

Introduction:

OVERCOMING MASS INCARCERATION

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The impulse to punish has been described as a universal and its roots seem to lie deep within the psychology and perhaps biology¹ of human beings,² but when we study punishment across different societies and cultures, and across history, we find that the story is one of variation and change.³ In California today, perhaps the biggest change in forty years is underway as a state that embraced the national experiment with supersizing prison populations (what criminologists call “mass incarceration”) in the most extreme way, and seemed to resist even modest modification for the longest time, is now in the midst of the most significant planned prison population reductions in US history.

Nationally the cause of the shift seems primarily fiscal. Under pressure from the Great Recession many states have become to dismantle aspects of their mass incarceration policies and experiencing sustained reductions in prison population. Some states began even before 2008, typically because of earlier budget problems, and have achieved quite substantial declines. Yet despite having difficult fiscal years repeatedly since the Dot.com bubble burst at the turn of the century, California has not been among those states using their normal political processes to modify a system despite widespread agreement that the prisons there cost too much and produce poor outcomes.

¹ Simon Gachter, Elke Renner, and Martin Sefton, The Long Run Benefit of Punishment, *Science Magazine*, 5 December 2008: Vol. 322 no. 5907 p. 1510 <http://www.sciencemag.org/content/322/5907/1510.full>

² John Darley. 2009. Morality in the law: the psychological foundations of citizens' desires to punish transgressions. *Annu Rev Law Soc Sci* 5: 1-23 <http://www.annualreviews.org/doi/pdf/10.1146/annurev.lawsocsci.4.110707.172335>

³ David Garland, *Punishment and Modern Society* (Chicago 1990)

Instead, the impetus for penal change in California has a very clear proximate cause, the extraordinary prison health care cases that arose more than 20 years ago and were that consolidated in a special 3-judge federal court in 2007. After a 13-day trial in 2008 the court found in 2009 that California's chronic levels of hyper overcrowding impeded any possibility of remedying the unconstitutional conditions experienced by prisoners in need of mental or physical health care, unconstitutional conditions that California prisoners had endured for more than a decade.⁴ The court held that the nearly 200 percent overcrowding in the system during that period (with 300 percent more common in the reception centers where most short term prisoners languish) had made any adequate remedy to unconstitutional health conditions impossible and ordered the state to reduce that figure to 137 percent in two years. In May 2011, the US Supreme Court upheld that order by a 5-4 vote, requiring California to complete a reduction in population, by approximately 30,000 by June of 2013 (two years after the order was upheld).

While underlying court findings and orders are among the most factually detailed and case specific in prison litigation history, the Supreme Court decision had a very pointed focus whose import was undeniable. Without directly accusing California of torture, Justice Kennedy noted that failure to provide for basic human needs in prison, whether food or health care, could "actually produce physical 'torture or a lingering death'".⁵

In language that seemed intended to draw a sharp line around California's example Kennedy wrote that:

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.⁶

California prisons had become what the rest of the world would call a major human rights problem.⁷

⁴ Coleman v. Schwarzenegger , <http://www.caed.uscourts.gov/caed/Documents/90cv520o10804.pdf>

⁵ Brown v. Plata, slip opinion, at 13, quoting Estelle v. Gamble, 429 U.S. 97 (1976)

⁶ Brown, slip opinion at 13.

⁷ And Justice Breyer said as much during the oral argument on Brown in December 2010

In May 2011 when the Supreme Court upheld the order, the State seemed to be reconciled to achieving the goal by reducing California's reliance on imprisonment primarily by diverting parole violators and those convicted of less serious and non-violent felonies to county level institutions like jail and probation. This new strategy (one cannot call it a policy exactly since little has been done to articulate one) dubbed "realignment" remains stealth to most of the public, but is clearly the most dramatic shift in a single state's penal policy since California led the nation in abandoning rehabilitation and the indeterminate sentence in the mid 1970s, nearly 40 years ago.⁸

Mass Incarceration California Style: The Extreme Strain

To appreciate both the limits and potential of *Brown* it is important to recognize that California is simultaneously an extreme case of the general phenomenon of mass incarceration that took hold across the American state, and one that reveals its underlying Between roughly 1975 and 1995, states everywhere in the US, albeit at different paces, grew their prison population. The causes are not mysterious, states decided as a matter of public policy to increase imprisonment. More prisons, for more people, more of the time became a kind of preferred solution to a raft of social problems, especially those associated with the economically poor urban neighborhoods, especially those with high concentrations of minorities, and immigrants.

In quantitative terms the rate of imprisonment, the portion imprisoned per 100 thousand free adults, a measure which standardizes population, quadrupled nationally and even a bit more than that in California. In absolute terms California went from having fewer than 20,000 prisoners when I began as an undergraduate in 1977 to nearly 100,000 by the time I received my doctorate and law degree in 1990, and to nearly 160,000 by the time I returned to Cal as a professor in 2003.

⁸ Coincidentally Jerry Brown was governor then and forty years later has resumed the governorship following an unusual political career and the state's worst fiscal crisis in more than half a century. For reasons we will explore later in the course there is little to suggest that this shift is being driven primarily by the governor.

Figure 1 here

Although Californians are often reassured by their leaders that the state's current imprisonment rate is roughly at the national average (or slightly below) that belies the significance of the change since 1980 and the role of southern states with their racially marked and historically high imprisonment rates in setting the national average. What Mississippi was to Jim Crow segregation, California is to mass incarceration today. Once the home of the nation's (and arguably the world's) most progressive prison system, one based on an evidence based approach to rehabilitating prisoners, California since the 1980s has become the most extreme example of mass incarceration. While it does not have the highest incarceration rate in the nation (that honor has belonged to states in the former Confederacy for more than a century), it has moved the farthest qualitatively, from one of the most progressive penal systems to one of the most repressive.

Looked at as its own region, California with 83 prisoners per 100,000 adult residents in 1977 was just slightly higher in imprisonment rate than the Northeast, the most lenient region of the nation, and well below that of the next most lenient region Midwest, and at just over half of that of the nationally leading southern imprisonment rate. In 2009 California was the second most punitive region in the nation, significantly higher than either than the Northeast or the Midwest, and at 80 percent of the Southern norm. No other large state saw its imprisonment rate increase has much as California, increasing by a staggering 500 percent

between 1977 and 1998.⁹ In other words, in imprisonment terms, California went from being a progressive Midwestern state, say Michigan or Minnesota, at the start of the 1970s, to being a Southern state, say Alabama or Arkansas, by the end of the 1990s.

This transformation was accomplished in large part by an epic program of prison construction. In the century and quarter between statehood in 1851 and 1980, California built twelve prisons. Over the next two decades, between 1980 and 2000, twenty-two more prisons were added (most of them colossally larger than their predecessors). But even that building program did not keep up with the prodigious rate at which California imprisoned, and re-imprisoned its residents. By the end of the 1990s, chronic overcrowding was moving to crisis stages of close to 200 percent of an already dubious definition of capacity (this despite a historic drop in crime)¹⁰.

Because of the scale of California's prison commitment and because of an innovative group of prisoners' rights lawyers that have operated in and around the Prison Law Office in the San Francisco Bay Area since the 1970s, the most important American prison litigation of the past generation, much of it establishing crucial national precedents, has involved California. Following the extraordinary efforts of federal courts to preserve the constitutional integrity of California prisons in the face of the state's wholesale and bipartisan political embrace of mass incarceration, can help us grasp the way out of this legal and political labyrinth as a nation. As precedents, these cases set a constitutional floor to the practice of mass incarceration in the states. As case studies in the

⁹ Tim Newburn, *Diffusion, differentiation and resistance in comparative penalty*, (2010) figure 2 at p. 349

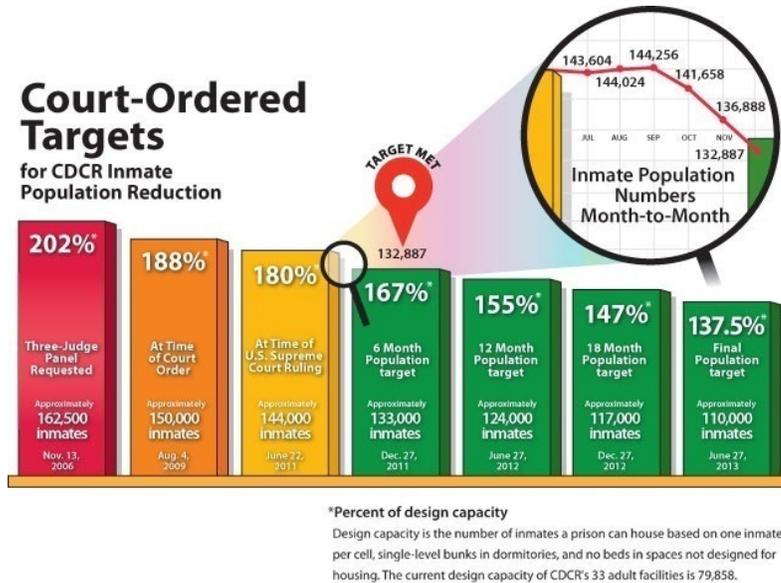
¹⁰ Zimring, *Great American Crime Decline* (2007)

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sociology of punishment, they form a critical public pedagogy that must be understood if we are to overcome the multi-generational legacies that are likely to follow mass incarceration into history.

Since *Brown*: Shrinking Prisons but What Next?

We will take a closer look at the detailed trends in California’s correctional population numbers later but for now consider this glossy chart on offer near the very top of the California Department of Corrections and Rehabilitation website.¹¹



The contrast with the first chart I showed you is obvious. The direction is down, with the symbol rich coloring going from red alert red to safety green. A system, which for nearly four decades stood only for growth,¹² now promotes its ability to get the job of population reduction done. While this deals in percentage of design capacity, the terms in which the 3-judge court made its order the actual prisoner numbers in

¹¹ CDCR, <http://www.cdcr.ca.gov/>

¹² Malcolm M. Feeley And Jonathan Simon (1992) “The New Penology: Notes on the Emerging Strategy of Corrections and its Implications,” *Criminology*, Vol. 30(4):449–474

smaller print below in each bar are perfectly clear, a system which held more than 160,000 prisoners (and more) as recently as the middle of the last decade is on track to reach 110,000 by June of 2013.¹³

It is possible but unlikely that *Brown v. Plata* will turn out to be merely an interruption in a longer term trajectory to grow the prison system further (at the end of the 1990s CDC planners anticipated a population of 250,000). It is possible that after the economy comes back there could be a backlash about crime and a new administration favorable to building dozens of new prisons to maintain current incarceration policies. Realignment is so far being offered as a way to achieve the 3-judge court's targets. This means that neither the governor or the legislature has sought to articulate a policy behind it. At its best this could give counties an opportunity develop a new model of corrections which emphasizes accountability and justice through restorative justice and incapacitation, where needed, through jail, probation, house arrest, and electronic monitoring. At its worst this could become a new kind of locally based incarceration with heavy reliance on longer jail terms.

But if it is clear that the era of mass incarceration is ending in California, it is far from clear that we are we going to reconsider our emphasis on punishment and incapacitation? If all *Brown v. Plata* means is that states will no longer be allowed tolerate humanitarian medical crises on a broad scale while packing people into prisons at two or even three times their design capacity it does not mean much beyond California. However, if the Supreme Court means that states have to assure conditions of incarceration, to the extent possible given their essential deprivation of liberty, comport with human dignity, something close to what the European Court of Human Rights is prepared to enforce, it could require a broad rethinking of our approach to punishment.

The Book

¹³ CDCR, note that (which represent disproportionately three or two years in the first three bars and only six months in the last four)

This book is about the jurisprudence produced by the two decades of litigation over mental and physical health care in California prisons leading up to *Brown v. Plata*. Health has been an important dimension of society's imagination of the prison since the scandalous reports of health conditions in 18th century jails by John Howard and others, led to birth of the penitentiary and helped spread the modern humanitarian consciousness that arose in that era.¹⁴ For much of the 19th and 20th centuries, corrections operated in a largely subordinated role to medicine, both metaphorically and to some extent directly (in reliance on medical authorities to help run prisons). The of therapeutic penology after World War II marked an apotheosis of medical influence, now mainly in the form of humanistic psycho-therapies.

Mass incarceration represented a sharp departure from this link between corrections and medicine. Prison became about secure confinement of people defined not by their life history or individual behavior, but about the sections of the legal code they violated, decisions made before prison by prosecutors and judges. Medicine, having long animated the project of corrections as one of health, went into a kind of exile from the prison (even ironically as prison health care became a constitutional right).

The metaphor of the warehouse came relatively early to critics of this system,¹⁵ but the full implications of that metaphor remained obscure. Warehouses hold valuable property in secure conditions, but they presume the internal stability of the objects held. The prisoners in a warehouse must be unchanging self-sufficient entities. Strange as it sounds this fit with the portrait of prisoners as predators, a constant risk to others, but not themselves subject to change, or illness, or death. In the extreme form it took in California this produced a humanitarian crisis of

¹⁴ John Howard, *The State of the Prisons* (1777), <http://books.google.com/ebooks/reader?id=4EhNAAAAYAAJ&printsec=frontcover&output=reader&pg=GBS.PA7>; Michael Ignatieff, *A Just Measure of Pain* (1978)

¹⁵ James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, *Hous. L. Rev.* Vol. 34(4) 1003-1064 (1997); Jonathan Simon, *From the Big House to the Warehouse: Rethinking Prisons and State Government in the 20th Century*, *Punishment and Society* Vol. 2(issue 2 April 2000) 213 to 234

the bodies and psyches of prisoners on mass scale that managed to remain below the conscience of the public, even as scandals like Abu Ghraib and Guantanamo arose. But moments of humanitarian scandal have their redemptive potential. Stripped down bare life,¹⁶ prisoners, whether of war, counter-insurgency, or crime control, reveal at last, their humanity. For centuries now it has been these moments of deep human suffering, where the eternal and existential foes of age and illness, framed by state punishment that have given rise to and expanded the content and reach of human rights. The most important potential result of *Brown* is the preservation and indeed strengthening of a jurisprudence anchored in the humanitarian disaster of California's extreme mass imprisonment.

This jurisprudence is a remarkable and unexpected development in our legal culture, one that offers a path out of the blind alley that mass incarceration has led to. It belongs to the modern history of court led prison reform that began in the 1970s,¹⁷ yet it has transcended the doctrinal and institutional sources of that jurisprudence; sources which had been significantly diminished by the decline of rehabilitative penology nationally since the 1970s and congressional and Supreme Court hostility in the 1990s. Today, with an penal incapacitation as the dominant penal rationale in most states, and unrelenting political sensitivity to appearing soft on crime, it is only a renewed constitutional recognition of the humanity of prisoner, anchored in the sheer facticities of suffering captured in the empirical record produced by these epic prison health care cases that can guide the application of the Eighth Amendment's otherwise arid and vague language.

These cases, mostly brought in the 1990s, challenged a penal regime that was created in the 1980s, to address nightmares of the 1970s. It is to these nightmares and their legacies that we now turn.

Chapter One provides a historical background to California's extreme path toward mass incarceration. These policies were not just

¹⁶ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford 1998)

¹⁷ Malcolm Feely and Edward Rubin, *Judicial Policy Making and the Modern State* (1998);

“tough on crime” in the sense that had already become generic in the late 1960s, they reflected a historically distinctive experience of crime fear anchored in the 1970s. David Garland may be correct that the “culture of control” is founded in a new common sense of “high crime societies”, but not crime in general, but crime in very specific ways that were made widely available to the popular imagination in that decade.¹⁸

Franklin Zimring and Gordon Hawkins, in their 1995 book, *Incapacitation*, described the surprise emergence of incapacitation as the dominant penal rationale in many if not most US states at the height of prison expansion. More than a decade and half on, California has come to exemplify such an extreme version of the logics so aptly described by Zimring and Hawkins that we need a new name for it. What I call “total Incapacitation,” differs considerably from the form of incapacitation historically practiced in the states and which plays a considerable role in European penal systems. Total incapacitation presumes a high and unchanging danger posed to the community by those who violate the criminal law. It eschews rational methods of risk selection in favor of general presumptions applicable to all law breakers. Most importantly, it presents physical isolation of the offender as the only reliable means of achieving public safety, and favors extended sentences of imprisonment.

Once in place, total incapacitation produces a zero sum logic between the dignity of prisoners and public safety which directly promotes degrading punishment. With its valorization of individual victims and overall public safety, total incapacitation is anchored in a moral doctrine that enjoys a powerful legitimacy. The key elements of

¹⁸ David Garland (2001) *The Culture of Control: Crime and Social Order in Contemporary Society*. Chicago: University of Chicago Press

degrading punishment, lengthy sentences that have little relationship to individual desert or danger, the overuse of high security and especially supermax style prisons, the absence of adequate medical and mental health treatment inside prisons, and the chronic hyper-overcrowding of prisons can all be traced to total incapacitation. This logic is largely immune from empirical evaluation or political reconsideration. Mass incarceration is the inevitable product of total incapacitation and the former cannot be overcome unless the latter is eroded.

Chapter Two, revisits *Madrid v. Gomez*¹⁹ case challenging conditions and policies and California's supermax style Secured Housing Unit (SHU) prisons that formed part of the massive Pelican Bay penal complex. While many states followed this path, California did it in typically gargantuan style, building two giant supermax prisons, each holding more than 1,000 prisoners. The strategy of isolating prisoners in high tech lockdown cells with little or no human contact was supposed to protect both staff and inmates from violence. The shocking result was a regression of penal conduct to medieval levels. *Madrid*, painted a gruesome picture of what California had created, the first public document to reveal what was happening inside the nation's burgeoning supermax prisons. The difficulties of conducting an investigation into the abuses reported at the prison revealed the existence of a culture of lawlessness within the prison staff, abetted by incompetent and indifferent management from the top of the Department. The ruling was a striking condemnation of the state's strategy. The lack of medical and mental

¹⁹ 889 F.Supp. 1146 (N.D. Cal. 1995)

health care in the prison was found to be a “cruel and unusual punishment” in violation of the 8th Amendment.

The *Madrid* opinion offered stinging criticism of the whole supermax strategy but it was only a partial victory. Deferring broadly to California’s total incapacitation logic, Judge Henderson stopped short of finding the supermax to be inherently “cruel and usual”, instead ordering changes in the internal security procedures and a ban on housing prisoners suffering from mental illness inside the SHU. *Madrid* soon became a national precedent, establishing both the highly problematic tendencies of the supermax, and its constitutionality under certain regulatory conditions.

Chapter Three follows the litigation that began simultaneously with the challenge to Pelican Bay. The next crucial precedent, *Coleman v. Wilson*,²⁰ which challenged the lack of mental health screening and treatment in the entire California prison system. Judge Lawrence Karlton of the Federal District Court for the Eastern District of California, found that the state’s systematic failure to treat the growing population of mentally ill inside state prisons violated the 8th Amendment and appointed a special master to oversee a wholesale reform in the way the Department of Corrections delivered mental health care; a project that has gone on for more than fifteen years and is not complete. By 2006 the number of prisoners in the Coleman class (a conservative estimate of the actual number of mentally ill prisoners inside California prisons) had reached 35,000.

²⁰ 912 F.Supp. 1282 (E.D. Cal. 1995)
http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cts=1331742716483&ved=0CCQQFjAA&url=http%3A%2F%2Fwww.rbg-law.com%2Fwp-content%2Fuploads%2FColeman-v-Wilson-912-F-Supp-1282-ED-Cal-1995.pdf&ei=xMdgT_rXFube2AXMmtWVCA&usg=AFQjCNF43LchWX7Vx5L-KkRBUi2BGCJNSw

Coleman became the leading national precedent on mental health in prisons, establishing for the first time a constitutionally minimum level of mental health treatment in prison. The case placed a spotlight on the growing number of persons with serious mental illness placed in prison and the complete lack of provision in the mostly new prisons built to establish mass incarceration. This underlined the degrading qualities of punishment under mass incarceration the practice of which clearly worsened the suffering of those already subject to the torments of mental illness. Perhaps most importantly, *Coleman* began to undermine the central moral foundations of mass incarceration by calling into question the premise that dangerousness is an unchanging feature of those in prison and raising the question of how many of them would even be in prison at all but for the absence of more effective mental health provision, and therefore challenging the axiom that incapacitation must promote public safety.

Chapter four takes up the parallel case of *Plata v. Davis*²¹ that challenged the lack of adequate medical care in California prisons. If *Coleman* revealed how many people with serious mental health problems were incarcerated in California's prisons, *Plata* revealed all California prisoners to be at real risk of harm or even death should they ever need medical care while in prison. Michel Foucault famously described the emergence of the penitentiary in the 19th century as marking a shift in the target of punishment from the body to something like the mind, psyche or

²¹ (N.D. Cal. 2002, stipulated agreement)
http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=24&cts=1331742987629&ved=0CDgQFjADOBQ&url=http%3A%2F%2Fwww.clearinghouse.net%2FchDocs%2Fpublic%2FPC-CA-0018-0005.pdf&ei=-MhgT5XrC4aQ2gXxt-D5Bw&usg=AFQjCNGjxrcTPVklcCkiB2gpl2ECU_idrQ

soul.²² With the rise of mass incarceration, California punishment seemed to return to the body, now not to eviscerate it (although the death penalty also returned to the state after a brief exile) but to simultaneously contain and abandon it. California penal policy seemed to imagine the bodies it was incapacitating were “bodies without organs”, ones defined by their physical capacity for violence, but not by their biological needs and vulnerabilities. Indeed, the prisons that the state began to build rapidly in the 1980s were designed with a willful indifference to the medical needs of the bodies they were incapacitating. It was if these bodies were only defined by the level of risk they posed to others, and in no way by the risks they faced from disease, accidents, and violence inside prisons.

Plata generalized the challenge to mass incarceration. The image of prisoners dying from routine medical problems underscored the degrading qualities of prison in California. By establishing that California prisons were full of people suffering the ravages of age and chronic illness, *Plata* established their humanity as the dominant normative framework for evaluating prisons (rather than crime control) and at the same time opened up common link to the rapidly aging voters of California.

Chapter five examines the 3-Judge Courts opinion and order of 2009.²³ For much of the previous decade, the California prison system had been operating at effectively 200 percent of design capacity (design capacity that already presumed the only purpose of prison was incapacitating prisoners by warehousing them in secure facilities). Lawyers for both the Coleman and Plata prisoners argued in their respective courts that years of remedial action had thus far failed and that

²² Michel Foucault, *Discipline & Punish: The Birth of the Prison*, trans. Alan Sheridan (Pantheon 1977)

²³ *Coleman v. Schwarzenegger*, supra note ____

an effective remedy to both cases would require a reduction in overcrowding and most likely a reduction in California's prisoner population.

The combined Coleman/Plata case would be by far the largest and most systematic court intervention in state prisons since the Prison Litigation Reform Act of 1996 (PLRA) came into effect and helped close out the era of prison condition lawsuits. The PLRA created a number of new procedural obstacles for prisoners seeking to challenge state prison policies in court, especially if the resulting order might require states to release prisoners or not accept them.²⁴ In the latter case, a special three judge court would have to find that prison overcrowding was the cause of the unconstitutional conditions, the removing the overcrowding was necessary to remedying those conditions, and that no other approaches would remedy them. Even if essential to a remedy, the court had to give weight to the potential impact of any prisoner release on public safety.

The resulting trial and order of the special three-judge (which included Judge Henderson, and Judge Karlton who had jurisdiction over the Coleman case) opened a new chapter in the history of court reform of prisons. The three judge court considered a range of questions quite different from the focus of prison condition cases of old; including, the political process by which California's prison population has developed, the kind of prison regime that has taken shape across more than a decade of state of emergency like overcrowding and medical failure, and the incapacitative effects of imprisonment. The final opinion and order of

²⁴ The PLRA an extraordinary piece of federal legislation which for the first time in modern history placed limits on the power of federal courts to enforce the constitution in prisons through a whole series of mechanisms

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August of 2009 provided a textbook on the pathologies of mass incarceration, summarized a growing body of expertise (much of it collected during the trial itself) on how to reduce prison populations without increasing crime, and compelled the state to take the first step in decades to trim its reliance on state prison. Most importantly the decision represents a return of an alarming historical theme in the history of punishment since the 18th century, the fear of prisons as places where a humanitarian medical crises might endanger the broader society.

Chapter six takes us to *Brown v. Plata* in the Supreme Court. The state's appeal of the three judge court order offered an early opportunity for the Supreme Court to shut down the innovative jurisprudence of the three judge court. *Brown v. Plata* instead, assures that the new jurisprudence of mass incarceration will remain an active resource for reforming state penal policy. As Feeley and Rubin's research on the jurisprudence of prison condition lawsuits showed, the innovation has generally come from federal trial courts with the Supreme Court operating more to kill or let live those initiatives than to encourage them. *Brown* represents a significant encouragement to this new jurisprudence. Although closely divided in votes, the 5-4 majority was anything but narrow. In reaffirming the centrality of dignity as a value underlying interpretation of the 8th Amendment the Court affirmed that it understood the humanitarian meaning of California's prison crisis and would support constitutional action to prevent the fear based logics of mass incarceration from undermining respect of the dignity of prisoners.

Brown's humanitarian vision of prisons is also one that may prove vital to the ongoing effort to reconstruct the public understanding of prisons. Transformations in popular penal imaginary described in chapter

one have remained remarkably potent, reinforced by a political and media environment that have learned to rely on that imaginary as well. The image of prisoners as young, aggressive and motivated to do maximum harm and prisons as secure and efficient ways to contain them helped to sell a massive increase in imprisonment beginning in the 1970s. That image was never accurate and is increasingly at variance with prison populations that include middle aged, chronically ill prisoners who are motivated to reintegrate into society, and prisons that are so physically flawed as to be a danger to health and safety. The Supreme Court's unusual inclusion of photographs of California imprisonment and prisoners makes *Brown* a potentially important moment to recast that penal imaginary and redefine the conditions for legitimate prisons.

The conclusion of the book will seek to describe the new pathways for reimagining imprisonment and restoring dignity and legitimacy to penal justice in California and other states caught up in mass incarceration. The federal courts are not going to declare mass incarceration unconstitutional, but in a series of striking federal court decisions they have produced a blue print for moving the state away from it. These cases have documented in precise terms the results of mass incarceration as a public policy. Most importantly, they have begun to reframe the prison from a question of the constitutional limits on penal crime control, to a question of the requirements of dignity in punishment, in short, the threshold of human rights law for American prisons.

From a legal perspective, health care has proven to be the Achilles heel of mass incarceration,²⁵ causing the previously impervious giant to

²⁵ One reason is that it is easier to make out a medical 8th Amendment violation. The Supreme Court has recognized varying classes of claims for purposes of assessing how blameworthy the state

stumble under the suddenly unsustainable weight of its own custodial ambitions. From a penological perspective the humanitarian crises that the Supreme Court has recognized in *Brown* offers promising directions for refashioning the correctional enterprise in California around healing, repair, restoration, and ultimately the conservation of dignity in prison. In independent recent reflections, two leading criminologists have suggested that overcoming mass incarceration requires a new way of seeing prisoners,²⁶ and a moral understanding of what prisons do.²⁷ *Brown v. Plata* has the potential to do both.

Afterward: Toward a New Medical Model

Medicine and health care have long functioned not just as an essential problem for imprisonment as a penal practice but as a constitutive template for imagining the way prison can operate to fulfill a mission of reducing crime. John Howard's scathing portraits of disease in jails and asylums helped launch the modern penitentiary as a project of social hygiene at the end of the 18th century. The rise of germ theory, and the medical logic of attacking the micro-organisms responsible for disease

defendant's non-intentional practices must be to constitute cruel and unusual punishment. Medical cases are construed as among the least demanding, requiring a showing only of "deliberate indifference" on the part of state defendants; on the grounds that providing medical care is complementary to the major purposes of the prison (secure custody, rehabilitation, etc.). In contrast, cases where state defendants have been engaged in security maintaining activity require a far more demanding showing on the part of prisoner plaintiffs, that state defendants were acting "maliciously and sadistically for the very purpose of causing harm" on the grounds that security is the core function of prisons. *Whitley v. Albers*, 475 U.S. 312

²⁶ Bernard Harcourt writes, "The ... question is whether we could imagine, at some point, that the public imagination of the 'convict' could ever be reshaped." See, Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, ssrn, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1748796

²⁷ John Pratt writes: "[T]he new structure of penal power ..can also lose its legitimacy when it breaches the boundaries of what is morally justifiable or when it loses consent for what it promises to do." John Pratt, "When Penal Populism Stops: Legitimacy, Scandal, and the Power to Punish in New Zealand," *Australian & New Zealand Journal of Criminology* December 2008 vol. 41 no. 3 364-385

symptoms, found its parallel in the rise of positivist criminology and ultimately in the 20th century medical model in which prison was conceived as a hospital for therapies designed to treat crime producing psychological abnormalities. After liberals and conservatives coalesced behind rejecting the medical model in the 1970s, mass incarceration developed as the first anti-medical regime of imprisonment in history.

Now the expulsion of any relationship to medicine and psychiatry in a pure form of incapacitation has created a humanitarian crisis and opened the door to a new kind of medical model for corrections. Humanitarian medicine has developed since the 19th century as a framework for protecting dignity and humanity at the core of sovereign functions like war. Organizations like the International Committee of the Red Cross, and *Medicin sans Frontiers* are organs of enforcing human rights and promoting public health as much as they are of medical rescue and relief. In the United Nations system, and in the European Community this has been replicated in important respects through the development of governmental bodies which brings a humanitarian medical approach into monitoring prisons, asylums and other places of detention, the Europe Committee for the Prevention of Torture and Inhuman or degrading Punishment or Treatment²⁸ and the Committee against Torture of the Office of the UN's High Commissioner for Human Rights.²⁹ As a medical program, the new global practice of humanitarian crisis medicine reflects a concern with chronic illnesses including mental illness, and a new emphasis on organizing patients to act on their own health and that of others around them. As a legal/human rights program, the NGOs behind

²⁸ <http://www.cpt.coe.int/en/>

²⁹ <http://www2.ohchr.org/english/bodies/cat/>

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the new humanitarian medicine have become exemplars of a new kind of human rights strategy, one distinctly concerned with restoring dignity to populations who have been stripped of the social and cultural resources on which such dignity is usually reproduced. While there are many reasons to be concerned about the impact of humanitarian medical governance on problems of inequality and political identity created by long term political conflict and civil war, most of these do not apply to the prison situation. California, and indeed the US, needs to develop something very much like a Committee for the Prevention of Torture that could extend the dignity preserving power of the courts and have a direct and long term influence on the development of correctional policies.

Figure 1

DIGNITY AND THE AMERICAN PRISONER: *Brown v. Plata* and the Jurisprudence of Mass Incarceration

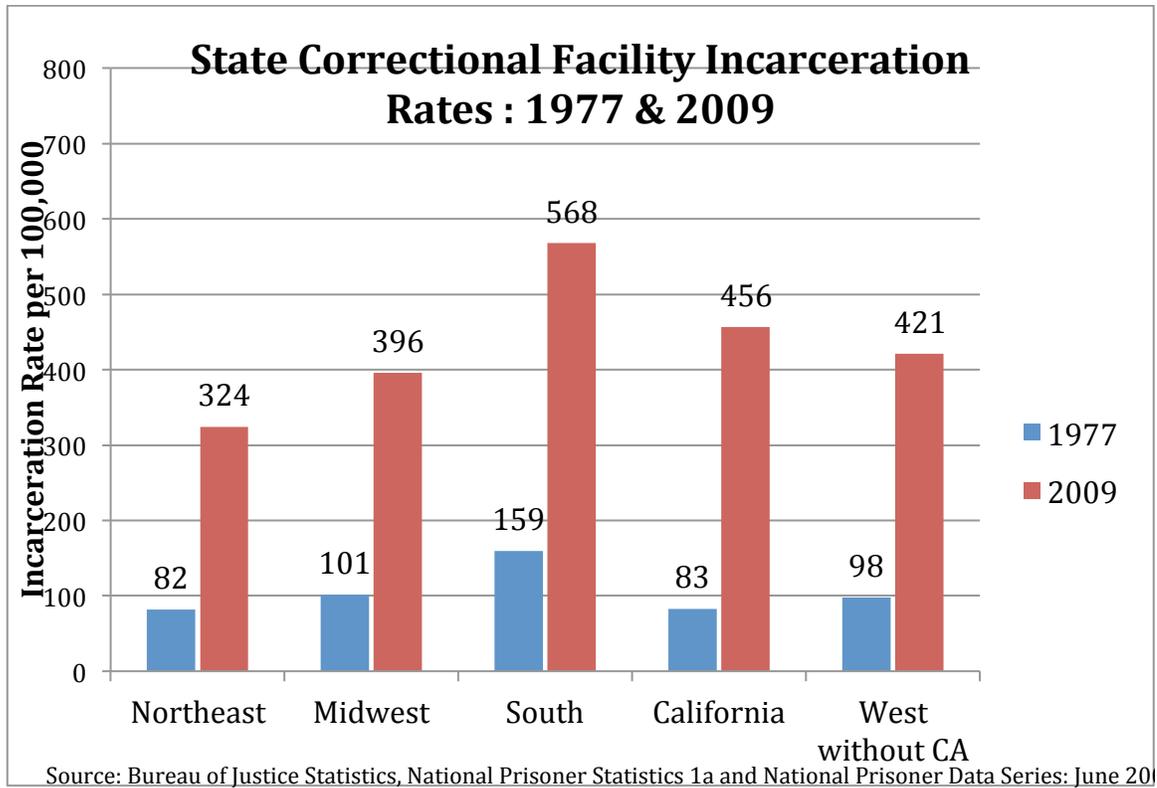
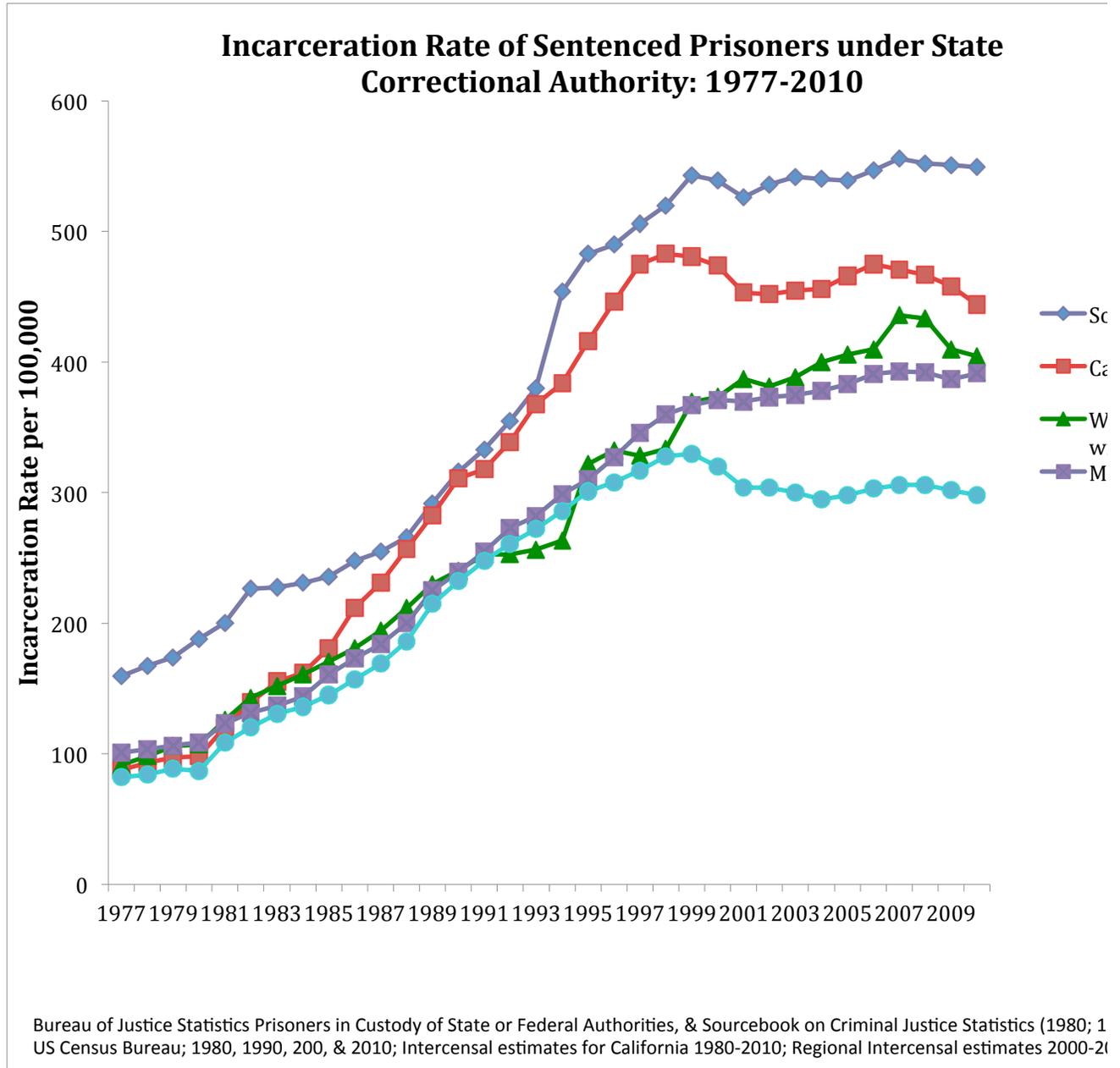


Figure 2



DIGNITY AND THE AMERICAN PRISONER: *Brown v. Plata* and the
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