

# Against Imprisonment: Part II

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### Introduction

Two years ago, I wrote an article for *FORUM* entitled “California Department of Corrections & Rehabilitation: The Reason Against Imprisonment” (2007), Vol. 34, No. 1, pp. 13-21.<sup>1</sup> The article recommended that at every sentencing where there is the slightest chance of a probationary sentence (*i.e.*, where prison looks like the probable, but not mandatory sentence), counsel should argue to keep the client in local custody based upon the cruel and unusual conditions of the prison system. Rules of Court, Rule 4.414(b) (5) specifically states that one of the criteria for considering a sentence of probation includes “the likely effect of imprisonment on the defendant.”

On August 4, 2009, a three judge federal court<sup>2</sup> made a historic ruling which prompted this article. Having previously found that the State of California prison system’s delivery of medical services unconstitutional

for being cruel and unusual punishment, and after years of trying to make corrections, it was forced to deal with the fact that conditions were not improving. The court’s 184 page opinion and order (hereafter “Opinion”) ruled that the State of California must deal with the unconstitutional overcrowding that has rendered the delivery of medical services non-compliant with basic human needs and the Eighth Amendment’s protection against cruel punishment. The remedy is a prison population cap at 137.5% of design capacity, that is, a reduction from about 156,000 inmates to less than 110,000. *Opn.*, 130, 131.

As this paper goes to print, the Legislature is considering the Governor’s proposed reforms to reduce the inmate population by 27,000 prisoners. The measures are drawing Republican opposition. Even if they pass, they cannot be implemented for many months if not years.<sup>3</sup>

The ruling was no surprise. In 1995, in *Coleman v. Wilson*, 912 F.Supp. 1282 (E.D. Cal. 1995), federal district court judge Lawrence Karlton declared the entire CDCR (California Department of Corrections and Rehabilitation) mental health system unconstitutional as cruel and unusual punishment. Prison officials were “deliberately indifferent” to the needs of mentally ill inmates. All thirty-three prisons have been monitored by a court-appointed special master since 1995 to evaluate compliance with the district court’s orders to improve the delivery of mental health treatment. Despite the years of effort, overcrowding has made it impossible to correct the problem.

Overcrowding rendered the delivery of *all* health services just as bad, or worse, than that of mental health

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<sup>1</sup> CACJ members may find the article at the CACJ website located at <http://www.cacj.org/documents/Forums/Vol%2034-1%20FINAL.pdf>. It is also available for download at my website’s publication page found at [charlessevilla.com/publications.htm](http://charlessevilla.com/publications.htm) under “No Prison Sentencing.”

<sup>2</sup> The court was composed of Ninth Circuit judges Steven Reinhardt, and district court judges Henderson and Karlton. The ruling was made by a three judge federal court under the Prison Litigation Reform Act of 1996. The Act “requires the court to find, by clear and convincing evidence, that crowding is the primary cause of the constitutional violation, and that no other relief will remedy the violation.” Hadar Aviram, “Confronting Overcrowding,” *Los Angeles Daily Journal*, p. 2, August 14, 2009. The Opinion made both findings at pp 99, 102.

<sup>3</sup> The proposal was initially part of the budget compromise but the “Republicans threatened to back out of the deal over a provision to cut the number of prison inmates by 27,000.” Michael Rothfeld and Patrick McGreevy, “Opposition to State Budget Deal Mounts,” *Los Angeles Times*, July 22, 2009. “Under the plan, some inmates would be allowed to finish their sentences on home detention, new incentives would be created for completion of rehabilitation programs, and parole supervision would be scaled back for the least serious offenders.” See <http://www.latimes.com/news/local/la-me-california-budget22-2009jul22,0,1856950.story>. To get the budget passed, prison reform was taken off the table and is now being debated. Given the historic use of “tough on crime” as a means of political advancement, it will be surprising if the Legislature passes meaningful prison reforms. The unprecedented budget emergency may be enough to do it.

services. In *Plata v. Schwarzenegger*, U.S.D.C. (N.D. Cal. 2005) No. C01-1351TEH, federal district court judge Thelton Henderson found health conditions in the CDCR “horrifying, barbaric.” CDCR was killing over one inmate per week due to grossly inadequate, incompetent and perverse medical treatment. As Judge Henderson wrote in 2005:

The prison medical delivery system is in such a blatant state of crisis that in recent days defendants have *publicly conceded their inability to find and implement on their own solutions that will meet constitutional standards*. 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. ¶ ...In the meantime, roughly 162,000 prisoners are being subjected to an unconstitutional system fraught with medical neglect and malfeasance. Defendants themselves have *conceded that a significant number of prisoners have died as a direct result of this lack of care*, and it is clear to the Court that more are sure to suffer and die if the system is not immediately overhauled. Opn., 6; italics added.

Finding a lack of will to correct the problems of prisoner medical care (Opn., 18), the court appointed a Receiver to try and correct the situation. But again, overcrowding has made those efforts insufficient.

Despite years of valiant effort by the courts, the special masters and receivers, conditions did not improve. The Opinion details the facts why overcrowding is the primary cause of the problem which requires a reduction of the prison population to 137.5% of design capacity. Currently, the prison operates at about 190% of that capacity. Lowering the population by about 45,000 was found the only possible path to providing minimally adequate health services. Even that reduction is no guarantee, but it is the most likely way for the

conditions causing the problem to be alleviated.

This reduction will *not* be accomplished through an arbitrary release of 45,000 prisoners; rather, the Opinion suggests a number of ways to reduce the prison population without endangering public safety. These measures include shortening parole terms, reducing parole supervision dramatically or little for those deemed not at risk, increasing release credits based on incentive programs, and implementing evidence-based (*i.e.*, proven) rehabilitation programming. Opn., 123.

The Opinion is a *tour de force* description of how we got into this mess. The first cause was the combined public and political appetite for solving the crime problem through ever increasingly harsh sentencing measures (*e.g.*, 1982’s Prop 8, Three Strikes, One Strike, a thousand Determinate Sentence Law (DSL) amendments, the substantial reduction of release credits and mandatory prison sentencing).

Soon after its enactment in the mid-1970’s, amending the DSL became the tool for politicians’ obsession for new “tough on crime” legislation. The result was an explosion of the prison population. In the mid-1970s, the prison population was about 20,000. Today, the number is about 750% greater at 156,352 (as of August 2008). The number is lower than it might have been only because of the transfers of several thousand prisoners out of state. Opn. 42.<sup>4</sup>

To attempt to deal with the tremendous inmate expansion in the

1980s and 1990s, the State went on a multi-billion dollar prison building binge. A political-prison-industrial complex emerged to lobby for more harsher sentences and more prisons and guards. But even the addition of the new prisons could not keep up with the numbers of inmates being sent to them under the new sentencing laws.

The CDCR responded to overcrowding the only way it could: eliminating gyms and dayrooms and other free space where rehabilitative programs formerly may have taken place. These facilities became new dorms for the double and triple bunking of inmates. With overcrowding came increased tensions, lack of remedial programming, and a shocking lack of health care.

Enter the Prison Law Office. It initiated the lawsuits leading to *Coleman* and *Plata* and now the August 4 Opinion. The measures ordered taken in *Coleman* and *Plata* did not work in part because the CDCR “utterly failed to comply with the implementation schedule to which they had stipulated” previously with the court. Opn., 13.

The State has indicated it will appeal the August 4 order.<sup>5</sup> Thus, it may be that the order will be stayed pending resolution in the U.S. Supreme Court. That court has regularly proven itself no friend to prisoner rights or Ninth Circuit decisions protecting them. The Opinion is so detailed in evidentiary findings (many stemming from admissions of the State), it should prove difficult — barring

<sup>4</sup> As of August 2008, 4,852 inmates had been transferred out of state and California has plans to move 3,000 more. However, the State has to monitor these out-of-state prisoners to make sure conditions there are constitutionally adequate. Opn., 113.

<sup>5</sup> “Attorney General Jerry Brown said in a telephone interview Tuesday that he intended to appeal the ruling. ‘Eventually, we’re going to have to go to the Supreme Court because I think the California prisons are spending about \$14,000 per year per inmate,’ Mr. Brown said, adding that the changes the judges ordered would cost more money, which the state does not have.” Solomon Moore, “California Prisons Must Cut Inmate Population,” August 4, 2009, *New York Times*. See [http://www.nytimes.com/2009/08/05/us/05calif.html?\\_r=2&ref=us](http://www.nytimes.com/2009/08/05/us/05calif.html?_r=2&ref=us). The Opinion has been criticized for purportedly not taking into account the impact of release on the public welfare and for not allowing further evidence of the “current” state of prison health care at the 2008 evidentiary hearing. See David DeGroot, “Reform at What Cost,” *Los Angeles Daily Journal*, p. 6, August 19, 2009. The Opinion stated that the proceeding only dealt with the plaintiffs requested remedy and thus evidence of whether the violations were current and on-going was not pertinent. Opn., p. 54, n. 42.

distortion from appellate surgery on the facts — for the Supreme Court to overturn the findings.

Indeed, the Governor's emergency declaration of October 4, 2006, was based upon conditions he found to pose an "extreme peril to the safety of persons and property." *Opn.*, 44. Further, many of the findings of constitutional violations were made either with concessions or without objection by the State. *Opn.*, 54. The State was reduced to claiming that overcrowding is not the *primary* cause of the constitutional violations. *Opn.*, 55. The Opinion found by clear and convincing evidence that overcrowding is the primary cause of the constitutional violation. *Opn.*, 57-58.

### Relevance to Client Practice

Defense counsel must act to protect clients in the sentencing courts from the "criminogenic" (*crime causing*), overcrowded prison environment where almost certain cruel punishment awaits the elderly, ill or mentally unstable state prisoner. *Opn.*, 135-136, 158. After the Opinion's findings, sending salvageable people into our prison system is now a knowing consignment of human beings to

cruel punishment.<sup>5</sup> For the aged, the infirm, the medically and mentally ill, this is almost a certain outcome. The evidence of the disaster is well documented. For example, in a study at Avenal State Prison, there were 316 "pending *urgent* referrals" for medical appointments. CDCR policy requires that such urgent care appointments take place within fourteen days. But of the 316, only *two* were seen within two weeks. *Opn.*, 81.

The Opinion provides overwhelming ammunition to use when arguing against a prison commitment at sentencing. It is loaded with findings that support the notion that defendants, if at all possible, should be diverted from our overcrowded prisons and handled locally. The overcrowding and related problems are system-wide and not institution specific (p. 121) so there is no single institutional haven in the CDCR where crowding is not an issue.

In what follows, I will quote<sup>7</sup> from the Opinion's helpful findings for use at sentencing to achieve this goal. We start with the testimony from the former Warden at San Quentin and former acting Secretary of the CDCR, Jeanne Woodford, which summarizes

the current condition:

I think it's unbelievable that in this state that we have the kind of overcrowded conditions that we have; that we do little or nothing to prepare people for the return to society in spite of the fact that we parole 10,000 people a month from our prison system.<sup>¶</sup> And I absolutely believe that we make people worse, and that we are not meeting public safety by the way we treat people. ¶ And that I believe overcrowding is prohibiting us from providing quality medical care and mental healthcare to inmates in our system. ¶ And for California to be in the shape that it's in is just unbelievable. *Opn.*, 90.<sup>8</sup>

### General Findings: Inmate Health Imperiled

"[T]he state's prisons have become places 'of extreme peril to the safety of persons' they house, Ex. P1 at 7-8 (Governor Schwarzenegger's Oct. 4, 2006 Prison Overcrowding State of Emergency Declaration), while contributing little to the safety of California's residents." *Opn.*, 6.

<sup>5</sup> continued...Of course, given the years of non-compliance by the State and its own admissions of health care deficiencies, the likelihood of a miraculous change for the better in the time since the last Receiver's report in *Plata* or the last Master's report in *Coleman* is unlikely in the extreme. As the Opinion stated: "We need not yet again evaluate the state's continuing constitutional violations. In requesting that this three-judge court be convened, the *Plata* and *Coleman* courts both found, *without objection from defendants*, that the constitutional violations were ongoing. [citing orders in both cases from July 23, 2007]." *Opn.*, p. 54; italics added.

<sup>6</sup> California prisons subject an inmate to a continual and unreasonable risk of the denial of basic medical care. This has now been declared cruel punishment. See *People v. Superior Court (Himmelsbach)* (1986) 186 Cal. App. 3d 524, 534, disapproved on other grounds, *People v. Norrell* (1996) 13 Cal. 4th 1. *Himmelsbach* requires that the defendant establish evidence of the record that he or she would be subject to undue risks or that state correctional officials could not or would not provide additional measures to protect the defendant. The Opinion provides the evidence.

<sup>7</sup> For simplicity, where the Opinion quotes from witnesses or exhibits presented at the two-week evidentiary hearing, I leave in the internal quotation without attribution to the quoted source. The full August 4, 2009 opinion is available on-line and is recommended reading for all and should be cited to the courts. See <http://www.ca9.uscourts.gov/datastore/general/2009/08/04/Opinion%20&%20Order%20FINAL.pdf>

<sup>8</sup> Even the powerful guards union, CCPOA, has weighed in on the overcrowding issue. "On August 15, 2006, Mike Jimenez, State President of CCPOA, testified before a Senate Select Committee on Prison Population Management and Capacity that: 'We at CCPOA have been continually raising issues about prison overcrowding, the severe shortages in prison staffing, the deterioration of prison facilities, and the lack of effective risk assessment for inmate evaluation. In the face of these conditions CCPOA members work hard to manage the increased tensions and dangers that are exacerbated when prisoners are double and triple bunked, when exercise yards and rehabilitation facilities are used for emergency housing and when staff shortages make inadequate inmate oversight and implementation of inmate rehabilitation programs nearly impossible. Our members already face an average of 9 assaults per day and are on the front lines of an ongoing battle keeping prison tensions from boiling over and the widespread violence that would threaten the safety of staff and inmates alike. At the same time we are facing a crisis within the prison system. California as a whole is on the verge of a public safety disaster.'" *California Correctional Peace Officers Assn. v. Schwarzenegger* (2008) 163 Cal. App. 4th 802, 818.

"Thousands of prisoners are assigned to 'bad beds,' such as triple-bunked beds placed in gymnasiums or day rooms, and some institutions have populations approaching 300% of their intended capacity. In these overcrowded conditions, inmate-on-inmate violence<sup>9</sup> is almost impossible to prevent, infectious diseases spread more easily, and lockdowns are sometimes the only means by which to maintain control. In short, California's prisons are bursting at the seams and are impossible to manage." Opn., 7.

"This severe crowding at the reception centers makes it impossible to provide adequate medical and mental health services to inmates entering the California prison system. In addition, severe crowding throughout the system forces prisons to house inmates in these reception centers without adequate care for extended periods of time." Opn., 60-61.

The result of the above is that prisoners are housed outside their classification status: "'prisoners are subject to increased degrees of danger and potential for violence because they are placed with more dangerous and violent prisoners than their classification scores would warrant.'" Opn., 68.

"As plaintiffs' medical expert testified, 'the overcrowded housing conditions, and in particular, the conditions in the non-traditional beds, including the converted gyms, create potential breeding grounds for disease.'" Opn., 72.

"[C]rowding prevents defendants from achieving an adequate medication delivery system that is marked by "'the timely delivery of the correct medication to the correct patient, with accurate documentation of what has been administered.'" Opn., 79.

"California's inmates have long been denied even that minimal level of medical and mental health care, with consequences that have been serious, and often fatal. Inmates are forced to wait months or years for medically necessary appointments and examinations, and many receive inadequate medical care in substandard facilities that lack the medical equipment ...." Opn., 6.

"Medical records in most CDCR prisons were 'either in a shambles or non-existent. . . mak[ing] even mediocre medical care impossible,' id. at 14 (citation omitted), and the resulting lack of access to inmates' medical histories 'result[ed] in dangerous mistakes, delay in patient care, and severe harm.' *Id.*

The system cannot maintain the overwhelming data requirements thus leading to inmate medical records that are dangerously incomplete. Opn., 83-84.

The frequency of "lockdowns," a product of overcrowding, means that inmates in medical programs are denied access to them during that time. Opn., 82.

"It is likely that '[t]he overwhelming and undisputed negative side effects of incarceration and crowding far outweigh the potential, unproven

benefits of incarceration.'" Opn., 174.

### For Defendants With Mental Health Issues

"By August 2008, there were 34,319 inmates with serious mental disorders identified in California's prison system." Opn., 28, fn 17.

"[T]he mental health care presently available to California's inmates" is "abysmal." Opn., 172.<sup>10</sup>

Even after 14 years of remedial efforts in *Coleman*, "California remains unable to deliver constitutionally adequate mental health care for these inmates." Opn., 2. Mentally ill inmates languish in "horrific conditions." Opn., 22, 31.

Things are getting worse. [T]wo monitoring reports filed by the *Coleman* Special Master in 2006 reflected a troubling reversal in the progress of the remedial efforts of the preceding decade and demonstrated the profound impact of population growth on the state's ability to meet its constitutional obligations to seriously mentally ill inmates." Opn., 34.

"[A]ccess to appropriate levels of care for seriously mentally ill inmates remained a problem in almost every CDCR institution." Opn., 36.

When prisons were built, there was 'no provision' for any expansion of medical care space beyond the initial 100% of [design] capacity." *Id.* (quoting Ex. D1292 at 4-5). "Even worse, 'none of the 19 CDCR institutions planned and built in the boom of the 80s and 90s gave any thought to the space that might be needed for mental health purposes.'" Opn., 40.

<sup>9</sup> Violence in the institutions is abetted by overcrowding. As the Opinion was published, the California Institution for Men (CIM) had a riot that injured 175 prisoners and damaged or destroyed six dormitories. "In a state prison system bursting at the seams and teeming with racial tensions, such violence would seem to be inevitable." Volker Janssen, "The Disaster Before the Disaster at Chino," *Los Angeles Times*, August 15, 2009. See [latimes.com/news/opinion/la-oe-janssen\\_15,0,2614583.story](http://latimes.com/news/opinion/la-oe-janssen_15,0,2614583.story). The Opinion noted the staffing to prisoner ratio at "'CIM's West Facility Cleveland Hall (two officers for CIM: 198 prisoners) or East Facility gym (two officers for 202 prisoners), [where] staff in an emergency can only sound the alarm, make frantic telephone or radio calls, and hope for backup.'" Opn., 78.

<sup>10</sup> "If the particular conditions of [confinement] being challenged are such that they inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then defendants have deprived inmates of a basic necessity of human existence - indeed, they have crossed into the realm of psychological torture." *Madrid v. Gomez*, 889 F. Supp. 1146, 1264 (N.D. Cal. 1995).

The prisons now at 180% of design capacity. Opn., 42. The resulting catastrophe was quite predictable.

"These shortages at every level, which are caused by the lack of space resulting from overcrowding, have created a destructive feedback loop that is now endemic to the CDCR's mental health care delivery system. Inmates denied necessary mental health placements 'are decompensating and are ending up in mental health conditions far more acute than necessary . . . creat[ing] 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.'" Opn., 70.

[T]hese conditions "inevitably escalate[] the incidence of mental illness and exacerbate[] the condition of those already mentally fragile and vulnerable." Opn., 73. As of 2006, the last date of available statistics, California's prison suicide rate was almost twice the non-prison national average. Opn., 86. The stress of the frequent lockdown environment will cause decompensation. Opn., 83.

"The failure of the CDCR's medication delivery systems results in not only traditional medical problems, but also high medication non-compliance rates among patients with serious mental illness." Opn., 80.

"Finally, and alarmingly, the evidence shows that crowded conditions, and the bed and staffing shortages and delays in access to necessary care that result from crowding, intensify the acuity of mental illness among inmates throughout the California prison system." Opn., 85, see also Opn., 92-93.

The prison conditions are simply so inimical to the mentally ill, the elderly and the infirm that non-prison settings are recommended for these low risk offenders. Opn., 156. Even the Governor's plan has recommended using as alternative placements "home, hospital or nursing home confinement for ill or infirm inmates, [and] some of those over age 60...."<sup>11</sup>

### Conclusion

The Opinion is said to be "the largest state prison reduction ever imposed by a federal court over the

objection of state officials...."<sup>12</sup> As with other shameful executive and legislative refusals to deal with mass constitutional deprivations, only the courts exist as the remedial backstop of last resort.<sup>13</sup> As the Opinion states: "Where the political process has utterly failed to protect the constitutional rights of a minority, the courts can, and must, vindicate those rights. See John Hart Ely, *Democracy and Distrust* 103, 173 (1980)." Opn., 182.<sup>14</sup>

It may be that the Opinion's order will not be implemented and that the abysmally overcrowded conditions in our prisons will continue. Sentencing judges must be confronted with the fact that they are front-loading human beings to this abysmal fate and that they have power<sup>15</sup> and duty to do something about it. As Oscar Wilde wrote over a century ago:

This too I know--and wise it were  
If each could know the same--  
That every prison that men build  
Is built with bricks of shame,  
And bound with bars lest Christ  
should see  
How men their brothers maim.<sup>16</sup>

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<sup>11</sup> Don Thompson (AP) "State Leaders Near Face-off Over Prison Funding Cuts," p. 12, *San Diego-Union Tribune*, August 16, 2009. Reforms being discussed are alternative custody methods for low-risk offenders, reducing parol for low risk parolees, commuting sentences for criminal aliens, increasing the felony monetary threshold for property crimes, changing some wobblers to straight misdemeanors, increasing incentive based credits and establishment of a sentencing commission. See Matthew Pordum, "Lawmakers Debate Prison Population Measures to Save Money," *Los Angeles Daily Journal*, August 18, 2009, p. 1.

<sup>12</sup> Quoted in Moore, note 5, *supra*.

<sup>13</sup> E.g., *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (overturned earlier rulings by declaring that state laws establishing separate public schools for black and white students denied black children equal educational opportunities.)

<sup>14</sup> As the Opinion also stated at the outset, "when 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 or privileges would amount to nothing.' The Federalist No. 78 (Alexander Hamilton)." Opn., 9.

<sup>15</sup> See *In re Estevez* (2008) 165 Cal.App.4th 1445, holding that despite the Receiver's appointment, the state courts maintain habeas corpus jurisdiction to deal with constitutional deprivations involving an individual inmate medical care: "we hold that the appointment of the Receiver did not divest California courts of their constitutional jurisdiction over matters raised through habeas corpus, and that the Receiver is subject to that jurisdiction. We further hold that both the warden having physical custody of the inmate and the Receiver are necessary and proper parties to respond in such actions." (*Id.*, 1451.)

<sup>16</sup> *The Ballad of Reading Gaol*. Wilde (1854-1900) knew of what he wrote. He was imprisoned for two years of hard labor following a conviction for gross indecency. He spent most of his time in Reading Prison, 30 miles west of London, where he was known as prisoner "C. 3.3" because he was housed in block C, floor three, cell three. His famous poem was written upon his release. See Wikipedia for a nice biography.