which attaches much greater importance to the state's interest in punishment and the difficulties faced in running prisons.

#### *Plata and the test for a breach of the Eighth Amendment*

The test for when the Eighth Amendment has been breached has become more difficult for prisoners to pass since a number of cases required plaintiffs to prove not only that the impugned conditions were such as to breach the prohibition on cruel and unusual punishments<sup>24</sup> but also that the prison authorities intended the breach the rights, or were indifferent to whether they were breached. *Estelle v. Gamble*<sup>25</sup> held that in order to succeed in an Eighth Amendment claim the plaintiff would have to prove that the prison authorities were deliberately indifferent to the breach of rights. *Farmer v. Brennan*<sup>26</sup> (hereinafter *Farmer*) refined this requirement. It held that the test for breach was whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial

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<sup>20</sup> *Cooper v. Pate* 378 US 546 (1964).

<sup>21</sup> *Wolff v. McDonnell* 41 US 539 (1974).

<sup>22</sup> *Hutto v. Finney* 437 US 678, 678 (1979); *Bell v. Woolfish* 441 US 520 (1979).

<sup>23</sup> Relying on *Curz v Beto* 450 US 319, 321 (1972).

<sup>24</sup> *Rhodes v. Chapman*, approved in *Wilson v. Seiter* 111 S Ct 2321 (1991).

<sup>25</sup> 429 US 97 103 (1976).

<sup>26</sup> 511 U. S. 825 (1994).

‘risk of serious damage to his future health’.<sup>27</sup> In both cases it was held that knowledge of risk could be inferred if circumstantial evidence suggested the risk was obvious.

The majority did not engage in extensive discussion of the test for a breach of the Eighth Amendment is a surprising feature of *Plata*. The PLRA requires a breach of constitutional rights to trigger the application of a population cap and that crowding must be the primary cause of that breach. On the face of the Act there is no indication that anything other than the usual rules of establishing breaches should be applied.

The discussion of the nature of the breach and the degree of knowledge required is confined to footnotes to the majority decision. In one such footnote, Kennedy J referred to the fact that the plaintiffs’ claims were not ones of individual or one-off unconstitutional deficiencies in medical care, as had been the case in *Estelle v. Gamble*. Instead, the claims in *Plata* were based on systemwide deficiencies, which, taken as a whole, subjected sick and mentally ill prisoners to substantial risk of serious harm and caused the delivery of care to fall below the evolving standards of decency that mark the progress of a maturing society.<sup>28</sup> The reason why this analysis is relegated to a footnote, with no further comment from Kennedy J can only be speculated upon. Perhaps a desire to apply but not to dwell on the ‘evolving standards of decency’ quotation was a motivator; Scalia J specifically excoriates this test in his dissent, considering it to be judge-empowering. It is notable that the majority chose to refer to the evolving standards doctrine rather than the ‘minimal civilized measure of life’s necessities’ or Scalia J’s preferred test of whether conditions are “sufficiently atrocious” to amount to a breach of the Eighth Amendment.<sup>29</sup>

It is difficult to explain why the majority, when referring to *Estelle* did not comment either way about its conclusion that the ‘deliberate indifference’ of the prison authorities is required to be proven in cases alleging breach of the Eighth Amendment, nor to the subsequent analysis of this term. This is all the more unexpected as the deliberate indifference test emerged first in *Estelle* with regard to the area of healthcare, the matter at issue in *Plata*. Furthermore, the Court, in the same footnote, referred to *Farmer v. Brennan*, which also concerned medical care and which clarified the meaning of the ‘subjective’

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<sup>27</sup> 511 U. S. 825 (1994), at 843.

<sup>28</sup> *Plata*, p. 7, footnote 3, citing *Farmer v Brennan* 511 US 825, 834 (1994).

<sup>29</sup> *Plata*, p. 3. of Scalia J’s dissent.



element of the test for the breach for the Eighth Amendment. The Supreme Court has remained remarkably silent on the interpretation or indeed application of *Farmer*.

The manner in which the Court dealt with the alleged breach of the Eighth may indicate that the Court has applied, implicitly, a test for breach of the Eighth Amendment which looks primarily to the objective nature of conditions and their compliance with standards deemed to mark the limits of decency, rather than to the knowledge of the authorities. The Supreme Court chose to focus on the consequences of the conditions and their effect on prisoners. While the court did refer to the duration of the litigation in the case and the lack of action by the prison authorities in remedying the wrongs, this was in the context of the requirements of the PLRA which requires an assessment of the opportunities given to the state to remedy the matters complained of rather than in an examination of the knowledge of the prison authorities normally explored in Eighth Amendment cases. The majority's lack of consideration of whether the prison authorities in California were deliberately indifferent or not coupled with the emphasis in the judgment on the effect of the conditions may indicate the majority's implicit moving away from the requirement for this proof.

It may also, however, suggest that the standard for breach under the PLRA when systemwide breaches is different to that which will apply when individual breaches are alleged. At the least, it suggests that the Supreme Court favours the test in *Estelle* which allows the knowledge of risk to be inferred where the risk is obvious. In this regard, the Court's decision is significant for what it did not do – i.e. make the hurdles for the plaintiff prisoner higher than they had already been set.<sup>30</sup> It must also, however, be acknowledged that that fact that medical and mental healthcare were at issue in the case made the proof somewhat easier for the plaintiffs. From *Estelle v. Gamble* it had already been held that the denial of medical care is cruel and unusual because, in the worst case, it can result in physical torture, and, even in less serious cases, it can result in pain without any penological purpose. In any event, the Supreme Court did not take the opportunity to hold that the requirements under the crowding provisions of the PLRA are more onerous than in other claims alleging breaches of rights.

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<sup>30</sup> 452 US 337 (1981).

## **The interpretation of the PLRA**

As well as the question of whether overcrowding caused a breach of the prisoners' rights, the majority also considered that the other requirements of the Prison Litigation Reform Act had also been complied with by the three-judge court. The requirement for a previous order to have been made was satisfied through the appointment of a Special Master to oversee the efforts at remediation in *Coleman* and the approval of a consent decree in *Plata*. The time periods, 12 years and 5 years respectively constituted ample time to allow them to succeed.

Furthermore, the majority considered that the three-judge court had not erred in finding that crowding was the primary cause of the violation of prisoners' constitutional rights. While there were other causes, including the fact that the State had not budgeted for sufficient numbers of staff and there were high vacancy rates in medical and mental health care positions, as well as a lack of political will and budget shortfalls, the PLRA required crowding to be the 'primary' and not the only cause of the breaches of constitutional rights.

The majority was also satisfied that the evidence supported the three-judge court's finding that no other relief would remedy the violation. The Court was not convinced that transfers to other states would relieve overcrowding sufficiently, and was a form of reduction under the Act in any event nor would the recruitment of extra staff as the system had insufficient space for them to work in. Nor was the Court satisfied that it was realistic that California would be able to build its way out of the crisis, declaring it was unable to "ignore the political and fiscal reality behind this case".<sup>31</sup>

The State argued that the terms of the relief were not narrowly drawn, no more than necessary to correct the violation, nor the least intrusive measure necessary, but these arguments were rejected. The Court noted that the fact that the order may have some 'collateral consequences' on prisoners outside the affected class did not mean such an order fell foul of the Act; in addition, prisoners which at present had no physical or mental illness

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<sup>31</sup> *Plata*, p. 32.

may become afflicted due to the conditions. These prisoners were not “remote bystanders”, but rather the system’s “next potential victims”.<sup>32</sup>

In analysing the PLRA’s requirements regarding public safety, the majority held that the requirement to give substantial weight to public safety did not require it to certify that the order had no possible adverse impact on the public. The requirement was for “substantial” weight rather than “conclusive”. The Court recognised that some number of released prisoners can be expected to commit crimes upon release, yet the PLRA still contemplates that courts can issue such orders.<sup>33</sup> While the questions were “difficult and sensitive”<sup>34</sup> they were nonetheless factual, and it was proper for the three-judge court to rely on testimony based on empirical evidence and extensive experience, some of which suggested reducing overcrowding may in fact decrease recidivism rates.

Finally, the Court examined the three-judge court’s reliance on expert evidence, which was a critical feature of the lower court’s reasoning.<sup>35</sup> The Court reiterated that “courts must not confuse professional standards with constitutional requirements ... but expert opinion may be relevant when determining what is obtainable and what is acceptable”<sup>36</sup> when addressed to how to remedy constitutional violations and to corrections philosophy.

### **The dissenting judgments**

Scalia J, joined by Thomas J described the order upheld by the majority as “perhaps the most radical injunction issued by a court in our Nation’s history”,<sup>37</sup> describing the decision of the majority as upholding the “absurd” and the proceedings leading to the result a “judicial travesty”, in which the PLRA and the limitations on the powers of judges were ignored.

Scalia J examined the nature of the alleged violations of the Eighth Amendment and the meaning of “cruel and unusual punishment”. Scalia J argued that it would be absurd to claim

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<sup>32</sup> *Plata*, p. 35.

<sup>33</sup> Here, the majority relied on evidence showing that some Californian counties and several States including Wisconsin; Illinois; Texas; Colorado; Montana; Michigan; Washington and Florida, as well as Canada had experienced the lowering of prison populations without adversely affecting public safety.

<sup>34</sup> *Plata*, p. 38.

<sup>35</sup> *Plata*, p. 43.

<sup>36</sup> *Plata*, p. 45.

<sup>37</sup> *Plata*, p. 1 of Scalia J’s dissent.

that every member of the plaintiff classes had personally experienced torture or a lingering death. It was inconceivable that anything more than a small proportion of prisoners in the plaintiff classes had received “sufficiently atrocious treatment” that their rights under the Eighth Amendment were violated.<sup>38</sup> In Scalia J’s view, systemwide deficiencies did not give rise to individual claims under the Constitution, nor did individual instances of mistreatment allow remedies reforming the entire system.

Scalia J also considered the nature of the remedy, a ‘structural injunction’, to give rise to many objections, chiefly that they turn judges into long-term administrators of complex social institutions and they force judges to engage in “factfinding-as-policymaking”.<sup>39</sup> Memorably, the learned judge continued “three years of law school and familiarity with pertinent Supreme Court precedents give no insight whatsoever into the management of social institutions”.<sup>40</sup>

The question of the appropriate role of judges in such cases was also considered by Alito J. Alito J’s dissent began with the issue of judges usurping the functions of the States. Alito J noted “the Constitution does not give federal judges the authority to run state penal systems” and while the Eighth Amendment placed an important restraint on state authority, it was a limited restraint. On what the Eighth Amendment required, Alito J quoted *Rhodes v. Chapman*<sup>41</sup> to the effect that prison officials could not deprive inmates of the “minimal civilized measure of life’s necessities”, rather than the evolving standards of decency test in *Estelle*. In Alito J’s view the remedy chosen by the lower court was likely to have a major and deleterious effect on public safety. To bring home his point, the judge remarked that the order involved the premature release of “approximately 46,000 criminals – the equivalent of three Army divisions”.<sup>42</sup>

Alito J held that the “deliberate indifference” on the part of the authorities required to establish an Eighth Amendment violation must be examined in light of prison authorities’

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<sup>38</sup> *Plata*, p. 3. of Scalia J’s dissent.

<sup>39</sup> *Plata*, p. 7. of Scalia J’s dissent.

<sup>40</sup> *Plata*, p. 9 of Scalia J’s dissent.

<sup>41</sup> 452 US 337, 347 (1981).

<sup>42</sup> *Plata*, p. 2 of Alito J’s dissent; emphasis in original.

current attitudes and conduct.<sup>43</sup> Alito J specifically applies the ‘deliberate indifference’ test, which makes it all the more surprising that the majority was silent on the matter.

Interestingly, despite strong assertions that judges were not competent to run prison systems, Alito J suggested a number of ‘more targeted’ mechanisms which would have the effect of remedying breaches of the Eighth Amendment, such as repair and expansion of medical facilities along with ‘targeted’ reductions in critical components of the State’s prison population.<sup>44</sup> As a last resort, a much smaller release of prisoners in the plaintiff classes could be considered. In Alito J’s view, these were the only prisoners permissible to consider in the order.<sup>45</sup>

### *Plata and the separation of powers*

Though the dissenting judgments take issue with much of the majority’s analysis, it is with regard to the separation of powers that the dissenting judgments may be on firmer ground. The PLRA was introduced with the aims of reducing the number of claims taken by prisoners in the courts and decreasing the involvement of the judiciary in prison administration.<sup>46</sup> It is in this context that Scalia and Alito JJ’s charge that the majority has breached the separation of powers must be placed. The remedy imposed by the three-judge court was the relatively blunt instrument of a population reduction order. Under a more traditional consent decree, where the authorities would agree to certain remedial actions, the court might have been able to oversee a plan which dealt with all of the causes of the violation together. Moreover, under the order as fashioned in *Plata* the onus is on the state to come up with proposals about how to implement the order to reduce the prison population.

Kennedy J was at pains to point out that it was up to the State to decide the how to administer capacity and it had much discretion in how this could be achieved. Kennedy J suggested that “time and experience” may reveal targeted and effective remedies that will

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<sup>43</sup> Citing *Helling v. McKinney* 509 US 25, 36 (1993) and *Farmer v. Brennan* 511 US 825, 46 (1994).

<sup>44</sup> *Plata*, p. 11 of Alito J’s dissent.

<sup>45</sup> *Plata*, p. 13 of Alito J’s dissent.

<sup>46</sup> J Robertson, “The Jurisprudence of the PLRA: Inmates as “Outsiders” and the Counter-majoritarian Difficulty” (2001) *Journal of Criminal Law and Criminology* 92(1) 187-209.

end the violations without a significant decrease in the prison population. If so, the State was free to seek a change to order which would be entitled to “serious consideration”.<sup>47</sup>

Though this issue of the deadline for remediation imposed by the three-judge court had not been appealed, the majority noted that the State could seek to modify the order as warranted and it reminded the lower court that proper respect for the State and its governmental processes required significant latitude to find mechanisms to correct the violations and the court may grant a motion to extend the deadline. The deference to the State shown in such orders is not new; it has already been held by the Supreme Court in the case of consent decrees that if a defendant shows a significant change in the facts leading to the making of the decree, the district court should tailor a new remedy.<sup>48</sup>

It is the majority’s concern with not intruding too far into the realm of the Executive, driven by the nature of the PLRA itself, which means that the impact of *Plata* on the high rates of imprisonment in the US is likely to be less than might first appear from the terms of the order. In this regard, while Scalia J may be right to point out that judges are becoming involved in the administration of prisons through the order, he overstates this involvement and possible breach of the separation of powers; the potential of both had already been severely reduced under the PLRA.

### **Plata and the reduction of mass incarceration**

The great hope offered by *Plata* for penal reformers is that it may signal the beginning of a reversal in the policies of mass incarceration pursued in the USA since the 1970s. Simon has called the case a “turning point”<sup>49</sup> as it specifically names overcrowding as causing systemwide violations of the constitutional rights of prisoners.

There is no doubting the importance of a judicial decision which finds that overcrowding is the primary cause of the breach of the constitutional rights of prisoners. This is doubly significant as, not only has it become more difficult for prisoners to argue successfully that their rights under the Eighth Amendment have been breached, but also because the Prison

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<sup>47</sup> *Plata*, p. 36.

<sup>48</sup> *Rufo v. Inmates of the Suffolk County Jail* 502 US 362 (1992).

<sup>49</sup> J Simon, “Mass incarceration on trial” (2011) 13(3) *Punishment and Society* 251-255.

Litigation Reform Act made the imposition of a population cap so difficult that commentators considered it a virtual impossibility that it would happen.<sup>50</sup>

While the decision is therefore of great consequence, it would be wrong to suggest that it alone will instigate a dramatic reversal in the prison population across the United States. There is debate as to whether interventions by judges prior to the introduction of the PLRA and subsequently led to major changes in prison conditions in the past.<sup>51</sup> The degree of deference that the Supreme Court suggests the lower court extend to the State in this case again indicates that the eventual impact of the decision may be less than might be apparent at first glance. While the court has laid down the outer marker on crowding, it is for the state to decide how best to bring the levels down to that limit. This is not necessarily through releases, but through transfers to local jails out of the state system or, if the finances were available, through prison building. As such, the Court has not by any measure said to California that the policy of sending lots of people for very long periods of time must stop, merely that the current levels of overcrowding amount to cruel and unusual punishment because of its effect on physical and mental healthcare. It is also unlikely that this case will give rise to a rash of similar actions resulting in the reduction of prison populations in other states. By any measure the conditions at issue in *Plata* were very poor and had been the subject of litigation and judicial oversight for years. To establish breaches of constitutional rights caused primarily by overcrowding remains difficult, and other cases are also likely to fall foul of the requirement that ample opportunity has been given to the state to remedy the situation; in *Plata*, litigation had been going on for twenty years.

There have been some developments since the case was decided. In August 2011, the defendants indicated that California is on target to meet the three-judge court's benchmark of bringing the prison population down to 155% of design capacity by January 2012.<sup>52</sup>

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<sup>50</sup> B Belbot, "Report on the Prison Litigation Reform Act: what have the courts decided so far?" (2004) 84 *The Prison Journal* 291-316. See further A Amend, "Giving Precise Content to the Eighth Amendment: An Assessment of the Remedial Provisions of the Prison Litigation Reform Act" (2008) 108 *Columbia Law Review* 143-181.

<sup>51</sup> See for example the discussion in S Livingstone, T Owen and A Macdonald, *Prison Law* (4<sup>th</sup> ed., Oxford, Oxford University Press, 2008), M Feeley and E Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (Cambridge, Cambridge University Press, 1998); Belbot, *supra* note 50.

<sup>52</sup> Defendants' Supplemental Report in Response to June 30, 2011 Order, available at <http://www.cdcr.ca.gov/News/docs/3JP-Filing-August-16-2011.pdf> (accessed October 1 2011).

The California Department of Corrections and Rehabilitation had in fact published a list of actions it has taken to reduce overcrowding prior to the Supreme Court's decision. Many thousands of prisoners have been placed in institutions paid for by the State of California but outside of that state. The parole system has been reformed such that certain 'low level' offenders are placed on non-revocable parole and cannot be recalled for violations. Extra credits<sup>53</sup> have been made available to count towards release.<sup>54</sup> Since October 1 2011, California has implemented two new Assembly Bills (AB109 and AB117). AB 109 allows prisoners convicted of offences that are not serious, violent or sexual in nature, as well as certain other offences, to serve their sentences in county jails rather than state prisons, placing responsibility for such prisoners on local, county administrations rather than the state system. This piece of legislation will apply prospectively only. Some prisoners released after October 1 2011 will also be supervised at county rather than state level. All parole revocations will be served in county jails instead of state prisons and the period of time which can be served has been limited at 180 days. From July 1 2013, the hearings process for parole revocations will be carried out by courts rather than the Board of Parole Hearings.

To date, then, California has chosen mainly to focus on prospective measures which they predict will bring down the prison population in the longer term and on immediate transfers out of state, to county jails and in making it more difficult to send those who breach their parole back to prison.

While important, particularly regarding the limitation on the amount of time which can be spent in custody for violations for parole, *Plata* does not, of itself, inhibit the State's ability to sentence people for very long periods of time. The *Plata* decision must, therefore, also be understood by reference to the Supreme Court's decisions on mandatory and very long sentencing. The Court has reiterated that grossly disproportionate prison sentences do breach the Eighth Amendment, but the question of proportionality has been examined in ways which are deferential to the States.<sup>55</sup> In *Ewing v. California*,<sup>56</sup> for example, the Supreme Court held by a majority that the Eighth Amendment does not prevent California

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<sup>53</sup> 'Credits' can be gained by prisoners in order to obtain release prior to the expiration of their sentences.

<sup>54</sup> <http://www.cdcr.ca.gov/News/docs/FS-Actions-ReduceInmatePop.pdf>

<sup>55</sup> J. Brennan, The Supreme Court's Excessive Deference to Legislative Bodies Under Eighth Amendment Sentencing Review (2004) *The Journal of Criminal Law and Criminology* 94(3) 551-586.

<sup>56</sup> 538 US 111 (2003).



from sentencing a person to life imprisonment without the possibility of parole for the first twenty-five years of the term for the offence of stealing \$1,200 worth of golf clubs as required under the State's 'three strikes' laws. Thus, while the Court has now said that a certain level of overcrowding which has caused egregious flaws in the provision of mental and medical health care breaches the Constitution, it has not said that the sentencing policies giving rise to this state of affairs must end.

### **The limits of dignity**

Simon, commenting on *Plata*, has also argued that the judgment offers the potential to alter the 'penal imaginary'; in other words that the judgment gives us a new image of prisoners as people who are 'at risk' by the prison system, rather than the source of risks themselves. Simon suggests that "California has produced a penal vision of a humanitarian medical crisis ... [which] threatens to delegitimize mass incarceration as nothing before".<sup>57</sup> Though this reading may give hope to those seeking the abandonment of the State's penal practices, such a conception of prisoners is, it is submitted, ultimately damaging to the notion of prisoners' rights. If it is only when human beings are at their most physically and mentally vulnerable, subject to conditions in which they await treatment in cages the size of phone booths and without access to toilet facilities, that we can see their dignity as human beings, then the notion of dignity has been severely eroded. Simon's argument raises the regrettable spectre that the humanity of prisoners can only be seen and protected when it has been stripped back to the barest and basest level.

The danger of treating dignity simply as a defensive concept is that it generates a kind of 'race to the bottom' in prison conditions, with prison authorities doing just enough to stay one step ahead of courts and courts engaged in a process of setting the minimum possible standards. The US Supreme Court has already given decisions allowing prison authorities the scope to diminish prison conditions, with *Lewis v. Casey* holding that prison libraries could be eliminated;<sup>58</sup> *Gilmore v. California* has held: "no longer may courts grant or approve relief that binds prison administrators to do more than the constitutional minimum".<sup>59</sup>

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<sup>57</sup> Simon, *supra* note 49, at p. 253

<sup>58</sup> 518 US 343 (1996).

<sup>59</sup> 220 F.3d 987 (9<sup>th</sup> Circuit 2000).

Indeed, this constrained notion of dignity is also evident in the *Plata* decision's result. After all, a prison population running at 137.5% of the prison system's capacity is still a very overcrowded system; it is simply the very outer limits which the Supreme Court is prepared to tolerate. This version of the protection of dignity simply protects people from the very outer limits of what is cruel and unusual, rather than being used to create a prison system which positively affirms that dignity. Since *Estelle* it has been the case that prisoners alleging breaches arising out of mental and physical healthcare have received a more favourable hearing from the Courts than other claims, meaning that *Plata's* impact outside of this arena may be further limited.

Commenting on the PLRA, Baradaran-Robinson argued that it "prohibits all prospective relief dealing with prison conditions from exceeding the constitutional minimum".<sup>60</sup> It seems that even when a Court orders the reduction of a State's prison population by tens of thousands of prisoners, the PLRA has succeeded in ensuring that prison conditions will remain only at the very outer limits of constitutional permissibility. In this regard, there may be some similarity with Garland's argument that the Supreme Court's interventions in the name of dignity may have, in fact, ensured the retention of the death penalty in some US states.<sup>61</sup> While the Supreme Court has perhaps added greater urgency to California's plans to reduce overcrowding, it cannot yet be said that it had shaken the foundations of mass incarceration.

## **Conclusion**

There is no doubt that the decision in *Plata* is a most striking one. While the statements that overcrowding has caused the violations of the rights of prisoners and the vindication of those rights are most significant features of the judgment of the majority, it is probably unwise to claim too much of the decision in terms of reshaping the nature of prison administration in California or the US generally. The judgment does not do as much good as may be claimed for it, nor as much harm as the dissenting judgments suggest. The dilution of the potential impact of the decision through the reminders from Kennedy J to the three-

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<sup>60</sup> S Baradaran-Robinson, Comment, Kaleidoscopic Consent Decrees: School Desegregation and Prison Reform Consent Decrees After the Prison Litigation Reform Act and *Freeman-Dowell*, (2003) *Brigham Young University Law Review*, 1336-1338.

<sup>61</sup> D Garland. *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Belknap Press, Massachusetts, 2010).

judge court of the need for flexibility and longer periods of time is likely to mean that conditions within Californian prisons will remain difficult for some time to come. Moreover, there is the added concern that the effects of litigation and the findings of the court may mean that States will seek to meet the minimum permissible standard under the Constitution rather than a more expansive system of protecting prisoners' rights and that this will be tolerated by the Courts when there is the prospect of such large releases.

It is perhaps most remarkable to European eyes that the USA, which has some of the highest prison population rates in the world gives judges this power to order mass releases. What is most notable about the judgment, and perhaps most of concern, however is that it has been deliberately left to the judiciary to take such tough and necessary decisions to remedy what have been found to be unconstitutional conditions and this, perhaps, is an easier option for those fearful of being seen as soft on crime and without the financial capacity to avoid penal reductionism. This kind of judicial intervention, though important for both the philosophical and practical protection of the rights of prisoners is no substitute for political reform of prison systems everywhere.