

Kennedy and the Prisons—Moral Exhortation and Technical Fastidiousness

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I. INTRODUCTION

Justice Anthony Kennedy has been notable and controversial for his views on American criminal justice, especially in the area of sentencing. Most of the controversy is associated with his majority opinions in capital punishment cases, where he has boldly drawn Eighth Amendment lines to carve out types of crimes and criminals as categorically off-limits to the death penalty.¹ In those cases, Justice Kennedy starkly rebuts the retributivist and utilitarian jurisprudential rationales proffered for the sentences he is declaring unconstitutional.² At the same time, one particular opinion, concurring in *Harmelin v. Michigan*,³ might suggest that his passion against cruel and unusual punishment is limited to the death penalty.⁴ There, he set a legal standard that has made it difficult, if not impossible, to challenge noncapital sentences as unconstitutionally disproportionate precisely because he was loath to second-guess the proffered jurisprudential rationales for exceptionally long prison sentences.⁵ Thus, where he has denounced punishments, he has done so in broad constitutional terms, infused with moral and philosophical principles; where he has resisted Eighth Amendment claims, he has done so according to notions of respect and deference toward legislative power to set punishment terms.⁶

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1. *E.g.*, *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (precluding the death penalty for crime of child rape that did not result in death); *Roper v. Simmons*, 543 U.S. 551 (2005) (precluding the death penalty for those who commit crimes before age eighteen).

2. *See Kennedy*, 544 U.S. 407; *Simmons*, 543 U.S. 351.

3. 501 U.S. 957, 996–1009 (1991) (Kennedy J., concurring).

4. *See id.* (arguing that because punishment can be supported by multiple penological theories and objectives, and because legislatures have primary responsibility in this area, the Eighth Amendment does not require strict proportionality between crime and sentence and only grossly disproportionate sentences are forbidden).

5. *See id.*

6. Of course, cases like *Harmelin* can also be read as exhibiting deference toward the states. *See id.* But federalism may be less of a concern than separation of powers in this context, because the Court would likely have the same view of federal sentencing legislation. This point merits emphasis in my reading of *Plata*, where one of the key forms of evidence is to the structure for equitable jurisdiction created by Congress. *See Brown v. Plata*, 131 S. Ct. 1910 (2011).

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It is fitting that the decision I will discuss here and promote as perhaps his most striking pronouncement on American criminal justice is itself a mixture of moral and philosophical passion and self-restrained appellate deference. In *Brown v. Plata*,⁷ Justice Kennedy wrote for a majority upholding a special three-judge court's order that the California prison system must undertake a huge reduction in the number of state inmates to relieve unconstitutional overcrowding.⁸ In my reading of *Plata*, I will consider how a Supreme Court decision could be characterized in strikingly different ways. For a preview, consider some brief quotes. In upholding the lower-court order, Justice Kennedy uses the following language:

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."⁹

In approving the lower court's flexibility in defining compliance under the order, he states:

Courts should presume that state officials are in a better position to gauge how best to preserve public safety and balance competing correctional and law enforcement concerns. The decision to leave details of implementation to the State's discretion protected public safety by leaving sensitive policy decisions to responsible and competent state officials.¹⁰

Proper respect for the State and for its governmental processes require that the three-judge court exercise its jurisdiction to accord the State considerable latitude to find mechanisms and make plans to correct the violations in a prompt and effective way consistent with public safety. In order to "give substantial weight to any adverse impact on public safety," 18 U. S. C. §3626(a)(1)(A), the three-judge court must give due deference to informed opinions as to what public safety requires, including the considered determinations of state officials regarding the time in which a reduction in the prison population can be achieved consistent with public safety.¹¹

7. 131 S. Ct. 1910.

8. *Id.*

9. *Id.* at 1929 (citations omitted) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)).

10. *Id.* at 1943.

11. *Id.* at 1946.

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And how does Justice Scalia, in dissent, view this decision that is so full of boringly mundane exercises and expressions of judicial modesty, institutional deference, and technical fastidiousness? “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.”¹²

So is the *Plata* decision a by-the-rules, almost ministerial act of judicial restraint, or is it a revolutionary judicial *coup d’état*? As I will discuss below, Justice Kennedy’s ability to win a majority for his side of his jurisprudential and rhetorical dialectic reflects how his conscience-stricken view of American punishment fits his punctilious professional sense of the Supreme Court’s role.

II. BACKGROUNDS TO THE CASE

After a decade-and-a-half on the Supreme Court, and while he was developing his views of Eighth Amendment proportionality in capital and noncapital sentencing, Justice Kennedy started broadly expressing strong and public reservations about American punishment. In a widely noted speech at the 2003 meeting of the American Bar Association, he threw down a gauntlet to the legal profession in America.¹³ Fully acknowledging the different and mutually limiting roles of the many actors in our legal system and the branches of government, he offered a *cri de coeur*, a call for conscience to address the ravages of incarceration in the United States.¹⁴ To quote his most ardent language:

Were we to enter the hidden world of punishment, we should be startled by what we see. Consider its remarkable scale. The nationwide inmate population today is about 2.1 million people. In California, even as we meet, this State alone keeps over 160,000 persons behind bars. In countries such as England, Italy, France and Germany, the incarceration rate is about 1 in 1,000 persons. In the United States it is about 1 in 143.

We must confront another reality. Nationwide, more than 40% of the prison population consists of African-American inmates. About 10% of African-American men in their mid-to-late 20s are behind bars. In some cities more than 50% of young African-American men are under the supervision of the criminal justice system.

12. *Id.* at 1949 (Scalia, J., dissenting).

13. Anthony Kennedy, Assoc. Justice, U.S. Supreme Court, Speech Before the American Bar Association Annual Meeting (Aug. 9, 2003) (revised Aug. 14, 2003) (transcript available at <http://www.supremecourt.gov/publicinfo/speeches> [hereinafter ABA Speech]) (on file with the *McGeorge Law Review*).

14. *See id.*

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While economic costs, defined in simple dollar terms, are secondary to human costs, they do illustrate the scale of the criminal justice system. The cost of housing, feeding, and caring for the inmate population in the United States is over 40 billion dollars per year. In the State of California alone, the cost of maintaining each inmate in the correctional system is about \$26,000 per year. And despite the high expenditures in prison, there remain urgent, unmet needs in the prison system.

It requires one with more expertise in the area than I possess to offer a complete analysis, but it does seem justified to say this: Our resources are misspent, our punishments too severe, our sentences too long.¹⁵

Justice Kennedy went on to cite specific governmental causes of these miseries—especially mandatory minimum sentencing laws and the phenomenon of rigid sentencing schemes that shift de facto sentencing authority from wise judges to overzealous and often immature prosecutors.¹⁶

In this speech, Justice Kennedy unabashedly entered the most roiling contemporary debate about criminal justice. The current American system of prisons and jails is arguably the largest per capita in the world today, and the largest in American history.¹⁷ Critics of our system have developed the dramatic term “mass incarceration” to induce anxiety and shame about the paradox (or about *whether* it is a paradox) that mass incarceration exists in the wealthiest and most powerful free-market democracy nation—at a time when crime itself is not one of the nation’s pressing social problems.¹⁸ Over the past decade, the humanities and social sciences have yielded substantial literature examining the rise of mass incarceration from various perspectives, ranging from econometric analysis of contributory factors to cultural critiques of American exceptionalism in penal policy.¹⁹

15. *Id.* at paras. 5–8.

16. *Id.* at para. 12.

17. The American ratio of incarcerated people to total population is about seven times as high as those of other industrialized democracies. ROY WALMSLEY, INT’L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST (9th ed. 2010), available at <http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf> (on file with the *McGeorge Law Review*). That ratio is about five times higher than the historical average for the half-century ending in 1980. See JOHN K. SCHMITT ET AL., CTR. FOR ECON. & POL’Y RES., THE HIGH BUDGETARY COST OF INCARCERATION 6 (2010), available at <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf> (on file with the *McGeorge Law Review*) (charting the sharp rise in the United States’ incarceration rate since 1980).

18. For an enumeration of recent books by prominent scholars decrying contemporary mass incarceration in the United States, see Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203, 1205–06 (2012).

19. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); TODD CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007); RUTH GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWES: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); GLENN LOURY, *RACE,*

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But as the most prominent American official to join the chorus against mass incarceration, Justice Kennedy acknowledged that in these remarks, he was going well beyond his role in pronouncing on constitutional law:

The legislative branch has the obligation to determine whether a policy is wise. It is a grave mistake to retain a policy just because a court finds it constitutional. Courts may conclude the legislature is permitted to choose long sentences, but that does not mean long sentences are wise or just. Few misconceptions about government are more mischievous than the idea that a policy is sound simply because a court finds it permissible. A court decision does not excuse the political branches or the public from the responsibility for unjust laws.²⁰

This acknowledgement is revealing because Justice Kennedy might well have been loath to invoke the power of the Supreme Court to make direct and aggressive constitutional pronouncements about mass incarceration. After all, this exceptional degree of incarceration, however grave a moral and social ill, does not by itself prove that any governmental agency was violating the Eighth Amendment. It was the *Plata* case that gave Justice Kennedy the opportunity and obligation to address the legal manifestations of mass incarceration, but the case did so in a subtle and indirect way that enabled him to rely not on broad and controversial constitutional themes, but on utterly conventional technical tools of adjudication.²¹

The death-penalty cases aside, no law-and-order campaigner could fairly accuse Justice Kennedy of excessively accommodating prisoners' claims or unduly interfering in state sovereignty in the area of imprisonment. In the context of imprisonment legality,²² Justice Kennedy has generally aligned himself with the justices who read the federal habeas corpus statute, 28 U.S.C. § 2554, as counseling great deference to state criminal court adjudications and to imposing high procedural barriers to inmates claiming their custody to be unconstitutional.²³

INCARCERATION, AND AMERICAN VALUES (2008); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); ANTHONY THOMPSON, RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS (2008); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006); JAMES WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003).

20. ABA Speech, *supra* note 13, at para. 14.

21. See *Brown v. Plata*, 131 S. Ct. 1910 (2011); see also *infra* Part III.

22. The habeas corpus statute requires that a petitioner establish that he is in state custody when he seeks the writ. 28 U.S.C. § 2254(a) (2006).

23. *Id.*; see also, e.g., *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010) (reversing lower federal court decision granting habeas because petitioner's right of silence had been violated). In fact, in his dissent in *Plata*, Justice Scalia noted acerbically that in a very recent habeas corpus opinion, Justice Kennedy himself had written that granting the writ "'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

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More to the point, while before *Plata* Justice Kennedy had not been associated to any unusual degree with lawsuits in the area of prisoners' rights, the opinions he did write followed the general tendency of the court to look askance at these claims.

*Overton v. Bazzetta*²⁴ involved a challenge to Michigan prison regulations that, among other things, imposed a two-year visitation ban on inmates with two drug-abuse violations and denied all visitation with minor nieces, nephews, and children for inmates whose parental rights had been terminated.²⁵ The challengers claimed that these regulations were not rationally related to legitimate penological objectives and violated the free-association guarantee of the First Amendment.²⁶ With sympathy for the state's predicament, Justice Kennedy noted the irony in the fact that the drastic increase of Michigan's prison population had strained "resources available for prison supervision and control."²⁷ He acknowledged that prison officials faced a challenge in maintaining order, preventing drug smuggling, and protecting children from encountering harmful conduct.²⁸ Justice Kennedy had little trouble in agreeing with the State that drug and alcohol abuse by prisoners poses a "direct threat to legitimate objectives of the corrections system, including rehabilitation, the maintenance of basic order, and the prevention of violence in the prisons."²⁹

The Court reversed lower court rulings in the plaintiffs' favor, abruptly dismissing the first amendment claim by noting that "[t]he very object of imprisonment is confinement."³⁰ Justice Kennedy observed that "[p]rison administrators had reasonably exercised their judgment as to the appropriate means of furthering penological goals" and that judges

must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them. The burden, moreover, is not on the State to prove the validity of prison regulations but on the prisoner to disprove it.³¹

He concluded that "the regulations promote internal security, perhaps the most legitimate of penological goals," crediting trial testimony "that reducing the

few exercises of federal judicial authority.'" *Plata*, 130 S. Ct. at 1956 (Scalia, J., dissenting) (quoting *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (Kennedy, J., dissenting)).

24. 539 U.S. 126 (1994).

25. *Id.*

26. *See id.* at 132.

27. *See id.* at 129.

28. *Id.*

29. *Id.*

30. *Id.* at 131.

31. *Id.* at 132 (citations omitted).

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number of children allows guards to supervise them better to ensure their safety and to minimize the disruptions they cause within the visiting areas.”³² He also accommodated the state’s line-drawing among inmates: “To reduce the number of child visitors, a line must be drawn, and the categories set out by these regulations are reasonable.”³³ As for claims that the drug violations triggering the ban were minor, Justice Kennedy stressed the Court’s reluctance “to substitute our judgment for the conclusions of prison officials concerning the infractions reached by the regulations”³⁴ He ended by accepting the State’s argument that inmates had alternative ways of communicating with outsiders; as for the effect of broader visitation rights on prison guards, Justice Kennedy emphasized that the Court is “‘particularly deferential’ to prison administrators’ regulatory judgments.”³⁵ Finally, he dismissed the Eighth Amendment claim:

This is not a dramatic departure from accepted standards for conditions of confinement. Nor does the regulation create inhumane prison conditions, deprive inmates of basic necessities, or fail to protect their health or safety. Nor does it involve the infliction of pain or injury, or deliberate indifference to the risk that it might occur.³⁶

Similarly, in *Wilkinson v. Austin*, Justice Kennedy upheld Ohio’s regulations of how the State determines placement of prisoners at its highest security prison.³⁷ This is known as a “Supermax” facility.³⁸ Justice Kennedy acknowledged that prisoners in Supermax are virtually in solitary confinement.³⁹ Prisoners brought a class action suit alleging that these protocols still fell short of due process requirements, and that the conditions of confinement violated the Eighth Amendment.⁴⁰ The trial court agreed and ordered significant changes in the state prison procedures and the conditions for Supermax inmates.⁴¹ Justice Kennedy recognized that the plaintiffs had a cognizable liberty interest in avoiding, if possible, Supermax classification, describing those conditions with vividness that foretells the language of *Plata*:

For an inmate placed in [a Supermax facility], almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours;

32. *Id.* at 133.

33. *Id.*

34. *Id.* at 134.

35. *Id.* at 135.

36. *Id.* at 137 (citations omitted).

37. 545 U.S. 209 (2005).

38. *Id.*

39. *Id.* at 214, 224.

40. *Id.* at 218.

41. *Id.* at 218–20.

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exercise is for 1 hour per day, but only in a small indoor room. Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities

. . . .⁴²

Nonetheless, Justice Kennedy held that the procedures supplied by the state were constitutionally sufficient under the conventional *Mathews v. Eldridge* standard.⁴³ After reviewing that standard,⁴⁴ he rejected any notion that “atypical and significant hardships” change this calculus.⁴⁵ Applying that calculus, he readily concluded that these procedures survived the test, especially because the extra and independent levels of review of the classification and the opportunity to prevent evidence rebutting it

guard[] against arbitrary decisionmaking while also providing the inmate a basis for objection before the next decisionmaker or in a subsequent classification review. . . . Ohio further reduces the risk of erroneous placement by providing for a placement review within 30 days of an inmate’s initial assignment to [a Supermax facility].⁴⁶

Justice Kennedy found the state’s interest at stake in these classifications powerful and, just as in the irony in *Overton*, here it was the brutality he turned against the plaintiffs.⁴⁷

Prison security, imperiled by the brutal reality of prison gangs, provides the backdrop of the State’s interest. Clandestine, organized, fueled by race-based hostility, and committed to fear and violence as a means of disciplining their own members and their rivals, gangs seek nothing less than to control prison life and to extend their power outside prison walls. Murder of an inmate, a guard, or one of their family members on the outside is a common form of gang discipline and control, as well as a condition for membership in some gangs. Testifying against, or

42. *Id.* at 223–24.

43. 424 U.S. 319 (1976) (designing procedures to determine when individuals can be denied state-created interests must consider nature of interest, risk of erroneous deprivation of interest, probable value of additional or substitute procedures, and fiscal and administrative burdens such additional or substitute procedures might place on state).

44. “First, the private interest that will be affected by the official action; second, such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Id.* at 335.

45. *Wilkinson*, 545 U.S. at 225 (internal quotations omitted) (quoting the lower court’s decision, *Wilkinson v. Austin*, 372 F.3d 346, 359 (6th Cir. 2005)).

46. *Id.* at 226–27.

47. *Id.* at 227.

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otherwise informing on, gang activities can invite one's own death sentence.⁴⁸

Finally, he observed that the State had to commit considerable resources to Supermax, since it cost approximately forty percent more than the next highest level of security prison; he assumed the State must have a well-considered policy in place to justify such costs.⁴⁹

III. THE MAJORITY OPINION

Here is a way of seeing (literally) the subtle artistry of the majority opinion: look at the appendices.⁵⁰ Appendix A reproduces the dry technical language of the statute under review, the Prison Litigation Reform Act (PLRA).⁵¹ Appendix B consists of photographs of dormitories in two states prisons, Mule Creek State prison and the California Institution for Men, showing large numbers of men standing next to or lying in double and triple-bunk beds in utterly non-private spaces.⁵² These men are in what are euphemistically, or ironically, called "reception centers."⁵³ They are recent arrivals, many having returned to prison from parole because of parole violations and remain in these open rooms for weeks or months while awaiting classification into the general population.⁵⁴ Appendix C contains photographs of Salinas Valley State Prison.⁵⁵ It shows the "Correctional Treatment Center"—specifically, cages in which mentally ill inmates stay until "mental health crisis" beds are available.⁵⁶ Presumably, these cages are for virtually psychotic prisoners who would pose dangers to themselves or others if left unconstrained.⁵⁷ The photographs, which were in the Court Record, reflect the shock and outrage of the lower court findings in *Plata*, as if to underscore the settled matter that conditions in the prisons violated the Eighth Amendment.⁵⁸ Yet Appendix A reminds us that the legal question before the Court arises from the utterly undramatic world of statutory interpretation.

48. *Id.* (citations omitted).

49. *Id.* at 229 ("It follows that courts must give substantial deference to prison management decisions before mandating additional expenditures for elaborate procedural safeguards when correctional officials conclude that a prisoner has engaged in disruptive behavior.").

50. *Brown v. Plata*, 131 S. Ct. 1910, 1947–50 (2011). The *Plata* Court included Appendices A, B, and C. *See id.*

51. *Id.* at 1947–48.

52. *Id.* at 1949.

53. *Id.* at 1934.

54. *See id.*

55. *Id.* at 1950.

56. *Id.*

57. *See id.* at 1924, 1950.

58. *See id.* at 1947–50.

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When the Court decided *Plata*, California's prison system had long been among the most dysfunctional in the nation.⁵⁹ Although the actual prison population per capita was not anomalously high, the ratio of prisoners to space was enormous.⁶⁰ Even after a prison construction boom, new entrants into the system far exceeded space; worse yet, California's system of mandatory parole caused a chaotic inflow and outflow of state prisoners for (often technical) parole violations, graphically illustrated in Appendix B.⁶¹

But the underlying claims that led to the ultimate Supreme Court case were only indirectly about crowding. In *Coleman v. Wilson*, a suit brought by class of seriously mentally ill inmates, the District Court found "overwhelming evidence of the systemic failure to deliver necessary care to mentally ill inmates" in California prisons.⁶² Finding such problems as high suicide rates and lack of access to crucial medications, in 1995, Judge Karlton appointed a Special Master to oversee development and implementation of a remedial action plan.⁶³ Twelve years later, the court found insufficient progress.⁶⁴

The second class-action lawsuit, *Brown v. Plata*,⁶⁵ was a parallel claim about overall health and medical care.⁶⁶ The State conceded that deficiencies in prison medical care violated prisoners' Eighth Amendment rights.⁶⁷ After the parties failed to reach a consensual remedy, Judge Henderson, finding a litany of preventable medical disasters, appointed a Receiver to redesign and temporarily manage the medical care and delivery system in all state prisons.⁶⁸ In Judge Henderson's words,

"[T]he California prison medical care system is broken beyond repair," resulting in an "unconscionable degree of suffering and death. . . . [I]t 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 [California prisons'] medical delivery system."⁶⁹

59. See *id.* at 1922 ("This case arises from serious constitutional violations in California's prison system. The violations have persisted for years. They remain uncorrected.").

60. Sara Mayeux, *Mass Incarceration: Breaking down the Data by State*, PRISON L. BLOG, <http://prisonlaw.wordpress.com/2010/07/13/mass-incarceration-breaking-down-the-data-by-state> (last visited Aug. 6, 2012) (on file with the *McGeorge Law Review*).

61. See JOAN PETERSILIA, CALI. POL'Y RES. CTR., UNDERSTANDING CALIFORNIA CORRECTIONS 29, 70–76 (2006), available at <http://ucicorrections.seweb.uci.edu/pdf/UnderstandingCorrectionsPetersilia20061.pdf> (on file with the *McGeorge Law Review*); see also *Plata*, 131 S. Ct. at 1949.

62. 912 F. Supp. 1282, 1316 (E.D. Cal. 1995).

63. See *id.* at 1324.

64. See *Plata*, 131 S. Ct. at 1922.

65. *Id.* at 1926.

66. *Id.*

67. *Id.*

68. See *id.* at 1931.

69. *Id.* at 1926–27 (quoting *Plata v. Schwarzenegger*, No. C01-1351 THE, 2005 WL 2932253, at *1

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Ultimately, the plaintiff classes persuaded both judges that the unconstitutional conditions could not be remedied without some effort to relieve prison overcrowding.⁷⁰ In effect, there was so little space and other logistical resources in the prisons for medical facilities and other necessary services that even staffing increases could not by themselves solve the problem.⁷¹ In theory, a State could finesse any release order by increasing space and resources so as to relieve the crowding, but at a time of straitened budgets, that alternative might not be available. And here the crux of the case lies. This is because a 1995 statute, the PLRA, which was passed largely to *limit* the scope of prisoners' rights suits, actually turned into an opportunity for the plaintiffs.⁷² Fearing that Eighth Amendment suits might allow individual judges to order prisoner releases as part of injunctions, Congress set a tough procedural and substantive standard for any reduction in prison populations.⁷³

The PLRA restricts the circumstances in which a court may enter an order "that has the purpose or effect of reducing or limiting the prison population."⁷⁴ Under the PLRA, only a special three-judge court may enter an order limiting a prison population.⁷⁵ Before a three-judge court may convene, a district court first must have entered an order for less intrusive relief that failed to remedy the constitutional violation and must have given the defendant a reasonable time to comply with its prior orders.⁷⁶ The party requesting the three-judge court must submit "materials sufficient to demonstrate that [these requirements] have been met."⁷⁷ If these materials are sufficient, the convened three-judge court must then find by clear and convincing evidence that "crowding is the primary cause of the violation of a Federal right" and that "no other relief will remedy the violation of the Federal right."⁷⁸ The three-judge court must find that the relief is "narrowly drawn, extends no further than necessary . . . , and is the least intrusive means necessary to correct the violation of the Federal right."⁷⁹ In reaching this conclusion, the three-judge court must give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief."⁸⁰

(N.D. Cal. Oct. 3, 2005)) (alterations in original) (omission added).

70. *Id.* at 1927–28.

71. *Id.* at 1926.

72. *See* 18 U.S.C. § 3626 (2000); *Plata*, 131 S. Ct. at 1929–31.

73. *See* 18 U.S.C. § 3626; *Plata*, 131 S. Ct. at 1929–31 (discussing procedural requirements of the PLRA).

74. 18 U.S.C. § 3626(g)(4).

75. *Id.* § 3626(a)(3)(B).

76. *Id.* § 3626(a)(3)(A).

77. *Id.* § 3626(a)(3)(C).

78. *Id.* § 3626(a)(3)(E).

79. *Id.* § 3626(a)(3)(E)(i).

80. *Id.* § 3626(a)(A)(1).

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The *Coleman* and *Plata* plaintiffs, believing that a remedy for unconstitutional medical and mental health care could not be achieved without reducing overcrowding, moved their respective District Courts to convene a three-judge court empowered under the PLRA to order reductions in the prison population. The judges in both actions granted the request, and the cases were consolidated before a single three-judge court. . . .

The three-judge court heard 14 days of testimony and issued a 184-page opinion, making extensive findings of fact. The court ordered California to reduce its prison population to 137.5% of the prisons' design capacity within two years. Assuming the State does not increase capacity through new construction, the order requires a population reduction of 38,000 to 46,000 persons.⁸¹

Under the statute, the State's appeal was directly to the Supreme Court.⁸²

What follows in the long *Plata* majority opinion is a fascinating interweaving of the litany of institutional miseries and embarrassments and a punctilious application of statutory rules.⁸³ The rhetorical key to the opinion is that whenever Justice Kennedy seems to be engaging in declamatory prose to express the shame of American incarceration, he is merely noting the findings made by a lower federal court. Here is a brief gallery of Justice Kennedy's excerpts from the lower courts' findings:

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. . . .⁸⁴

Overcrowding has overtaken the limited resources of prison staff; imposed demands well beyond the capacity of medical and mental health facilities; and created unsanitary and unsafe conditions that make progress in the provision of care difficult or impossible to achieve.⁸⁵

Prisoners are crammed into spaces neither designed nor intended to house inmates. As many as 200 prisoners may live in a gymnasium,

81. *Brown v. Plata*, 131 S. Ct. 1910, 1927–28 (2011).

82. *Id.* at 1928.

83. *See id.* at 1928–50.

84. *Id.* at 1923.

85. *Id.*

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monitored by as few as two or three correctional officers. As many as 54 prisoners may share a single toilet.⁸⁶

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.”⁸⁷

Experts from outside California offered similar assessments. Doyle Wayne Scott, the former head of corrections in Texas, described conditions in California’s prisons as “appalling,” “inhumane,” and “unacceptable” and stated that “[i]n more than 35 years of prison work experience, I have never seen anything like it.”⁸⁸

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.”⁸⁹

Prisons were unable to retain sufficient numbers of competent medical staff, and would “hire any doctor who had ‘a license, a pulse and a pair of shoes.’”⁹⁰

But the key legal conclusion is that, as required by the PLRA, “[t]he overcrowding is the ‘primary cause of the violation of a Federal right,’ specifically the severe and unlawful mistreatment of prisoners through grossly inadequate provision of medical and mental health care.”⁹¹

86. *Id.* at 1924 (citations omitted).

87. *Id.* (citations omitted).

88. *Id.* at 1924 n.1 (alteration in original).

89. *Id.* at 1924 (citation omitted).

90. *Id.* at 1927 (citation omitted).

91. *Id.* at 1923 (quoting 18 U.S.C. § 3626(a)(3)(E)(i) (2000)).

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Moreover, Justice Kennedy was able to invoke a kind of estoppel, because implicitly or explicitly so many of these depredations were conceded by the State or by current or former state officials:

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."⁹²

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."⁹³

And although the opinion resonates with Eighth Amendment moral outrage (abetted by ample citations to Eighth Amendment cases),⁹⁴ Justice Kennedy could say that his opinion drew no Eighth Amendment conclusions at all. The lower court established those conclusions; indeed, the State essentially conceded them.⁹⁵ Justice Kennedy, of course, notes that the Supreme Court, while deferring to lower-court fact-finding, performs de novo review of questions of law.⁹⁶ But the questions of law here were technical interpretations of a jurisdictional statute, not the broad exhortations of the Bill of Rights.⁹⁷

Justice Kennedy was left to address a series of state objections to the status of the order, especially a complaint that the State had not been given enough time to comply with the original single-judge orders in *Coleman* and *Plata*.⁹⁸ Justice Kennedy brushed aside this complaint by echoing the lower court judges' impatience:

The *Coleman* and *Plata* courts had a solid basis to doubt that additional efforts to build new facilities and hire new staff would achieve a remedy.

92. *Id.* at 1924 (citations omitted).

93. *Id.* (citations omitted).

94. *Id.* at 1928. "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." *Id.* (citing *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978)).

95. *See, e.g., supra* notes 92–93 and accompanying text.

96. *Plata*, 131 S. Ct. at 1929.

97. *See id.* at 1929–31.

98. *See id.* at 1930–47.

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Indeed, although 5 years have now passed since the appointment of the *Plata* Receiver and approval of the revised plan of action in *Coleman*, there is no indication that the constitutional violations have been cured. A report filed by the *Coleman* Special Master in July 2009 describes ongoing violations, including an “absence of timely access to appropriate levels of care at every point in the system.”⁹⁹

Having addressed the State’s objections, Justice Kennedy turned to the specific provisions of the PLRA at issue. He readily affirmed that virtually all the dangerous and chaotic conditions in the prisons could be traced to the overcrowding problem, finding more than ample documentation in the trial record:

In one facility, staff cared for 7,525 prisoners in space designed for one-third as many. Staff operate out of converted storage rooms, closets, bathrooms, shower rooms, and visiting centers. These makeshift facilities impede the effective delivery of care and place the safety of medical professionals in jeopardy, compounding the difficulty of hiring additional staff.¹⁰⁰

A medical expert described living quarters in converted gymnasiums or dayrooms, where large numbers of prisoners may share just a few toilets and showers, as “breeding grounds for disease.” Cramped conditions promote unrest and violence, making it difficult for prison officials to monitor and control the prison population. On any given day, prisoners in the general prison population may become ill, thus entering the plaintiff class; and overcrowding may prevent immediate medical attention necessary to avoid suffering, death, or spread of disease. After one prisoner was assaulted in a crowded gymnasium, prison staff did not even learn of the injury until the prisoner had been dead for several hours. . . .¹⁰¹

Two prisoners committed suicide by hanging after being placed in cells that had been identified as requiring a simple fix to remove attachment points that could support a noose. The repair was not made because doing so would involve removing prisoners from the cells, and there was no place to put them. . . .¹⁰²

99. *Id.* at 1931 (citations omitted).

100. *Id.* at 1933 (citations omitted).

101. *Id.* at 1933–34 (citations omitted).

102. *Id.* (citations omitted).

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The State also unsuccessfully argued that it had been given too little opportunity to provide rebuttal facts.¹⁰³ Justice Kennedy found that both the underlying trial records and additional fact-finding at the three-judge court level were more than enough to warrant appellate deference.¹⁰⁴ Any complaints by the State that in discovery it had been rushed and even bullied into submission were met with witheringly mundane responses about trial court authority and “orderly trial management.”¹⁰⁵

Justice Kennedy read the PLRA as not requiring proof that overcrowding be the only conceivable cause of the violations, but that it was “the foremost, chief, or principal cause.”¹⁰⁶

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. The *Plata* District Judge, in his order appointing the Receiver, compared the problem to ““a spider web, in which the tension of the various strands is determined by the relationship among all the parts of the web, so that if one pulls on a single strand, the tension of the entire web is redistributed in a new and complex pattern.””¹⁰⁷

In concluding his statutory analysis, Justice Kennedy affirmed the three-judge court’s conclusions that ““no other relief will remedy the violation of the Federal right.””¹⁰⁸ Justice Kennedy affirmed because the State’s arguments that construction of new facilities or transfer of prisoners out of state were woefully unconvincing and even disingenuous on the facts, because efforts in those directions had been pitiful, given the lack of State money and the absence of demonstrable political will.¹⁰⁹ These arguments were also essentially irrelevant, because the State was always free to seek modification of the order to allow for those alternatives.¹¹⁰

103. *See id.* at 1935.

104. *See id.* at 1935–36.

105. *Id.* at 1935.

106. *Id.* at 1936.

107. *Id.* at 1936–37 (citations omitted).

108. *Id.* at 1937 (quoting 18 U.S.C. § 3626(a)(3)(E)(ii) (2000)).

109. *Id.* at 1938.

110. *Id.* at 1936–39.

IV. POINT AND COUNTERPOINT WITH THE DISSENTS

Perhaps the best way to encapsulate the *Plata* majority opinion is to see it in counterpoint with the resounding dissents. Indeed, the rhetorical artistry of the majority opinion lies precisely in its provocation and then deflation of those dissents.

As noted earlier, Justice Scalia was hyperbolic, if not apoplectic:

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.

The proceedings that led to this result were a judicial travesty. I dissent because the institutional reform the District Court has undertaken violates the terms of the governing statute, ignores bedrock limitations on the power of Article III judges, and takes federal courts wildly beyond their institutional capacity.¹¹¹

In general terms, Justice Scalia went on to denounce the whole phenomenon of “structural injunctions” as radically contravening the traditions of equity jurisdiction.¹¹² In his view, these injunctions “turn[] 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.”¹¹³ In his view, what the District Court and the Supreme Court majority characterized as “factual findings” were really empirically unfounded predictions and expressions of the jurists’ policy preferences.¹¹⁴ Exasperated by Justice Kennedy’s view that the Supreme Court was obliged to defer to such findings, Justice Scalia declaims:

But the 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

111. *Id.* at 1950–51 (Scalia, J., dissenting).

112. *See id.* at 1953–55.

113. *Id.* at 1953.

114. *Id.* at 1954–55.

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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.¹¹⁵

Justice Scalia was thwarted by Justice Kennedy’s straightforward approach to the legal posture of this case. These were indeed “factual findings” by any conventional legal definition of the term, and structural injunctions had long ago been accepted by the Supreme Court as a necessary means by which federal courts could enforce civil liberties.¹¹⁶

Further, Justice Scalia decried the part of the majority decision that invited the State to move for modification so as to extend the three-year deadline to five years.¹¹⁷ Since any defendant is free at any time to request modification of an injunction, Justice Scalia suggested a more sinister inference: That the majority actually wants to overturn the lower court, feels hamstrung by the principles of deference it invokes, and is looking for a backdoor way of effecting a reversal to “achieve the benefit of a marginal reduction in the inevitable murders, robberies, and rapes to be committed by the released inmates.”¹¹⁸ To Scalia, the majority opinion is not a balanced, measured legal judgment so much as his colleagues’ reaction to their own mixture of cowardice and desperation.¹¹⁹ But here again, Justice Kennedy’s counter-position was brilliantly simple: Equity power always allows for modification of injunctions.¹²⁰ This is Justice Kennedy’s version of, “Move along folks, nothing to see here!”

But perhaps most notably, Justice Scalia took Justice Kennedy to task for conflating the possibility that some or most of the plaintiffs had individually suffered the deprivations caused by overcrowding with the status of all prisoners as a class.¹²¹ Justice Scalia averred that the former notion “is contrary to the

115. *Id.* (emphasis in original).

116. *See* *Missouri v. Jenkins*, 515 U.S. 70, 126 (1995) (Thomas, J., concurring) (“Our willingness to unleash the federal equitable power has reached areas beyond school desegregation. Federal courts have used ‘structural injunctions,’ as they are known, not only to supervise our Nation’s schools, but also to manage prisons.”).

117. *Plata*, 131 S. Ct. at 1956–57 (Scalia, J., dissenting).

118. *See id.* at 1957.

119. *See id.*

120. *Id.* at 1923.

121. *Id.* at 1952.

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bedrock rule that the sole purpose of classwide adjudication is to aggregate claims that are individually viable.”¹²² As for the latter, the notion that the effects of overcrowding could trickle down to every prisoner, he found this so “preposterous” as to reflect a foundational breakdown in separation-of-powers.¹²³

If . . . a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his constitutional right to medical care . . . simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared: it would have become the function of the courts to assure adequate medical care in prisons.¹²⁴

In his view, the decision had the perverse effect of granting a gratuitous reward of release to tens of thousands of prisoners who suffer no serious medical or psychiatric problems and were unaffected by any deficiencies in healthcare.¹²⁵ And as if he had not yet been sufficiently sarcastic, Justice Scalia added that “many will undoubtedly be fine physical specimens who have developed intimidating muscles pumping iron in the prison gym.”¹²⁶

Justice Kennedy acknowledged that the PLRA requires any prospective relief to be “narrowly drawn” and “the least intrusive means necessary to correct the violation.”¹²⁷ Moreover, the courts must “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system.”¹²⁸ To him, where a violation infects the entire system and where every prisoner by could require medical or mental health treatment while incarcerated, Justice Scalia’s objection to the remedy’s scope must have seemed so absurdly formalistic as to belie the settled facts of the constitutional violations¹²⁹:

Relief targeted only at present members of the plaintiff classes may therefore fail to adequately protect future class members who will develop serious physical or mental illness. Prisoners who are not sick or mentally ill do not yet have a claim that they have been subjected to care that violates the Eighth Amendment, but in no sense are they remote

122. *Id.*

123. *Id.*

124. *Id.* (quoting *Lewis v. Casey*, 518 U.S. 343, 350 (1996)) (internal quotation marks omitted) (alterations in original).

125. *See id.* at 1952–53.

126. *Id.* at 1953.

127. *Id.* at 1929 (quoting 18 U.S.C. § 3626(a)(1)(A) (2000)) (internal quotation marks omitted).

128. *Id.* (quoting 18 U.S.C. § 3626(a)(1)(A) (2000)) (internal quotation marks omitted).

129. *See id.* at 1940.

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bystanders in California’s medical care system. They are that system’s next potential victims.¹³⁰

Indeed, as the State itself acknowledged, “release of seriously mentally ill inmates [would be] likely to create special dangers because of their recidivism rates.”¹³¹ Moreover, Justice Kennedy noted approvingly that despite the alleged overbreadth of the remedy, it was not a monolithic order because the lower courts had afforded the State great flexibility to allocate the reductions according to its judgment about differences among state facilities.¹³²

Justice Alito was only somewhat less melodramatic in his prose than Justice Scalia. While he was unconvinced that the lower court had considered all up-to-date evidence or that it had paid enough heed to less drastic remedies, perhaps the key point of his dissent was the PLRA’s command that a court “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.”¹³³ Justice Alito lamented that the lower court had “ordered the premature release of approximately 46,000 criminals—the equivalent of three Army divisions.”¹³⁴ To prove his point, he ventured somewhat into the realm of criminology:

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. . . . If increased incarceration in California has led to decreased crime, it is entirely possible that a decrease in imprisonment will have the opposite effect.¹³⁵

Justice Alito concludes:

The prisoner release ordered in this case is unprecedented, improvident, and contrary to the PLRA. In largely sustaining the decision below, the majority is gambling with the safety of the people of California. Before putting public safety at risk, every reasonable precaution should be taken.

130. *Id.*

131. *Id.* (alteration in original) (quoting the State’s Reply Brief) (internal quotation marks omitted).

132. *Id.* at 1940–41.

133. *Id.* at 1959 (Alito, J., dissenting) (quoting 18 U.S.C. § 3626(a)(1)(A) (2000)) (internal quotation marks omitted).

134. *Id.*

135. *Id.* at 1966–67 (citations omitted).

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The decision below should be reversed, and the case should be remanded for this to be done.

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.¹³⁶

It is ironic that Justice Alito invites the Court to engage in empirical speculation, especially when his social science is highly questionable. It is fitting that he loses to a majority that treats such empirical speculations as beside the point when a lower court makes statutorily-required, garden-variety factual findings, and when it relies on the garden-variety tools of equity jurisdiction to modify orders in light of changing factual contexts.

But Justice Kennedy insisted that the three-judge court indeed gave "substantial weight" to the public safety issue, noting the amount of time and documentation devoted to it.¹³⁷ But the three-judge court read the statute as realistically as possible using the term "substantial" instead of "conclusive,"¹³⁸ precisely because no court could ever meet an absolute standard of crime or harm prevention when, by definition, the other organs of government themselves could not be expected to do so. Indeed, he noted items in the record suggesting that reducing overcrowding in California's prisons could even *improve* public safety in the long run by mitigating the "criminogenic" effect of imprisonment.¹³⁹

IV. CONCLUSION

Recall these words from Justice Kennedy's 2003 ABA address:

The debate over the goals of sentencing is a difficult one, but we should not cease to conduct it. Prevention and incapacitation are often legitimate goals. Some classes of criminals commit scores of offenses before they are caught, so one conviction may reflect years of criminal activity. There are realistic limits to efforts at rehabilitation. We must try, however, to bridge the gap between proper skepticism about rehabilitation on the one hand and improper refusal to acknowledge that the more than two million inmates in the United States are human beings whose minds and spirits we must try to reach

A purpose to degrade or demean individuals is not acceptable in a society founded on respect for the inalienable rights of the people. No public official should echo the sentiments of the Arizona sheriff who once said

136. *Id.* at 1967–68.

137. *Id.* at 1941.

138. *See id.*

139. *See id.* at 1942 n.10.

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with great pride that he “runs a very bad jail.” It is no defense if our current prison system is more the product of neglect than of purpose. Out of sight, out of mind is an unacceptable excuse for a prison system that incarcerates over two million human beings in the United States.¹⁴⁰

Brown v. Plata gave Justice Kennedy an unusual opportunity. The California prisons presented to him the worst aspects of the dysfunctionality and unfairness of American criminal justice. But as a jurist concerned with adhering to the limits of his Article II role, he knew that responsibility for redeeming our system lay as much, or even more, with other actors in the legal system than with high-level appellate judges. He knew that dealing with the details of particular cases and sometimes the scrutiny of particular institutions was something that ground-level lawyers and judges did. He knew that the fair administration of prisons was chiefly the task of state executive-branch officials, and that when confronted with grim realities, those officials will often concede prisoners’ claims when the facts are clear. He also knew that even where rights are held out as abstract guarantees, remedies are a complex institutional matter that often are best left to legislative design. The confluence of the roles of lower-court judges, executive-branch officials, and aggressive plaintiffs’ lawyers, is what created the opportunity in *Brown v. Plata*.¹⁴¹ Though the decision is crammed with the jurisdictional and other legal niceties that only lawyers can appreciate, Justice Kennedy’s opinion nevertheless helps vindicate the broader, holistic view of American punishment that he invoked in 2003:

In seeking to improve our corrections system, the Bar can use the full diversity of its talents. Those of you in civil practice who have expertise in coordinating groups, finding evidence, and influencing government policies have great potential to help find more just solutions and more humane policies for those who are the least deserving of our citizens, but citizens nonetheless. A decent and free society, founded in respect for the individual, ought not to run a system with a sign at the entrance for inmates saying, “Abandon Hope, All Ye Who Enter Here.”¹⁴²

140. ABA Speech, *supra* note 13, at paras. 16–17.

141. See 131 S. Ct. 1910; see also *supra* Part III.

142. ABA Speech, *supra* note 13, at para. 18.