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To Free or Not to Free: Rethinking Release Orders under the Prison Litigation Reform Act after *Brown v. Plata*

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TO FREE OR NOT TO FREE: RETHINKING RELEASE ORDERS UNDER THE PRISON LITIGATION REFORM ACT AFTER *BROWN v. PLATA*

KYLE T. SULLIVAN*

Abstract: The United States Supreme Court made one of its most controversial decisions in recent memory in May 2011. *Brown v. Plata* involved a class action by inmates in California who alleged that their Eighth Amendment rights had been violated because overcrowding in the State's prisons prevented access to adequate physical and mental health care. After California failed to comply with previous orders to remedy those conditions, the U.S. District Court for the Eastern District of California ordered the State to reduce its prison population by forty-six thousand inmates. Forced to either affirm the release order and jeopardize public safety or reverse the order and allow continued violation of prisoners' Eighth Amendment rights, the Supreme Court chose the former. Understandably, many questioned the wisdom of both the decision and the Prison Litigation Reform Act, the statute that required it. As a result, the need for prison reform and alternatives to mass incarceration are clearer than ever.

INTRODUCTION

On May 23, 2011, the United States Supreme Court upheld a court order releasing forty-six thousand inmates from Californian prisons, but the decision was by no means an easy one.¹ So objectionable were the options before the Court in *Brown v. Plata*, and so grave were their potential consequences, that the justices may have felt themselves reluctant participants in a Hobsonian gameshow.² Behind door number one lay reversal of the three-judge court's order and continued overcrowding in California's prisons, which was already so acute that it violated the Eighth Amendment's prohibition against cruel and unusual

* Managing Editor, BOSTON COLLEGE JOURNAL OF LAW & SOCIAL JUSTICE (2012-2103).

¹ See *Brown v. Plata*, 131 S. Ct. 1910, 1923, 1928 (2011); Adam Liptak, *Justices, 5-4, Tell California to Cut Prison Crowding*, N.Y. TIMES May 24, 2011, at A1 (describing the Court's decision as "ideological" and Justice Scalia and Justice Alito's dissents as "vigorous").

² See *Plata*, 131 S. Ct. at 1923; Liptak, *supra* note 1.

punishment.³ Behind door number two lay affirmation of the release order and assumption of the public safety risks associated with releasing thousands of prisoners.⁴ The Court's 5–4 choice of this second door left many wondering whether a more tenable solution to prison overcrowding might lie behind a third door that eschews the binary construct presented in *Plata* and instead opts for systemic change in America's criminal justice system.⁵

The option behind door number one was unpleasant indeed.⁶ Although designed to hold just under eighty thousand prisoners, the inmate population in California's prison system crested at more than one hundred and sixty thousand in 2006, and, as of August 2009, some prisons in the state had populations approaching three hundred percent of their capacity.⁷ The predictable result of this arrangement was an increase in violence among inmates.⁸

Over time, the overcrowding in California's prisons produced even more pernicious results.⁹ Prisoners with mental illnesses "languished for months" without access to care of any sort, and the ever-expanding inmate population led to a "four to five-year gap in the availability of sufficient beds" for the proper treatment of such inmates.¹⁰ In lieu of adequate personnel and treatment beds, suicidal inmates were often "held for prolonged periods in telephone booth-sized cages without

³ See *Plata*, 131 S. Ct. at 1923–28 (describing unsanitary conditions in California's prisons); *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, at 1, 6–9 (E.D. Cal. Aug. 4, 2009), available at <http://www.ca9.uscourts.gov/datastore/general/2009/08/04/Opinion%20&%20Order%20FINAL.pdf>.

⁴ See *Plata*, 131 S. Ct. at 1923; *Coleman*, No. CIV S-90-0520 LKK JFM P, at 9.

⁵ See Craig M. Bradley, *The Right Remedy for Crowded Prisons*, 47 TRIAL; Allison Torres Burtka, *The Problem with Prisons*, 47 TRIAL 24, 26 (2011). See generally John W. Parry, *Supreme Court Embraces Minimal Relief for California Prisoners with Mental Disabilities and Other Serious Health Care Needs*, 35 MENTAL & PHYSICAL DISABILITY L. REP. 545 (2011).

⁶ See *Plata*, 131 S. Ct. at 1923.

⁷ See *id.*; *Coleman*, No. CIV S-90-0520 LKK JFM P, at 7. Thousands of prisoners were assigned to triple-bunks in gymnasiums, as many as fifty-four prisoners were made to share a single toilet, and in some cases two hundred prisoners were also forced to share six showers. See *Plata*, 131 S. Ct. at 1924; *Coleman*, No. CIV S-90-0520 LKK JFM P, at 7, 72.

⁸ See *Plata*, 131 S. Ct. at 1933–34. In one memorable incident, a prisoner died after an assault by fellow inmates in a dormitory-gymnasium; the area was so understaffed that correctional officers did not learn of the death until hours later. *Id.*; see also Michelle Parilo, *Protecting Prisoners During Custodial Interrogations: The Road Forward After Howes v. Fields*, 33 B.C. J.L. & SOC. JUST. 217, 234–37 (2013) (describing the many forms of prison violence).

⁹ See *id.*; *Coleman*, No. CIV S-90-0520 LKK JFM P, at 72.

¹⁰ *Plata*, 131 S. Ct. at 1926.

toilets.”¹¹ Inmates not fortunate enough to receive even this modicum of care were largely unsupervised.¹²

The plight of prisoners with physical illnesses told a similar story.¹³ Like the “telephone booth-sized cages” used to hold suicidal inmates, one prison held fifty inmates in a twelve– by twenty–foot cage for nearly five hours while they awaited medical treatment.¹⁴ Elsewhere, a prisoner died after his testicular cancer went untreated for seventeen months, and in San Quentin, a prisoner died from renal failure after going three months without receiving a consultation that should have occurred within fourteen days of his diagnosis.¹⁵ The severe understaffing that caused these and other deaths was compounded by the lack of basic sanitation, absence of medical equipment, and incompetence of prison medical staff.¹⁶ Of particular concern was the spread of communicable diseases which, in light of crowded conditions, amounted to system-wide pestilences.¹⁷ In San Quentin alone, facilities were so “antiquated, dirty, poorly staffed, [and] poorly maintained,” and medical equipment was so “inadequate,” that they posed a “public health and life-safety risk” to inmates and employees alike.¹⁸ These conditions were not unique to San Quentin.¹⁹ One expert declared that California’s prisons as a whole were “breeding grounds for disease,” and another determined that sub-standard care was “widespread” and that an “extremely high” proportion of inmate deaths in California were either “possibly preventable or preventable.”²⁰ With one California inmate dying needlessly every week,

¹¹ *Id.* at 1924.

¹² *See id.* at 1933–34. In two such cases, prisoners hanged themselves after being assigned to cells that prison staff knew could support a noose but could not fix “because doing so would involve removing [the] prisoners from the cells” in question and holding them in alternative space that did not exist. *Id.* at 1934.

¹³ *Id.* at 1925.

¹⁴ *See id.* at 1924–25.

¹⁵ *See id.* at 1925, 1927.

¹⁶ *See Plata*, 131 S. Ct. at 1927. Expert testimony revealed that hiring and retaining competent medical staff was difficult because of the “culture of cynicism, fear, and despair” in the prison environment. *Id.* As a result, California’s prisons were often forced to “hire any doctor who had a license, a pulse, and a pair of shoes.” *Id.*

¹⁷ *See id.* at 1933; *Coleman*, No. CIV S-90-0520 LKK JFM P, at 7. “Infectious diseases prevalent in prisons include Hepatitis B, Hepatitis C, HIV/AIDS, and MRSA, sexually transmitted diseases . . . and airborne diseases such as tuberculosis . . . studies in the late 90’s . . . indicated rates of HIV were eight to ten times higher than in the general public, rates of Hepatitis C nine to ten times higher, rates of TB four to 17 times higher, and that 10 percent to 20 percent of inmates suffered from grave mental illness.” Maureen Mullen Dove, *Law and Fact of Health Care in Prisons*, 44 MD. BAR J. 4, 11 (2011).

¹⁸ *See Coleman*, No. CIV S-90-0520 LKK JFM P, at 7, 15.

¹⁹ *See Plata*, 131 S. Ct. at 1934.

²⁰ *Id.* at 1925; *Coleman*, No. CIV S-90-0520 LKK JFM P, at 72.

then-Governor Arnold Schwarzenegger declared a state of emergency in the State's prisons in October of 2006, condemning them as places of "extreme peril."²¹

Ultimately, the Supreme Court decided that the option behind door number one was unacceptable.²² Writing for the majority in *Plata*, Justice Kennedy ruled that the conditions in California's prisons—specifically, the unavailability of adequate medical and mental health care due to overcrowding—violated the Eighth Amendment's prohibition against cruel and unusual punishment.²³ With the Prison Litigation Reform Act (PLRA) as his guide, Justice Kennedy affirmed a special three-judge panel's conclusion that the only way to remedy these violations was through a prison population cap which, absent the financial resources to build and staff more prisons, would require the release of as many as forty-six thousand inmates.²⁴ To be sure, Justice Kennedy and the majority did not take this decision lightly; they acknowledged that an action of such "unprecedented sweep and extent" raised "grave concern[s]" for public safety.²⁵ Thus, per the PLRA's requirements, the majority affirmed the release order only after determining that it was narrowly tailored to correct the Eighth Amendment violations in question and that its necessity outweighed concerns for public safety.²⁶

What lay behind door number two—the release of tens of thousands of convicted felons—was equally unpalatable.²⁷ Justices Scalia and Alito, joined by Justice Thomas and Chief Justice Roberts, respectively, raised this concern in separate and unusually aggressive dissents.²⁸ Maligning the majority's decision as "the most radical injunction issued by a court in our Nation's history," Justice Scalia's dissent began by reminding the Court that the forty-six thousand "convicted felons" it ordered released would "undoubtedly be fine physical specimens who have developed intimidating muscles pumping iron in the

²¹ See *Coleman*, No. CIV S-90-0520 LKK JFM P, at 7, 43.

²² See *Plata*, 131 S. Ct. at 1923.

²³ See *id.* at 1947.

²⁴ See *id.* at 1944–47.

²⁵ See *id.* at 1923.

²⁶ See *generally id.* at 1928–1947 (applying the PLRA to determine that the release order was the necessary, narrowly tailored, and least intrusive means of remedying the Eighth Amendment violations, and that it was not outweighed by concerns for public safety).

²⁷ See *generally id.* at 1950–59 (Scalia, J., dissenting) (emphasizing the grave risks to public safety posed by a mass-release of prisoners); *id.* at 1959–68 (Alito, J., dissenting) (echoing Justice Scalia's public safety concerns).

²⁸ See *generally Plata*, 131 S. Ct. at 1950–59 (Scalia, J., dissenting); *id.* at 1959–68 (Alito, J., dissenting).

prison gym.”²⁹ Public safety concerns aside, Justice Scalia also found the Court’s decision troubling as a matter of law.³⁰ The release order imposed a “‘structural injunction’” requiring judicial oversight of the entire California prison system, a task that exceeded the Court’s expertise and constitutional authority.³¹ Likewise, Justice Scalia criticized the Court’s methodology as nothing more than “the dressing-up of policy judgments as factual findings.”³² While Justice Scalia did not believe that such findings were made in bad faith, he emphasized that the judiciary’s relative inexperience in running social institutions counseled against finding facts in a way that directed a mass-release of prisoners.³³ Such was the crux of Justice Scalia’s dissent—common sense and principles of judicial restraint militated against the release of forty-six thousand convicted criminals into the general population.³⁴

Justice Alito’s dissent similarly declared that “[t]he Constitution does not give federal judges the authority to run state penal systems.”³⁵ Like Justice Scalia, Justice Alito believed this conclusion to be dictated by concern for the separation of powers, the tenets of federalism, and the serious public safety concerns of releasing prisoners.³⁶ Justice Alito was particularly concerned with the apparent haste with which the Court took the “radical and dangerous step” of affirming the release of “46,000 criminals—the equivalent of three Army divisions.”³⁷ Anything short of absolute exhaustion of intermediate remedial measures would “gambl[e] with the safety of the people of California” in a way that

²⁹ *Id.* at 1950, 1953 (Scalia, J., dissenting).

³⁰ *Id.* at 1951.

³¹ *See id.* at 1953, 1956 (noting that “structural injunctions” imposed on States by federal courts violate the separation of powers and precepts of federalism).

³² *See id.* at 1955. Professor Dan M. Kahan describes Justice Scalia’s criticism as “aporetic” and therefore, perhaps, moot. *See generally* Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 66 (2011). Justice Scalia’s remonstrance that the Court “bend every effort to read the law in such a way as to” avoid the prisoner release suggests that he engaged in the selfsame “dressing-up of policy judgments as factual findings.” *See Plata*, 131 S. Ct. at 1950, 1955 (Scalia, J., dissenting). After all, if “it is impossible for judges to make ‘factual findings’ without inserting their own policy judgments,” it seems that Justice Scalia’s criticism is more properly directed at the factfinding required by the Prison Litigation Reform Act than at the judges who “find” facts under its auspices. *See id.* at 1954.

³³ *See Plata*, 131 S. Ct. at 1950, 1954–55 (Scalia, J., dissenting).

³⁴ *Id.* at 1950, 1957–58.

³⁵ *Id.* at 1959 (Alito, J., dissenting).

³⁶ *See id.*

³⁷ *See id.* at 1959, 1963 (emphasis in original).

would “lead to a grim roster of victims,” just as previous release orders had.³⁸

Despite their differences, the Justices agreed “that general overcrowding contribute[d] to many of the California [prison] system’s healthcare problems.”³⁹ Thus, the solution in *Brown v. Plata* may have lain behind a third door—one that considers overcrowding not as something to be fixed, but as something to be prevented from the outset.⁴⁰ Although the PLRA—the statute that gave the Court the authority to either affirm or reverse the lower court’s release order—did not present this third option in *Plata*, it has received renewed support from those on both sides of the *Plata* decision.⁴¹ For those who argue that the Court offered only temporary relief for a systemic problem, a reform of the penal system that emphasizes proactive measures aspires to permanent eradication of Eighth Amendment violations.⁴² The fewer people who are imprisoned, the less likely are prison staff and resources to be overwhelmed.⁴³ For those who believe that public safety is paramount, the proactive model ensures that prison conditions never again will become so acute as to force the “improvident” release of convicted criminals.⁴⁴ The difficulty with this approach, however, is that it is largely chimerical.⁴⁵ Few states or municipalities have completely succeeded in implementing a system that avoids prison overcrowding by preventing crime before it begins, and such efforts on the federal level have yet to begin in earnest.⁴⁶

³⁸ See *id.* at 1965–68. The “prior prisoner release order” to which Justice Alito referred was the one attempted in Philadelphia in the early 1990s for the same reasons and with disastrous consequences for public safety. See *id.*; *infra* notes 149–170 and accompanying text.

³⁹ See *Plata*, 131 S. Ct. at 1929–30; *id.* at 1951 (Scalia, J., dissenting); *id.* at 1963 (Alito, J., dissenting) (emphasis omitted).

⁴⁰ See Bradley, *supra* note 5, at 56; Burtka, *supra* note 5, at 26; Parry, *supra* note 5, at 546.

⁴¹ See Prison Litigation Reform Act, 18 U.S.C. § 3626 (2006); *Plata*, 131 S. Ct. at 1956 (Scalia, J., dissenting); Burtka, *supra* note 5, at 26–28.

⁴² See Bradley, *supra* note 5, at 56; Burtka, *supra* note 5, at 26–28; Parry, *supra* note 5, at 546.

⁴³ See *Plata*, 131 S. Ct. at 1933–34; *Coleman*, No. CIV S-90-0520 LKK JFM P, at 72.

⁴⁴ See *Plata*, 131 S. Ct. at 1950–59 (Scalia, J., dissenting) (emphasizing the grave risks to public safety posed by a mass-release of prisoners); *id.* at 1959–68 (Alito, J., dissenting) (echoing Justice Scalia’s public safety concerns).

⁴⁵ Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L133, 137 (2011).

⁴⁶ See Andrew W. Amend, Note, *Giving Precise Content to the Eighth Amendment: An Assessment of the Remedial Provisions of the Prison Litigation Reform Act*, 108 COLUM. L. REV. 143, 169–70 (2008). See generally PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS I (Apr. 2011) [hereinafter STATE OF RECIDIVISM], available at <http://>

The PLRA and the *Plata* decision are laudable to the extent that they are an indictment of the American penal system's dependence on incarceration.⁴⁷ But to the extent that the Court's decision, as demanded by the PLRA, is only a half-measure for a problem that requires a full solution, it should be viewed as a call for more comprehensive change.⁴⁸ The purpose of this Note is to heed that call by offering an alternative to the PLRA that shifts the American penal system away from its preference for imprisonment and toward other forms of sanction that address the interest in rehabilitating criminals, rather than just incapacitating them; conserve fiscal and administrative resources; and reconcile the constitutional concerns raised by Justices Kennedy, Scalia, and Alito in *Plata*.⁴⁹ Support for this proposal will be presented in five parts. Part I reviews the history of the American criminal justice system in the twentieth century with an eye toward the ideologies that have impelled the rise of the prison state and its concomitant, the PLRA. Part II examines criticisms of the PLRA and suggests that the Act's malleability indicates the need for a more definitive solution to prison overcrowding from the legislature. Part III considers historical parallels to *Plata's* release order as predictors of its potential impact. Part IV explores the success of efforts in other states to supplant imprisonment with alternative sanctions and preventive measures. Part V draws on the findings of Parts II, III, and IV to recommend ways that each of the three branches of government can help to reduce America's prison population. Finally, this Note concludes by observing that, though incomplete and imperfect, the proposed measures can serve as a foundation for the long-awaited reform of the American penal system.

www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolving_Door_America_Prisons%20.pdf (citing "[t]he dramatic growth of America's prison population during the past three decades" and exploring alternatives to incarceration); Taslitz, *supra* note 45, at 138–52 (analyzing California, New York, and Washington as the states that represent the three main approaches to incarceration in the United States and demonstrating that none of the three approaches is completely successful).

⁴⁷ See Prison Litigation Reform Act, 18 U.S.C. § 3626 (2006); *Plata*, 131 S. Ct. at 1928; see also Burtka, *supra* note 5, at 27–28; Parry, *supra* note 5, at 545.

⁴⁸ See 18 U.S.C. § 3626; *Plata*, 131 S. Ct. 1928; see also Bradley, *supra* note 5, at 56; Burtka, *supra* note 5, at 27–28; Parry, *supra* note 5, at 546.

⁴⁹ See *Plata*, 131 S. Ct. at 1928; *id.* at 1950–59 (Scalia, J., dissenting); *id.* at 1959–68 (Alito, J., dissenting); STATE OF RECIDIVISM, *supra* note 46, at 1; Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1401–02 (2006).

I. THE ROAD TO *PLATA*: RISE OF THE AMERICAN PRISON STATE

Criminal justice blossomed as a political issue in the presidential election of 1968 when Republican challenger Richard Nixon made “law and order” a priority of his campaign, and famously accused Democratic incumbent Lyndon Johnson of being “soft-on-crime.”⁵⁰ Nixon also ascribed the rising crime rate to the liberal activism of the Warren Court, whose decisions consistently favored the rights of defendants in criminal cases.⁵¹ Thus, the Republican platform emphasized the need to “re-establish the principle that men are accountable for what they do,” while the Democratic platform lamented a society that forced individuals to “resort to violence.”⁵² With this partisan contrast drawn, a candidate’s willingness to combat crime through stiffer law enforcement measures would be a critical matter in national elections forever more.⁵³

Indeed, the moral tenor of Nixon’s 1968 campaign was echoed by President Ronald Reagan in the 1980s. For Reagan, crime was not something to be prevented or excused as it was during Johnson’s Great Society; rather, it was a moral failing to be punished and repressed.⁵⁴

⁵⁰ See Clayton & Pickerill, *supra* note 49, at 1396.

⁵¹ See generally *Duncan v. Louisiana*, 391 U.S. 145 (1968) (applying the Sixth Amendment right to trial by jury to the States); *Miranda v. Arizona*, 384 U.S. 436 (1966) (applying the exclusionary rule to Fifth Amendment violations by the States); *Gideon v. Wainwright* 372 U.S. 335 (1963) (applying the Sixth Amendment right to counsel to the States); Clayton & Pickerill, *supra* note 49, at 1399–1400. As Professors Cornell W. Clayton and J. Mitchell Pickerill observe, Nixon’s criticism of the Warren Court was part of his “southern strategy,” which sought to secure the votes of Southern Democrats by “tap[ping] into southern resentment of the Court without having to repudiate the substance of [its] civil rights reforms.” Clayton & Pickerill, *supra* note 49, at 1399. Thus, Nixon’s attack on the Warren Court was in reality a roundabout way of attacking the Democrats’ allegedly soft position on crime. See *id.* Every promise to appoint “strict constructionist[.]” judges who would restore “the ‘forgotten civil right’ of public order” and read criminal defendants’ rights more narrowly than the Warren Court was meant to foreground the difference between Democrats and Republicans in matters of criminal justice. See *id.* at 1399–1400.

⁵² See Clayton & Pickerill, *supra* note 49, at 1400–01 (quoting *Political Party Platforms: Republican Party Platform of 1968*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=25841#axzz1py74wlp3> (last visited May 17, 2013), and *Political Party Platforms: Democratic Party Platform of 1968*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=29604#axzz1py74wlp3> (last visited May 17, 2013)). Likewise, where the Republican platform cast law as “the cornerstone of a free and well-ordered society,” the Democratic platform cautioned against using the law to “foster injustice” and “curtail[] the hard-won liberties of all Americans.” See *id.* at 1400–01 (quoting *Political Party Platforms: Republican Party Platform of 1968*, *supra*, and *Political Platforms: Democratic Party Platform of 1968*, *supra*).

⁵³ See *id.* at 1400.

⁵⁴ VANESSA BARKER, *THE POLITICS OF IMPRISONMENT*, JOHN J. NEWMAN & JOHN M. SCHMALBACH, *UNITED STATES HISTORY: PREPARING FOR THE ADVANCED PLACEMENT EX-*

And like Nixon's campaign in 1968, Reagan's 1980 campaign exploited "the political power of the crime issue" by explicitly linking it to "liberal permissiveness" and advocating a more robust mandatory sentencing program, as well as renewed reliance on the death penalty.⁵⁵ Reagan's successor, George H.W. Bush, continued this trend in his successful bid for the presidency in 1988.⁵⁶ The Bush Administration marked the fifth victory by a Republican presidential candidate in six elections.⁵⁷ If nothing else, this pattern made clear the enduring power of criminal justice as an emotive issue, and its strong correlation to the success of candidates for national office.⁵⁸

The Democratic Party could not help but notice this trend, and for the election of 1992 they nominated a candidate capable of exploiting it.⁵⁹ A southern governor with progressive-center leanings, Bill Clinton of Arkansas understood that the term "liberal" had become pejorative, and that the Democratic Party needed to change its identity in order to change its fortunes.⁶⁰ Thus, during his two terms in office Clinton appropriated the Republicans' calls for tougher laws, harsher sentencing, and victims' rights, and by the end of his second term, there was no meaningful difference between the criminal justice platforms of the Democratic and Republican Parties.⁶¹

Clinton's decision to embrace conservative crime policy normalized the notion of "prevention through incapacitation and retribution."⁶² This normalization set the nation on a path toward increased rates of incarceration, which would in turn produce the overcrowding and dire conditions catalogued by the Supreme Court in *Brown v. Plata*

AMINATION 644 (2004); Steve Hoenisch, *Crime Policy of the Republican Party*, CRITICISM.COM (July 28, 2004), <http://www.criticism.com/policy/republicans-crime-policy.php>. This was particularly true of Reagan's efforts to combat the domestic effects of the burgeoning international drug trade. See Hoenisch, *supra*. See generally MARK BOWDEN, *KILLING PABLO: THE HUNT FOR THE WORLD'S GREATEST OUTLAW* (describing the Reagan administration's efforts to dismantle the Colombian drug trade using United States military and intelligence resources). Just as federal agencies sought to stem the flow of illegal drugs from South to North America, Reagan's wife, Nancy, embarked on the "Just Say No" campaign, the message of which was that drug use, and by extension crime generally, were moral choices within the individual's control. See Hoenisch, *supra*. See generally BOWDEN, *supra*.

⁵⁵ See Clayton & Pickerill, *supra* note 49, at 1404; Hoenisch, *supra* note 54.

⁵⁶ See Clayton & Pickerill, *supra* note 49, at 1396–97, 1404–06; Hoenisch, *supra* note 54.

⁵⁷ See Clayton & Pickerill, *supra* note 49, at 1406.

⁵⁸ See *id.* at 1400, 1406.

⁵⁹ See *id.* at 1406.

⁶⁰ See *id.*

⁶¹ See *id.* at 1409–10.

⁶² See *id.*

nearly fifteen years later.⁶³ It is little coincidence that *Coleman v. Brown*, one of the two cases that later became *Brown v. Plata*, was filed in 1990, just as the effects of Presidents Reagan and Bush's policies were first being felt.⁶⁴ Indeed, the American public may have unwittingly exchanged the specter of "crime in the streets" for the curtailment of the "hard-won liberties of all Americans."⁶⁵

The national crime debate was particularly relevant in California.⁶⁶ After the sit-ins and demonstrations by students at the University of California Berkeley in the fall of 1964 and the violent race riots in South Central Los Angeles in the summer of 1965, many Californians began to doubt their government's ability to enforce the law and keep the peace.⁶⁷ Not surprisingly, in 1966 voters proved receptive to gubernatorial candidate Ronald Reagan's characterization of crime as a moral failing that should be dealt with severely.⁶⁸ Indeed, Reagan's moral message translated into electoral and legislative success.⁶⁹ Senate Bill (SB) 85-87, popularly known as the Reagan-Deukmejian penalty package, gave legal effect to Reagan's crime rhetoric by foregrounding crime victims' pain and suffering as a justification for heightened mandatory minimum sentences.⁷⁰ The most significant aspect of SB 85-87 might be its "delayed but cumulative effect over time" on prison overcrowding.⁷¹ With prisoners committed to longer sentences, the turnover in California's prison system was reduced and new inmates began literally "stacking up" with old ones.⁷²

⁶³ See Clayton & Pickerill, *supra* note 49, at 1409–10; see also *Plata*, 131 S. Ct. at 1923–28.

⁶⁴ See *Plata*, 131 S. Ct. at 1926.

⁶⁵ See Clayton & Pickerill, *supra* note 49, at 1401 (quoting *Political Party Platforms: Democratic Party Platform of 1968*, *supra* note 52); Hoenisch, *supra* note 54.

⁶⁶ See BARKER, *supra* note 54, at 47–84 (describing California's shift away from rehabilitation and toward retribution and incapacitation as function of politics and the cultural upheaval of the 1960s); NEWMAN & SCHMALBACH, *supra* note 54, at 601.

⁶⁷ BARKER, *supra* note 54, at 61.

⁶⁸ See *id.* at 59, 62. Reagan's campaign repeatedly characterized crime as a moral failing, consolidated the threat of lawlessness—comprised of political protest, street crime, and communist subversion—and pledged to restore common decency and social order. See *id.* at 62–63.

⁶⁹ See *id.* at 68.

⁷⁰ See *id.* at 67–68. Specifically, SB 85-87 raised the minimum penalty "for offenders who inflicted great bodily harm" on their victims during the commission of a rape, burglary, or robbery "from five years to fifteen years to life imprisonment." See *id.* at 67.

⁷¹ *Id.* at 68.

⁷² See *id.*; see also *Plata*, 131 S. Ct. at 1924; *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, at 1, 7 (E.D. Cal. Aug. 4, 2009), available at <http://www.ca9.uscourts.gov/dataset/general/2009/08/04/Opinion%20&%20Order%20FINAL.pdf>.

This retributive model ripened during the remainder of the century.⁷³ In 1976, Governor Jerry Brown oversaw the passage of SB 42, known as the California Determinate Sentencing Law, which replaced the state's flexible sentencing model with a system of fixed prison terms and gave judges the discretion to lengthen prison sentences.⁷⁴ Similarly, the 1982 passage of Proposition 8, the Victims' Bill of Rights, amended the California State Constitution by increasing prison terms and also allowing victims and their families to influence sentencing decisions.⁷⁵ Finally, in 1994, Californians approved the Sentencing Enhancement Repeat Offenders initiative, a three-strikes provision requiring more severe sanctions for repeat offenders.⁷⁶ The cumulative effect of the retributive policies established by Reagan and perpetuated by his successors made prison overcrowding an intractable problem in the state.⁷⁷ And just as Reagan's policies took decades to reach fruition, so too will any attempt to change California's sentencing scheme and underlying perceptions of criminality.⁷⁸ Thus, *Brown v. Plata* may be the first in a long line of cases that documents California's prison overcrowding before the crisis is resolved.⁷⁹

II. THE WOLF IN REFORM'S CLOTHING: COUNTERREMEDIAL CONSTRUCTS OF THE PLRA

As the ranks of America's prisons swelled, conditions of confinement deteriorated.⁸⁰ By 1998, at least one prison in forty-eight of America's fifty-three jurisdictions was found to be in violation of the Eighth Amendment; sanitation and essential resources were so lacking that life in the facilities constituted "cruel and unusual punishment."⁸¹ Inmates,

⁷³ See BARKER, *supra* note 54, at 68–78 (describing statutes and amendments to the California State Constitution supporting increased penal sanctions and emphasizing the role of victims' rights in sentencing decisions).

⁷⁴ See *id.* at 68–69. SB 42 also mandated longer prison terms for offenders who used "a deadly weapon, used a firearm, intentionally caused great bodily injury, and caused 'great loss of property.'" *Id.* at 69 (internal citation omitted).

⁷⁵ CAL. CONST. art. I, § 28; see BARKER, *supra* note 54, at 69.

⁷⁶ See BARKER, *supra* note 54, at 77–78.

⁷⁷ See *id.* at 83–84. Despite the rise of California's preference for imprisonment, efforts to reduce prison overcrowding have taken the form of the Prison Reform Act of 2007 and Proposition 66, which narrowly failed in 2004. See *id.* at 79–83. As Professor Barker posits, the fact that Proposition 66 failed by a 53% to 47% vote demonstrates that sentiments have changed from the time of Proposition 184's 71.85% victory in 1994. See *id.* at 77, 82.

⁷⁸ See *id.* at 68, 83–84; Taslitz, *supra* note 45, at 137.

⁷⁹ See Burtka, *supra* note 5, at 28. See generally *Plata*, 131 S. Ct. at 1910.

⁸⁰ See *Brown v. Plata*, 131 S. Ct. 1910, 1936–37 (2011); Dove, *supra* note 17, at 11.

⁸¹ Amend, *supra* note 46, at 159.

however, did not bear silent witness to the squalor and disease that surrounded them—in 2005, an estimated ten percent of all civil suits filed in federal courts were complaints brought by prisoners, and in the 1990s, the National Association of Attorneys General estimated that inmate lawsuits cost upwards of eighty million dollars annually.⁸² The rise in inmate litigation had three primary effects.⁸³ First, federal courts began issuing injunctions and consent decrees that either required the release of prisoners to maintain prison populations at sustainable levels, or mandated costly internal reforms to ensure compliance with the Eighth Amendment.⁸⁴ Prison managers complained that these measures limited their ability to use “ingenuity and initiative” in solving problems unique to their prisons, and federalists decried the measures as an intrusion by the federal government into the affairs of state and local entities.⁸⁵ Second, the cost of prison overcrowding and substandard conditions began to be externalized—as suffering inmates brought suit against federal, state, and local governments, “[t]axpayers footed the hefty bill” for the defense.⁸⁶ Third, because federal courts were inundated with prison litigation, fewer judicial resources were available to adjudicate other pressing matters.⁸⁷ In the aggregate, the trend spawned by the retributive criminal justice system had reached critical mass by the late-1990s.⁸⁸ Increasingly, the pleas of prisoners toiling in cruel and unusual conditions were no longer stifled by prison walls, but were instead resonating in courts of law and with citizens who reluctantly subsidized the defense of the prison system.⁸⁹ But while the

⁸² See *Prison Abuse Remedies Act of 2007: Hearing on H.R. 4109 Before The Subcomm. on Crime, Terrorism, and Homeland Sec. of the Comm. on the Judiciary*, 110th Cong. 1 (2008) (statement of Sarah V. Hart, Former Director of the National Institute of Justice and Counsel to Philadelphia District Attorney Lynne Abraham) [hereinafter *Hearing on H.R. 4109*]; Philip White, Jr., *Construction and Application of Prison Litigation Reform Act—Supreme Court Cases*, 51 A.L.R. FED. 2D 143 (2010).

⁸³ See *Hearing on H.R. 4109*, *supra* note 82, at 1–2; Amend, *supra* note 46, at 156–57.

⁸⁴ See *Hearing on H.R. 4109*, *supra* note 82, at 1–2; Amend, *supra* note 46, at 156–57. Consent decrees were agreements entered into by prisons and inmates in lieu of adjudication whereby prisons agreed to certain remedial stipulations. See *Hearing on H.R. 4109*, *supra* note 82, at 2; Amend, *supra* note 46, at 158.

⁸⁵ See *Hearing on H.R. 4109*, *supra* note 82, at 1–2.

⁸⁶ See *id.* at 1; White, *supra* note 82. Costs included corrections lawyers to defend the lawsuits, prison staff to respond to the lawsuits, court clerks to process inmates’ claims, and judges to rule on them. See *Hearing on H.R. 4109*, *supra* note 82, at 1.

⁸⁷ See *Hearing on H.R. 4109*, *supra* note 82, at 1; White, *supra* note 82.

⁸⁸ See *Hearing on H.R. 4109*, *supra* note 82, at 1; Amend, *supra* note 46, at 159.

⁸⁹ See *Hearing on H.R. 4109*, *supra* note 82, at 1; Amend, *supra* note 46, at 159.

demand for change was widespread, support for the form it ultimately took was not.⁹⁰

A. *Goals and Provisions of the PLRA*

The legislative history of the PLRA is sparse, but its aims are clear.⁹¹ First, because of the judiciary's perceived lack of expertise in supervising large social institutions, the PLRA was meant to limit judicial oversight of the prison system.⁹² Second, the PLRA sought to reduce administrative burdens on courts by curbing frivolous inmate litigation.⁹³

Pursuant to this first aim, the PLRA limits the circumstances in which a court may remedy prison conditions through injunctions and consent decrees.⁹⁴ Where federal district courts once made such orders routinely, the PLRA establishes a number of ancillary requirements that must be met first.⁹⁵ Namely, the court must ensure that a preliminary injunction against a prison—the first form of relief sought by prisoners living in substandard conditions—is “narrowly drawn, extend[s] no further than necessary to correct the harm the court finds requires preliminary relief, and [is] the least intrusive means necessary to correct that harm.”⁹⁶ After submitting the preliminary injunction to this “need-narrowness-intrusiveness” test, the court must then “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief”⁹⁷ Even after satisfying this rigorous standard, a preliminary injunction automatically expires ninety days after its entry “unless the court makes [an order for prospective relief] . . . before the expiration of the 90-day pe-

⁹⁰ See *Hearing on H.R. 4109*, *supra* note 82, at 2. See generally Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It*, 86 CORNELL L. REV. 483 (2001) (describing the PLRA as a “rider” in an appropriations bill that received minimal legislative scrutiny); Burtka, *supra* note 5, at 27–29 (encouraging replacement of the PLRA with a system that provides more effective oversight and remedies for substandard prison conditions).

⁹¹ See *Hearing on H.R. 4109*, *supra* note 82, at 1–2; Branham, *supra* note 90, at 488, 537–39; Amend, *supra* note 46, at 156–57.

⁹² See *Hearing on H.R. 4109*, *supra* note 82, at 1–2; Amend, *supra* note 46, at 156–57.

⁹³ See *Hearing on H.R. 4109*, *supra* note 82, at 1–2; White, *supra* note 82.

⁹⁴ See *Hearing on H.R. 4109*, *supra* note 82, at 6; Amend, *supra* note 46, at 156–57. See generally Prison Litigation Reform Act, 18 U.S.C. § 3626 (2006) (limiting circumstances in which a prison release order may be issued and requiring that intermediate remedial measures be given “a reasonable amount of time” to succeed).

⁹⁵ See 18 U.S.C. § 3626; *Hearing on H.R. 4109*, *supra* note 82, at 1.

⁹⁶ 18 U.S.C. § 3626(a) (2).

⁹⁷ See *id.*; Amend, *supra* note 46, at 157.

riod.”⁹⁸ An order for prospective relief must satisfy the same “need-narrowness-intrusiveness” test, though additionally it must be determined that the relief is necessary to correct the violation of a federal right, and that no other relief will correct that violation.⁹⁹ And just as preliminary injunctions are subject to time constraints, subsection (b) of the PLRA allows termination of prospective relief two years after the date the court grants it or one year after the court denies an initial motion requesting termination of the relief.¹⁰⁰ In such cases, subsection (b) also places the burden of proving that relief is still required on the prisoners, rather than on prison administrators.¹⁰¹ As some have observed, this arrangement is unfair because the prisoners have already proven the need for prospective relief and should not be made to do so again.¹⁰²

Prisoner release orders like the one entered in *Plata* are subject to even greater limitations.¹⁰³ Under the PLRA, prisoner release orders may be issued only when a specially convened three-judge court finds that: the prison has had a reasonable amount of time to comply with previous orders for less intrusive relief; “crowding is the primary cause of the violation of [the] Federal right” in question; and “no other relief will remedy [that] violation.”¹⁰⁴

Together with the provisions designed to deter frivolous litigation, the PLRA’s restrictions on judicial remedies form “a whole range of obstacles and pitfalls” for prisoners seeking vindication of their Eighth Amendment rights.¹⁰⁵ It is unclear, however, if this was the intention of Congress or the President in passing the PLRA.¹⁰⁶ Some may have withheld support for the Act had they known that it would perpetuate the type of Eighth Amendment violations documented in *Brown v. Plata*,

⁹⁸ 18 U.S.C. § 3626(a)(2).

⁹⁹ See § 3626(a)(3). Prospective relief is a court order for future remedial action, as distinct from a preliminary injunction, which requires immediate remedial action before final adjudication of the case. See § 3626(a)(1)–(2).

¹⁰⁰ See § 3626(b).

¹⁰¹ See *id.*; Amend, *supra* note 46, at 174–75.

¹⁰² See Amend, *supra* note 46, at 175.

¹⁰³ See § 3626(a)(3); *Hearing on H.R. 4109, supra* note 82, at 6.

¹⁰⁴ § 3626(a)(3); see *Hearing on H.R. 4109, supra* note 82, at 6.

¹⁰⁵ See Burtka, *supra* note 5, at 27; Amend, *supra* note 46, at 156–57. The PLRA seeks to deter frivolous inmate litigation by: allowing judges to dismiss claims earlier in the process; requiring prisoners to pay filing fees; establishing a three-strikes provision to bar numerous frivolous filings; providing for the subtraction of good-time credits in the event of a filing based solely upon malice; and requiring exhaustion of administrative remedies before filing suit. See *Hearing on H.R. 4109, supra* note 82, at 5–6; Burtka, *supra* note 5, at 27; White, *supra* note 82, § 4.

¹⁰⁶ See Branham, *supra* note 90, at 537–39.

and others who understood the PLRA as a way “to filter out the bad claims and facilitate consideration of the good ones” would likely recommend that Congress “go back to the drawing board.”¹⁰⁷ Before doing so, however, the flaws of the PLRA should be placed in context.¹⁰⁸

B. Criticisms of the PLRA

The need for revision of the PLRA is clear from a review of its discrete provisions and their cumulative effect, but these criticisms alone are not enough.¹⁰⁹ Lasting reform demands a more exacting inquiry into the policy missteps that allowed the PLRA to take shape.¹¹⁰ Specifically, the PLRA’s consistency with the legislative process required by the Constitution, effect on the contours of the Bill of Rights, implications for prison reform, and utility as a rubric for adjudication all merit closer scrutiny.¹¹¹ The results of this scrutiny, coupled with an understanding of the mechanics of the PLRA, provide a cautionary tale for those intent on future reform.¹¹²

1. The PLRA as Legislative Subterfuge

To claim that the PLRA was passed “with strong bipartisan support and the support of the Clinton Administration” is something of a half-truth.¹¹³ Because the PLRA was passed as an appropriations bill rider, it might not have received the same “strong bipartisan support” had it been submitted for legislative and executive review as a standalone bill.¹¹⁴ On the contrary, the PLRA’s passage was more a function of fiscal exigency than of sound policy.¹¹⁵ The appropriations bill in whose “fine print” the PLRA was buried was enacted by a desperate Congress after months of budgetary crisis, and the PLRA’s sparse legislative history attests to the cursory review it received amid the clangor.¹¹⁶

¹⁰⁷ See *id.* at 537–39, 547 (quoting *Hyche v. Christensen*, 170 F.3d 769, 771 (7th Cir. 1999) (Evans, J., concurring)); White, *supra* note 82, § 4; Amend, *supra* note 46, at 161–69 (describing the PLRA’s practical limitation on enforcement of the Eighth Amendment).

¹⁰⁸ See Amend, *supra* note 46, at 161–69.

¹⁰⁹ See Branham, *supra* note 90, at 537–39; Burtka, *supra* note 5, at 27–29; Amend, *supra* note 46, at 161–69.

¹¹⁰ See Branham, *supra* note 90, at 537–39; Amend, *supra* note 46, at 168–69.

¹¹¹ See *Plata*, 131 S. Ct. at 1954 (Scalia, J., dissenting); Branham, *supra* note 90, at 537–39; Amend, *supra* note 46, at 162–65, 167–69.

¹¹² See Branham, *supra* note 90, at 537–39.

¹¹³ See *Hearing on H.R. 4109*, *supra* note 82, at 4; Branham, *supra* note 90, at 537–39.

¹¹⁴ See *Hearing on H.R. 4109*, *supra* note 82, at 4; Branham, *supra* note 90, at 537–38.

¹¹⁵ See Branham, *supra* note 90, at 537–39.

¹¹⁶ See *id.* at 488–89, 537–39.

The difficulty with inserting provisions like the PLRA into omnibus appropriations bills is that they circumvent the deliberative process required by Article I of the Constitution.¹¹⁷ Such provisions often escape legislators' attention, and the result is policy that runs contrary to the intent of Congress and the interests of the people.¹¹⁸ And just as legislators are hard-pressed to give full consideration to individual provisions in a sweeping appropriations bill, the President has neither the time nor the constitutional authority to review and excise individual provisions from an omnibus budget bill.¹¹⁹ Thus, a primary criticism of the PLRA is not that it is *bad law*, but that it is *not law* in the truest sense.¹²⁰ Legislation-by-misdirection may meet the technical requirements of bicameralism and presentment, but such formalism undermines the spirit of the Constitution and, in the case of the PLRA, facilitates violation of prisoners' Eighth Amendment rights.¹²¹

2. The PLRA as Arbiter of Constitutional Rights

In addition to straining the precepts of the legislative process, the PLRA also reduces the Eighth Amendment from a steadfast prohibition to a mere advisory dictum with a generous "margin for toleration."¹²² By limiting the circumstances in which the Eighth Amendment may be enforced, the PLRA encourages prisons to "[o]perate on the [m]argins of [c]ruelty."¹²³ The PLRA thus functions as something of a self-fulfilling prophecy: the Act is suffused with the language of limitation, and prison administrators, secure in the knowledge of these limitations, have a reduced incentive to fulfill what would otherwise be a constitutional duty.¹²⁴

¹¹⁷ See U.S. CONST. art. I, § 7, cl. 2–3. See generally *INS v. Chadha*, 462 U.S. 919 (1983) (holding that bills must be considered and approved by both houses of Congress and by the President in order to become law); Branham, *supra* note 90, at 537–38. The Presentment Clause states in relevant part: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States . . ." U.S. CONST. art. I, § 7, cl. 2.

¹¹⁸ See U.S. CONST. art. I, § 7, cl. 2–3; Branham, *supra* note 90, at 537–38.

¹¹⁹ See *Clinton v. New York*, 524 U.S. 417, 421 (1998) (holding that allowing the President to strike individual provisions from appropriations bill and sign the modified bill into law violates the Presentment Clause of the Constitution); Branham, *supra* note 90, at 537–39.

¹²⁰ See U.S. CONST. art. I, § 7, cl. 2; *Clinton*, 524 U.S. at 421; Branham, *supra* note 90, at 537–38.

¹²¹ See U.S. CONST. art. I, § 7, cl. 2–3; Branham, *supra* note 90, at 538; Amend, *supra* note 46, at 168–69.

¹²² See U.S. CONST. amend. VIII; Amend, *supra* note 46, at 161 (internal citation omitted).

¹²³ See Amend, *supra* note 46, at 168.

¹²⁴ See *id.* at 163–64, 168–69.

The PLRA also strains the Equal Protection provisions of the Fifth and Fourteenth Amendments because it creates “a separate but unequal system of access to courts that applies only to prisoners.”¹²⁵ If the protections of these Amendments are as absolute as their language suggests, then the PLRA’s limitation of them based on one’s status as a criminal is inherently unconstitutional.¹²⁶ Moreover, the application of the PLRA to pretrial detainees who retain the presumption of innocence and to juvenile detainees who are deemed civil offenders rather than criminals curtails constitutional rights beyond even the PLRA’s own justifications.¹²⁷ To the extent that the PLRA restricts these rights outside of the Article V amendment process, its legality is questionable.¹²⁸

3. The PLRA as Impediment to Change

As the district court in *Plata* observed in a 2005 order, another principal flaw of the PLRA is its failure to comprehend substandard prison conditions as a “polycentric” issue.¹²⁹ In what appears to be an internal contradiction, the PLRA’s “language invites scrutiny of proposed relief with a presumption against it.”¹³⁰ That is, the PLRA highlights the many “subsidiary problem ‘centers’” associated with prison overcrowding, but the “needs-narrowness-intrusiveness test,” coupled with the requirement that courts give substantial weight to concerns for public safety and the criminal justice system, prohibits a polycentric solution.¹³¹ Likewise, the PLRA’s requirement that courts terminate relief orders upon compliance, even in the face of likely relapse, and the ability of prison administrators to move for termination of relief at specific junctures, regardless of compliance, militate against lasting reform.¹³²

¹²⁵ See U.S. CONST. amends. V, XIV; Burtka, *supra* note 5, at 27–28.

¹²⁶ See U.S. CONST. amends. V, XIV; Burtka, *supra* note 5, at 27–28. Not every provision in the Bill of Rights is absolute; for example, it is settled law that, despite its absolute language, the First Amendment freedom of speech is qualified by the need to maintain order in society. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 924–25 (3d ed. 2006).

¹²⁷ See Burtka, *supra* note 5, at 27–28; see also *Hearing on H.R. 4109, supra* note 82, at 1–2.

¹²⁸ See U.S. CONST. art. V; Burtka, *supra* note 5, at 27–28.

¹²⁹ See *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2005 U.S. Dist. LEXIS 43796, at *1, *72–74 (N.D. Cal. Oct. 3, 2005) (outlining conclusions of law in the May 10, 2005, hearing on the Order to Show Cause), *aff’d*, *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, at 1, 6–9 (E.D. Cal. Aug. 4, 2009), available at <http://www.ca9.uscourts.gov/datastore/general/2009/08/04/Opinion%20&%20Order%20FINAL.pdf>; Amend, *supra* note 46, at 162–63.

¹³⁰ Amend, *supra* note 46, at 164.

¹³¹ See Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(2)–(3) (2006); Amend, *supra* note 46, at 162, 164–65 (quoting *Plata*, 2005 U.S. Dist. LEXIS 43796, at *72).

¹³² See § 3626(b); Amend, *supra* note 46, at 165–67.

This counterremedial orientation impedes the courts in their role as a guarantor of prisoners' constitutional rights.¹³³

4. The PLRA as Legislative Indeterminacy

Justice Scalia's dissent in *Plata* echoes a final criticism of the PLRA: that the Act's operative terms are pliable to the point of uselessness.¹³⁴ Where Justice Kennedy's majority opinion applied the "need-narrowness-intrusiveness" test to find that the prisoner release order was necessary, sufficiently narrowly tailored, and the least intrusive means of correcting the Eighth Amendment violations in California's prisons, Justices Scalia and Alito used the same statutory language to direct the opposite result.¹³⁵ For Justice Scalia, a statewide prisoner release order was neither narrowly drawn nor the least intrusive means of remedying the Eighth Amendment violations in specific prisons.¹³⁶ Similarly, Justice Alito found that the release order was premature because remedies short of a prisoner release could bring California's prisons into compliance with the Eighth Amendment.¹³⁷ Nor does the PLRA describe how to account for the "substantial weight" of the public safety analysis.¹³⁸ Justice Kennedy found that public safety concerns did not outweigh the need for a prisoner release, while Justices Scalia and Alito found that they did.¹³⁹ The lack of precise meaning in the PLRA's terms renders it little more than a flaccid judicial test that allows prisoners' constitutional rights to hang in the balance.¹⁴⁰

III. LESSONS FROM A CHECKERED PAST: PHILADELPHIA'S PRETRIAL RELEASE ORDERS

The PLRA's contemplation of large-scale release orders was not without precedent.¹⁴¹ When *Brown v. Plata* came before the Court,

¹³³ See Amend, *supra* note 46, at 162–167.

¹³⁴ See *Plata*, 131 S. Ct. at 1953–54 (Scalia, J., dissenting); Branham, *supra* note 90, at 535.

¹³⁵ See *Plata*, 131 S. Ct. at 1937–40; *id.* at 1951–53 (Scalia, J., dissenting); *id.* at 1959–60 (Alito, J., dissenting).

¹³⁶ See *id.* at 1951–53 (Scalia, J., dissenting).

¹³⁷ See *id.* at 1963–64 (Alito, J., dissenting).

¹³⁸ See Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(1)(A) (2006).

¹³⁹ See *Plata*, 131 S. Ct. at 1941–43; *id.* at 1950–51 (Scalia, J., dissenting); *id.* at 1965–67 (Alito, J., dissenting).

¹⁴⁰ See *id.* at 1953–54 (Scalia, J., dissenting); Branham, *supra* note 90, at 535.

¹⁴¹ See *Brown v. Plata*, 131 S. Ct. 1910, 1965–66 (2011) (Alito, J., dissenting); John Gibeaut, *After Philadelphia Prison Case, Many Still Weigh the Effects of Releasing Inmates*, ABA J.

many, including Justice Alito, were reminded of a similar situation that occurred in Philadelphia some twenty years prior.¹⁴² In the 1987 case *Harris v. Pemsley*, inmates filed a class action lawsuit alleging that overcrowding in Holmesburg Prison violated the Eighth Amendment.¹⁴³ Based on evidence submitted by the prisoners and the City of Philadelphia, and upon the court's own tour of Holmesburg, a federal district judge approved a consent decree through which the City would implement a gradual population reduction in its prison system.¹⁴⁴ Ominously, the district court declined to suggest possible methods for achieving the reduction, stating that: "[t]he implementation of these maximum allowable populations is left in the first instance to the City defendants and the Pennsylvania [state] courts."¹⁴⁵ While the court's directive was issued with "the best of intentions," its demurral on this difficult point—how to release prisoners without compromising public safety—perhaps betrayed its misgivings about the very notion of release orders as a way of remedying Eighth Amendment violations.¹⁴⁶

The Supreme Court took a similar tack in *Plata*, choosing "to accord the State considerable latitude to find mechanisms and make plans to correct the violations in a prompt and effective way consistent with public safety."¹⁴⁷ Concerns for the limits of judicial expertise warranted restraint in both cases, but the outcome in Philadelphia demonstrates that prison systems are no better equipped than courts for the task of releasing prisoners in large numbers.¹⁴⁸

A. *Implications of the Philadelphia Population Cap*

The fact that Philadelphia's mayor agreed to release only "non-violent" offenders did little to allay concerns for public safety.¹⁴⁹ Indeed, Philadelphians' fears about the prison population cap were validated during an eighteen-month period from January 1993 through June 1994, when city police rearrested 9732 prisoners who were re-

(Sept. 1, 2011, 2:40 AM), http://www.abajournal.com/magazine/article/after_prison_case_many_still_weigh_the_effects_of_releasing_inmates/.

¹⁴² See *Plata*, 131 S. Ct. at 1965–66 (Alito, J., dissenting); Gibeaut, *supra* note 141.

¹⁴³ See generally *Harris v. Pemsley*, 654 F. Supp. 1042 (E.D. Pa. 1987) (ordering a gradual population reduction in Philadelphia's prison system to remedy problems associated with overcrowding).

¹⁴⁴ See *id.* at 1045.

¹⁴⁵ See *id.* at 1046.

¹⁴⁶ See *id.*; Gibeaut, *supra* note 141 (internal citations omitted).

¹⁴⁷ See *Plata*, 131 S. Ct. at 1946.

¹⁴⁸ See *id.*; *Harris*, 654 F. Supp. at 1046; Gibeaut, *supra* note 141.

¹⁴⁹ See *Hearing on H.R. 4109*, *supra* note 82, at 3.

leased because of the cap.¹⁵⁰ Among the charges filed against the released prisoners were 79 murders, 1113 assaults, 959 robberies, 264 firearms violations, and 90 rapes.¹⁵¹ With District Attorney Lynne Abraham and Mayor Edward Rendell unable to terminate the population cap, it appeared that the city would be overwhelmed by crime.¹⁵²

Sarah Vandenbraak, an Assistant District Attorney who participated in the *Pernsley* settlement, also observed that the population cap was as important for the criminals it forced the City to overlook as for the ones it forced the City to release.¹⁵³ In 1994, Philadelphia judges released 15,000 “non-violent” criminal defendants—including those charged with manslaughter, gun crimes, and aggravated robbery—because the population cap prevented their detention in the City’s already-full jails.¹⁵⁴ That courts’ hands were tied was not lost on criminals, who began flocking to Philadelphia to ply their trade.¹⁵⁵ Overall, the number of fugitives in Philadelphia increased from 18,000 to nearly 50,000 under the population cap, and the rate of recidivism among prisoners released under the cap was eighteen percent, more than double the rate for those released under normal state bail procedures.¹⁵⁶ While the population cap may have helped to remedy the conditions in Philadelphia’s prisons, many questioned whether residents should have paid the price in public safety.¹⁵⁷

The population cap also vitiated other initiatives meant to reduce pressure on Philadelphia’s prison system.¹⁵⁸ Drug treatment programs and bail arrangements were reduced to nullities because the underlying enforcement mechanism—the threat of imprisonment—was inoperable.¹⁵⁹ The result was a culture of flagrant lawlessness where crimi-

¹⁵⁰ See *id.*; Gibeaut, *supra* note 141; see also *Plata*, 131 S. Ct. at 1965–66 (Alito, J., dissenting).

¹⁵¹ See *Plata*, 131 S. Ct. at 1965–66; Gibeaut, *supra* note 141. Public furor was aroused especially by the shooting of five police officers, one of whom died from his injuries. Gibeaut, *supra* note 141.

¹⁵² See *Hearing on H.R. 4109, supra* note 82, at 3; Sarah B. Vandenbraak, *Bail Humbug!: Why Prisoners Would Rather Be in Philadelphia*, 73 POL’Y REV. 73, 75 (1995).

¹⁵³ See Vandenbraak, *supra* note 152, at 75–76; Gibeaut, *supra* note 141.

¹⁵⁴ See *Hearing on H.R. 4109, supra* note 82, at 3; Vandenbraak, *supra* note 152, at 73.

¹⁵⁵ See Vandenbraak, *supra* note 152, at 74. An official report showed that the city was particularly popular among drug dealers, seventy-six percent of whom became fugitives within ninety days of being arrested, compared with twenty-six percent nationally. *Id.*

¹⁵⁶ See *id.* at 75.

¹⁵⁷ See *Plata*, 131 S. Ct. at 1965–66; Gibeaut, *supra* note 141.

¹⁵⁸ See Vandenbraak, *supra* note 152, at 75–76.

¹⁵⁹ See *id.*

nals both knew and acted as though they were beyond the reach of justice.¹⁶⁰

Ironically, the population cap also imposed greater long-term costs on Philadelphia's criminal justice system.¹⁶¹ Because alternative treatment programs were impotent without the backing of imprisonment, criminals who might otherwise have been rehabilitated at low cost after their first offense were allowed to recidivate until their records warranted a prison sentence.¹⁶² In short, the population cap produced more cases requiring imprisonment because it eliminated all other rehabilitative options.¹⁶³ This single-solution model also increased costs because imprisonment did not reduce recidivism as effectively as treatment programs, and thereby created the need to adjudicate and punish otherwise preventable crimes.¹⁶⁴

Perhaps the most significant failure of Philadelphia's population cap was the regression that it ultimately produced.¹⁶⁵ With memories of the cap's effect on public safety still fresh, lawmakers retreated to a criminal justice model predicated on incapacitation, and Philadelphia's incarceration rates rose accordingly.¹⁶⁶ The city's prison population grew by forty-five percent from 1999 through 2008, and the total spending on jails during the same period rivaled that of cities with much larger populations.¹⁶⁷ Although Philadelphia's prison population and spending decreased slightly in mid-2009, it seems that the failure of the population cap set the City's prison reform efforts back by at least a decade.¹⁶⁸ The victims of this result were both the prisoners who were returned to overcrowded prisons and the public that was forced to pay for them.¹⁶⁹ The experience in Philadelphia is still relevant today; it shows

¹⁶⁰ See *id.*

¹⁶¹ See STATE OF RECIDIVISM, *supra* note 46, at 6; Vandenbraak, *supra* note 152, at 75–76.

¹⁶² See STATE OF RECIDIVISM, *supra* note 46, at 6; Vandenbraak, *supra* note 152, at 75–76.

¹⁶³ See Vandenbraak, *supra* note 152, at 75–76.

¹⁶⁴ See Hon. Renee Cardwell Hughes, Keynote Address at the Temple Political & Civil Rights Law Review Symposium: U.S. Drug Laws: The New Jim Crow? (Oct. 24, 2000), in 10 TEMP. POL. & CIV. RTS. L. REV. 311 (2001); Vandenbraak, *supra* note 152, at 75–76.

¹⁶⁵ PHILA. RESEARCH INITIATIVE, PHILADELPHIA'S CROWDED, COSTLY JAILS: THE SEARCH FOR SAFE SOLUTIONS 2 (May 17, 2010) [hereinafter CROWDED, COSTLY JAILS], available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Philadelphia_Research_Initiative/Philadelphias_Crowded_Costly_Jails_rev.pdf.

¹⁶⁶ See *id.*

¹⁶⁷ *Id.*

¹⁶⁸ See *id.*

¹⁶⁹ *Id.*; see *Hearing on H.R. 4109*, *supra* note 82, at 1.

not only that release orders are “improvident,” but also that they are indicative of a criminal justice system in need of comprehensive reform.¹⁷⁰

IV. PROACTIVE PENOLOGY: STATES AND THE FIGHT AGAINST OVERCROWDING

Had mounting concern for prisoners’ Eighth Amendment rights not been coupled with the sharp downturn of the American economy in 2008, many states might have persisted in their tepid attempts at prison reform.¹⁷¹ As it happened, though, the confluence of social and economic demand aroused states’ interest in more sustainable criminal justice models.¹⁷² It cannot be gainsaid that the demand for reform was a function of economy first and morality second; in an act of self-preservation, politicians hastened to “do more with less” of their constituents’ taxes.¹⁷³ Nevertheless, the salutary effects of these efforts are important guideposts in the search for a tenable solution to prison overcrowding and privation.¹⁷⁴ The most promising of these efforts have focused on three junctures in the criminal justice process: pretrial detention; sentencing; and release and reentry.¹⁷⁵

A. *Minimizing Pretrial Detention*

The news from Philadelphia has not been all bad; in fact, much of it has been good since January 2010, when new District Attorney R.

¹⁷⁰ See *Plata*, 131 S. Ct. at 1967; *Hearing on H.R. 4109*, *supra* note 82, at 3.

¹⁷¹ See STATE OF RECIDIVISM, *supra* note 46, at 1.

¹⁷² See *id.* One of the catalysts of this interest was the Pew Center on the States, which released two comprehensive studies in 2008 and 2009 detailing the profligacy of state corrections departments. See generally PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS (Mar. 2009) [hereinafter ONE IN 31], available at http://www.pewcenteronthestates.org/uploadedFiles/PSPP_lin31_report_FINAL_WEB_3-26-09.pdf; PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA IN 2008 (Feb. 2008), available at http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf. Perhaps most alarming was that state spending on corrections had quadrupled since the Reagan Administration, outstripped only by Medicaid spending, that total state spending on corrections was roughly \$52 billion, and that, as of 2009, “one in 31 adults in the United States was either incarcerated or on probation or parole.” See ONE IN 31, *supra*; STATE OF RECIDIVISM, *supra* note 46, at 1.

¹⁷³ See STATE OF RECIDIVISM, *supra* note 46, at 1; Kevin Johnson, *Study: Prisons Failing to Deter Repeat Criminals in 41 States*, USA TODAY (last updated Apr. 13, 2011, 12:24 PM), <http://www.usatoday.com/news/nation/2011-04-12-Prison-recidivism-rates-hold-steady.htm>.

¹⁷⁴ See STATE OF RECIDIVISM, *supra* note 46, at 1–2; Johnson, *supra* note 173.

¹⁷⁵ See CROWDED, COSTLY JAILS, *supra* note 165, at 29–31; STATE OF RECIDIVISM, *supra* note 46, at 25.

Seth Williams placed the city at the vanguard of efforts to reduce prison populations by reducing the number of pretrial detentions.¹⁷⁶

Among these reforms were changes to the charging process.¹⁷⁷ During the post-release spike in crime in the early 1990s, the charging unit in the District Attorney's office lacked the resources to conduct an exhaustive threshold inquiry for each of the thousands of matters that came before it.¹⁷⁸ As a result, charges were often filed under a "probable cause" standard that required minimal factual determinations.¹⁷⁹ These charges were often dropped or dismissed when their weakness was revealed at pretrial hearings, a time-consuming process that prevented courts from focusing on the merits of a case.¹⁸⁰ Meanwhile, criminal defendants were detained while waiting for dismissal of most, if not all, of their charges.¹⁸¹ To curb this "inefficient gatekeep[ing]," Williams raised the charging standard to the more rigorous "beyond a reasonable doubt," which allows prosecutors to file charges only if conviction is likely.¹⁸² The reduction in charges filed has resulted in fewer and shorter pretrial detentions.¹⁸³ This in turn has reduced the pressure on prison staff and resources, and the quality of treatment available to inmates has improved accordingly.¹⁸⁴

Additionally, Philadelphia now requires all cases to pass through a "Discovery Court," where evidentiary issues are resolved so that continuances do not delay the substantive trial indefinitely.¹⁸⁵ As one administrative judge has observed, an added benefit of Discovery Court is that it requires the prosecution and defense to "address the case in

¹⁷⁶ See PHILA. RESEARCH INITIATIVE, PHILADELPHIA'S LESS CROWDED, LESS COSTLY JAILS 2 (July 20, 2011) [hereinafter LESS CROWDED], available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Philadelphia_Research_Initiative/Philadelphia-Jail-Population.pdf; CROWDED, COSTLY JAILS, *supra* note 165, at 22, 29–31 (describing efforts to reduce pretrial detentions and prison populations in the Philadelphia Prison System).

¹⁷⁷ See CROWDED, COSTLY JAILS, *supra* note 165, at 29; LESS CROWDED, *supra* note 176, at 8.

¹⁷⁸ See CROWDED, COSTLY JAILS, *supra* note 165, at 22.

¹⁷⁹ See *id.* at 29; LESS CROWDED, *supra* note 176, at 8–9.

¹⁸⁰ See CROWDED, COSTLY JAILS, *supra* note 165, at 22.

¹⁸¹ See LESS CROWDED, *supra* note 176, at 8; *id.*

¹⁸² See CROWDED, COSTLY JAILS, *supra* note 165, at 22, 29; LESS CROWDED, *supra* note 176, at 8–9.

¹⁸³ See CROWDED, COSTLY JAILS, *supra* note 165, at 22, 29; LESS CROWDED, *supra* note 176, at 8–9.

¹⁸⁴ See CROWDED, COSTLY JAILS, *supra* note 165, at 22, 29; LESS CROWDED, *supra* note 176, at 8–9; see also *Brown v. Plata*, 131 S. Ct. 1910, 1932–34 (2011) (finding that prison overcrowding impedes delivery of healthcare to inmates).

¹⁸⁵ See CROWDED, COSTLY JAILS, *supra* note 165, at 31; LESS CROWDED, *supra* note 176, at 12–13.

a meaningful way earlier on” so that, by the time it reaches trial, arguments on the merits are clearly defined and the case is ripe for adjudication.¹⁸⁶ Empirics have also confirmed the efficacy of Discovery Court: the number of cases with incomplete discovery in the Common Pleas Court dropped from sixty-one percent in 2009 to twenty-one percent in 2010.¹⁸⁷

B. *Making Sense of Sentencing*

The determinate sentencing movement began in the 1970s, when rising crime rates prompted calls for state legislative sentencing commissions to prescribe uniform sentences and prevent judges from grading punishment based on the context in which a crime occurred.¹⁸⁸ The political expedience of determinate sentencing ensured that it became the law in many states without full consideration of its long-term effects, and the result was an increase in prison populations and a decline in prison living standards.¹⁸⁹ Budgetary pressures, however, have forced jurisdictions to revisit their determinate sentencing laws, and the resulting statutory reform has generally pursued three goals: reclassifying criminal offenses, strengthening alternatives to imprisonment, and reducing prison terms.¹⁹⁰

The reclassification of drug crimes has itself taken three forms.¹⁹¹ First, at least eight states have established sentencing committees tasked with undoing the work of their predecessors.¹⁹² The general trend among these commissions has been to prescribe lesser sentences for

¹⁸⁶ See CROWDED, COSTLY JAILS, *supra* note 165, at 31 (quoting administrative judge D. Webster Keogh).

¹⁸⁷ See LESS CROWDED, *supra* note 176, at 13.

¹⁸⁸ See BARKER, *supra* note 54, at 68–69; Craig Haney, *Politicizing Crime and Punishment: Redefining “Justice” to Fight the “War on Prisoners,”* 114 W. VA. L. REV. 373, 381 (2012). Perhaps surprisingly, this movement was led by one of the judiciary’s own, federal district court judge Marvin E. Frankel, who argued that rehabilitation was no longer a viable goal in American criminal justice, and that flexible laws allowed judges to exercise “unchecked and sweeping power . . . in the fashioning of sentences.” See Haney, *supra*, at 383–84 (quoting MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER, at vii–viii (1973)). The movement proved persuasive: in 1984 Congress passed the Sentencing Reform Act, and by 1994 every state had a mandatory sentencing law. See *id.* at 390–92.

¹⁸⁹ See BARKER, *supra* note 54 at 68–69; Haney, *supra* note 188 at 385.

¹⁹⁰ See STATE OF RECIDIVISM, *supra* note 46, at 25; Johnson, *supra* note 173. See generally ADRIENNE AUSTIN, VERA INST. JUST., CRIMINAL JUSTICE TRENDS: KEY LEGISLATIVE CHANGES IN SENTENCING POLICY, 2001–2010 (2010), available at <http://www.courts.ca.gov/documents/ccp-sentencingtrends.pdf> (describing state legislatures’ efforts in different statutes to reclassify criminal offenses, bolster alternatives to incarceration, and reduce the length of prison terms).

¹⁹¹ See AUSTIN, *supra* note 190, at 4–7.

¹⁹² See *id.* at 4–6.

certain crimes in the name of proportionality, fiscal responsibility, and rehabilitation.¹⁹³ Second, states have reduced classification levels for possessory drug offenses, and some have converted possession of small amounts of marijuana to a fineable civil offense.¹⁹⁴ Third, many states have raised the monetary threshold for low-level property crimes.¹⁹⁵

States have invested even more energy in providing alternatives to imprisonment, particularly for drug-related offenses.¹⁹⁶ To avoid futile and repeated stints in prison, drug offenders in many states are diverted to drug courts, which emphasize abuse treatment programs and evidence-based supervision.¹⁹⁷ The success of these measures in Kentucky shows that drug treatment programs hold the potential for significant savings and declines in prison populations.¹⁹⁸ In fact, the more than 1151 drug courts in the United States have been so successful that many states have begun diverting defendants to other “specialty courts” that are equipped to provide appropriate sentences and competent oversight.¹⁹⁹

Sentencing reform has also sought to reduce the length of prison terms.²⁰⁰ Here, too, three trends have emerged.²⁰¹ A number of states have reduced mandatory minimum sentences, particularly for drug offenses.²⁰² Others have expanded accelerated discharge options by increasing the number of good-time credits available for good behavior and participation in educational and vocational programs.²⁰³ A third group of states has also decreased the prison population by reducing sentences for parole and probation violations and by eliminating sen-

¹⁹³ *See id.*

¹⁹⁴ *See id.* at 6.

¹⁹⁵ *See id.* at 6; STATE OF RECIDIVISM, *supra* note 46, at 25. Existing threshold amounts were often based on 1960s dollar values; however, while increasing these thresholds may have reduced the number of criminal offenses, this practice has had a limited impact because property crimes generally do not carry a prison term. *See* AUSTIN, *supra* note 190, at 6; STATE OF RECIDIVISM, *supra* note 46, at 25.

¹⁹⁶ *See* AUSTIN, *supra* note 190, at 8.

¹⁹⁷ *Id.* at 11; STATE OF RECIDIVISM, *supra* note 46, at 29–30. Evidence-based supervision requires corrections officers to use empirically proven methods when devising and implementing plans for successful completion of the supervision period. *See* STATE OF RECIDIVISM, *supra* note 46, at 25–26, 29–30.

¹⁹⁸ *See* AUSTIN, *supra* note 190, at 11.

¹⁹⁹ *See id.* House Bill 1271 in Indiana, which created statewide problem-solving courts, including drug, family, and mental health courts, is emblematic of this trend. *See* H.B. 1271, 116th Gen. Assemb., 2d Reg. Sess. (Ind. 2010).

²⁰⁰ *See* AUSTIN, *supra* note 190, at 12–16; STATE OF RECIDIVISM, *supra* note 46, at 25.

²⁰¹ *See* AUSTIN, *supra* note 190, at 12–16.

²⁰² *See id.* at 12.

²⁰³ *See id.* at 13–15.

tences for certain low-level offenses.²⁰⁴ By moving toward a sentencing model that coheres with the goals of rehabilitation as well as fiscal and administrative constraints, states have allowed prisons to devote resources to the inmates who need them most.²⁰⁵

C. *Revising Reentry Strategies*

States have also begun to reduce prison overcrowding by aiding paroled prisoners as they reenter society.²⁰⁶ As others have observed, reentry is not simply the end of the criminal justice process; it is the goal toward which all aspects of the criminal justice system should be calibrated.²⁰⁷ The emphasis on reentry has been made possible by funding from the federal Second Chance Act, which some regard as the catalyst for “an era of innovation, with states seeing themselves as laboratories carrying out . . . social experiments on behalf of the nation.”²⁰⁸ The states have done just that, pursuing reentry programs that strive to reduce recidivism and prevent additional prison terms.²⁰⁹

To this end, many states now subject new parolees to a risk-needs assessment designed to help parole officers create individualized reentry plans that account for the vulnerabilities of specific parolees.²¹⁰ Resources are generally allocated based on the parolee’s degree of risk, but all reentry plans are “front-loaded” because the risk of recidivism is highest in the days immediately after release.²¹¹ To bolster a parolee’s

²⁰⁴ See *id.* at 12–16; STATE OF RECIDIVISM, *supra* note 46, at 25. See generally H.B. 10-1360, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010) (reducing parole revocation prison sentences for nonviolent offenders); S.B. 1154, 118th Gen. Assemb., Reg. Sess. (S.C. 2010) (eliminating mandatory minimum sentences for simple drug possession crimes and expanding parole and probation options for other drug offenses).

²⁰⁵ See AUSTIN, *supra* note 190, at 12–16. For example, House Bill 10-1360 in Colorado was projected to save \$4,738,823 annually, a portion of which is invested in reentry programs for parolees. See *id.* at 15.

²⁰⁶ See COUNCIL OF STATE GOV’TS, REPORT PREVIEW: REPORT OF THE RE-ENTRY POLICY COUNCIL 14 (2005) [hereinafter REPORT PREVIEW], available at <http://reentrypolicy.org/publications/1691;file>; THE URBAN INST., PUTTING PUBLIC SAFETY FIRST: 13 PAROLE SUPERVISION STRATEGIES TO ENHANCE REENTRY OUTCOMES 1–3 (2008), available at http://www.urban.org/uploadedpdf/411791_public_safety_first.pdf. The Pew Center estimates that if the forty-one states surveyed in 2004 reduced recidivism by a mere 10%, they could save upwards of \$635 million annually. See STATE OF RECIDIVISM, *supra* note 46, at 26.

²⁰⁷ See Jeremy Travis, *Reflections on the Reentry Movement*, 20 FED. SENTENCING RPTR. 2, 84, 86 (2007).

²⁰⁸ Travis, *supra* note 207, at 87; see Editorial, *Second Chances After Prison*, N.Y. TIMES, Oct. 14, 2011, at A30.

²⁰⁹ See STATE OF RECIDIVISM, *supra* note 46, at 26; Travis, *supra* note 207, at 87.

²¹⁰ See STATE OF RECIDIVISM, *supra* note 46, at 29–30.

²¹¹ See *id.* at 30; URBAN INST., *supra* note 206, at 14.

chances for successful reintegration, state corrections offices have also begun to collaborate with other community resource centers to address parolees' employment, housing, and health care needs.²¹² Programs in some states pursue rehabilitation even more aggressively, requiring inmates to participate in educational, vocational, and social programs while still in prison.²¹³

States have also rethought the relationship between parole officer and parolee.²¹⁴ Technical violations of parole terms no longer trigger an automatic return to prison; instead, officers employ graduated responses based on the nature of the violation, reserving imprisonment for the most extreme cases.²¹⁵ Further, many officers now use an incentivized model to encourage parole compliance through positive reinforcement, which preliminary studies have shown to be more effective than negative reinforcement.²¹⁶ On the whole, states that have committed to parolees' successful reentry have reaped the benefits in lower recidivism rates and lower prison populations.²¹⁷

V. BEYOND THE BROMIDES: A REAL PRESCRIPTION FOR REAL CHANGE

One of the greatest obstacles to prison reform has been the equivocality of its proponents.²¹⁸ Quick to voice the need for change, many reformists hesitate to say what form that change should take.²¹⁹ The most common formulation is that employed by the majority in *Brown v. Plata*, which condemned California's prisons but immediately offered that "[p]roper respect for the State" required the Court to accord California "considerable latitude" in implementing the prisoner release order.²²⁰ This federalist apologia has been recited so often that

²¹² See URBAN INST., *supra* note 206, at 20–21.

²¹³ See AUSTIN, *supra* note 190, at 13–15; REPORT PREVIEW, *supra* note 206, at 7; STATE OF RECIDIVISM, *supra* note 46, at 28–29.

²¹⁴ See STATE OF RECIDIVISM, *supra* note 46, at 31; URBAN INST., *supra* note 206, at 31–32.

²¹⁵ See STATE OF RECIDIVISM, *supra* note 46, at 30–31; URBAN INST., *supra* note 206, at 33–34.

²¹⁶ See STATE OF RECIDIVISM, *supra* note 46, at 31; URBAN INST., *supra* note 206, at 31–32.

²¹⁷ See STATE OF RECIDIVISM, *supra* note 46, at 31–32. See generally PEW CTR. ON THE STATES, THE IMPACT OF HAWAII'S HOPE PROGRAM ON DRUG USE, CRIME AND RECIDIVISM (Jan. 2010), available at http://www.pewcenteronthestates.org/uploadedFiles/PSPP_HOPE_Brief_web.pdf?n=8765.

²¹⁸ See *Brown v. Plata*, 131 S. Ct. 1910, 1946 (2011); *Harris v. Pernesley*, 654 F. Supp. 1042, 1046 (E.D. Pa. 1987); Taslitz, *supra* note 45, at 137, 185.

²¹⁹ See *Plata*, 131 S. Ct. at 1946; *Harris*, 654 F. Supp. at 1046.

²²⁰ *Plata*, 131 S. Ct. at 1946. The District Court in *Plata* was the notable exception to this, undertaking an exhaustive analysis of methods for implementing the prisoner release order and weighing the potential effects of each. See generally *Coleman v. Schwarzenegger*, No. CIV

it is now a matter of rote incantation—risk-averse jurists, politicians, and scholars need only invoke it to avoid positing a potentially unpopular solution to prison overcrowding.²²¹ But as the facts of *Plata* demonstrate, the need for such a solution is so dire that truisms will no longer do.²²² The architects of the criminal justice system—prison administrators, judges, and legislators—must discard old models for reform in favor of a blueprint for lasting change.²²³

A. Prisons

The mandate that prisons do a better job of upholding the Eighth Amendment cannot stand alone.²²⁴ To ensure the success of this directive, “better” must be defined and ways of achieving it must be prescribed.²²⁵ To this end, the federal government would do well to establish an independent entity resembling Missouri’s Constituent Services Office, which tracks grievance patterns among inmates in order to identify and remedy systemic problems with conditions of confinement.²²⁶ The Constituent Services Office’s success suggests two possible roles for a federal counterpart.²²⁷

First, the federal entity can enumerate protocol and reporting standards for physical and mental healthcare so that staff can engage in more effective triage.²²⁸ With clearer requirements for how and when certain conditions should be treated, the number of egregious cases like the ones reported in *Plata* may decline.²²⁹ Likewise, sanitation standards and cleaning schedules for cells, bathrooms, and medical facilities can be communicated so as to eliminate the root causes of disease and infection.²³⁰ As Justice Alito suggested in his dissent in *Plata*, requiring semi-regular cleanings would not be an onerous burden, and need only be

S-90-0520 LKK JFM P, at 1, 131–181 (E.D. Cal. Aug. 4, 2009), available at <http://www.ca9.uscourts.gov/datatore/general/2009/08/04/Opinion%20&%20Order%20FINAL.pdf> (describing sentencing reform and reentry alternatives).

²²¹ See *Plata*, 131 S. Ct. at 1946; Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L53, 88 (2011); Taslitz, *supra* note 45, at 137, 185.

²²² See *Plata*, 131 S. Ct. at 1928.

²²³ See Bradley, *supra* note 5, at 56; Burtka, *supra* note 5, at 27–29; Harcourt, *supra* note 221, at 88.

²²⁴ See Branham, *supra* note 90, at 520–45; Amend, *supra* note 46, at 169–72.

²²⁵ See Branham, *supra* note 90, at 520–45; Amend, *supra* note 46, at 169–72.

²²⁶ See Branham, *supra* note 90, at 524–27.

²²⁷ See *id.* at 524–25.

²²⁸ See *Plata*, 131 S. Ct. at 1963 (Alito, J., dissenting); Branham, *supra* note 90, at 524–25.

²²⁹ See *Plata*, 131 S. Ct. at 1963 (Alito, J., dissenting); Branham, *supra* note 90, at 524–25.

²³⁰ See *Plata*, 131 S. Ct. at 1963 (Alito, J., dissenting); Dove, *supra* note 17, at 11.

mandated to be effective.²³¹ Limited resources would, of course, prevent delivery of perfect medical care and sanitation, but minimum standards would reduce the risk of clear violations of the Eighth Amendment.²³² Further, the enumerated standards for conditions of confinement will help to restore absolutism to the Eighth Amendment.²³³ If the PLRA invites prisons to “[o]perate on the [m]argins of [c]ruelty,” explicit standards will let prison personnel know exactly where those margins are, and courts will have an easier time determining when they have been crossed.²³⁴

The enforcement mechanism for this entity must include trained corrections officials with jurisdiction over federal and state prisons alike.²³⁵ This arrangement will no doubt raise concerns for state sovereignty, but in fact it contemplates a narrower role for the federal government than the one currently in place under the PLRA.²³⁶ Where the current system of graduated remedies is overseen by judges who lack the expertise to run social institutions, establishment of a federal entity would ensure that such authority is exercised only by trained experts.²³⁷

B. *The Judiciary*

Prison reform may also benefit from changes in the judiciary’s handling of PLRA litigation.²³⁸ It is argued that, rather than attempting to divine congressional intent from the ambiguous terms of the PLRA, “courts should confine the statute’s application to the situations to which it clearly applies and those only.”²³⁹ Such an application of judicial restraint would limit the possibility of judges subjugating the PLRA to their policy preferences, and would also encourage Congress to revisit the statute and endow its terms with clearer meaning.²⁴⁰ Additionally, it is argued that this narrow approach is consistent with precedent

²³¹ See *Plata*, 131 S. Ct. at 1963 (Alito, J., dissenting).

²³² See *id.*; Dove, *supra* note 17, at 11.

²³³ See *Plata*, 131 S. Ct. at 1928; Amend, *supra* note 46, at 168–69.

²³⁴ See *Plata*, 131 S. Ct. at 1928; *id.* at 1963 (Alito, J., dissenting); Amend, *supra* note 46, at 168–69.

²³⁵ See Burtka, *supra* note 5, at 28 (emphasizing the need for centralized oversight to implement uniform improvements in the American prison system).

²³⁶ See *Plata*, 131 S. Ct. at 1957 (Scalia, J., dissenting); *id.* at 1959 (Alito, J., dissenting).

²³⁷ See *id.* at 1957 (Scalia, J., dissenting); *id.* at 1959 (Alito, J., dissenting).

²³⁸ See *id.* at 1953–54 (Scalia, J., dissenting); *id.* at 1959 (Alito, J., dissenting); Branham, *supra* note 90 at 532, 535.

²³⁹ Branham, *supra* note 90, at 535.

²⁴⁰ See *id.*

established by *Miranda v. Arizona*, where the Court limited the inquiry into whether a particular Miranda warning was needed by requiring it wherever there was “any doubt” as to its necessity.²⁴¹

While this approach addresses valid concerns about the scope of judicial authority, it construes PLRA litigation as a matter of abstract statutory interpretation and overlooks its constitutional implications.²⁴² Had such a narrow reading of the PLRA applied in *Plata*, hundreds of thousands of prisoners would have been barred from vindicating their Eighth Amendment rights and, as *Coleman v. Wilson* shows, decades can pass before a prisoner obtains final disposition of his case.²⁴³ To that end, the above comparison to *Miranda* is also flawed; the rule articulated in that case was not when in doubt, defer, but rather, when in doubt, *defer to the party whose constitutional rights are in jeopardy*.²⁴⁴ This is consistent with the insuperable nature of constitutional rights, and teaches that the Court can and should favor those rights when adopting rules of construction.²⁴⁵

In the future, the Court should read the PLRA’s terms to favor more aggressive remedial plans.²⁴⁶ The “needs-narrowness-intrusiveness” test should no longer be used to sidestep release orders, and the “reasonable amount of time to comply” provision for graduated remedies should be limited.²⁴⁷ In addition to favoring express constitutional rights over abstract federalist concerns, the increased possibility of release orders under this approach would encourage prompt reconsideration of the PLRA by Congress.²⁴⁸ If possible, the Court should also strive to make its next reading of the PLRA a unanimous one.²⁴⁹ Providing clear precedent would obviate the need for trial and appellate

²⁴¹ See *id.* at 535–36 (quoting *Miranda v. Arizona*, 384 U.S. 436, 473 n.43 (1966)). See generally *Miranda*, 384 U.S. at 473 (applying the exclusionary rule to Fifth Amendment violations by the States).

²⁴² See *Plata*, 131 S. Ct. at 1928; *id.* at 1957 (Scalia, J., dissenting); *id.* at 1959 (Alito, J., dissenting); Branham, *supra* note 90, at 535–36.

²⁴³ See *Plata*, 131 S. Ct. at 1926, 1928–29; *Coleman v. Wilson*, 912 F. Supp. 1282, 1324 (E.D. Cal. 1995); Branham, *supra* note 90, at 535–36.

²⁴⁴ See *Miranda*, 384 U.S. at 442; Branham, *supra* note 90, at 535–36.

²⁴⁵ See *Miranda*, 384 U.S. at 442; Branham, *supra* note 90, at 535–36.

²⁴⁶ See Amend, *supra* note 46, at 168–69, 174–75.

²⁴⁷ See Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(1)(A), (a)(3)(A)(ii) (2006); Amend, *supra* note 46, at 168–69, 174–75.

²⁴⁸ See *Plata*, 131 S. Ct. at 1928; Branham, *supra* note 90, at 537; Amend, *supra* note 46, at 168–69.

²⁴⁹ See Branham, *supra* note 90, at 536–37.

courts to engage in semantic excursions, and prisoners' rights would be vindicated more quickly.²⁵⁰

C. Congress

The academy to this point has recommended only that the PLRA be amended, but the time for piecemeal reform has passed.²⁵¹ Instead of delaying change at prisoners' expense, Congress should repeal or substantially amend the PLRA to protect their rights more fully.²⁵² In considering the PLRA's replacement, Congress should avail of the many state experiments to reduce prison overcrowding that have been conducted in recent years.²⁵³ As discussed in Part IV of this Note, methods for addressing substandard prison conditions and the predicate overcrowding have taken three forms, the latter two of which, sentencing reform and renewed emphasis on successful reentry, are within Congress's purview.²⁵⁴

Congress should begin by repealing the Sentencing Reform Act of 1984 and restoring judicial discretion in sentencing.²⁵⁵ Of course, abrupt repeal of the Act raises concerns.²⁵⁶ It is true that the judiciary is underequipped to render perfect sentences in all instances, but this should not bar judges from any consideration of mitigating circumstances when imposing a sentence.²⁵⁷ To reconcile the need for flexibility with the need to cabin judicial discretion, Congress should prescribe broad parameters for sentencing, articulated with the advice of corrections experts.²⁵⁸ To the extent that these new parameters would themselves be a form of determinate sentencing, they would at least be grounded in experience, not emotion.²⁵⁹ Short of summary repeal of

²⁵⁰ See *id.*; Compare *Plata*, 131 S. Ct. at 1910–47 (interpreting the needs-narrowness-intrusiveness-test to uphold a prisoner release order under the PLRA), with *id.* at 1950–59 (Scalia, J., dissenting) (interpreting the needs-narrowness-intrusiveness test to reverse a prisoner release order under the PLRA), and *id.* at 1959–69 (Alito, J., dissenting) (finding that greater weight should have been given to concerns for public safety).

²⁵¹ See *Plata*, 131 S. Ct. at 1928; Branham, *supra* note 9090, at 539–40; Amend, *supra* note 46, at 169–70.

²⁵² See Branham, *supra* note 90, at 539–40; Amend, *supra* note 46, at 169–70.

²⁵³ See Amend, *supra* note 46, at 169–70. See generally AUSTIN, *supra* note 190.

²⁵⁴ See CROWDED, COSTLY JAILS, *supra* note 165, at 30; STATE OF RECIDIVISM, *supra* note 46, at 25; *supra* notes 171–217 and accompanying text.

²⁵⁵ See Haney, *supra* note 188, at 390–91.

²⁵⁶ See *id.* at 383–84 (discussing the perils of allowing “untrained, unsupervised” judges to fashion sentences independently).

²⁵⁷ See *id.*

²⁵⁸ See *id.* at 383–84, 390–91.

²⁵⁹ See *id.* at 382–84.

the Sentencing Reform Act, the experiences of the states indicate that the reclassification of crimes, reduction of sentences, and introduction of alternative treatment programs for drug offenders would all reduce rates of incarceration and relieve stress on prison resources.²⁶⁰

Congress should also emulate the reentry programs pioneered by the states.²⁶¹ First, Congress should expand remedial programs that begin during imprisonment.²⁶² Educational, vocational, and behavioral programs have all been shown to facilitate successful reentry.²⁶³ In keeping with this, Congress should establish a Parolees' Support Service to create individualized reentry plans for prisoners and coordinate community resources to provide support during the initial phase of reentry, when the risk of recidivism is highest.²⁶⁴ Finally, Congress should pass laws encouraging innovation by parole officers.²⁶⁵ Several states have incorporated incentivized parole programs already, and there is reason to believe this approach would succeed nationally as well.²⁶⁶

CONCLUSION

The rise of the American prison state was a function of social anxiety and political opportunism. Draconian sentencing policies imprisoned Americans in record numbers and, by the close of the twentieth century, prison systems were so overburdened that those same Americans began to suffer and die behind prison walls. Worse still was the PLRA's denial of the opportunity for redress in all but the most extreme cases. Enacted under minimal legislative scrutiny, the PLRA curtailed prisoners' Eighth Amendment rights by limiting the circumstances in which they could be asserted and the remedies that courts could provide for their violation. It comes as no surprise that one of the extreme cases heralded by the PLRA found its way to the Supreme Court in *Brown v. Plata*. There, the Court was forced to choose between two evils, neither of which was truly lesser than the other. Perpetuating

²⁶⁰ See AUSTIN, *supra* note 190, at 4; STATE OF RECIDIVISM, *supra* note 46, at 25.

²⁶¹ See REPORT PREVIEW, *supra* note 206, at 14; STATE OF RECIDIVISM, *supra* note 46, at 25–26; URBAN INST., *supra* note 206, at 16–17, 20–21.

²⁶² See STATE OF RECIDIVISM, *supra* note 46, at 28–29; URBAN INST., *supra* note 206, at 16–17.

²⁶³ See AUSTIN, *supra* note 190, at 13–15; REPORT PREVIEW, *supra* note 206, at 7; STATE OF RECIDIVISM, *supra* note 46, at 28–29.

²⁶⁴ See STATE OF RECIDIVISM, *supra* note 46, at 29–31; URBAN INST., *supra* note 206, at 12–16.

²⁶⁵ See STATE OF RECIDIVISM, *supra* note 46, at 27–28.

²⁶⁶ See STATE OF RECIDIVISM, *supra* note 46, at 29–32; URBAN INST., *supra* note 206, at 31–32.

a system of cruel and unusual punishment was no more desirable than releasing its inhabitants into the general public but, in the end, the Court found that this was the only conscionable—and, indeed, the only constitutional—choice.

It remains to be seen whether history will remember *Brown v. Plata* as a tragedy or as a turning point. The call for change, however, has been sounded anew, and a number of states have already answered it. The purpose of this Note has been to provide a template for similar change nationally and to express hope that it will come. As the Bard once wrote, “Tis a consummation devoutly to be wished.”²⁶⁷

²⁶⁷ WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc. 1.

