COLEMAN V. SCHWARZENEGGER: LIBERAL ACTIVISM RUN AMOK OR MEASURED RESPONSE TO A SYSTEM IN CRISIS?

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I. INTRODUCTION

"California's correctional system is in a tailspin."[1] So began the 2009 opinion of a three-judge court requiring the California prison system to reduce its prisoner population by more than 50,000 prisoners within two years.[2] The order was the first issued over the State's objections under the Prison Litigation Reform Act (PLRA) of 1996.[3] The order was issued after hearing joint motions from two similar cases, *Plata v. Schwarzenegger*[4] and *Coleman v. Schwarzenegger*,[5] and was a culmination of over twenty-five years of litigation, decrees, and stipulations addressing California's

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[1] Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *1 (E.D. Cal. Aug. 4, 2009) (citing Little Hoover Comm'n, Report 185, *Solving California's Corrections Crisis: Time is Running Out*, at 5 (Cal. Jan. 2007), *available at* http://www.lhc.ca.gov/studies/185/Report185.pdf.).

[2] *See id.* (stating that California's prison population exceeded 160,000 prisoners in 2006); *see also id.* at *83 (requiring a reduction to 137.5% design capacity, or just below 110,000 prisoners).

[3] *See* Jurisdictional Statement at 2, Schwarzenegger v. Plata, 130 S. Ct. 1140 (2009) (No. 09-416); Transcript of Proceedings at 12, *Coleman*, No. CIV S-90-0520 LKK JFM P (E.D. Cal. Aug. 4, 2009) ("I cannot possibly convey to you the depth of our reluctance [to issue the order], but if you leave us no alternative, we will.").

[4] Plata v. Schwarzenegger, No. C01-1351 TEH, 2007 WL 2122657 (N.D. Cal. July 23, 2007).

[5] Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM P, 2007 WL 2122636 (E.D. Cal. July 23, 2007).

constitutionally inadequate medical and mental health-care delivery systems.[6]

Years earlier, on October 4, 2006, Governor Arnold Schwarzenegger issued the Prison Overcrowding State of Emergency Proclamation (the "Proclamation"), declaring a state of emergency under the authority of the California Emergency Services Act.[7] In the Proclamation, Governor Schwarzenegger declared that all thirty-three California Department of Corrections and Rehabilitation[8] (CDCR) prisons were at or above operational capacity and that "extreme peril to the safety of persons" existed in twenty-nine of those facilities.[9] Within weeks, the plaintiffs in *Plata* and *Coleman* filed motions to convene a three-judge court under the PLRA to consider whether to issue a prisoner release order covering all of the thirty-three CDCR prisons.[10]

This Note discusses the background leading to this unprecedented decision and analyzes the complexities of the prison release order. Part II briefly reviews the history of litigation concerning prison conditions that led to the passage of the PLRA in 1996. Part III then examines the statutory provisions and legislative history of the PLRA. Part IV provides an overview of the *Coleman* ruling granting the prison release order. Finally, Part V examines the decision and discusses expected challenges to the court's conclusions.

II. HISTORY OF PRISON CONDITIONS LITIGATION

The Eighth Amendment of the United States Constitution provides that "cruel and unusual punishments [shall not be] inflicted."[11] While draf-

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[6] *Coleman*, 2009 WL 2430820, at *2. The *Coleman* case was combined with Plata v. Schwarzenegger, No. C01-1351 TEH, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005) for purposes of judicial economy and to avoid the risk of inconsistent judgments. *Coleman* challenged constitutional deficiencies in mental health-care provided to California inmates, while *Plata* challenged the prison system's constitutionally inadequate medical care. *Id.*

[7] Arnold Schwarzenegger, Governor, Prison Overcrowding State of Emergency Proclamation at 1 (Oct. 04, 2006) [hereinafter *Proclamation*], *available at* http://gov.ca.gov/proclamation/4278/.

[8] *Coleman*, 2009 WL 2430820, at *2 ("Until 2005, California's adult prisons were run by the California Department of Corrections, which was a department within the state's Youth and Corrections Agency. On July 1, 2005, the agency was reorganized and renamed the California Department of Corrections and Rehabilitation (the 'CDCR').").

[9] *Proclamation*, *supra* note 7, at 5.

[10] Under the PLRA, only a three-judge court, composed of two district court judges and one appellate judge, has the authority to issue an order that has the purpose or effect of limiting the population of a correctional facility. 18 U.S.C. § 3626(a)(3)(B) (2006).

[11] U.S. CONST. amend. VIII.

ters of the Amendment used language that clearly bound future generations to a broad moral principle, the types of punishments that the Amendment proscribes are anything but clear. The struggle to define the contours of such a principle is compounded by the sparse legislative record surrounding its ratification.[12] As the Supreme Court noted, "the American draftsmen, who adopted the English phrasing in drafting the Eighth Amendment, were primarily concerned . . . with proscribing 'tortures' and other 'barbarous' methods of punishment."[13] The Court, however, has not limited the application of the Eighth Amendment merely to the methods of torture or barbarous punishment relevant at the time of the Amendment's ratification.[14] Instead, the Court has held that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[15] That is, punishments under the Eighth Amendment must accord with the "dignity of man," which is the "basic concept underlying the Eighth Amendment."[16]

In *Estelle v. Gamble*, the Supreme Court acknowledged for the first time that the Eighth Amendment placed obligations on the government to provide health-care for incarcerated prisoners, because prisoners rely on the State for their medical needs.[17] Officials who fail to meet these needs may, "[i]n the worst cases . . . actually produce physical 'torture or a lingering death,'. . . the evils of most immediate concern to the drafters of the Amendment."[18] Moreover, the Court noted that denying prisoners medical care could produce pain and suffering that served no penological purpose.[19] Thus, the Court equated the "deliberate indifference to serious

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[12] *See* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969) (explaining that the language of the Eighth Amendment was derived from a provision in the Virginia Constitution, which in turn was taken directly from the English Bill of Rights of 1689).

[13] Gregg v. Georgia, 428 U.S. 153, 169–70 (1976).

[14] *See* Weems v. United States, 217 U.S. 349, 373 (1910) ("Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth.").

[15] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[16] *Gregg*, 428 U.S. at 169–70.

[17] Estelle v. Gamble, 429 U.S. 97 (1976). The Court reasoned that this obligation was supported by the common law view that "the public [is] required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." *Id.* at 104 (citing Spicer v. Williamson, 132 S.E. 291, 293 (1926)).

[18] *Id.* at 103.

[19] *Id.* (citations omitted).

medical needs of prisoners" with the "unnecessary and wanton infliction of pain proscribed by the Eighth Amendment."[20]

The *Estelle* holding reflects the general movement in the late 1960s and 1970s characterized by "massive judicial intervention" in the country's prison systems.[21] Throughout these decades, courts had an enormous impact on the prison system and life in prisons and jails.[22] The combined effects of several cases created what is known as "structural reform litigation," which brought about real reform by utilizing system-wide injunctive relief to ameliorate America's deplorable prison conditions.[23] In *Hutto v. Finney*, a case representative of mid-twentieth-century judicial intervention, the Supreme Court generally upheld the authority of district court judges to issue sweeping reforms,[24] and specifically held that the district court was justified in entering a comprehensive order against a state that had been given multiple opportunities to bring their penal system into compliance with constitutional mandates, yet repeatedly failed to do so.[25] The Court also emphasized the "interdependence of the conditions producing the violation" and the discretion that should be afforded to the district court judge's experience with the problem at issue.[26]

Although these cases were important in reforming prisons in the United States, they also raised serious federalism concerns about the appropriate scope of injunctive relief given that federal courts were intruding upon state-run prison systems.[27] In response to the federalism concerns

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[20] *Id.* at 104 (citations and quotation marks omitted).

[21] Thelton Henderson, *Confronting the Crisis of California Prisons*, 43 U.S.F. L. REV. 1, 4 (2008). Courts began using the totality of conditions test to determine if incarceration in a particular institution constituted cruel and unusual punishment. *See id.* In Arkansas, this led to a complete reform of the Arkansas prison system. *See* Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970); *see also* Hutto v. Finney, 437 U.S. 678 (1978) (reversing the two-century-old policy of keeping prisons virtually immune from judicial intervention).

[22] Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 564 (2006).

[23] *See* Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979) (arguing that adjudication is the social process by which judges give meaning to our public values).

[24] Such as imposing a "prophylactic" limit on prisoner isolation for a maximum of thirty days. *Hutto*, 437 U.S. at 712.

[25] *Id.* at 687.

[26] *Id.* at 688.

[27] *See* Schlanger, *supra* note 22, at 594 n.50 (explaining that the relief must be narrowly drawn, extending no further than necessary to correct the violation); *compare* Ralph Cavanagh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 L. & SOC'Y REV. 371, 376 (1980) (discussing defenses of judicial legitimacy and capacity), *with* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977) (disapproving of active judicial involvement in structural remedies on the basis of lack of capacity), *and* Nathan Glazer, *Towards an Imperial Judiciary?*, 41 PUB. INT. 104 (1975) (questioning the authori-

that followed the explosion of prison litigation in the 1960s and 1970s, the Supreme Court systematically reined in the volume and scope of prison-condition injunctions in the 1980s.[28] In 1981, the Court squarely addressed these concerns in *Rhodes v. Chapman*,[29] in which it struck down a district court injunction prohibiting "double celling" in the Southern Ohio Correctional Facility.[30] In holding that double celling did not constitute cruel and unusual punishment, the Court emphasized the need for judicial humility when confronting prison conditions cases.[31] The Court warned that although federal courts have a duty to protect the constitutional rights of prison inmates against cruel and unusual punishment, "courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system."[32]

Later, in *Farmer v. Brennan*, the Court emphasized that for an Eighth Amendment violation to occur, a defendant must have acted with "deliberate indifference"[33]:

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.[34]

The Court indicated, however, that whether a prison official was aware of a substantial risk is a question of fact that could be proved by cir-

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ty of courts to displace the value choices of elected legislative bodies by judicially fashioned policies).

[28] *See* Schlanger, *supra* note 22, at 605–16 (describing both the top-down and bottom-up forces that reigned in prison conditions injunctions).

[29] Rhodes v. Chapman, 452 U.S. 337 (1981). Concerned with the new federal judicial activism, the Supreme Court sought to clarify the federal role in the operation of state prisons. *See generally id.*

[30] *Id.* at 347–48. The Court argued that discomforts like "double celling" inmates were not serious enough to violate the constitutional standard. The Court did not specify the degree of severity that would violate the Eighth Amendment, but did suggest a policy of deference to the penal philosophy of prison officials. *Id.*

[31] *Id.* at 346 ("'Eighth Amendment judgments should neither be nor appear to be merely the subjective views of judges.'") (citing Rummel v. Estelle, 445 U.S. 263 (1980)).

[32] *Id.* at 352.

[33] Farmer v. Brennan, 511 U.S. 825, 834–35 (1994).

[34] *Id.* at 837.

cumstantial evidence, and that an apparently obvious risk would allow a fact-finder to impute knowledge to a prison official.[35]

The Supreme Court again emphasized the limited role of the judiciary and the need for judicial humility in prison injunction cases in *Lewis v. Casey*.[36] After finding that the plaintiffs had not demonstrated a pervasive system-wide injury that justified the detailed, system-wide remedy issued by the district court,[37] the Court struck down an injunction that "mandated sweeping changes" in the administration of prison libraries in order to ensure constitutionally adequate inmate access to the courts.[38] Moreover, the Court opined on the necessary limits that federalism places on the federal courts' ability to issue injunctive relief over state institutions:

> It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of the courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.[39]

The Court further emphasized the necessity of the actual injury requirement to "prevent[] courts from undertaking tasks assigned to the political branches"; otherwise, a finding that one plaintiff proved that inadequate administration caused a particular harm would allow courts to remedy all such inadequacies system-wide.[40] The Court stressed that remedies must "be limited to the inadequacy that produced the injury in fact"[41] and warned against courts becoming "enmeshed in the minutiae of prison operations."[42]

The Court also looked to its 1977 decision in *Bounds v. Smith*, which first detailed the constitutional right of inmates' access to the courts, to describe the proper deference a district court should give to prison officials when fashioning a remedy for unconstitutional prison conditions.[43] The

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[35] *Id.* at 842 ("A fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.").

[36] Lewis v. Casey, 518 U.S. 343 (1996) (overturning the district court's decision and reversing the court of appeals, which had ruled as inadequate the law libraries and legal assistance programs in the Arizona state prison system).

[37] *Id.* at 359–60. ("Only if there has been a systemwide impact may there be a systemwide remedy." (quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979)).

[38] *Id.* at 347.

[39] *Lewis*, 518 U.S. at 349.

[40] *Id.* at 344.

[41] *Id.*

[42] *Id.* at 362 (quoting Bell v. Wolfish, 441 U.S. 520, 562 (1979)).

[43] Bounds v. Smith, 430 U.S. 817 (1977).

Court highlighted that, in *Bounds*, the lower court had "refrained from 'dictat[ing] precisely what course the State should follow'" in correcting its constitutional violations.[44] Instead, the lower court acknowledged its limited role by deferring to prison administrators' judgment regarding how best to comply with constitutional mandates.[45]

Lewis is illustrative of three major principles that help ensure the separation between federal and state governments and prevent judicial usurpation of executive and legislative functions. First, plaintiffs must show actual injury in order to bring claims against prison officials for violating their constitutional rights.[46] Second, any injunction that is issued must be narrowly tailored to the actual injury that has occurred and cannot exceed the bounds necessary to correct the constitutional violation.[47] Third, courts must give prison administrators discretion in deciding how to best come into constitutional compliance.[48]

III. THE PRISON LITIGATION REFORM ACT

In addition to this doctrinal shift by the Supreme Court, Congress also took action to define the role of the judiciary in prison-condition litigation by passing the Prison Litigation Reform Act two months prior to the Court's decision in *Lewis*. The PLRA, which established "a comprehensive set of [statutory] standards to govern prospective relief in prison conditions cases,"[49] was enacted as Title VIII of the Omnibus Consolidated Recessions and Appropriations Act of 1996 and was signed into law by President Clinton on April 26, 1996.[50] The bill was enacted under Newt Gingrich's Republican Congress in reaction to the supposed overreach of federal courts and the rise of prisoner litigation.[51] The bill did not go

[44] *Lewis*, 518 U.S. at 362 (citing *Bounds*, 430 U.S. at 818) (quotation marks omitted).

[45] *Id.* at 363 (citing *Bounds*, 430 U.S. at 832–33) (quotation marks omitted).

[46] *Id.* at 348.

[47] *Id.* at 359–60.

[48] *Id.* at 391.

[49] Gilmore v. California, 220 F.3d 987, 998 (9th Cir. 2000).

[50] Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321–66 (1996) (codified in relevant part at 18 U.S.C. § 3626 (1996)).

[51] *See* Woodford v. Ngo, 548 U.S. 81, 84 (2006) (stating that the bill was enacted to bring this litigation under control); *see also* Alexander v. Hawk, 159 F.3d 1321, 1324–25 (11th Cir. 1998) (citing statistics); *Constitutional Law—Eighth Amendment—Eastern District of California Holds that Prisoner Release is Necessary to Remedy Unconstitutional California Prison Conditions.—Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820 (E.D. Cal. Aug. 4, 2009)*, 123 HARV. L. REV. 752 (2010) (explaining that the PLRA was enacted to restrict the equity jurisdiction of federal courts); Andrew W. Amend, *Giving Precise Content to the Eighth Amendment: An Assessment of the Remedial Provisions of the Prison Litigation*

through mark-up by the Judiciary Committee, so no detailed analysis of the bill exists in the legislative history,[52] but supporters of the bill stated it was intended to limit the remedies for prison-condition lawsuits and discourage frivolous and abusive prison lawsuits.[53] Statements by Republican proponents repeatedly emphasized, with disapproval, their belief that "[f]ederal judges have been attempting to micromanage correctional facilities throughout the country."[54] In reference to population caps specifically, Senator Orrin Hatch (R., Utah) noted that, "[a]s of January 1994, twenty-four corrections agencies reported having court-mandated prison population caps" and that it was "past time to slam shut the revolving door on the prison gate and to put the key safely out of reach of overzealous Federal courts."[55]

In an attempt to solve these perceived problems, the PLRA enacted a statutory regime that attempted to limit courts' ability to issue both prospective relief, generally,[56] and prisoner release orders, specifically.[57] Section (a)(1)(A) of the Act requires that any prospective relief should be specific to the plaintiff or plaintiffs and "extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs" and be "narrowly drawn, extend[ing] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the right."[58] The section also requires courts to "give substantial weight to any adverse impact on public safety."[59] It is unclear exactly what requirements this section of the PLRA

Reform Act, 108 COLUM. L. REV. 143, 156–57 (2008) (asserting that the PLRA was passed in response to a "deluge of inmate litigation and judicial micromanagement of penal institutions").

[52] *See* 142 Cong. Rec. S2285-02, at S2296 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy) ("The PLRA was the subject of a single hearing in the Judiciary Committee, hardly the type of thorough review that a measure of this scope deserves."); *see also* 141 Cong. Rec. H14078-02, at H14106 (daily ed. Dec. 6, 1995) (statement of Rep. Conyers) (objecting to the use of an appropriations bill as a way to subvert the Judiciary Committee's jurisdiction).

[53] 141 Cong. Rec. H13874-01, at H13928 (daily ed. Dec. 4, 1995) (H. Conf. Rep. No. 104-378).

[54] 141 Cong. Rec. H14078-02, at H14106 (daily ed. Dec. 6, 1995) (statement of Rep. Canady).

[55] 141 Cong. Rec. S14312-03, at S14316 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch).

[56] 18 U.S.C. § 3626(a)(1)(A) (2006).

[57] *Id.* § 3626(a)(3).

[58] *Id.* § 3626(a)(1)(A).

[59] *Id.* As described in Part III of this Note, and as many scholars have commented, this language seems to merely reiterate the Court's existing injunction jurisprudence, exemplified by *Lewis v. Casey*. *See* Gomez v. Vernon, 255 F.3d 1118, 1129 (9th Cir. 2001) ("[PLRA h]as not substantially changed the threshold findings and standards required to justify an injunction.");

places on the courts, other than what has already been articulated by the Supreme Court. It may be seen as an attempt to reject a court's equitable discretion in ordering prophylactic remedies because, by definition, these remedies go beyond the direct cause of the harm.[60] Yet this interpretation has not been followed, as evidenced by the fact that courts have continued to order prophylactic remedies, finding them appropriate under the PLRA.[61]

The PLRA's section regarding prisoner release orders did, however, place new restrictions on lower courts by severely limiting their ability to issue prisoner release orders.[62] The PLRA defines a prisoner release order to include "any order . . . that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or non-admission of prisoners to a prison."[63] The PLRA's definition includes not only orders explicitly directing the release of prisoners, but also orders requiring "the diversion of convicted persons from prison, changing the treatment of parole violators in order to prevent their return to overcrowded prisons, or imposing a cap on the prison population or any part of it."[64]

After broadly defining a release order, the PLRA then erects a number of procedural and substantive hurdles to ordering the release of prisoners.[65] The first hurdle prevents a court from issuing a prison release order unless that court "has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be

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Schlanger, *supra* note 22, at 594 ("Application of these limits to litigated relief was not a major change from prior law."); Amend, *supra* note 51, at 162 ("[stating that the section] appear[s] merely to codify the limits on judicial power the Supreme Court has articulated in prison and school desegregation cases").

[60] *See* Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFFALO L. REV. 301, 314 (2004) ("The conduct addressed in a prophylactic injunction, unlike other equitable relief, directs legal conduct that is affiliated with, rather than the direct cause of or result of, the harm.").

[61] *See, e.g.*, Armstrong v. Davis, 275 F.3d 849, 872–73 (9th Cir. 2001) (upholding prophylactic measures to prevent Americans with Disabilities Act violations by California prisons under the PLRA); Skinner v. Lampert, 457 F. Supp. 2d 1269, 1276–85 (D. Wyo. 2006) (upholding prophylactic measures to prevent inmate violence as narrowly tailored under the PLRA); *cf.* Amend, *supra* note 51 (arguing for interpreting the PLRA as a cohesive whole and drawing on the work of Jeremy Waldron, which supports this interpretation).

[62] *See* 18 U.S.C. § 3626(a)(3)(2006).

[63] *Id.* § 3626(g)(4).

[64] Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *28 (E.D. Cal. Aug. 4, 2009); *accord* Tyler v. Murphy, 135 F.3d 594, 595–96 (8th Cir. 1998) (finding a cap on the number of technical probation violators who could be admitted to a particular facility to be a "prisoner release order").

[65] 18 U.S.C. § 3632(a)(3).

remedied,"[66] and unless "the defendant has had a reasonable amount of time to comply with the previous court orders."[67] This section prevents prison release orders except as a remedy of last resort, furthering Congress's goal of limiting the ability of courts to significantly interfere with a state's operation of its prison system.[68]

The second hurdle requires a prison release order to be entered "only by a three-judge court in accordance with section 2284 of title 28."[69] Under 28 U.S.C. § 2284, the chief judge of the circuit where the request is presented shall empanel the three-judge court, to be comprised of the judge to whom the request was presented along with at least one circuit court judge.[70] Further, an order of the three-judge court is directly appealable to the Supreme Court.[71] The use of three-judge courts is "designed to encourage greater deliberation among three minds before a grant of injunctive relief, to lend greater dignity to the proceedings, and to provide expedited Supreme Court correction, if necessary."[72] The original drafters of the legislation also believed that a three-judge court "would be more sensitive to issues of federalism."[73] In introducing the bill, Senator Dole (R., Kansas) commented that the legislation would prevent a federal judge from "single-handedly" ordering a population cap.[74]

The final hurdle to overcome in issuing a prison release order under the PLRA comes from section (a)(3)(E). Under this section, a three-judge court can enter a prison release order only if the judges find "by clear and convincing evidence that crowding is the primary cause of the violation of a Federal right," and "no other relief will remedy the violation of the Federal right."[75] Again, due to the irregular procedure used for this important

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[66] *Id.* § 3626(a)(3)(A)(i).

[67] *Id.* § 3626(a)(3)(A)(ii).

[68] 141 Cong. Rec. H14078-02, at H14106. (daily ed. Dec. 6, 1995) (statement of Rep. Canady) ("[I]mposing a prison population cap should absolutely be a last resort.").

[69] 18 U.S.C. § 3626(a)(3)(B).

[70] 28 U.S.C § 2284(b)(1) (2006). For a historical account of the three-judge court, see 17 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 4234 (2d ed. 1988); David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 1–8 (1964).

[71] 28 U.S.C. § 1253 (2006).

[72] Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 84 (1996) (providing a critique of the three-judge court).

[73] *Id.* at 120.

[74] 141 Cong. Rec. S14408-01, at S14414 (daily ed. Sept. 27, 1995) (statement of Sen. Dole).

[75] 18 U.S.C. § 3626(a)(3)(E)(i)–(ii) (2006).

piece of legislation,[76] there is no legislative guidance as to the meaning of these provisions. For this reason, one of the most contested issues following the *Coleman* litigation may center on whether the court correctly determined that overcrowding was the primary cause of the underlying constitutional violations.

IV. *COLEMAN V. SCHWARZENEGGER*

A. BACKGROUND

The three-judge court's order in *Coleman v. Schwarzenegger* stems from two separate cases: *Coleman v. Schwarzenegger* and *Plata v. Schwarzenegger*.[77] The *Coleman* case, originally filed on April 23, 1990, was brought by mentally ill prisoners who alleged that the mental health-care provided to them was "so inadequate that their rights under the Eighth and Fourteenth Amendments to the United States Constitution [were] violated."[78] The class consisted of both current and future CDCR inmates with serious mental disorders.[79] After almost four years of proceedings before Chief Magistrate Judge John F. Moulds,[80] the Federal Court for the Eastern District of California found inadequacies throughout the CDCR system, including deficiencies in inmate screening,[81] staffing of mental health-care personnel,[82] access to mental health-care[83] and the medical

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[76] *See* 142 Cong. Rec. S2285-02, at S2296 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy) ("Although a version of the PLRA was introduced as a free-standing bill and referred to the Judiciary Committee, it was never the subject of a committee mark-up, and there is no Judiciary Committee report explaining the proposal.").

[77] Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM P, 2007 WL 2122636 (E.D. Cal. July 23, 2007); Plata v. Schwarzenegger, No. C01-1351 TEH, 2007 WL 2122657 (N.D. Cal. July 23, 2007). In both cases California prisoners sued the governor and corrections officials because the prisoners' basic health-care needs were not being met. *See supra* note 6 (listing the claims involved in each case).

[78] Coleman v. Wilson, 912 F. Supp. 1282, 1293 (E.D. Cal. 1995).

[79] *Id.* (citing Order filed Nov. 14, 1991, at 4–5).

[80] *Id.*

[81] *Id.* at 1305 ("Delivery of adequate mental health care to such inmates requires their identification. For that reason it has been held that correctional systems are required by the Constitution to put in place a 'systematic program for screening and evaluating inmates in order to identify those who require mental health treatment.'" (citing Balla v. Idaho State Bd. of Corr., 595 F. Supp. 1558, 1577 (D. Idaho 1984))).

[82] *Id.* at 1306–08 ("In order to provide inmates with access to constitutionally adequate mental health care, defendants must employ mental health staff in 'sufficient numbers to identify and treat in an individualized manner those treatable inmates suffering from serious mental disorders.'" (citing *Balla,* 595 F. Supp. at 1577)).

record system.[84] These shortcomings left prisoners with serious mental disorders untreated and, in many cases, exacerbated the prisoners' mental health problems.[85] The court further concluded that, because "overwhelming" evidence demonstrated that state officials had knowledge of these "gross inadequacies" in mental health-care delivery, and yet they failed to take action, the Eighth Amendment standard of acting with "deliberate indifference" to the serious medical needs of prisoners was satisfied.[86] The court began to take remedial action to cure the unconstitutional mental health-delivery system and appointed a Special Master[87] who, over the course of the decade following the appointment, would ensure the CDCR system complied with the court's numerous orders.[88] Despite some progress, however, mental health-care within the CDCR still fell short of Eighth Amendment standards in 2007, when the case went before the three-judge court.[89]

The companion case, *Plata*, was originally filed on April 5, 2001, as a class-action suit alleging that medical care at all California state prisons was constitutionally inadequate.[90] Under the Stipulation for Injunctive Relief filed June 13, 2002, the State agreed to undertake "comprehensive new medical care policies and procedures at all institutions."[91] The stipulation required CDCR to implement court-specified measures designed to comply with the minimum standards required by the Eighth Amendment.[92] The policies and procedures contained in the stipulation were to be enacted on a staggered basis, with complete implementation in the first in-

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[83] *Id.* at 1308 ("The constitutional requirement that defendants provide inmates with 'a system of ready access to adequate medical care,' means simply either ready access to physicians at each prison or 'reasonably speedy access' to outside physicians or facilities. In addition, there must be an 'adequate system for responding to emergencies.'" (citing Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982))).

[84] *Id.* at 1314 ("Defendants have a constitutional obligation to provide inmates with adequate medical care. A necessary component of minimally adequate medical care is maintenance of complete and accurate medical records.").

[85] *Id.* at 1304–23.

[86] *Id.* at 1318–19.

[87] *Id.* at 1324.

[88] Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM P, 2007 WL 2122636, at *2 (E.D. Cal. July 23, 2007) ("Since February of 1996, this court has issued at least seventy-seven substantive orders to defendants in an effort to bring the CDCR's mental health care delivery system into compliance with the requirements of the Eighth Amendment.").

[89] *Id.* at *3.

[90] Plata v. Schwarzenegger, No. C01-1351 TEH, 2005 WL 2932253, at *1 (N.D. Cal. Oct. 3, 2005).

[91] *Id.* (citing June 13, 2002 Stipulation for Injunctive Relief).

[92] *Id.* at *19.

stitutions by 2004.[93] Again, however, the prison system failed to take action: by the fall of 2004, no prison had implemented the policies or procedures or "even [came] close to attaining compliance."[94] Because of this "paltry progress," the State stipulated to entry of the Patient Care Order in 2004.[95] Three years later, the CDCR still failed to meet any of the requirements under either the Stipulation or the Patient Care Order.[96]

On June 30, 2005, the *Plata* court ruled that it would establish a Receivership to manage the delivery of medical care for the state's prison system.[97] In support of its ruling, the court cited the rapid growth of California's prison population in the 1980s and 1990s that brought about institutional deficiencies that required "fundamental reform" in order to bring the system into compliance with "basic constitutional standards."[98] Particularly troubling was the lack of qualified medical staff within the CDCR. The number of physicians in the system was inadequate to serve "even a fraction" of the entire prison population, and many of the physicians were "inadequately trained and poorly qualified."[99] The court found that the "incompetence and indifference" of these physicians led to medical care that at times constituted "unprecedented gross negligence" and even "outright cruelty."[100] So-called death reviews,[101] which document instances of

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[93] *Id.*

[94] *Id.* at *19–20.

[95] *Id.*

[96] *Id.*

[97] *Id.* at *1.

[98] *Id.* at *3.

[99] *Id.* at *5. For example, "[m]any of the CDCR physicians have prior criminal charges, have had privileges revoked from hospitals, or have mental health related problems." *Id.* Furthermore, a report from August of 2004 found that "approximately 20 percent of the CDCR physicians had a record of an adverse report on the National Practitioner Database, had a malpractice settlement, had their license restricted, or had been put on probation by the Medical Board of California." *Id.*

[100] *Id.* at 5–6. The court gave some specific examples of these problems. In one instance

> a prisoner repeatedly requested to see a doctor regarding acute abdominal and chest pains; the triage nurse canceled the medical appointment, thinking the prisoner was faking illness. When the prisoner requested transfer to another prison for treatment, his doctor refused the request without conducting an examination. A doctor did see the prisoner a few weeks later but refused to examine him because the prisoner had arrived with a self-diagnosis and the doctor found this unacceptable. The prisoner died two weeks later. Sixty-two grievances had been filed against that same physician, but when interviewed by the Court Expert, the physician advised that most of the prisoners she examined had no medical problems and were simply trying to take advantage of the medical care system.

Id. (citations omitted).

[101] "Death reviews" were meant to determine whether there was "a gross deviation from the adequate provision[s] of care." *Id.* at *7.

prison deaths, further supported the court's position. Of the 193 cases of prison deaths that were reviewed,[102] thirty-four were deemed to be preventable.[103] The court connected the "inordinately high" levels of significant injury, harm, or medical complication falling short of death to physicians' gross negligence and cruelty.[104] CDCR clinics were also substandard: the court found that the conditions in many of the CDCR's clinics were "completely inadequate for the provision of medical care," and that "[m]any clinics [did] not meet basic sanitation standards"[105] and lacked necessary medical equipment.[106]

After discussing these and other deficiencies in the CDCR system,[107] the court concluded that *Plata* was paradigmatic of the Supreme Court's discussion of prisoner medical care in *Estelle*;[108] the State's inability and seeming unwillingness to correct these explicitly known institutional deficiencies demonstrated deliberate disregard of "an excessive risk to inmate health or safety," in violation of the Eighth Amendment.[109]

In November 2006, just one day apart from one another, the plaintiffs in both *Coleman* and *Plata* filed motions to convene a three-judge court to

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[102] Only a fraction of the death reviews were completed due to a backlog. *Id.*

[103] *Id.* Physicians from the University of California, San Diego, reviewed twenty cases and described instances of "gross" departures from the standard of care, in some instances using language such as "standard of care definitely not met," "a severe systemic problem," " an egregious deviation," and "multiple gross deviations." *Id.* Court Expert Goldenson reported that the deaths were the result of the "most reckless and grossly negligent behavior" he had ever seen. *Id.*

[104] *Id.* at *8–9 ("In one instance, a physician's cruelty may have caused a prisoner to suffer paralysis. The prisoner arrived at the clinic after a fight and was unable to move his legs. As the patient had sustained a neck injury, the medical staff should have immobilized his neck to prevent further injury. When the patient failed to respond as the doctor stuck needles in his legs, the doctor said that the patient was faking, and moved his neck from side to side, paralyzing the patient, assuming he was not already paralyzed. [Court Expert] Dr. Puisis termed his actions 'fairly amazing' and cruel." (citations omitted)).

[105] *Id.* at *14 ("Exam tables and counter tops . . . are not routinely disinfected or sanitized . . . . Many medical facilities require fundamental repairs, installation of adequate lighting and such basic sanitary facilities as sinks for hand-washing.").

[106] *Id.* at *15.

[107] *Id.* at *3–17. The court noted the following deficiencies in the CDCR health-care system: lack of medical leadership, lack of qualified medical staff, lack of medical supervision, failure to engage in meaningful peer review, lack of capacity to recruit qualified personnel for key medical positions, inadequate intake screening and treatment, lack of access to medical care, unusable or non-existent medical records, interference by custodial staff with medical care, inadequate medication administration, and lack of a system to track and treat patients who suffer from chronic illness. *Id.*

[108] *Id.* at *24.

[109] Farmer v. Brennan, 511 U.S. 825, 837 (1994).

consider issuing a prisoner release order.[110] On July 23, 2007, both courts granted the plaintiffs' motions.[111] The *Coleman* court had little trouble finding that the PLRA's requirements for convening a three-judge court were met.[112] Noting that twelve years had passed since the court had found widespread Eighth Amendment violations, the court found that despite progress in some areas, the system still fell far short of minimum Eighth Amendment standards.[113] Finding that the State had been given more than a reasonable amount of time to comply with the previous orders for less intrusive relief, the court granted the motion.[114]

The *Plata* court also granted the motion in July of 2007. Even though the court-appointed Receiver began his duties in only April of 2006 and had yet to file his final plan of action,[115] the court concluded that the State had been given a "reasonable amount of time" to comply with the court's orders, as required under the PLRA.[116] The State's "previous five years of complete and utter failure" to comply with the June 2002 Stipulation for Injunctive Relief and the September 2004 Patient Care Order[117] militated against waiting to see if the Receiver's Plan of Action would remedy the constitutional deficiencies.[118] The court buttressed this reasoning with the

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[110] *Id.* at *1; Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *8 (E.D. Cal. Aug. 4 2009).

[111] *Id.* at *25.

[112] See *supra* Part III for requirements of 18 U.S.C. § 3626(a) (2006).

[113] Or "woefully short of meeting the requirements of the Eighth Amendment," in the court's own words. *Coleman*, 2009 WL 2430820, at *3–4.

[114] *Id.* at *8.

[115] Plata v. Schwarzenegger, No. C01-1351 TEH, 2005 WL 2932253, at *3 (N.D. Cal. Oct. 3, 2005).

[116] 18 U.S.C. § 3626(a)(3)(A)(ii).

[117] *Plata*, 2007 WL 2122657, at *3.

[118] *Id.* The court reasoned that the appointment of the Receiver should be viewed as "the end of a series of less intrusive orders that failed to bring about any meaningful reform, rather than as a new beginning that requires this Court to wait more time, potentially years, to see whether the Receiver's plans will succeed or fail." *Id.*

fact that the Receiver's own reports noted serious overcrowding[119] that could make adequate health-care delivery impossible. [120]

B. THREE-JUDGE COURT'S AUGUST 4TH ORDER

On August 4, 2009, the three-judge court, comprised of Judge Karlton and Judge Henderson, the district court judges overseeing the *Coleman* and *Plata* cases, respectively, and Judge Reinhardt, from the Ninth Circuit, ordered the State of California to provide the court with a prison reduction plan within forty-five days that would reduce the entire population of the CDCR's adult institutions to 137.5% of their combined design capacity[121] in no more than two years.[122] The court found that crowding was the primary cause of the constitutional violation; that no other relief would remedy the violation; that the prison release order was the least intrusive, narrowly drawn means necessary to address the violation;[123] and that the order would have only a minimal impact on public safety and the operation of the criminal justice system.[124] In light of these findings, the three-judge court granted the first prison release order imposed under the PLRA

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[119] *Id.* at *4. The court explained that overcrowding was central to all of the deficiencies within the CDCR system:

> Every element of the Plan of Action faces crowding related obstacles. Furthermore, overcrowding does not only adversely impact the Receiver's substantive plans, it also adversely impacts on the very process of implementing remedies because overcrowding, and the resulting day to day operational chaos of the CDCR, creates regular 'crisis' situations which call for action on the part of the Receivership and take time, energy, and person power away from important remedial programs.

Id. (citing Receiver's Rep. Re Overcrowding at 26–28).

[120] *Id.* at *4 ("Mission changes, yard flips, and prison-to-prison transfers, aggravated by the limited alternatives imposed by overcrowding, are now assuming a size, scope and frequency that will *clearly* extend the timeframes and costs of the receivership and *may render adequate medical care impossible*, especially for patients who require longer term chronic care." (citing Receiver's Suppl. Rep. Re Overcrowding at 10)).

[121] For a discussion of levels of capacity, see CORRECTIONS INDEPENDENT REVIEW PANEL, REFORMING CORRECTIONS 123–24 (2004), *available at* http://cpr.ca.gov/Review_Panel/from7to11.pdf. Design capacity is defined as the number of inmates a prison is

> designed to accommodate according to standards developed by the Commission on Accreditation and the American Correctional Association . . . . The standards take into account the need for humane conditions, as well as the need to prevent violence and move inmates to and from programs, such as mental health care, education classes, and drug abuse treatment. In California, design capacity is based on one inmate per cell, single bunks in dormitories, and no beds in space not designed for housing.

Id. at 123.

[122] Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *116 (E.D. Cal. Aug. 4, 2009).

[123] *Id.* at *31–75.

[124] *Id.*

over the State's objection.[125] This section will briefly review the court's findings in each of these areas.

C. CROWDING AS PRIMARY CAUSE

The PLRA requires that the court find by clear and convincing evidence that crowding is the primary cause of the violation.[126] Addressing this issue, the court accepted the State's proposed definition that a primary cause is "'first or highest in rank or importance; chief; principal,'"[127] but the court was careful to note that the *primary* cause need not be the *sole* cause of the constitutional violations.[128] In fact, the term "primary cause" itself suggests that other causes will also be at play:

> The PLRA's "primary cause" standard incorporates this basic aspect of causation. By requiring only that crowding be the *primary* cause of the constitutional violations at issue, the PLRA's language explicitly contemplates that *secondary* causes may exist. Had Congress intended to require that crowding be the only cause, it would have used language to that effect–for example, "exclusive" or "only" instead of "primary."[129]

Thus, the fact that other causes may contribute to the constitutional violations did not prevent the court from parsing out the primary cause underlying the violations. Having framed the issue, the court detailed the evidence that overcrowding was the primary cause of the constitutional violations in both *Plata* and *Coleman*.[130]

Despite hearing evidence regarding the levels of overcrowding and its effects on each individual prison, the court focused its analysis on the effects of overcrowding on the entire prison system. According to the court, although each prison differed in the amount of overcrowding,[131] the ways that overcrowding affected the delivery of mental and physical health-care were common across the prison system.[132] Secretary Woodford, the former Secretary of the CDRC and a former warden at San Quentin State Prison, stated that "'[o]vercrowding in the CDCR is extreme,'"

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[125] Jurisdictional Statement at 2, Schwarzenegger v. Plata, No. 09-416 (U.S. Oct. 5, 2009).

[126] 18 U.S.C. § 3626(a)(3)(E)(i) (2006).

[127] *Coleman*, 2009 WL 2430820, at *31 (citing RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1537 (2d ed. 1998)).

[128] *Id.*

[129] *Id.* (citing 4 HARPER, JAMES AND GRAY ON TORTS § 20.2 (3d ed. 2007)).

[130] *Id.* at 32.

[131] *See* Appendix of Exhibits in Support of Receiver's Report Re Overcrowding at 56, *Coleman*, 2009 WL 2430820.

[132] *See Coleman*, 2009 WL 2430820, at *41–63.

which makes it "'virtually impossible for the organization to develop, much less implement, a plan to provide prisoners with adequate care.'"[133] In addition, Matthew Cate, head of the CDCR, stated that "'overpopulation makes everything . . . more difficult,'" and agreed that crowding continues to "'severely hamper[ ]'" the CDCR's ability "'to provide inmates with adequate medical care in a fiscally sound manner.'"[134] James Tilton, Cate's predecessor as Secretary of the CDCR, likewise explained that, "'crowding, and the resulting lack of space, adversely affected the delivery of medical and mental health care.'"[135] The court noted that "[e]ven defendants' expert Dr. Ira Packer opined that 'the overcrowding in CDCR significantly contributes to the difficulties in providing adequate mental health services.'"[136]

After reviewing these statements, the court looked at four main areas where lack of space due to overcrowding affected delivery of care: reception centers, treatment space, inability to house inmates by classifications, and beds for mentally ill inmates. Reception centers are the "locus of the intake and classification functions" for the approximately 140,000 inmates admitted each year into California's prisons;[137] yet, as the court noted, "[a]s of August 2008, all but one of these reception centers were near or over 200% design capacity, and two were over 300% design capacity."[138] Such a high level of overcrowding, the court argued, makes it "impossible to provide adequate medical and mental health services to inmates."[139]

In regards to the lack of treatment space, the court found that the "problem of adequate office and treatment space is endemic in the CDCR," and is compounded by the fact that "the space that does exist to provide health care services is often 'woefully inadequate.'"[140] The court received evidence that inadequate treatment space existed system-wide,

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[133] *Coleman*, 2009 WL 2430820, at *34 (citing Woodford Supp. Rep. ¶ 31, Aug. 15, 2008).

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.* at *35 ("One of the clearest effects of crowding is that the current prison system lacks the physical space necessary to deliver minimally adequate care to inmates.").

[138] *Id.*

[139] *Id.* The court stated that "numerous experts, including defendants' own mental health expert, testified [that] the number and types of inmates in the centers overwhelm their capacity to provide adequate medical or mental health care services." *Id.* at 37.

[140] *Id.* at *48 (citing Stewart Rep. ¶ 190, Nov. 9, 2007).

and that this lack of space seriously inhibited the ability to deliver medical and mental health-care.[141]

The court also detailed the evidence regarding the lack of beds for the mentally ill.[142] For example, the court noted that, "between June and September of 2008, the CDCR's severe shortage of mental health crisis beds [sic] prevented more than two-thirds of the inmates referred to such beds from actually being transferred."[143] The lack of beds sometimes forced even the most mentally ill inmates to "wait as much as a year before being transferred to inpatient beds."[144] Inmates in need of crisis beds are "frequently placed 'in a variety of temporary housing alternatives' ranging from infirmaries to 'telephone-booth-sized interview stalls typically placed in corridors.'"[145] Particularly distressing to the court was the lack of beds for suicidal inmates. The court detailed multiple instances of suicidal inmates who had been referred to mental health crisis beds but committed suicide while awaiting transfer.[146] The court also noted "the destructive feedback loop" created by the lack of beds: inmates who were denied necessary mental health-care were "'ending up in mental health conditions far more acute than necessary,'" which in turn creates a "cycle of sicker people being admitted, with greater resources necessary to treat them, which then creates even further backlog in an already overwhelmed system.'"[147]

The court's position was supported by seven experts, who opined that overcrowding was the primary cause of the prison system's deficiencies.[148] These experts, including some of the nation's leading prison administrators, testified that constitutionally adequate health-care will be impossible until the prison population is reduced to a manageable size.[149] However, the State's only expert, Dr. David Thomas, disagreed with this conclusion.[150] Dr. Thomas testified that, "'the single most important item in achieving a sound Constitutional [sic] level of care is a culture that fos-

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[141] *Id.* For example, "[a]t Avenal State Prison, staff must attempt to provide care for 7,525 inmates in space designed for less than one-third of that number." *Id.* at *39.

[142] *Id.* at *40.

[143] *Id.*

[144] *Id.*

[145] *Id.* at *41 (citing Ex. D 1292 at 3).

[146] *Id.*

[147] *Id.* (citing Stewart Supp. Rep. ¶ 92, Aug. 15, 2008).

[148] *Id.* at *54.

[149] *Id.* at *62.

[150] *Id.* at *58.

ters providing care at that level.'"[151] In his opinion, the "'empowerment of [health-care] staff'–unlike in the past, when 'security services dominated the prison system and program services existed only at the whim of security services'–is 'the crux of having a constitutional level of health care.'"[152] He explained that the appointment of the Receiver had begun to change the culture of the CDCR away from a security-based system to one focused on attaining a constitutional level of health-care.[153]

The court, however, dismissed Dr. Thomas's testimony for several reasons, including due to his qualifications[154] and his belief that "reducing crowding will not, without more, remedy the constitutional violations at issue."[155] The court reasoned that this confuses the primary cause issue: "reducing crowding is a necessary but not sufficient condition for eliminating the constitutional deficiencies in the provision of medical care to California's inmate population."[156] Pointing to their original analysis of the definition of primary cause, the court reasoned that, although other steps would be necessary to correct the constitutional violations, the existence of other causes of the violations did not mean that overcrowding is not the primary cause.[157] Moreover, the court agreed with another expert, Dr. Beard, who testified that reducing the prison population was the first, necessary step to changing the culture of the CDCR.[158]

After exhaustively detailing the evidence before it, the court found by clear and convincing evidence that overcrowding was the primary cause of the constitutional violations.[159]

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[151] *Id.* (citing Thomas Rep. ¶ 11, Nov. 9, 2007).

[152] *Id.*

[153] *Id.*

[154] The court found Dr. Thomas's testimony unpersuasive, noting that it was supported by minimal independent research and calling it inconsistent, "patently incredible," and "overwhelmingly outweighed by the testimony of the numerous other, more qualified experts." *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.* ("Reducing overcrowding is not a panacea, but crowding is the primary cause of the ongoing inadequate medical care in the CDCR system. Overcrowding is the one factor that negatively impacts almost every other matter that must be addressed to create a minimally adequate medical care delivery system for California's prisons." (citing Shansky 2d Supp. Rep. ¶ 9, Sep. 10, 2008)).

[158] *Id.* at *59 ("'If you try to change the culture, you can't. You can't change the culture until you reduce the population and can make the institution safe.'").

[159] *Id.* at *63.

D. NO OTHER RELIEF WILL REMEDY THE VIOLATION

The court next turned to the question of whether the prison release order was the only remedy capable of curing the constitutionally deficient health-care system.[160] To begin, the court stated that, under the PLRA the prison release order need not be sufficient on its own to cure the deficiencies. Rather, the PLRA requires only that the order be a necessary part of the solution.[161] In other words, "[i]f all other potential remedies will be futile in the absence of a prisoner release order, 'no other relief will remedy the violation.'"[162]

In looking at the alternatives to a prison release order, the court first considered construction of new prisons and re-entry facilities.[163] The court quickly dismissed this solution to prison overcrowding because the State had "no plans to construct additional prisons in the near future,"[164] and two years after Assembly Bill 900 authorized construction of new re-entry facilities, no construction had begun due to lack of funding.[165] Even if funding were attained, the court suggested, the number of re-entry facilities that would be constructed would not solve the overcrowding problem.[166] Additionally, because of the length of time needed for construction, any relief from overcrowding would be "too distant" to relieve the "emergency-like" conditions.[167]

The final alternative remedy that the court considered was leaving the *Plata* Receivership and the *Coleman* Special Master in place.[168] The court

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[160] 18 U.S.C. § 3626(a)(3)(E)(ii) (2006).

[161] *Coleman*, 2009 WL 2430820, at *63 (E.D. Cal. Aug. 4, 2009) ("The PLRA does not require that a prisoner release order, on its own, will necessarily resolve the constitutional deficiencies found to exist in *Plata* and *Coleman*. All the PLRA requires is that a prisoner release order be a necessary part of any successful remedy.").

[162] *Id.*

[163] *Id.*

[164] *Id.* at *64.

[165] *Id.* at *65.

[166] *Id.* at *66.

[167] *Id.* The court noted that, while it may be

> theoretically possible for California to build its way out of its prison overcrowding problem, it is not practical to anticipate that the state will do so in a timely manner, if ever, given "the time that it takes and . . . the huge costs that it takes to do things like this."

Id. at *66–68. In fact, as of March 17, 2010, the State had made "little progress in the actual construction of any facilities." *See* CAL. STATE SEN. REPUBLICAN CAUCUS, BRIEFING REPORT: THE PRISON OVERCROWDING CRISIS—AB 900 THREE YEARS LATER (2010), *available at* http://cssrc.us/publications.aspx?id=7741.

[168] *Id.* at *69.

first referred again to the *Plata* Receiver's own reports that detailed the problems of overcrowding and stated that the excessive prison population may make adequate health-care impossible.[169] Further, despite issuing over seventy orders during a fourteen-year period in an attempt to bring California's prison system into compliance, the *Coleman* court's actions failed to remedy the constitutional violations.[170] Specifically, in regards to the number of beds, the *Coleman* court issued specific orders for almost a decade, yet there were insufficient beds to meet current demand.[171] Thus, the three-judge court found that, although improvements were made, the *Plata* Receiver and *Coleman* Special Master could not sufficiently remedy the constitutional violations.[172]

After detailing the expert testimony supporting its finding, the court found "by clear and convincing evidence, that no relief other than a prisoner release order [was] capable of remedying the constitutional deficiencies at the heart of these two cases."[173]

E. NARROWLY DRAWN, LEAST INTRUSIVE REMEDY EXTENDING NO FURTHER THAN NECESSARY

Having found the PLRA's requirements under 18 U.S.C. § 3626(a)(3)(E) met, the court next turned to whether the proposed remedy of reducing the population to 137.5% design capacity was "narrowly drawn," that it did not extend "further than necessary to correct the violation of the Federal [sic] right," and that it was "the least intrusive means necessary" to correct the violation.[174] The court first looked to the scope of the relief sought.[175] Since relief must "'be limited to the inadequac[ies] that produced the injur[ies] in fact that the plaintiff[s] ha[ve] established,'"[176] the court first reiterated the underlying injuries involving the state's knowing failure to provide a minimum level of medical and mental

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[169] *Id.* ("The *Plata* Receiver has determined that adequate care cannot be provided for the current number of inmates at existing prisons and that additional capacity is required to remedy the medical care deficiencies that exist in California's prison system.").

[170] *Id.* at *12.

[171] *Id.* at *70.

[172] *Id.* at *69.

[173] *Id.* at *75.

[174] 18 U.S.C. § 3626(a)(1)(A) (2006).

[175] *Coleman*, 2009 WL 2430820, at *76.

[176] *Id.* (citing Lewis v. Casey, 518 U.S. 343, 357 (1996)).

health-care required by the Constitution to its prisoners.[177] Issuing a prison release order is a system-wide remedy, so the court first noted that, "the constitutional violations identified by the *Plata* and *Coleman* courts exist throughout the California prison system and are the result of systemic failures."[178] Supporting this conclusion was the fact that the "defendants have never contended that the problems at issue in *Plata* and *Coleman* are institution-specific" and have not attempted to terminate or modify the injunction under the PLRA.[179] The court therefore had no trouble finding that the scope of the injury was system-wide and necessitated a system-wide remedy.[180] The court also found that a system-wide cap was less intrusive than an institution-specific cap, because the latter would "interfere with the state's management of its prisons," while the system-wide cap would leave the State with more flexibility.[181] The court then briefly considered whether the order's effect on non-class members might prevent it from being granted.[182] The court reasoned that, because there was no feasible prisoner release order that would reduce overcrowding without affecting some inmates outside the *Plata* and *Coleman* classes, the order "contravene[d] no principle of law or equity in that regard."[183]

The court next looked at the form of relief to be ordered.[184] The court stated that it was adopting a "nearly identical procedure"[185] to the one used

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[177] *Id.* The court referred to the opinions in *Plata* and *Coleman*, which detailed at length the reported deficiencies within the CDCR system and the dangers those deficiencies pose to California's prisoner population:

> The *Plata* courts found that "[t]he California prison medical system is broken beyond repair"; that the "future injury and death" of California prisoners is "virtually guaranteed in the absence of drastic action"; and that the state had failed to address those problems despite having "every reasonable opportunity" to do so. Likewise, the *Coleman* court found that the state was deliberately indifferent to the fact that "seriously mentally ill inmates in the California Department of Corrections daily face an objectively intolerable risk of harm as a result of the gross systemic deficiencies that obtain throughout the Department . . . . [I]nmates have in fact suffered significant harm as a result of those deficiencies; seriously mentally ill inmates have languished for months, or even years, without access to necessary care. They suffer from severe hallucinations, they decompensate into catatonic states, and they suffer the other sequela to untreated mental disease."

Id. (citations omitted).

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.* at *77.

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

in *Bounds v. Smith*,[186] which the Supreme Court described in *Lewis v. Casey* as being an "exemplar of what should be done" when crafting system-wide injunctive relief.[187] Just as the district court in *Bounds* did not craft an order for injunctive relief on its own, but instead ordered the State to devise a program that the court later adopted with minor changes,[188] the court's proposed remedy would allow the State to craft its own plan, "thereby maximizing the state's flexibility and permitting the state to comply with the cap in a manner that best accords with the state's penal priorities."[189]

The court finally turned to the proper size of the reduction, which it measured in terms of a percentage of the overall prison population. Noting first that it was "not an exact science,"[190] and that the prison system may still have problems delivering health-care at 100% design capacity,[191] the court began with the plaintiffs' requested cap of 130%.[192] Although the court detailed some evidence that showed compliance could be achieved at 140% design capacity and that the "operable capacity" determined by the Corrections Independent Review Panel was 145%,[193] the court found ample evidence to support the conclusion that 130% to 145% design capacity was a reasonable upper limit.[194] Following this reasoning, the court required a population reduction "to 137.5% of their combined design capaci-

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[186] Bounds v. Smith, 430 U.S. 817 (1977).

[187] Lewis v. Casey, 518 U.S. 343, 363 (1996); *see supra* Part II (discussing the Supreme Court's approval of the lower court's restraint in *Bounds*).

[188] *Bounds*, 430 U.S. at 818–20.

[189] *Coleman*, 2009 WL 2430820, at *78.

[190] *Id.* at *79.

[191] *Id.* at *80. Expert testimony suggested that, even at 100% capacity, it would still be difficult to provide adequate medical and mental health-care to inmates because prisons are designed to operate below their full design capacity. *Id.*

[192] *See id.* The court also indicated that its task was "further complicated by the fact that defendants [did not present] any evidence or arguments suggesting that [it] should adopt a percentage other than 130% design capacity." *Id.* at *79.

[193] *Id.* at *82. The court did not find the 145% operable capacity to be an indicator of a percentage that would allow for constitutionally adequate mental and health-care:

> Plaintiffs' experts convincingly demonstrated that, in light of the wardens' failure to consider the provision of medical and mental health care to California's inmates and in light of their reliance on maximum operable capacity, which does not consider the ability to provide such care, the Panel's 145% estimate clearly exceeds the maximum level at which the state could provide constitutionally adequate medical and mental health care in its prisons.

Id.

[194] *Id.* at *83. However, the court cautioned that the evidence "suggests [only] that the limit on California's prison population should be somewhat higher than 130% but lower than 145%." *Id.*

ty—a population reduction halfway between the cap requested by plaintiffs and the operable capacity estimate absent consideration of the need for medical and mental-health care."[195]

F. POTENTIAL IMPACT ON PUBLIC SAFETY AND THE CRIMINAL JUSTICE SYSTEM

Finally, to complete its analysis under the PLRA, the court analyzed evidence as to whether the proposed prison release order would adversely impact public safety or the operation of the criminal justice system.[196] To begin its analysis, the court presented evidence on the "criminogenic nature" of overcrowded prisons.[197] For example, the court found that because of CDCR's limited capacity to properly classify inmates due to overcrowding, "high-risk inmates do not rehabilitate and low-risk inmates learn new criminal behavior," causing California's prisons to serve as "crime school[s]."[198] This criminogenic environment, according to the court, burdened California communities with "123,000 offenders returning from prison, often more dangerous than when they left."[199] Thus, the court reasoned that "[m]itigating prison overcrowding could improve public safety by rendering possible the proper classification of inmates and the expansion and targeting of rehabilitation programming."[200] The court then analyzed options that would not have an impact on public safety, including early release through expansion of good time credits, diversion of technical parole violators, diversion of low-risk offenders with short sentences, expansion of evidence-based rehabilitative programming in prisons or communities, and sentencing reform.[201]

The State proposed several arguments regarding the adverse impact of the prison release order, all of which the court rejected. The court rejected evidence presented by the State that the release order "would result in an overwhelming increase in the number of crimes, arrests, and jail in-

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[195] *Id.*

[196] 18 U.S.C. § 3626(a)(1)(A) (2006).

[197] *Coleman*, 2009 WL 2430820, at *84–85 ("As an initial matter, we conclude that the current combination of overcrowding and inadequate rehabilitation or re-entry programming in California's prison system itself has a substantial adverse impact on public safety and the operation of the criminal justice system. A reduction in the crowding of California's prisons will have a significant positive effect on public safety by reducing the criminogenic aspects of California's prisons.").

[198] *Id.* at *86.

[199] *Id.*

[200] *Id.* at *87.

[201] *Id.* at *88–99.

mates, thus adversely affecting their ability to investigate, prosecute, and punish crime."[202] The court argued that this was based on the assumption that a prisoner release order would involve such drastic measures as a mass early release or a ban on the admission of new offenders to prison.[203] Instead, the court found that "the fears regarding increased crime, arrests, and jail populations [were] largely unjustified, and that there [were] ways to achieve a reduction in California's prison population without unduly burdening the already limited resources of local communities."[204]

The court next dismissed the State's argument "that the parole departments would not be able to supervise the increased number of parolees," "that inadequate supervision would lead to an increase in recidivism," and "that, even at present, parole departments are overburdened and cannot adequately supervise the parolees, leading to parolees' failure to integrate into society."[205] The court found that "many of the current problems with parole supervision are created by the poor allocation of resources."[206] The court noted that "California's parole system is significantly out of step with that of the other states," as it is "the only state that puts every inmate leaving the prison system on parole, usually for one to three years."[207]

The court then dismissed the State's argument that "the influx of parolees and probationers in communities . . . would strain the community corrections system, rehabilitative services, and re-entry programs," as "there [would not be] enough community correctional resources to supervise or provide services to offenders who are diverted from the prison system to the communities." [208] According to the court, any adverse affects could be mitigated through a population reduction plan based on "a gradual increase in the number of parolees or probationers in each county," and the increased needs of each county would likely "fall within normal fluctuations in the number of people served by the counties."[209] The court further stated that the proposed population reduction measures would not adversely impact communities, but would in fact "improve public safety," if the State were to "divert some portion of the savings generated by the

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[202] *Id.* at *99.

[203] *Id.*

[204] *Id.*

[205] *Id.* at *102.

[206] *Id.*

[207] *Id.*

[208] *Id.* at *104.

[209] *Id.*

population reduction to community corrections, rehabilitation, and reentry resources."[210]

In concluding its discussion of the potential adverse impact of the prison release order on public safety and the operation of the criminal justice system, the court noted that this factor was to be weighed in concert with the other requirements of the PLRA, and thus some degree of potential adverse impact was permissible, if not unavoidable:

> We do not construe this PLRA requirement, however, to preclude a population reduction order based on a possibility that the order *might* have an adverse impact on public safety or the operation of the criminal justice system, no matter how small. If that were enough to prevent the court from ordering a population cap, no court would ever be able to impose such a remedy, thus contravening the congressional intent that a population cap be ordered if "it is truly necessary to prevent an actual violation of a prisoner's federal rights."[211]

Though the prison release order could *potentially* adversely impact public safety and criminal justice, the court found those potential consequences to be both attenuated and outweighed by the perceived constitutional violations. Having thus found all requirements of the PLRA met, the three-judge court concluded its opinion with an order requiring the State to provide the court with a proposed plan for reducing the population of adult CDCR prisons to 137.5% of design capacity within two years.[212]

V. DID THE THREE-JUDGE COURT'S ORDER EXCEED THE BOUNDS OF THE PLRA?

Having laid out in detail the extensive findings by the three-judge court, this section examines whether those findings comply with the intent and purposes of the PLRA by looking at the State's challenges to each element of the PLRA.

A. UNDERLYING CONSTITUTIONAL VIOLATIONS

Because any remedy must be narrowly tailored to correct the actual constitutional violations, it is important to keep the breadth and scope of those violations in mind before analyzing the three-judge court's findings. In both *Plata* and *Coleman*, the court found itself confronted with an insti-

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[210] *Id.* at *105.

[211] *Id.* at *112 (citing H.R. REP. NO. 104-21, at 25 (1995)).

[212] *Id.* at *84.

tution that, by its very design, was unable to deliver constitutionally adequate medical care.[213] Because of the lack of planning and leadership during periods of explosive growth in the prison population, the institutional structure of the CDCR itself prevented the delivery of medical and mental health-care to inmates with serious medical conditions.[214] Although unconstitutional conditions were found to exist in all of California's prisons, their underlying causes and the main obstacles to correcting those conditions existed at an institutional level.[215] Thus, the remedies ordered by the *Plata* and *Coleman* courts had to address the system as a whole. Throughout the remedial phase of both cases, the courts attempted to implement simple policies and procedures to help the CDCR develop and create a system that would address the delivery of and access to adequate medical and mental health-care that did not leave inmates needlessly with the deliberate indifference of individual physicians, who were unqualified or incompetent, and the institutional culture that did not take the medical needs of prisoners seriously.[216] Time and again the State was unable to implement these orders.[217] The policies and procedures that the State, in *Plata*, agreed to implement in the Stipulation for Injunctive Relief in 2002 have still yet to be accomplished despite the urgency of the crisis in California's prisons.[218]

In deciding on whether to issue the prison release order, the three-judge court declined to reconsider the State's continuing constitutional violations and did not allow evidence that was relevant only to determine whether the constitutional violations were ongoing.[219] The State argued that this prevented it from demonstrating that advances had been made

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[213] *See id.* at *3, *12.

[214] "The State's failure has created a vacuum of leadership, and utter disarray in the management, supervision, and delivery of care in the Department of Corrections' medical system." *Id.* at *7 (quoting May 10, 2005 Order to Show Cause at *1–2, Plata v. Schwarzenegger, No. C01-1351 TEH, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005)).

[215] *See id.* at *9 (explaining that the prison system is in a state of "institutional paralysis" (citing Oct. 3, 2005 Order to Show Cause at *1, Plata v. Schwarzenegger, No. C01-1351 TEH, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005))).

[216] *Id.* at *10 ("[noting the *Plata* court's description of the prison culture as one of] non-accountability and non-professionalism whereby the acceptance of degrading and humiliating conditions became routine and permissible" (internal quotation marks and brackets omitted)).

[217] *Id.* at *2.

[218] *See* ACHIEVING A CONSTITUTIONAL LEVEL OF MEDICAL CARE IN CALIFORNIA'S PRISONS: THIRTEENTH TRI-ANNUAL REPORT OF THE FEDERAL RECEIVER'S TURNAROUND PLAN OF ACTION (2010).

[219] *Coleman*, 2009 WL 2430820, at *31.

under the Receivership and from showing "how it was implementing the *Coleman* Special Master's latest recommendations."[220]

The State's arguments on this point misconstrue the nature of the three-judge court under the PLRA. Under the statutory scheme set up by the PLRA, a three-judge court is empanelled only to hear whether a particular remedy, a prisoner release order, should be ordered.[221] It is not empanelled to decide questions of the underlying constitutional violations because this work has already been done at the district court level prior to the remedial phase. This does not mean, however, that the court did not consider the current extent of the constitutional violations, which is necessitated by the narrow tailoring requirements of the PLRA. In fact, the court heard voluminous evidence about current conditions within the CDCR prisons but did so within the context of whether overcrowding was the primary cause of the constitutional violations.[222] Thus, although the court did not re-litigate whether the constitutional violations existed systemwide, it did consider evidence concerning the current state of CDCR prisons and, in doing so, heard testimony on the extent of ongoing constitutional violations.

B. WAS CDCR GIVEN A REASONABLE AMOUNT OF TIME TO COMPLY WITH PREVIOUS COURT ORDERS?

In granting the plaintiffs' motions to convene a three-judge court under the PLRA, the *Plata* and *Coleman* courts first had to find that the State had been given a reasonable amount of time to comply with those courts' previous, less intrusive orders.[223] In arguing that both the *Coleman* and *Plata* courts failed to give the State a reasonable amount of time, the State emphasized that "strict compliance with the PLRA procedural requirements is essential to fulfilling Congress's goal of having fewer, more sub-

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[220] Jurisdictional Statement at 8, Schwarzenegger v. Plata, 130 S. Ct. 1140 (2009) (No. 09-416).

[221] *See supra* Part III.

[222] Appellees' Joint Motion to Dismiss or Affirm Appeal of State Defendants at 21, Schwarzenegger v. Plata, 130 S. Ct. 1140 (2009) (No. 09-416) ("The State's medical and mental health experts toured the prisons, including only weeks before trial; viewed the medical facilities; interviewed medical personnel and other prison staff, as well as prisoners; and reported and testified about the conditions they found. The State introduced evidence about current health care statistics, current medical and mental health care staffing, and institutional populations. The State also introduced into evidence the reports of the *Coleman* Special Master and the *Plata* Receiver, which include extensive discussion of current conditions in the prisons." (citations omitted)).

[223] *See supra* Part III.

stantial suits regarding prison conditions litigated in federal court."[224] As its opinion illustrates, the *Coleman* court had little trouble finding this requirement met.[225] In arguing that the *Coleman* court did not give the State a reasonable amount of time, the State rested on the fact that the plaintiffs moved to convene a three-judge court just eight months after the court had approved new remedial plans and had required the State to submit new plans to the Special Master.[226] Moreover, the court issued its order even though it recognized that "slow but evident progress toward constitutional compliance" had been reflected in the Special Master's reports through 2005.[227] However, considering the number of orders the *Coleman* court had issued, the several years the case had been in the remedial phase, and the State's continued failure to fully implement past orders, this argument is not persuasive.

The State argued that the *Plata* court similarly also failed to give the State a reasonable amount of time to comply with its most recent orders. The Receiver appointed by the *Plata* court did not commence his duties until April of 2006, just seven months before the plaintiffs filed their motion to convene a three-judge court, and the Receiver had requested an extension to submit his Plan of Action on the same day that the motion was filed.[228] Furthermore, when the Receiver filed his Plan of Action on May 10, 2007, which "contemplated several years of efforts to remedy the claimed violations," he stated his belief that the "'Plan of Action will work' and that 'it was simply wrong' to think that 'population controls will solve California's prison health care problems."[229] In short, the State argued, by allowing the three-judge court to be convened, "[t]he court . . . short-circuited the process it had set in motion."[230]

These arguments omitted crucial facts that undermine the State's position about the time frame of both the *Plata* and *Coleman* cases. Although

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[224] Jurisdictional Statement at 14, Schwarzenegger v. Plata, 130 S. Ct. 1140, No. 09-416 (Oct. 5, 2009); *See, e.g.*, Jones v. Bock, 549 U.S. 199, 202–04 (2007); Porter v. Nussle, 534 U.S. 516, 523–25 (2002).

[225] *See Coleman*, 2009 WL 2430820, at *5 ("Defendants failed to come close to meeting the terms of the Patient Care Order, even with generous extensions of time from the [*Plata*] Court.").

[226] *Id.* at *31.

[227] *Id.* at 16; Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM P, 2007 WL 2122636, at *3 (E.D. Cal. July 23, 2007).

[228] Plata v. Schwarzenegger, No. C01-1351 TEH, 2007 WL 2122657, at *3 (N.D. Cal. July 23, 2007).

[229] Jurisdictional Statement at 15, Schwarzenegger v. Plata, 130 S. Ct. 1140, No. 09-416 (Oct. 5, 2009).

[230] *Id.*

the plaintiffs filed their motions in November of 2006, both courts issued continuances in order to allow the State to show progress and to give the Receiver time to analyze the effects of crowding and potential remedial efforts.[231] In fact, oral arguments did not begin until June 6, 2007, eight months after the motion was filed.[232] Further, although the State quoted from the *Plata* Receiver's May 10 Plan of Action, the State failed to note his supplemental report filed a month later, which stated that conditions "aggravated by the limited alternatives imposed by overcrowding, [were] . . . assuming a size, scope and frequency that . . . may render adequate medical care impossible, especially for patients who require longer term chronic care."[233]

There is another fact that may put the timing into context. On October 4, 2006, just over one month before the plaintiffs' motions were filed, Governor Schwarzenegger issued his Prison Overcrowding State of Emergency Proclamation.[234] In the proclamation, Governor Schwarzenegger detailed the prisons' system-wide problems caused by severe overcrowding and proclaimed a state of emergency under the authority of the California Emergency Services Act.[235] It could easily be inferred that the plaintiffs in both cases seized on this proclamation for opportunistic purposes. However, considering the length of time already spent in the remedial phase in both cases and the mounting evidence that overcrowding was preventing the courts' orders from being implemented, the proclamation may have been seen as just the catalyst needed to attempt to force the State to institute real reforms. In the face the State's continual inability to comply with previous orders, and confronted with an institution that demonstrated deliberate indifference toward the serious medical needs of its prisoners, the *Plata* and *Coleman* courts rightly felt there was little else to do than grant the motion to convene a three-judge court.

C. WAS CROWDING THE PRIMARY CAUSE OF THE VIOLATION?

The State's main criticism of the three-judge court's finding that crowding was the primary cause of the unconstitutional conditions was

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[231] *Plata*, 2007 WL 2122657 at *2; *Coleman*, 2007 WL at *1.

[232] *Plata*, 2007 WL at *2.

[233] Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *4 (N.D. Cal. Aug. 4, 2009).

[234] *Proclamation*, *supra* note 7.

[235] *Id.*

that it did not "give the word [primary] . . . its natural meaning."[236] Instead, the court found that overcrowding was the primary cause simply because it was a contributing factor to the constitutional violations.[237] As the evidence showed, however, the effects of overcrowding permeate the entire prison system, and prevent the State from implementing the policies and procedures that are necessary to create a system that is able to provide adequate care to prisoners with serious medical conditions.[238] Overcrowding causes deadly delays in emergency responses; exacerbates problems of inadequate space for treatment and screening; frustrates the CDCR's ability to provide enough medical and mental health beds; increases the frequency of lockdowns, which severely impede delivery of care; increases the spread of infectious diseases; and magnifies staffing deficiencies and medical record management problems.[239] In the face of such evidence, the court correctly found that reducing the prison population was a necessary but not sufficient condition to alleviating the constitutional violations.[240] It is difficult to see then how a cause that permeates the entire system and frustrates every attempt to bring the CDCR into constitutional compliance could not be considered a primary cause of the violations. If it were not, the PLRA would create an intractable problem where less intrusive remedies would be futile, yet courts would be unable to address the cause of the futility.

The State also argued that, "[i]f overcrowding [wa]s the primary cause of the constitutional violation, then it st[ood] to reason that eliminating overcrowding necessarily w[ould] undo all or virtually all of the constitutional harm."[241] The State also made much of the fact that "*Coleman* and *Plata* were not litigated as cases about crowding," but as cases about the delivery of medical and mental health-care. Indeed, the State maintained, the orders and decrees issued throughout the long histories of both

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[236] Jurisdictional Statement at 18, Schwarzenegger v. Plata, 130 S. Ct. 1140 (2009) (No. 09-416).

[237] *Id.*

[238] *See supra* Part IV.B.

[239] Appellees' Joint Motion to Dismiss or Affirm Appeal of State Defendants at 13–17, Schwarzenegger v. Plata, 130 S. Ct. 1140 (2009) (No. 09-416) (listing uncontested findings of fact regarding the impact of overcrowding on the delivery of medical and mental health-care: "the State's expert conceded that crowding is the primary cause of some of the violations at issue in this case, and the current and former Secretaries of California's prison system affirm that crowding is a major impediment to remedying the conditions" (citations omitted)).

[240] Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *58 (E.D. Cal. Aug. 4, 2009).

[241] Jurisdictional Statement at 21, Schwarzenegger v. Plata, 130 S. Ct. 1140 (2009) (No. 09-416).

Plata and *Coleman* "direct[ed] relief, not at crowding, but at problems such as recruitment and retention of qualified personnel, medical leadership, medical equipment, screening systems, systems to track patients with needs, record keeping, and institutional culture."[242]

These arguments from the State are also flawed; here, the State ignored the "polycentric" nature of the problems with the CDCR's medical and mental health delivery system. In other words, the State failed to see that overcrowding was central to the deficiencies addressed by the *Plata* and *Coleman* courts. As William A. Fletcher explains,

> The concept of polycentricity may help to clarify the problems involved in trial court remedial discretion in institutional suits. Polycentricity is the property of a complex problem with a number of subsidiary problem "centers," each of which is related to the others, such that the solution to each depends on the solution to all the others. A classic metaphor for a polycentric problem is a spider web, in which the tension of the various strands is determined by the relationship among all the parts of the web, so that if one pulls on a single strand, the tension of the entire web is redistributed in a new and complex pattern.[243]

This concept helps to explain why a prisoner release order would not in and of itself correct the constitutional violations underlying the CDCR's medical and mental health-care delivery system. The deficiencies identified in both cases are multifarious and complex.[244] Requiring a prisoner release order to cure all constitutional violations when complex problems underlie those violations asks too much of a prisoner release order. A prison release order is but one order in a series of remedial orders designed to bring the CDCR's medical and mental health-care delivery system into constitutional compliance. Other orders remain in effect; for instance, the policies and procedures in the *Plata* Stipulation for Injunctive Relief must still be implemented. Thus, viewed in its proper context, a prisoner release order is designed to remedy the primary cause of the violations so that other remedies will not be futile.

Further, if the State's argument was correct, it is hard to see how a court would ever be able to issue a prison release order. It is hard to imagine a prison system with systemic Eighth Amendment violations where the underlying causes are not polycentric and a prisoner release order on its own would be able to bring the system into constitutional compliance.

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[242] *Coleman*, 2009 WL 2430820, at *22.

[243] William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 645 (1982) (citation omitted).

[244] *See supra* Part IV.A.

In enacting the PLRA, Congress allowed for the courts to issue a prison release order as a remedy of last resort for unconstitutional prison conditions. If reducing overcrowding is truly necessary to cure such conditions, but a court is unable issue a prison release order because other orders are also necessary, then the court would never be able to issue a prison release order. This would leave the courts powerless in the face of the continued violations of prisoners' constitutional rights.

D. WAS THERE NO OTHER RELIEF THAT WOULD REMEDY THE VIOLATION?

The State's primary argument regarding other means of relief was not so much whether there was another remedy that could cure the violation—in fact, the State pointed to no alternative form of relief other than continuing the Special Master and Receivership—but whether the prison release order would actually remedy the violation. The State pointed to the district court's determination that "even capping the overall prison population . . . would not remedy the violation of plaintiff's federal rights."[245] The State thus essentially repeated its previous argument that "no other relief" implies that a prison release order must be the *sole* relief necessary to correct the constitutional violation. Yet, as the court reasoned, "[i]f all other potential remedies will be futile in the absence of a prisoner release order, 'no other relief will remedy the violation.'"[246]

E. WAS THE ORDER NARROWLY DRAWN AND THE LEAST INTRUSIVE REMEDY THAT EXTENDED NO FURTHER THAN NECESSARY?

One of the most troubling aspects of the court's order is the seemingly arbitrary percentage of design capacity reduction in the prison population. As the State points out, 137.5% design capacity "was not the level at which the alleged constitutional violations would be remedied, nor did it have a nexus to the mental health and medical treatment sought by the plaintiff classes or the other remedies proposed to improve such treatment."[247] The court seemed to have merely "split the difference" between the plaintiffs' requested reduction to 130% and the "operable capacity" of

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[245] Jurisdictional Statement at 18, Schwarzenegger v. Plata, 130 S. Ct. 1140 (2009) (No. 09-416).

[246] *Coleman*, 2009 WL at *63.

[247] Jurisdictional Statement at 30, Schwarzenegger v. Plata, 130 S. Ct. 1140 (2009) (No. 09-416).

145%.[248] It would appear, as the State contended, that "[t]his is the antithesis of narrow tailoring."[249]

This argument, however, misinterprets the court's reasoning as to the 137.5% number. From the evidence presented, the court could have justifiably granted the plaintiffs their requested reduction to 130% of design capacity.[250] As the court noted, determining an appropriate level of capacity is not "an exact science" and the plaintiffs' evidence demonstrated that, at 130%, the system could be brought into constitutional compliance.[251] Furthermore, the State did not present any testimony as to what level of capacity would be appropriate.[252] Instead of ordering a reduction to 130%, however, the court chose a higher percentage out of "caution and restraint."[253] If the State's argument is that 137.5% capacity is not narrowly tailored because the court wanted to ensure that the reduction did not exceed the level necessary to bring the CDCR within the constitutional minimum, then under the State's reasoning, the court should have chosen the 130% design capacity because the evidence supported that conclusion. It is difficult to see how the court's cautious approach in favor of the State would violate the intent of the PLRA, especially when the State presented no evidence of its own.

A perhaps more troubling aspect of the court's order is its imposition of a system-wide, as opposed to an institution-specific, population reduction. On its face, such an order appears to be anything but narrowly drawn and the least intrusive means to correct the violation. An institution specific cap is much more appealing because it gives the appearance of precision to the required percentage of population reduction. On closer inspection, however, the system-wide reduction is more in-line with the intent of the PLRA in respecting federalism concerns. Prison populations are in constant flux as inmates are released, new inmates enter, and inter-prison transfers occur. If the court had fashioned an institution-specific remedy, it would have had to attempt to determine what percentage of design capacity should be allowed at each prison. It is again worth emphasizing that the court acknowledged that choosing a percentage of design capacity is not an exact science, so even at the institution-specific level the court would have had to engage in the same type of inexact calculation that was used

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[248] *Id.*

[249] *Id.*

[250] *Coleman*, 2009 WL at *79–84.

[251] *Id.* at *79.

[252] *Id.* at *82.

[253] *Id.* at *83.

for the entire CDCR system. Therefore, an institution-specific cap would not have been any more exact than a system-wide cap, but an institution-specific cap would take flexibility away from the State in determining how best to manage its prison population. An institution-specific cap would have placed the court in a position of greater micromanagement of California's prisons than the system-wide cap and would stray from both the intent of the PLRA and the *Bounds* model endorsed by the Supreme Court in *Lewis*. By choosing a system-wide cap, the court allowed the State greater future flexibility in determining how to manage its prison population, perhaps allowing for greater percentages in prisons where mentally ill inmates are not present. Also, because different facilities may be able to deliver adequate care at different capacity levels,[254] as the remedial phase proceeds the State will have greater latitude to increase populations at facilities that are capable of delivering adequate care to greater populations, without having to modify the prisoner release order.[255]

F. DID THE COURT GIVE SUBSTANTIAL WEIGHT TO ANY POTENTIAL IMPACT ON PUBLIC SAFETY AND THE CRIMINAL JUSTICE SYSTEM?

The court's findings on the impact to public safety present some of the most troubling aspects of the prison release order. By beginning their analysis with a lengthy discussion of the "criminogenic nature" of overcrowded prisons,[256] the court signaled its belief that *not* issuing the prison release order would have a greater impact on public safety. In its discussion, the court delved too much into policy decisions that are the province of the legislature and beyond the competence of the court. The court provided reasonable responses to the State's arguments that crime would increase on account of the order, but the court gave a less compelling answer to the State's argument that already overburdened "parole departments would not be able to supervise the increased number of parolees."[257] The court first claimed that the State could "gradually increase the number of parolees or probationers in each county," but this argument assumes that certain counties are not overburdened; the State contended that *any increase* in the parole system could create problems for public safety and could interfere with the criminal justice system. The court did address the

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[254] *Id.* at 81.

[255] Coleman v. Schwarzenegger, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2010 WL 99000 (E.D. Cal. Jan. 12, 2010).

[256] *Coleman*, 2009 WL at *85.

[257] *Id.* at *102.

concern to a certain extent by explaining that the reduction measures will likely fall within the normal fluctuations in inmate population.

Because the court allowed the State to develop its own population reduction plan, the court actually completed its public safety analysis before a final population reduction plan had been approved. Unfortunately, the court declined to evaluate the public safety impact of the State's second proposed reduction plan; the court instead "trust[ed] that the State w[ould] comply with its duty to ensure public safety as it implements the constitutionally required reductions."[258] This may prove problematic on appeal as the PLRA demands this analysis, and it is not clear that the court's analysis that preceded the adoption of the reduction plan will satisfy this requirement of the PLRA. However, in light of the extent of the crisis in the delivery of medical and mental health-care, it is unlikely that the effect on public safety would outweigh the need for the constitutional rights of California's prison population to be vindicated.

VI. CONCLUSION

The gravity of the crisis facing California's prisons cannot be underestimated. The lack of leadership at both the executive and legislative levels has allowed the problems facing California's prisons to continuously grow out of control with little movement toward real reform. Although principles of federalism require district courts to exercise great deference toward states, "[t]here is no reason of comity, judicial restraint, or recognition of expertise for courts to defer to negligent omissions of officials who lack the resources or motivation to operate prisons within limits of decency."[259]

In *Coleman v. Schwarzenegger*, the three-judge court was confronted with constitutional violations stemming from institutional deficiencies that had not been reformed after years of court orders and proceedings. As the hearing proceeded, the evidence overwhelmingly demonstrated that the overcrowding in California's prisons was an insurmountable roadblock to reform and was central to the State's inability to institute a medical and mental health-care delivery system that did not threaten the lives and health of its inmates. In the face of such facts, the court had little choice but to order a population reduction of California's prison system.

A prisoner release order is not a politically popular decision. Political candidates consistently run as "tough on crime," and supporting the rights

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[258] *Coleman*, 2010 WL at *2.

[259] Rhodes v. Chapman, 452 U.S. 337, 362 (1981) (Brennan, J., concurring).

of incarcerated prisoners is often seen as political suicide. Particularly as California's budget is strained to the brink, public support for adequate funding of the prison system is almost non-existent. Yet it is exactly these attitudes that have lead to the crisis in California's prisons. In such situations, it is the particular province of the federal judiciary to step in and ensure that the constitutional rights of citizens are not violated. Budget restraints or no, the words of Justice Blackman ring true: "[O]ur Constitution sets minimal standards governing the administration of punishment in this country, and thus it is no answer to the complaints of the brutalized inmate that the resources are unavailable to protect him from what, in reality, is nothing less than torture."[260]

Although the three-judge court's sweeping order mandating a system-wide population cap seems on its face to be incongruous with the intent of the PLRA, after closer consideration such an order gave the State the deference warranted and attempted as much as possible to refrain from judicial micromanagement. Even though the PLRA placed many restrictions on when a prisoner release order may be issued, it did not do away with such orders completely. The prisoner release order is an order of last resort. The unprecedented crisis of California's prison system demanded it.

[260] Farmer v. Brennan, 511 U.S. 825, 853–54 (1994) (Blackmun, J., concurring).