

# Everything Revolves Around Overcrowding: The State of California's Prisons



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## I. Introduction

California has the nation's largest and the world's third-largest prison system.<sup>1</sup> In two separate class action lawsuits, filed a decade apart, California prisoners sued the governor and corrections officials for violating their rights under the Eighth Amendment's Cruel and Unusual Punishment Clause because they were being deprived of adequate health care. In the first case, *Coleman v. Wilson*, the federal court in 1995 held after a three-month trial "that thousands of inmates suffering from mental illness are either undetected, untreated, or both."<sup>2</sup> In the second case, *Plata v. Davis*, the state of California in 2002 implicitly acknowledged that it had been deliberately indifferent to the medical care needs of prisoners and stipulated to an injunction designed to improve medical care throughout the state's thirty-three prisons.<sup>3</sup> The common thread in both cases is that prisoners' basic health care needs were not being met, resulting in injury or death from neglect, suicide, or malpractice at an alarming rate.

Three years after stipulating to the injunction in *Plata*, the court put California's prison medical system into receivership because it remained "broken beyond repair" and the state had proved utterly incapable of fixing the system.<sup>4</sup> At that time, the court noted that

[t]he harm already done in this case to California's prison inmate population could not be more grave, and the threat of future injury and death is virtually guaranteed in the absence of drastic action. . . . Indeed, it is an uncontested fact that, on average, an inmate in one of California's prisons needlessly dies every six to seven days due to constitutional deficiencies in the CDCR's medical delivery system. This statistic, awful as it is, barely provides a window into the waste of human life occurring behind California's prison walls due to the gross failures of the medical delivery system. *Plata*, 2005 WL 2932253, at \*1.

Nearly five years after the *Plata* court placed California's prisons in partial receivership and after the *Coleman* court issued more than seventy additional orders to improve mental health care,<sup>5</sup> California's prisoners remain at serious risk of injury or death because medical and mental health care remain abysmal. There is one

primary reason why neither the state nor the receiver has been able to improve prison health care—overcrowding.

## II. Overcrowding in California's Prisons

Severe overcrowding makes the safe operation of a prison system nearly impossible. "Everything revolves around overcrowding. The deficiencies in the classification plan, the deficiencies in the unavailability of staff because they are doing other tasks associated with overcrowding problems to do onsite medical appointments or offsite medical appointments, the wear and tear on the infrastructure."<sup>6</sup>

The level of overcrowding in California's prisons is unprecedented. California's prison system incarcerates approximately 155,500 men and women in thirty-three prisons that were designed to house roughly half that many.<sup>7</sup> In recent times, some converted and triple-bunked gymnasiums have approached 300 percent of their capacity.<sup>8</sup> There is near unanimity among correctional experts, California prison administrators, the correctional officers' union, the Governor of California, and various commissions that have studied the situation over the last two decades that this level of overcrowding causes serious and at times deadly harm to prisoners, prison staff, and the public.<sup>9</sup>

Current and former heads of corrections from other states have been shocked at the conditions.<sup>10</sup> The former director of the next-largest state prison system, in Texas, said that "[i]n more than 35 years of prison work experience, I have never seen anything like it."<sup>11</sup> This observation includes the time when all of Texas's prisons were condemned by a federal court for overcrowding.<sup>12</sup>

Governor Arnold Schwarzenegger has recognized the dangers overcrowding poses to prisoners, prison staff, and the public. In October 2006, the Governor proclaimed a prison overcrowding state of emergency.<sup>13</sup> In that proclamation, the Governor accurately described what the court would find two and a half years later—that overcrowding in California's prison system "has caused substantial risk to the health and safety of the men and women who work inside these prisons and the inmates housed in them," making prisons places of "extreme peril to the safety of persons."<sup>14</sup> He found that overcrowding creates "an increased, substantial risk of violence" and "an increased substantial risk for transmission of infectious illnesses," and that "tight quarters

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create line-of-sight problems for correctional officers by blocking views, creating an increased, substantial security risk.”<sup>15</sup> The Governor declared that “immediate action is necessary to prevent death and harm caused by California’s severe prison overcrowding.”<sup>16</sup>

These risks are not theoretical. In one instance, a dormitory was so crowded that prison staff did not learn about a prisoner’s death for hours, much less provide emergency care.<sup>17</sup>

Last year, a riot broke out in a state prison near Los Angeles.<sup>18</sup> Hundreds of prisoners were injured, some critically, and millions of dollars in damage was caused by the fire that destroyed several buildings.<sup>19</sup> After touring the scene, Governor Schwarzenegger was clear about the reason for the disturbance. The riot, he explained, was “a terrible symptom of a much larger problem, a much larger illness. The reality is that California’s entire prison system is in a state of crisis. It is collapsing under its own weight.”<sup>20</sup>

### III. Litigation Leading to Limits on California’s Prison Population

#### A. Genesis of the Proceedings

The court’s constitutional authority to protect prisoners from cruel and unusual punishment under the Eighth Amendment by capping the prison population and thereby overriding state sentencing and parole laws is well established.<sup>21</sup> That authority was restricted in 1996, when the Republican-controlled Congress passed the Prison Litigation Reform Act (PLRA).<sup>22</sup> As one might expect, the so-called reform provisions were designed not to enhance constitutional protections, but to prevent prisoner litigation against state prison systems through restrictions on the ability of prisoners to initiate litigation,<sup>23</sup> substantive limits on the injuries subject to compensation,<sup>24</sup> and a low cap on attorney fees.<sup>25</sup>

In one sense the “reform” intended by the PLRA has been achieved. Despite the long trend of increasing prison populations throughout the United States, involuntary population caps on correctional facilities have been rare. Indeed, since the PLRA was enacted there have been only a couple of reported decisions, one of which resulted in a consent judgment.<sup>26</sup>

The PLRA permits a court to cap the population of a prison or jail to alleviate constitutional violations caused by overcrowding.<sup>27</sup> Before a prisoner release order—defined as “any order . . . that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison”<sup>28</sup>—can be issued, the district court must find by clear and convincing evidence that overcrowding is the “primary cause” of the constitutional violation and that no other relief would be sufficient.<sup>29</sup> Before imposing a cap, the three-judge panel also must “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.”<sup>30</sup>

Although it was meant to protect state and local governments from judicial interference, the PLRA gave the courts explicit authority, albeit in very limited situations, to interfere with the states’ criminal justice systems. By expressly directing the court to consider public safety concerns when doing so, it embedded the federal courts in highly sensitive issues that traditionally have been left largely to the discretion of the states.<sup>31</sup>

The Supreme Court has made it clear that crowding itself is not a constitutional violation; instead, prisoners have to prove that crowding contributes to the deprivation of a basic human right, such as shelter or personal safety.<sup>32</sup> The prototypical overcrowding case involves old dilapidated prisons or jails, with prisoners sleeping on the floor and/or living in filthy and violent conditions.<sup>33</sup> In California, however, many of the prisons are relatively new, and the corrections department has largely managed to provide each prisoner with a bed by triple-bunking prisoners in gymnasiums and dayrooms and sending thousands to private, out-of-state prisons.

On the other hand, basic medical and mental health care for prisoners have been lacking for decades, and have become less available as the prison population has swelled. Shortly after Governor Arnold Schwarzenegger proclaimed the State of Emergency, the plaintiffs in *Plata* and *Coleman* filed simultaneous motions before their respective single district court judges, seeking the creation of a special three-judge court to determine whether to cap California’s prison population.<sup>34</sup> The theory behind the motions was unique and untested. In contrast to the usual case where the connection between crowding and violence, for example, is more intuitive, in these motions the prisoners claimed that overcrowding was responsible for the state’s decade-long inability to provide constitutionally adequate medical and mental health care to prisoners. In *Coleman* and *Plata*, the prisoners maintained that the demand for health care outstripped the ability of the prison system to provide adequate staff and facilities, and that the sheer number of prisoners crammed into the state’s thirty-three prisons made doing so impossible.<sup>35</sup>

Both Judge Henderson in *Plata* and Judge Karlton in *Coleman* were extremely reluctant to initiate proceedings that could result in a cap on California’s prison population. Both judges continued the hearings for six months to obtain more information and to give the state another opportunity to solve the overcrowding crisis on its own.<sup>36</sup>

Six months later, the state had done nothing except to pass a \$7.7 billion bond measure to finance another massive wave of prison construction that, three years later, has not resulted in the addition of a single prison cell.<sup>37</sup> As the court later stated, “Although California’s existing prison system serves neither the public nor the inmates well, the state has for years been unable or unwilling to implement the reforms necessary to reverse its continuing deterioration.”<sup>38</sup> The court found itself as the only practical mechanism to achieve the necessary reform: “[W]hen federal court intervention becomes the only means by which to enforce rights

guaranteed by the Constitution, federal courts are obligated to act. “Without this, all the reservations of particular rights would amount to nothing.”<sup>39</sup>

Left with no choice, and based on the reports of the receiver in *Plata* and the Special Master in *Coleman* and a lengthy review of the history of both cases, both courts ordered the creation of a three-judge court.<sup>40</sup> The Chief Judge of the Ninth Circuit consolidated the cases and assigned Judges Thelton Henderson, Lawrence Karlton, and Stephen Reinhardt to preside over the proceedings.<sup>41</sup>

### B. The Three-Judge Court’s Decision

After hearing testimony from nearly fifty witnesses in fourteen days and sifting through thousands of documents,<sup>42</sup> the court found in a 184-page opinion overwhelming evidence that overcrowding was the primary cause of the state’s failure to provide constitutionally acceptable health care to California prisoners.<sup>43</sup> It quoted particularly from the expert report of former acting Secretary of the California Department of Corrections and Rehabilitation (CDCR) Jeanne Woodford: “[O]vercrowding in the CDCR is extreme, its effects are pervasive and it is preventing the Department from providing adequate mental and medical health care to prisoners.”<sup>44</sup> “In short,” the court concluded, “California’s prisons are bursting at the seams and are impossible to manage.”<sup>45</sup>

Specifically, the court found that besides adversely affecting prison administration, crowding created numerous barriers to adequate health care:

Crowding also renders the state incapable of maintaining an adequate staff and an adequate medical records system. In addition, crowding causes prisons to rely on lockdowns, which further restrict inmates’ access to care, and it forces prisons to house inmates in non-traditional settings, such as triple-bunks in gyms and dayrooms not designed for housing, that contribute to the lack of care and the spread of infectious disease and that increase the incidence and severity of mental illness among prisoners. *Coleman*, 2009 WL 2430820, at \*32.

All of these problems “ultimately contribute to unacceptably high numbers of both preventable or possibly preventable deaths, including suicides, and extreme departures from the standard of care.”<sup>46</sup>

The PLRA required the court to balance such extraordinary and dire circumstances with the potential consequences to public safety from an order capping the prison population.<sup>47</sup> The three judges were acutely aware of these concerns and expressed extreme reluctance at the prospect of interfering so directly in the operation of the prison system and making policy choices affecting public safety that usually belong to the state.<sup>48</sup> They virtually begged the parties, and the state in particular, to resolve the crisis through legislation or settlement, without success.<sup>49</sup> Finally, concluding that “California’s prisoners, present and future, (and the state’s population as a whole) can wait

no longer,”<sup>50</sup> the court set a population cap of 137.5 percent of design capacity and ordered the state to develop a plan to make the required reduction of 40,000 prisoners over two years.<sup>51</sup> The state and other parties have appealed that decision to the United States Supreme Court.<sup>52</sup>

Were the Court forced to choose between reducing the prison population and increasing crime, the decision would have been even more difficult. However, that false dilemma is not present for one simple, yet counterintuitive reason—crime does not increase when fewer offenders are punished by incarceration. In fact, most agree that a prison population reduction, when targeted at low-risk offenders and accompanied by evidence-based programs in the community, is safer than the status quo.<sup>53</sup>

The belief that a reduction in the prison population leads to more crime is not supported by data or the experience in many jurisdictions that have used early release to reduce their correctional populations. A 2007 study by the National Council of Crime and Delinquency reviewed thirteen reports on the early release of prisoners in the United States and Canada.<sup>54</sup> In each case, the crime rates remained the same or declined during the early-release period, and the prisoners released early did not commit more crimes than their counterparts who served the full sentence.<sup>55</sup> In jurisdictions that provided community-based supportive services, recidivism rates declined.<sup>56</sup>

Nor is there a change in the crime rate when correctional facilities cap their populations. From 1996 to 2006, twenty-one California counties released 1.7 million inmates early because of jail overcrowding.<sup>57</sup> During that same period, the number of reported serious crimes dropped by 18 percent.<sup>58</sup> A similar, although less dramatic, reduction in the crime rate occurred during the most recent three-year period.<sup>59</sup>

One reason that there is no direct link between releasing prisoners and crime is that parolees are not responsible for as much crime as the public is led to believe. Although featured prominently in media stories about violent crime, parolees actually contribute very little to the crime rate. A study by the U.S. Department of Justice concluded that parolees account for less than 5 percent of serious crimes.<sup>60</sup>

The experience of Fresno County, California, is indicative of the sharp contrast between common myths about parolees perpetuated by both the media and law enforcement and the actual data. The police chief of the City of Fresno, who at the time also was president of the California Police Chief’s Association, testified that crime would increase if prisoners were released early. That prediction was based on his belief that the additional parolees would “dramatically” increase crime in his community.<sup>61</sup> But the data showed—and the chief admitted—that despite a 28 percent increase in the number of parolees from 2003 to 2007, both property and violent crime dropped during that time.<sup>62</sup> The drop in crime was so significant that it led the chief to boast on his Web site that Fresno was enjoying the lowest crime rate in forty-three years.<sup>63</sup>

Another reason that incarcerating more offenders does not always translate into safe streets is that there is no evidence that sentence length affects recidivism.<sup>64</sup> The length of the sentence does not control whether a parolee will commit another crime and, if so, how many. That may be why virtually all states and the Federal Bureau of Prisons release prisoners “early” through some form of sentence credit to provide incentives for good behavior and to control their prison populations.<sup>65</sup>

This central point explains why the three-judge panel concluded that a reduction in the prison population, through increased credits or other means, would not lead to more crime:

[A]ll else being equal the likelihood that a person who is released a few months before his original release date will reoffend is the same as if he were released on his original release date. Shortening the length of stay in prison thus affects only the timing and circumstances of the crime, if any, committed by a released inmate—i.e., whether it happens a few months earlier or a few months later. *Coleman*, 2009 WL 2430820, at \*90 (citations omitted).

The court is not alone in concluding that public safety and a smaller prison population are compatible. Ironically, at the same time the Governor was fighting to prevent the court’s ultimate ruling, he was trying to persuade the state legislature to pass a series of laws that would effectively achieve nearly the same result.

The Governor proposed measures that would reduce the prison population by 37,000 over the same two-year period.<sup>66</sup> His administration publicly trumpeted the reforms, proclaiming that

[t]he best minds in California and the nation have already provided us with recommendations. Five years ago, the Deukmejian Commission outlined ways that we can target resources on higher risk offenders and reduce costs, without increasing crime rates. An expert panel convened by the Schwarzenegger Administration has given us a roadmap to reducing recidivism.<sup>67</sup>

The proposed reforms—enhancing good time credits, parole reform, diversion of low-risk offenders, and reducing some property crimes to misdemeanors—were similar to those that the court found effective and safe.<sup>68</sup> The state legislature passed a watered-down version that ultimately is expected to reduce the prison population by approximately 11,000 prisoners.<sup>69</sup>

#### IV. The State’s Response to the Order Capping California’s Prison Population

Despite the congruence between the Governor’s policy and the court’s findings, the battle between the state and the court continued. Having concluded that overcrowding presents an extreme danger to prisoners and that the

prison population could be reduced safely, the court reluctantly but firmly ordered the Governor to submit a plan to reduce the prison population by about 40,000 prisoners within two years.<sup>70</sup> The Governor, however, defied the court’s order. The plan he submitted called for a population reduction of only about 18,000 prisoners within two years.<sup>71</sup>

After the prisoners moved to hold the Governor in civil and criminal contempt, the court rejected the Governor’s plan, implied that it would initiate contempt proceedings absent compliance with its orders, and directed the Governor to submit a plan consistent with its original order.<sup>72</sup> The Governor blinked, perhaps motivated by the threat of contempt, and submitted a responsible plan that provides for the safe reduction of the prison population by the amount and within the time required by the court’s order.<sup>73</sup>

This plan, which the court subsequently approved,<sup>74</sup> relies on a mixture of measures that include sentencing reform, the transfer of prisoners to private out-of-state and federal immigration facilities, parole reform, community corrections, and enhanced conduct credits.<sup>75</sup> The largest single reduction (28 percent of the total) would be accomplished by abolishing state prison sentences for seven drug and property crimes.<sup>76</sup>

The state’s plan will not go into effect immediately because the court stayed its order pending the appeal to the U.S. Supreme Court. In the meantime, California’s prisons remain extremely overcrowded, with recent reports of prisoners in at least one prison being confined to large cages called holding cells for days at time without beds and toilets. In his first report of the new decade, the federal receiver for medical care noted that he remained unable to implement needed reforms because of the excessive prison population.<sup>77</sup>

#### V. Conclusion

The crux of the problem confronting California’s criminal justice system is that its sentencing and parole laws imprison more offenders than the state can house safely. Until the state recognizes that prison is a finite, scarce, and expensive resource and takes steps to use that resource efficiently and effectively to produce the maximum safety to the public, there is little hope that judicial intervention will end. As Governor Schwarzenegger candidly admitted earlier in his administration,

I don’t blame the courts for stepping in to try to solve the health care crisis that we have, the overcrowding crisis that we have, because the fact of the matter is, for decades the state of California hasn’t really taken it seriously. It hasn’t really done something about it.<sup>78</sup>

#### Notes

<sup>1</sup> See Thelton Henderson, *Confronting the Crisis of California Prisons*, 43 U.S.F. L. Rev. 1, 3 (2008). California topped Texas by 15,000 prisoners as of August 2008. See OFFENDER INFORMATION SERVICES BRANCH, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION (hereinafter CDCR), WEEKLY REPORT OF POPULATION AS

- of MIDNIGHT AUGUST 27, 2008 (2008), available at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/WeeklyWed/TPOP1A/TPOP1Ad080827.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad080827.pdf); Tex. Dep't of Criminal Justice, Annual Review 2008, at 26 (2008), available at <http://www.tdcj.state.tx.us/mediasevc/annualreview2008.pdf>.
- <sup>2</sup> Coleman v. Wilson, 912 F. Supp. 1282, 1306 (E.D. Cal. 1995).
- <sup>3</sup> Stipulation for Injunctive Relief, Plata v. Schwarzenegger, No. C01-1351 TEH, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005).
- <sup>4</sup> Plata, 2005 WL 2932253, at \*1.
- <sup>5</sup> Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at \*12 (E.D. Cal. Aug. 4, 2009) (opinion and order).
- <sup>6</sup> *Id.* at \*55 (quoting expert testimony of Doyle Wayne Scott) (internal quotation marks omitted).
- <sup>7</sup> OFFENDER INFORMATION SERVICES BRANCH, CDCR, WEEKLY REPORT OF POPULATION AS OF MIDNIGHT DECEMBER 30, 2009 (2010), available at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/WeeklyWed/TPOP1A/TPOP1Ad091230.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad091230.pdf); Coleman, 2009 WL 2430820, at \*1.
- <sup>8</sup> Coleman, 2009 WL 2430820, at \*1.
- <sup>9</sup> See, e.g., *id.* at \*38–\*39, \*44–\*45.
- <sup>10</sup> See photos of overcrowded conditions on the CDCR website at Prison Overcrowding Photos, <http://www.cdcr.ca.gov/News/prisonovercrowding.html> (last visited Feb. 24, 2010).
- <sup>11</sup> Coleman, 2009 WL 2430820, at \*42 (quoting expert report of Doyle Wayne Scott) (internal quotation marks omitted).
- <sup>12</sup> See Ruiz v. Estelle, 503 F. Supp. 1265, 1277-88 (S.D. Tex. 1980).
- <sup>13</sup> Proclamation by the Governor of the State of California, Prison Overcrowding State of Emergency Proclamation, Oct. 4, 2006, available at <http://www.gov.ca.gov/proclamation/4278/>.
- <sup>14</sup> *Id.*
- <sup>15</sup> *Id.*
- <sup>16</sup> *Id.*
- <sup>17</sup> Transcript of Proceedings at 382–83, Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820 (E.D. Cal. Aug. 4, 2009) (testimony of Jeanne Woodford).
- <sup>18</sup> See Jackie Castillo, *250 Inmates Hurt, 55 Hospitalized After California Prison Riot*, CNN.COM, Aug. 9, 2009, <http://www.cnn.com/2009/US/08/09/california.prison.riot/index.html>.
- <sup>19</sup> *Id.* Visual images of the riot and its aftermath can be found at *California's Overcrowded Prisons*, BBC NEWS, Oct. 5, 2009, [http://news.bbc.co.uk/2/hi/programmes/world\\_news\\_america/8291916.stm](http://news.bbc.co.uk/2/hi/programmes/world_news_america/8291916.stm).
- <sup>20</sup> Governor Arnold Schwarzenegger, Governor Tours the California Institution for Men in Chino (Aug. 19, 2009) (transcript available at <http://gov.ca.gov/speech/13023>).
- <sup>21</sup> See, e.g., Harris v. Philadelphia, 47 F.3d 1342 (3d Cir. 1995); Johnson v. Levine, 588 F.2d 1378 (4th Cir. 1978); Campbell v. McGruder, 580 F.2d 521 (D.C. Cir. 1978); Vazquez v. Carver, 729 F. Supp. 1063 (E.D. Pa. 1989).
- <sup>22</sup> Pub. L. No. 104-134 tit. VIII, 110 Stat. 1321-66 to 1321-77 (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).
- <sup>23</sup> 42 U.S.C. § 1997e(a), (c) (2006).
- <sup>24</sup> 42 U.S.C. § 1997e(e) (2006).
- <sup>25</sup> 42 U.S.C. § 1997e(d) (2006).
- <sup>26</sup> See Roberts v. Mahoning County, 495 F. Supp. 2d 719 (N.D. Ohio 2007).
- <sup>27</sup> 18 U.S.C. § 3626(a)(3) (2006). The PLRA is applicable to prisoner federal civil rights cases brought in both state and federal courts. See, e.g., Baker v. Rolnick, 210 Ariz. 321, 325 (Ariz. Ct. App. 2005) (holding that “the broad yet plain language of [the PLRA] encompasses § 1983 prisoner lawsuits filed in both state and federal court”); Martin v. Ohio Dep't of Rehab. & Corr., 749 N.E. 2d 787, 790 (Ohio Ct. App. 2001) (construing 42 U.S.C. § 1997e(a) to apply to federal civil rights cases “whether the claim is brought in federal court or state court”).
- <sup>28</sup> 18 U.S.C. § 3626(g)(4) (2006).
- <sup>29</sup> 18 U.S.C. § 3626(a)(3)(E) (2006).
- <sup>30</sup> 18 U.S.C. § 3626(a)(1) (2006).
- <sup>31</sup> See, e.g., Ewing v. California, 538 U.S. 11, 24–25 (2003) (emphasizing courts' traditional deference to states' sentencing choices); Proconier v. Martinez, 416 U.S. 396, 412 (1974), overruled on other grounds by Thornburgh v. Abbott, 490 U.S. 401 (1989) (characterizing the enforcement of criminal law as one of the primary functions of state governments).
- <sup>32</sup> Rhodes v. Chapman, 452 U.S. 337, 347 (1981).
- <sup>33</sup> See, e.g., Ruiz v. Estelle, 503 F. Supp. 1265, 1277-82 (D.C. Tex. 1980).
- <sup>34</sup> Coleman v. Schwarzenegger, No. CIV-S-90-0520 LKK JFM P, 2009 WL 2430820, at \*24 (E.D. Cal. Aug. 4, 2009) (opinion and order). 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), (g)(4) (2006).
- <sup>35</sup> Coleman, 2009 WL 2430820, at \*2.
- <sup>36</sup> *Id.* at \*44.
- <sup>37</sup> Assemb. B. 900 ch. 7, 2007–2008 Reg. Sess. (Cal. 2007); Coleman, 2009 WL 2430820, at \*65.
- <sup>38</sup> Coleman, 2009 WL 2430820, at \*1.
- <sup>39</sup> *Id.* at \*3 (quoting THE FEDERALIST No. 78 (Alexander Hamilton)).
- <sup>40</sup> *Id.* at \*27.
- <sup>41</sup> *Id.*
- <sup>42</sup> *Id.*
- <sup>43</sup> *Id.* at \*62.
- <sup>44</sup> *Id.* at \*34.
- <sup>45</sup> *Id.* at \*1.
- <sup>46</sup> *Id.* at \*53.
- <sup>47</sup> 18 U.S.C. § 3626(a)(1) (2006).
- <sup>48</sup> See Transcript of Proceedings at 3145, Coleman, 2009 WL 2430820 (No. CIV-S-90-0520 LKK JFM P) (“I cannot possibly convey to you the depth of our reluctance to [order a remedy], but if you leave us no alternative, we will.” (statement of Reinhardt, J.)); *id.* at 3146 (“[W]e will do our duty. That’s what we are sworn to do, but we do it reluctantly and only when you have demonstrated that there is nothing else and no other way to proceed.” (statement of Karlton, J.)).
- <sup>49</sup> See *id.* at 3142–43.
- <sup>50</sup> Coleman, 2009 WL 2430820, at \*3.
- <sup>51</sup> *Id.* at \*116.
- <sup>52</sup> The U.S. Supreme Court has jurisdiction over appeals from a three-judge district court. 28 U.S.C. § 1253 (2006). Although the first appeal was dismissed for want of jurisdiction, Schwarzenegger v. Plata, No. 09-416, 2010 WL 154851, at \*1 (U.S. Jan. 19, 2010), the State and defendant-intervenor have filed a subsequent appeal from the three-judge court’s final order, which was issued on January 12, 2010. If the Court agrees to hear that appeal, the case will probably be decided by the end of June 2011.
- <sup>53</sup> See EXPERT PANEL ON ADULT OFFENDER AND RECIDIVISM REDUCTION PROGRAMMING, CDCR, REPORT TO THE CALIFORNIA STATE LEGISLATURE: A ROADMAP FOR EFFECTIVE OFFENDER PROGRAMMING IN CALIFORNIA 77–79 (2007) (reviewing fifteen reports over the previous seventeen years), available at [http://www.cdcr.ca.gov/News/2007\\_Press\\_Releases/docs/ExpertPanelRpt.pdf](http://www.cdcr.ca.gov/News/2007_Press_Releases/docs/ExpertPanelRpt.pdf).
- <sup>54</sup> CAROLINA GUZMAN, BARRY KRISBERG, & CHRIS TSUKIDA, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, ACCELERATED RELEASE: A LITERATURE REVIEW (2008), available at [http://nccd-crc.issueelab.org/sd\\_clicks/download2/accelerated\\_release\\_a\\_literature\\_review\\_focus](http://nccd-crc.issueelab.org/sd_clicks/download2/accelerated_release_a_literature_review_focus).
- <sup>55</sup> *Id.* at 2.
- <sup>56</sup> *Id.*

- <sup>57</sup> Expert Report of Barry Krisberg Ph.D. at 10, *Coleman v. Schwarzenegger*, No. CIV-S-90-0520 LKK JFM P, 2009 WL 2430820 (E.D. Cal. Aug. 4, 2009) (opinion and order).
- <sup>58</sup> *Id.*
- <sup>59</sup> *Id.*
- <sup>60</sup> PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994, at tbl.5 (2002), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf>.
- <sup>61</sup> Transcript of Proceedings at 2348, *Coleman*, 2009 WL 2430820 (No. CIV-S-90-0520 LKK JFM P).
- <sup>62</sup> Plaintiffs' Trial Exhibit No. 842, *Coleman*, 2009 WL 2430820 (No. CIV-S-90-0520 LKK JFM P); Transcript of Proceedings at 2349-51, *Coleman*, 2009 WL 2430820 (No. CIV-S-90-0520 LKK JFM P).
- <sup>63</sup> *Id.* Currently, the police chief's website states that violent crime is at its lowest point since 1973 and that in 2008, the property crime rate was the lowest in more than forty years. City of Fresno, Fresno Police Department, Chief Jerry Dyer, <http://www.fresno.gov/Government/DepartmentDirectory/Police/default.htm> (last visited on Feb. 25, 2010).
- <sup>64</sup> Expert Panel on Adult Offender and Recidivism Reduction Programming, *supra* note 57, at 92.
- <sup>65</sup> *Id.*
- <sup>66</sup> Matthew Cate, *Prisons: It's Time to Reform and Reduce Population*, CAP. WKLY., Aug. 13, 2009, *available at* [http://www.capitolweekly.net/article.php?\\_c=ybr1t2urmkdej&xid=y6x62x72akddq&done=.ybr1ub1utqweuz](http://www.capitolweekly.net/article.php?_c=ybr1t2urmkdej&xid=y6x62x72akddq&done=.ybr1ub1utqweuz).
- <sup>67</sup> *Id.*
- <sup>68</sup> *Id.*; *Coleman*, 2009 WL 2430820, at \*87-\*99.
- <sup>69</sup> Sen. B. xxx 18 ch. 28 2009–2010 Third Extra. Sess. (Cal. 2009); see CDCR, CALIFORNIA TO SUBMIT POPULATION MANAGEMENT PLAN THAT PRIORITIZES PUBLIC SAFETY AND RELIEVES OVERCROWDING (2009), *available at* [http://www.cdcr.ca.gov/News/2009\\_Press\\_Releases/Sept\\_18.html](http://www.cdcr.ca.gov/News/2009_Press_Releases/Sept_18.html).
- <sup>70</sup> *Id.* at \*116.
- <sup>71</sup> Defendants' Population Reduction Plan, at ex.A tbl.1, *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2010 WL 99000 (E.D. Cal. Jan. 12, 2010) (order to reduce prison population), *available at* [http://www.cdcr.ca.gov/News/2009\\_Press\\_Releases/docs/Defendants\\_Pop\\_Reduction\\_Plan\\_wExhibits.pdf](http://www.cdcr.ca.gov/News/2009_Press_Releases/docs/Defendants_Pop_Reduction_Plan_wExhibits.pdf).
- <sup>72</sup> Order Rejecting Defendants' Population Reduction Plan and Directing the Submission of a Plan That Complies with the August 4, 2009, Opinion and Order, *Coleman*, 2010 WL 99000 (No. CIV S-90-0520 LKK JFM P).
- <sup>73</sup> Defendants' Response to Three-Judge Court's October 21, 2009 Order, *Coleman*, 2010 WL 99000 (No. CIV S-90-0520 LKK JFM P), *available at* [http://www.cdcr.ca.gov/News/2009\\_Press\\_Releases/docs/Defendants\\_Pop\\_Reduction\\_Plan\\_wExhibits.pdf](http://www.cdcr.ca.gov/News/2009_Press_Releases/docs/Defendants_Pop_Reduction_Plan_wExhibits.pdf).
- <sup>74</sup> *Coleman*, 2010 WL 99000 at \*1.
- <sup>75</sup> Defendants' Response to Three-Judge Court's October 21, 2009 Order, at ex.A, *Coleman*, 2010 WL 99000 (No. CIV S-90-0520 LKK JFM P).
- <sup>76</sup> *Id.* at ex.A tbl.1.
- <sup>77</sup> CLARK KELSO, ACHIEVING A CONSTITUTIONAL LEVEL OF MEDICAL CARE IN CALIFORNIA'S PRISONS: THIRTEENTH TRI-ANNUAL REPORT OF THE FEDERAL RECEIVER'S TURNAROUND PLAN OF ACTION 6 (2010), *available at* [http://www.cprinc.org/docs/court/T13\\_13th\\_Tri-Annual20100114.pdf](http://www.cprinc.org/docs/court/T13_13th_Tri-Annual20100114.pdf).
- <sup>78</sup> Plaintiffs' Trial Exhibit 1012A, *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820 (E.D. Cal. Aug. 4, 2009).