AMERICAN CONSTITUTIONALISM
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Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Punishments/Prison Conditions

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Brown v. Plata, 563 U.S. ____ (2011)

Marciano Plata was an inmate in the California prison system. In 1997, he hurt himself while working in the prison kitchen. He was unable to get adequate medical attention because the prison lacked sufficient medical staff. Eventually, his knee required surgery, which took years to schedule. In 2001, Plata and other California inmates with serious medical conditions filed a class action lawsuit against the state,[1] claiming that the severe lack of medical care in the prison constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. That lawsuit was soon joined with a second class action, Coleman v. Brown*, that had first been filed in 1990. In both cases, federal district courts found prison conditions constitutionally deficient and ordered state officials to take remedial action. In 2008, after years of failed efforts to improve health conditions, lawyers for the prisoners asked the federal court to order California to make substantial reductions in the state prison population. The three-judge federal court, after finding that the number of persons in state prisons was double the capacity of those prisons, ordered California to reduce the number of prisons by 38,000 to 46,000. This number, the judges believed, would enable the state to provide constitutionally mandated health services to the prison population. California appealed to the Supreme Court. State officials claimed that the court order was not mandated by the Constitution and barred by the Prison Litigation Reform Act of 1995 (PLRA), which declares that courts may only order states to release prisoners in order to ensure prison conditions comply with the Constitution when "crowding is the primary cause of the violation of a Federal right," "no other relief with remedy the violation of the Federal right," and when the relief "extend(s) no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs."*

Nineteen states, the Greater Stockton Chamber of Commerce, and the Criminal Justice Legal Foundation filed amicus briefs urging the Supreme Court to overturn the lower court order releasing prisoners. The brief for the Stockton Chamber of Commerce condemned a previous effort in the Plata *litigation to place a prison hospital in the community and asserted,*

> *When a federal court fails to follow the heightened statutory criteria for ordering federal intervention into a state prison system, it potentially wreaks havoc on local communities by wrongly shifting direct and indirect costs of a state prison to local taxpayers. A federal receiver, fully supported by a federal court that appointed him or her, exercises state power with virtually no procedural accountability, is allowed unlimited access to state money, and has the power to ask the appointing court to waive any state regulation that may decelerate the speed of implementing his or her decisions.*

The American Psychiatric Association, numerous other health and mental health organizations, liberal religious groups, the American Bar Association, and an organization of Corrections and Law Enforcement Personnel filed briefs urging the Supreme Court to sustain the lower court order. The brief for Corrections and Law Enforcement Personnel stated,

> *When a prison population is allowed to expand so far beyond prison capacity, the effect is analogous to cancerous cells metastasizing in a healthy body. As the inmate population soars, the destructive effects are felt throughout the system—tensions rise for inmates, correction officers,*

[1] Edmund (Jerry) Brown was the state governor when the case reached the Supreme Court.

and staff; violence increases; rehabilitation efforts are compromised; care for inmates is reduced; organizational ability is lost; the morale of both correctional staff and inmates plummets. In short, chronic overcrowding makes prison systems unmanageable, unsafe, and inhumane.

The Supreme Court by a 5–4 vote sustained the lower court order that as many as 46,000 prisoners be released. Justice Kennedy's majority opinion hold that the lower federal court had made fact-findings sufficient to demonstrate that the only way the state could ensure constitutionally adequate health and mental health conditions in prisons was by significantly reducing the size of the prison population. What fact-findings did Justice Kennedy rely on? Why did he believe such a drastic order constitutionally necessary? Why did the dissents disagree with these fact-findings? How would you remedy the conditions in California prisons?

JUSTICE KENNEDY delivered the opinion of the Court.

This case arises from serious constitutional violations in California's prison system. The violations have persisted for years. They remain uncorrected. . . .

After years of litigation, it became apparent that a remedy for the constitutional violations would not be effective absent a reduction in the prison system population. . . .

. . .

At the time of trial, California's correctional facilities held some 156,000 persons. This is nearly double the number that California's prisons were designed to hold, and California has been ordered to reduce its prison population to 137.5% of design capacity. By the three-judge court's own estimate, the required population reduction could be as high as 46,000 persons. Although the State has reduced the population by at least 9,000 persons during the pendency of this appeal, this means a further reduction of 37,000 persons could be required. As will be noted, the reduction need not be accomplished in an indiscriminate manner or in these substantial numbers if satisfactory, alternate remedies or means for compliance are devised. The State may employ measures, including good-time credits and diversion of low-risk offenders and technical parole violators to community-based programs, that will mitigate the order's impact. The population reduction potentially required is nevertheless of unprecedented sweep and extent.

Yet so too is the continuing injury and harm resulting from these serious constitutional violations. For years the medical and mental health care provided by California's prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners' basic health needs. Needless suffering and death have been the well-documented result. Over the whole course of years during which this litigation has been pending, no other remedies have been found to be sufficient. Efforts to remedy the violation have been frustrated by severe overcrowding in California's prison system. Short term gains in the provision of care have been eroded by the long-term effects of severe and pervasive overcrowding.

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The Corrections Independent Review Panel, a body appointed by the Governor and composed of correctional consultants and representatives from state agencies, concluded that California's prisons are "'severely overcrowded, imperiling the safety of both correctional employees and inmates.'" . . . In 2006, then-Governor Schwarzenegger declared a state of emergency in the prisons, as "'immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding.'" The consequences of overcrowding identified by the Governor include "'increased, substantial risk for transmission of infectious illness' " and a suicide rate "'approaching an average of one per week.' "

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Prisoners in California with serious mental illness do not receive minimal, adequate care. Because of a shortage of treatment beds, suicidal inmates may be held for prolonged periods in telephone-booth sized cages without toilets. . . . A psychiatric expert reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic. Prison officials explained they had "'no place to put him.'" Other inmates awaiting care may be held for months in administrative segregation, where they endure harsh and isolated conditions and receive only

limited mental health services. Wait times for mental health care range as high as 12 months. In 2006, the suicide rate in California's prisons was nearly 80% higher than the national average for prison populations; and a court-appointed Special Master found that 72.1% of suicides involved "some measure of inadequate assessment, treatment, or intervention, and were therefore most probably foreseeable and/or preventable."

Prisoners suffering from physical illness also receive severely deficient care. California's prisons were designed to meet the medical needs of a population at 100% of design capacity and so have only half the clinical space needed to treat the current population. A correctional officer testified that, in one prison, up to 50 sick inmates may be held together in a 12- by 20-foot cage for up to five hours awaiting treatment. The number of staff is inadequate, and prisoners face significant delays in access to care. A prisoner with severe abdominal pain died after a 5-week delay in referral to a specialist; a prisoner with "constant and extreme" chest pain died after an 8-hour delay in evaluation by a doctor; and a prisoner died of testicular cancer after a "failure of MDs to work up for cancer in a young man with 17 months of testicular pain." Doctor Ronald Shansky, former medical director of the Illinois state prison system, surveyed death reviews for California prisoners. He concluded that extreme departures from the standard of care were "widespread," and that the proportion of "possibly preventable or preventable" deaths was "extremely high." Many more prisoners, suffering from severe but not life-threatening conditions, experience prolonged illness and unnecessary pain.

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These conditions are the subject of two federal cases. The first to commence, Coleman v. Brown, was filed in 1990. Coleman involves the class of seriously mentally ill persons in California prisons. Over 15 years ago, in 1995, after a 39-day trial, the Coleman District Court found "overwhelming evidence of the systematic failure to deliver necessary care to mentally ill inmates" in California prisons. . . . The court appointed a Special Master to oversee development and implementation of a remedial plan of action.

In 2007, 12 years after his appointment, the Special Master in Coleman filed a report stating that, after years of slow improvement, the state of mental health care in California's prisons was deteriorating. The Special Master ascribed this change to increased overcrowding. . . .

The second action, *Plata v. Brown*, involves the class of state prisoners with serious medical conditions. After this action commenced in 2001, the State conceded that deficiencies in prison medical care violated prisoners' Eighth Amendment rights. The State stipulated to a remedial injunction. The State failed to comply with that injunction, and in 2005 the court appointed a Receiver to oversee remedial efforts. The court found that "the California prison medical care system is broken beyond repair," resulting in an "unconscionable degree of suffering and death."

. . .

As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment." . . . .

. . . Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.

If government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation. . . .

Courts faced with the sensitive task of remedying unconstitutional prison conditions must consider a range of available options, including appointment of special masters or receivers and the possibility of consent decrees. When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison's population. . . .

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This Court's review of the three-judge court's legal determinations is de novo, but factual findings are reviewed for clear error. Deference to trial court factfinding reflects an understanding that "[t]he trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." The three-judge court oversaw two weeks of trial and heard at considerable length from

California prison officials, as well as experts in the field of correctional administration. The judges had the opportunity to ask relevant questions of those witnesses. Two of the judges had overseen the ongoing remedial efforts of the Receiver and Special Master. The three-judge court was well situated to make the difficult factual judgments necessary to fashion a remedy for this complex and intractable constitutional violation. The three-judge court's findings of fact may be reversed only if this Court is left with a "'definite and firm conviction that a mistake has been committed.'"

. . .

Numerous experts testified that crowding is the primary cause of the constitutional violations. The former warden of San Quentin and former acting secretary of the California prisons concluded that crowding "makes it 'virtually impossible for the organization to develop, much less implement, a plan to provide prisoners with adequate care.'" The former executive director of the Texas Department of Criminal Justice testified that "'[e]verything revolves around overcrowding'" and that "'overcrowding is the primary cause of the medical and mental health care violations.'" The former head of corrections in Pennsylvania, Washington, and Maine testified that overcrowding is "'overwhelming the system both in terms of sheer numbers, in terms of the space available, in terms of providing healthcare.'" And the current secretary of the Pennsylvania Department of Corrections testified that "'the biggest inhibiting factor right now in California being able to deliver appropriate mental health and medical care is the severe overcrowding.'"

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As this case illustrates, constitutional violations in conditions of confinement are rarely susceptible of simple or straightforward solutions. In addition to overcrowding the failure of California's prisons to provide adequate medical and mental health care may be ascribed to chronic and worsening budget shortfalls, a lack of political will in favor of reform, inadequate facilities, and systemic administrative failures. . . . Only a multifaceted approach aimed at many causes, including overcrowding, will yield a solution.

. . .

The State argues that the violation could have been remedied through a combination of new construction, transfers of prisoners out of State, hiring of medical personnel, and continued efforts by the Plata Receiver and Coleman Special Master. The order in fact permits the State to comply with the population limit by transferring prisoners to county facilities or facilities in other States, or by constructing new facilities to raise the prisons' design capacity. And the three-judge court's order does not bar the State from undertaking any other remedial efforts. If the State does find an adequate remedy other than a population limit, it may seek modification or termination of the three-judge court's order on that basis. The evidence at trial, however, supports the three-judge court's conclusion that an order limited to other remedies would not provide effective relief.

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Construction of new facilities, in theory, could alleviate overcrowding, but the three-judge court found no realistic possibility that California would be able to build itself out of this crisis. At the time of the court's decision the State had plans to build new medical and housing facilities, but funding for some plans had not been secured and funding for other plans had been delayed by the legislature for years. . . .

The three-judge court also rejected additional hiring as a realistic means to achieve a remedy. The State for years had been unable to fill positions necessary for the adequate provision of medical and mental health care, and the three-judge court found no reason to expect a change.

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The common thread connecting the State's proposed remedial efforts is that they would require the State to expend large amounts of money absent a reduction in overcrowding. The Court cannot ignore the political and fiscal reality behind this case. California's Legislature has not been willing or able to allocate the resources necessary to meet this crisis absent a reduction in overcrowding. There is no reason to believe it will begin to do so now, when the State of California is facing an unprecedented budgetary shortfall.

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As the State implements the order of the three-judge court, time and experience may reveal targeted and effective remedies that will end the constitutional violations even without a significant decrease in the general prison population. The State will be free to move the three-judge court for modification of its order on that basis, and these motions would be entitled to serious consideration. . . .

In reaching its decision, the three-judge court gave "substantial weight" to any potential adverse impact on public safety from its order. The court devoted nearly 10 days of trial to the issue of public safety, and it gave the question extensive attention in its opinion. Ultimately, the court concluded that it would be possible to reduce the prison population "in a manner that preserves public safety and the operation of the criminal justice system."

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Expert witnesses produced statistical evidence that prison populations had been lowered without adversely affecting public safety in a number of jurisdictions, including certain counties in California, as well as Wisconsin, Illinois, Texas, Colorado, Montana, Michigan, Florida, and Canada. . . . In light of this evidence, the three-judge court concluded that any negative impact on public safety would be "substantially offset, and perhaps entirely eliminated, by the public safety benefits" of a reduction in overcrowding.

The court found that various available methods of reducing overcrowding would have little or no impact on public safety. Expansion of good-time credits would allow the State to give early release to only those prisoners who pose the least risk of reoffending. Diverting low-risk offenders to community programs such as drug treatment, day reporting centers, and electronic monitoring would likewise lower the prison population without releasing violent convicts. . . .

. . .

The three-judge court concluded that the population of California's prisons should be capped at 137.5% of design capacity. This conclusion is supported by the record. Indeed, some evidence supported a limit as low as 100% of design capacity. . . .

. . . Nothing in the record indicates that the experts in this case imposed their own policy views or lost sight of the underlying violations. To the contrary, the witnesses testified that a 130% population limit would allow the State to remedy the constitutionally inadequate provision of medical and mental health care. When expert opinion is addressed to the question of how to remedy the relevant constitutional violations, as it was here, federal judges can give it considerable weight.

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. . . The three-judge court made the most precise determination it could in light of the record before it. The PLRA's narrow tailoring requirement is satisfied so long as these equitable, remedial judgments are made with the objective of releasing the fewest possible prisoners consistent with an efficacious remedy. In light of substantial evidence supporting an even more drastic remedy, the three-judge court complied with the requirement of the PLRA in this case.

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The State has already made significant progress toward reducing its prison population, including reforms that will result in shifting "thousands" of prisoners to county jails. As the State makes further progress, the three-judge court should evaluate whether its order remains appropriate. If significant progress is made toward remedying the underlying constitutional violations, that progress may demonstrate that further population reductions are not necessary or are less urgent than previously believed. Were the State to make this showing, the three-judge court in the exercise of its discretion could consider whether it is appropriate to extend or modify this timeline.

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These observations reflect the fact that the three-judge court's order, like all continuing equitable decrees, must remain open to appropriate modification. They are not intended to cast doubt on the validity of the basic premise of the existing order. The medical and mental health care provided by California's prisons falls below the standard of decency that inheres in the Eighth Amendment. This extensive and ongoing constitutional violation requires a remedy, and a remedy will not be achieved without a reduction in overcrowding. The relief ordered by the three-judge court is required by the

Constitution and was authorized by Congress in the PLRA. The State shall implement the order without further delay.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

Today the Court affirms what is perhaps the most radical injunction issued by a court in our Nation's history: an order requiring California to release the staggering number of 46,000 convicted criminals.

There comes before us, now and then, a case whose proper outcome is so clearly indicated by tradition and common sense, that its decision ought to shape the law, rather than vice versa. One would think that, before allowing the decree of a federal district court to release 46,000 convicted felons, this Court would bend every effort to read the law in such a way as to avoid that outrageous result. Today, quite to the contrary, the Court disregards stringently drawn provisions of the governing statute, and traditional constitutional limitations upon the power of a federal judge, in order to uphold the absurd.

. . . What has been alleged here, and what the injunction issued by the Court is tailored (narrowly or not) to remedy is the running of a prison system with inadequate medical facilities. That may result in the denial of needed medical treatment to "a particular [prisoner] or [prisoners]," thereby violating (according to our cases) his or their Eighth Amendment rights. But the mere existence of the inadequate system does not subject to cruel and unusual punishment the entire prison population in need of medical care, including those who receive it.

The Court acknowledges that the plaintiffs "do not base their case on deficiencies in care provided on any one occasion"; rather, "[p]laintiffs rely on systemwide deficiencies in the provision of medical and mental health care that, taken as a whole, subject sick and mentally ill prisoners in California to 'substantial risk of serious harm' and cause the delivery of care in the prisons to fall below the evolving standards of decency that mark the progress of a maturing society." But our judge-empowering "evolving standards of decency" jurisprudence (with which, by the way, I heartily disagree, does not prescribe (or at least has not until today prescribed) rules for the "decent" running of schools, prisons, and other government institutions. It forbids "indecent" treatment of individuals—in the context of this case, the denial of medical care to those who need it. And the persons who have a constitutional claim for denial of medical care are those who are denied medical care—not all who face a "substantial risk" (whatever that is) of being denied medical care.

. . .

Whether procedurally wrong or substantively wrong, the notion that the plaintiff class can allege an Eighth Amendment violation based on "systemwide deficiencies" is assuredly wrong. It follows that the remedy decreed here is also contrary to law, since the theory of systemic unconstitutionality is central to the plaintiffs' case. . . . If (as is the case) the only viable constitutional claims consist of individual instances of mistreatment, then a remedy reforming the system as a whole goes far beyond what the statute allows.

It is also worth noting the peculiarity that the vast majority of inmates most generously rewarded by the re-lease order—the 46,000 whose incarceration will be ended—do not form part of any aggrieved class even under the Court's expansive notion of constitutional violation. Most of them will not be prisoners with medical conditions or severe mental illness; and many will undoubtedly be fine physical specimens who have developed intimidating muscles pumping iron in the prison gym.

. . .

Structural injunctions depart from that historical practice, turning judges into long-term administrators of complex social institutions such as schools, prisons, and police departments. Indeed, they require judges to play a role essentially indistinguishable from the role ordinarily played by executive officials. Today's decision not only affirms the structural injunction but vastly expands its use, by holding that an entire system is unconstitutional because it may produce constitutional violations.

The drawbacks of structural injunctions have been described at great length elsewhere. This case illustrates one of their most pernicious aspects: that they force judges to engage in a form of factfinding-as-policymaking that is outside the traditional judicial role. . . . When a judge manages a structural

injunction, he will inevitably be required to make very broad empirical predictions necessarily based in large part upon policy views—the sort of predictions regularly made by legislators and executive officials, but inappropriate for the Third Branch.

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[T]he idea that the three District Judges in this case relied solely on the credibility of the testifying expert witnesses is fanciful. Of course they were relying largely on their own beliefs about penology and recidivism. And of course different district judges, of different policy views, would have "found" that rehabilitation would not work and that releasing prisoners would increase the crime rate. I am not saying that the District Judges rendered their factual findings in bad faith. I am saying that it is impossible for judges to make "factual findings" without inserting their own policy judgments, when the factual findings are policy judgments. What occurred here is no more judicial factfinding in the ordinary sense than would be the factual findings that deficit spending will not lower the unemployment rate, or that the continued occupation of Iraq will decrease the risk of terrorism. Yet, because they have been branded "factual findings" entitled to deferential review, the policy preferences of three District Judges now govern the operation of California's penal system.

. . .

But structural injunctions do not simply invite judges to indulge policy preferences. They invite judges to indulge incompetent policy preferences. Three years of law school and familiarity with pertinent Supreme Court precedents give no insight whatsoever into the management of social institutions. Thus, in the proceeding below the District Court determined that constitutionally adequate medical services could be provided if the prison population was 137.5% of design capacity. This was an empirical finding it was utterly unqualified to make.

. . .

My general concerns associated with judges' running social institutions are magnified when they run prison systems, and doubly magnified when they force prison officials to release convicted criminals.

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As the author of today's opinion explained earlier this Term, granting a writ of habeas corpus " 'disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'" . . . And yet here, the Court affirms an order granting the functional equivalent of 46,000 writs of habeas corpus, based on its paean to courts' "substantial flexibility when making these judgments." It seems that the Court's respect for state sovereignty has vanished in the case where it most matters.

. . .

In my view, a court may not order a prisoner's release unless it determines that the prisoner is suffering from a violation of his constitutional rights, and that his release, and no other relief, will remedy that violation. Thus, if the court determines that a particular prisoner is being denied constitutionally required medical treatment, and the release of that prisoner (and no other remedy) would enable him to obtain medical treatment, then the court can order his release; but a court may not order the release of prisoners who have suffered no violations of their constitutional rights, merely to make it less likely that that will happen to them in the future.

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JUSTICE ALITO, with whom THE CHIEF JUSTICE joins, dissenting.

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I would reverse the decision below for three interrelated reasons. First, the three-judge court improperly refused to consider evidence concerning present conditions in the California prison system. Second, the court erred in holding that no remedy short of a massive prisoner release can bring the California system into compliance with the Eighth Amendment. Third, the court gave inadequate weight to the impact of its decree on public safety.

The three-judge court, however, relied heavily on outdated information and findings and refused to permit California to introduce new evidence. Despite evidence of improvement, the three-judge court relied on old findings made by the single-judge courts. The three-judge court highlighted death statistics from 2005, while ignoring the "significant and continuous decline since 2006." And the court dwelled on conditions at a facility that has since been replaced.

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The three-judge court justified its refusal to receive up-to-date evidence on the ground that the State had not filed a motion to terminate prospective relief. . . . But the State's opportunity to file such a motion did not eliminate the three-judge court's obligation to ensure that its relief was necessary to remedy ongoing violations.

. . .

The majority highlights past instances in which particular prisoners received shockingly deficient medical care. But such anecdotal evidence cannot be given undue weight in assessing the current state of the California system. The population of the California prison system (156,000 inmates at the time of trial) is larger than that of many medium-sized cities, and an examination of the medical care provided to the residents of many such cities would likely reveal cases in which grossly deficient treatment was provided. Instances of past mistreatment in the California system are relevant, but prospective relief must be tailored to present and future, not past, conditions.

. . .

[T]he majority and the court below maintain that no remedy short of a massive release of prisoners from the general prison population can remedy the State's failure to provide constitutionally adequate health care. This argument is implausible on its face and is not supported by the requisite clear and convincing evidence.

. . .

I do not dispute that general overcrowding contributes to many of the California system's healthcare problems. But it by no means follows that reducing overcrowding is the only or the best or even a particularly good way to alleviate those problems. Indeed, it is apparent that the prisoner release ordered by the court below is poorly suited for this purpose. The release order is not limited to prisoners needing substantial medical care but instead calls for a reduction in the system's overall population. Under the order issued by the court below, it is not necessary for a single prisoner in the plaintiff classes to be released. Although some class members will presumably be among those who are discharged, the decrease in the number of prisoners needing mental health treatment or other forms of extensive medical care will be much smaller than the total number of prisoners released, and thus the release will produce at best only a modest improvement in the burden on the medical care system.

. . .

Many of the problems noted above plainly could be addressed without releasing prisoners and without incurring the costs associated with a large-scale prison construction program. Sanitary procedures could be improved; sufficient supplies of medicine and medical equipment could be purchased; an adequate system of records management could be implemented; and the number of medical and other staff positions could be increased. Similarly, it is hard to believe that staffing vacancies cannot be reduced or eliminated and that the qualifications of medical personnel cannot be improved by any means short of a massive prisoner release. Without specific findings backed by hard evidence, this Court should not accept the counterintuitive proposition that these problems cannot be ameliorated by increasing salaries, improving working conditions, and providing better training and monitoring of performance.

. . .

Before ordering any prisoner release, the PLRA commands a court to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." This provision unmistakably reflects Congress' view that prisoner release orders are inherently risky.

In taking this view, Congress was well aware of the impact of previous prisoner release orders. The prisoner release program carried out a few years earlier in Philadelphia is illustrative. In the early 1990's, federal courts enforced a cap on the number of inmates in the Philadelphia prison system, and

thousands of inmates were set free. Although efforts were made to release only those prisoners who were least likely to commit violent crimes, that attempt was spectacularly unsuccessful. During an 18–month period, the Philadelphia police rearrested thousands of these prisoners for committing 9,732 new crimes. Those defendants were charged with 79 murders, 90 rapes, 1,113 assaults, 959 robberies, 701 burglaries, and 2,748 thefts, not to mention thousands of drug offenses.

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The particular three-judge court convened in this case was "confident" that releasing 46,000 prisoners pursuant to its plan "would in fact benefit public safety." . . But a more cautious court, less bent on implementing its own criminal justice agenda, would have at least acknowledged that the consequences of this massive prisoner release cannot be ascertained in advance with any degree of certainty and that it is entirely possible that this release will produce results similar to those under prior court-ordered population caps. After all, the sharp increase in the California prison population that the three-judge court lamented, has been accompanied by an equally sharp decrease in violent crime. These California trends mirror similar developments at the national level,F and "[t]here is a general consensus that the decline in crime is, at least in part, due to more and longer prison sentences." If increased incarceration in California has led to decreased crime, it is entirely possible that a decrease in imprisonment will have the opposite effect.

. . .

I fear that today's decision, like prior prisoner release orders, will lead to a grim roster of victims. I hope that I am wrong.

In a few years, we will see.