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# Courts and the Penal State: Lessons from California's Decades of Prison Litigation and Expansion

**Abstract:** The Supreme Court's 2011 *Brown v. Plata* decision may mark a turning point in the history of mass incarceration in California and nationwide. Between the mid-1970s and 2009 the California prison population grew absolutely and relative to population every year, expanding more than any other large state and continuing to grow even after much of the rest of the country had begun to stabilize or even shrink prison populations. Since the court injunction that was upheld in *Brown v. Plata*, however, the state has begun to shrink its population at one of the fastest paces in history and is also experimenting with changes in its imprisonment penal policies. However a look at the parallel history of prisoners' rights litigation and mass incarceration in California, particularly the *Toussaint v. McCarthy* case that took place between 1976 and 1991, shows that the two developed together and that the state's increasingly uncivilized and degrading prisons reflected a political culture of defiance to constitutional rights developed reactively to litigation. Will *Brown v. Plata* play out any differently? The article suggests some reasons why today's decisions may be more effective in overcoming the state's hostile penal culture than in the past.

**Keywords:** mass incarceration; prisoners' rights; uncivilized punishments; prison reform litigation; penology; *Brown v. Plata*.

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## 1 Is California's Experiment with Mass Incarceration Over?

California's leaders like to claim that California's prison system is either average in terms of its level of imprisonment by population, or more recently (and incredibly) one of the "finest in the nation," in terms of the quality of prisons. Neither is accurate. From the mid-1970s California went from a state that fit in with the most lenient regions of the country (and with a lower imprisonment rate than other

western states) to a state that fits well in a highly punitive “sunbelt” that includes the South and Southwest.<sup>1</sup>

Between 1977 and 2009 California's prison population, the absolute number confined, grew by more than 700%, more than any other state. The state's imprisonment rate, the portion of resident adults held in state prisons at any one point in time, rose by nearly 500%, exceeding that of any other large state (although Pennsylvania came close). At the height of what was a national swing toward imprisonment during the 1980s, California treated as a “region” and compared to the other regions of the US, grew at a faster rate than even the South (long the most punitive region of the nation).<sup>2</sup>

But despite the modern standards and materials with which the new prisons were built, by the first decades of the 21st century the system was experiencing a crisis due to a rigid determinate sentencing system, prosecutorial punitiveness, and the state's uniquely harsh “three-strikes” law. These factors drove continued prison population growth in the first decades of the new century despite a decade of lower crime and continuing budget pressure. In 2005 a federal court took over the entire prison health care system (accounting for a quarter of the system's roughly 10 billion dollar annual budget), and in 2006 Governor Arnold Schwarzenegger declared a “state of emergency,” asserting that “the severe overcrowding in 29 CDCR prisons has caused substantial risk to the health and safety of the men and women who work inside these prisons and the inmates housed in them.” Despite what in other places and times might have counted as major political scandals, the business of prison population growth continued as usual.

In 2009 a special three judge federal court placed the entire prison system under a population cap forcing the state to divert admissions or release prisoners with the target of removing some 40,000 prisoners by 2011 through means to be determined by the state of California. The injunction (one Justice Scalia described as “the most radical issued by a court in our Nation's history...”)<sup>3</sup> was intended to make possible progress on fixing the prison system's longstanding medical and mental health crises. In May 2011 the Supreme Court upheld the injunction by a closely divided 5–4 vote, but the opinion by Associate Justice (and California native) Anthony Kennedy, was one of the strongest worded in years, reiterating decades old language placing dignity at the center of the Eighth Amendment's

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<sup>1</sup> On the sunbelt see Mona Lynch, *Sunbelt Justice: Arizona and the Transformation of American Punishment*.

<sup>2</sup> Jonathan Simon, *Mass Incarceration on Trial: Dignity and the Future of Imprisonment* (forthcoming New Press, 2013), 19 (calculated using statistics reported in the Bureau of Justice Statistics, *Persons under Custody of State or Federal Authorities (1980–2010)* and US Census Bureau reports 1980–2010).

<sup>3</sup> *Brown v. Plata*, 131 S.Ct. 1910, 1950 Scalia, J. Dissenting.

bar on “cruel and unusual punishment.” Kennedy found that California’s overcrowded and medically incompetent prisons were incompatible with the standards of a “civilized society.”

*Brown v. Plata* represents the sharpest shock to California’s massive prison system in decades,<sup>4</sup> and for the past several years at least seems to have knocked the state off its long-term pattern of indiscriminate growth. Indeed, the state has succeeded in reducing the prison population at a dramatic pace through a “realignment” package of legislation that places responsibility and new financial resources in California’s county justice systems for lower level felony offenders (those convicted of a non-serious, non-violent, non-sexual felony offense). Although it has yet to receive a programmatic statement of its aims, means, or philosophy, there is little doubt that realignment is the most dramatic shift in penal policy in recent US penal history. Coming as it does in a state that plunged the deepest into and stayed committed the longest to the policies and politics of mass incarceration, *Brown v. Plata* could signal the end of a decades long national movement that remade American justice and society.

But if the decision and the state’s response offers some real hope that federal courts might be shifting away from decades of deference to populist crime fears, and that combined with 21st century fiscal realities, political leaders may be able to move us beyond mass incarceration, the California story also points to considerable reason for doubt and concern that mass incarceration is not ending but rather “shape shifting.” One reason is realignment itself, which permits counties to replace state prison with county jail time with no reduction in the use of incarceration. Counties are allowed to invest their state funding to expand jails rather than develop alternatives to incarceration; and further subsidies for jail construction, or outright transfers of state prison assets to counties is likely.

In this essay I want to focus on a second reason for caution, California’s entrenched political culture of inhumanity toward prisoners and contempt for courts that go back to the tumultuous early 1970s (a time when both prison violence and violence in too many California communities was going up) and has continued right up to and through realignment. *Brown v. Plata* itself, and the cases that led up to it are replete with judicial recognition of this entrenched culture within the correctional bureaucracy and the larger political field in which it is embedded.

A growing body of socio-legal research now suggests that court litigation in the 1970s challenging prison conditions with the aim of encouraging states to limit their use of imprisonment paradoxically may have pushed those states

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<sup>4</sup> The state began using administrative discretion to divert population even as the case was on appeal before the Supreme Court.

to overcome traditional reserves on spending and committed them to building new and expanded prison space not to replace but to supplement existing prison stock.<sup>5</sup> California appears to have been an extreme case of this, where a prison bureaucracy came to see courts as co-equal threats to the prisoners they believed themselves to be at war with.<sup>6</sup>

## 2 Litigation and More Incarceration: From *Toussaint v. McCarthy* to *Madrid v. Gomez*

Indeed, if *Brown v. Plata* represents the possible end of an arc of penal severity during which California prisons grew at an extraordinary rate and produced conditions bad enough to require court intervention, the *Toussaint v. McCarthy* case, decided in principle part in 1984 and affirmed by the Ninth Circuit (the Supreme Court did not grant certiorari on the state's appeal), could be seen as the beginning of that arc.<sup>7</sup> That litigation began in 1976 and culminated after nearly a decade of full legal resistance by the state in a sweeping court injunction that covered all of the state's high security units, including substantial parts of the two oldest and largest prisons in the system, San Quentin and Folsom.

The *Toussaint* litigation was not a response to mass incarceration. When it began California's prison population was still at or near its historic low and no new prison had been built in a decade. Indeed, the context of the case lies in a tangle of complex events at the end of the rehabilitative era in California prisons (events that may be said to have helped end it). The early 1970s saw a spike in prisoner on prisoner and prisoner on guard violence, peaking in 1971 with the take-over of the San Quentin adjustment center by prisoners led by famed prison writer (and Black Panther leader) George Jackson in which eight people died including several guards. In the years that followed, the survivors of the take

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5 Heather Schoenfeld; Lynch, *supra*, at

6 On California's penal bureaucracy, especially the correctional officers and their union, see Joshua Page, *The Toughest Beat: Politics, Punishment and the Prison Officers Union in California* (2010).

7 The case began as *Wright v. Enomoto* (N.D. Cal. 1976) 462 F. Supp. 397, *aff'd*, (1978) 434 U.S. 1052. The second phase was *Toussaint v. Rushen*, 553 F. Supp. 1365, on remand from *Wright v. Rushen*, (9th Cir. 1981) 642 F.2d 1129. The preliminary injunction entered in *Toussaint v. Rushen* was affirmed in part and reversed in part by the 9th Circuit Court of Appeal, 722 F. 2d 1490 (9th Cir. 1984). The injunction was made permanent in *Toussaint v. McCarthy*, 597 F.Supp. 1388 (1984), affirmed in part and reversed in part, *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir.(Cal.) Sep 30, 1986) certiorari denied, *Toussaint v. McCarthy*, 481 U.S. 1069 (1987). The case went on for another decade. Hereinafter I will refer to the entire litigation as *Toussaint*.

over<sup>8</sup> and soon a growing body of additional prisoners deemed members of Jackson's group or other racially defined prison gangs that emerged, were held by California in an increasingly harsh penal regime.

Key to the case and to understanding its historical legacy is the fact that California's prison bureaucracy was reeling from multiple blows to its own normative orientation.<sup>9</sup> One was the violence just referenced, a protracted period of abnormally high violence combined with politically charged criticisms of prisons from the left and right. The second blow came in 1976 (the year the litigation began) with the adoption of a Determinate Sentence Law that officially established "punishment" as the major purpose of imprisonment and relegated rehabilitation to a service function prisons might seek to accomplish after protecting public safety. As a result the California correctional bureaucracy in the 1980s had few if any internal normative restraints on their repressive mission.

Despite the pretense that rehabilitation remained the objective of California's prisons (at least until the 1976 Determinate Sentencing Law), these prisoners were subjected to a kind of permanent isolation well in excess of traditional disciplinary isolation, often on preemptive grounds. Conditions in these special maximum security units (which California labeled Secure Housing Units, the term it would later use for its new supermax prisons) were especially harsh because of the bad repair of San Quentin (1851) and Folsom (1880) (the opinions were replete with references to the nauseating smells of the "rotten" plumbing in the two prisons and the fact that many of the prisoners were celled with other inmates in cells so small that only one at a time could stand up and the prisoner on the upper bunk could not sit up).

Trial court judges, echoing the findings that would lead to *Brown*, called the state to account on inhuman conditions including overcrowding and lack of adequate health care. The court also expressed strong concern about the overall rationale for the state's high security confinement strategy based on preemptively locking down large numbers of suspected gang members and ordered the state to conduct hearings at which secured housing prisoners could contest the grounds of their confinement; a concern that continues today in the state's supermax prisons. Controversially, the judge appointed his law clerk, a recent Stanford graduate, as the Special Master with power to spend state funds to remedy terrible physical conditions in the prisons under the order.

The Ninth Circuit upheld much of the injunction and the Supreme Court denied certiorari. For a few years in the mid 1980s, the court and its special master

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<sup>8</sup> The AC takeover survivors brought their own lawsuit challenging their particularly horrendous treatment, which included frequent chaining especially as their criminal cases were taking place. See, *Spain v. Proconier*, 600 F.2d 189, 196 (1979).

<sup>9</sup> See Page, *supra*.

operated as a parallel leadership in the California Department of Corrections, then through transfers of most of the high security prisoners in the *Toussaint* class to new prisons built in the prison construction boom, the case collapsed like an empty balloon, finally terminating in 1991. The case seems to capture much of what has since come to define California's "uncivilized" penal culture in several aspects that I will only be able to bullet point for brevity sake.<sup>10</sup>

The prison population had already grown steadily for nearly a decade by 1985, but with an incarceration rate of 162 prisoners per 100 hundred thousand adult residents (the standard measure of imprisonment change over time) it remained less than half the peak it would reach in this century. The high security population created its own overcrowding problem that anticipated the chronic problems of overcrowding that would follow despite a wave of prison building. At San Quentin, some 3,800 high security inmates were locked in 2712 cells.

Despite the fact that rehabilitation remained the official justification for imprisonment and the very salient fact that most of these prisoners needed to show progress on that to achieve parole (after 1976 that would change for incoming felons), these prisoners were subject to a regime near a total lock down with no access to programs, work, or education. In a way, these prisoners were pioneers in the new approach to penology in California — one that put all its emphasis on dangerousness and incapacitation.

Despite prison conditions that clearly shocked the federal judges involved, California officials maintained a stance of total resistance to the lawsuit. In an unusual section of his "finding of facts" titled "compliance with court orders," District Judge Stanley Weigel recorded his clear frustration with "orders that have not been obeyed or that have been obeyed following excessive delay." In the same section the Court expressed the view that the top administrative officials at the relevant prisons, the wardens, "while well intentioned, frequently prove unaware of actual events transpiring within the lockup units of their prisons."<sup>11</sup>

Once its appeals had been exhausted, rather than complying, the state strategically rendered *Toussaint* irrelevant through a prison building campaign to first

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<sup>10</sup> I mean uncivilized in two senses. Social theorist, Norbert Elias described the "civilizing process" whereby the rise of strong centralized nation states went along with a reduction of violence and arbitrariness in the exercise of authority at all levels of society. See, Norbert Elias, *The Civilizing Process: The History of Manners* (1978). Some criminologists have argued that contemporary penal trends include a combination of civilizing and uncivilizing processes. John Pratt, "Emotive and Ostentatious Punishment: Its decline and resurgence in modern society," *Punishment and Society*, Vol. 2: 417–439. Courts have also used civilization to describe the "evolving standards of decency" that the Eighth Amendment imposes on governments by banning "cruel and unusual punishments." See, *Rhodes v. Chapman*, 452 U.S. 337 (1981).

<sup>11</sup> *Toussaint v. McCarthy*, 597 F.Supp. 1388, 1408 (1984).

render the court's jurisdiction moot by closing many of the units actually covered by the order and then building a new tier of supermax prison designed to accomplish the exact same control model but with modern infrastructure more readily capable of meeting (but never exceeding) the minimum standards enforced by *Toussaint* and other court decisions.<sup>12</sup> Court management was not the only motivation to build prisons in the California, but the legal battle with prisoners' rights advocates and an increasingly hostile view of the federal courts clearly influenced the timing and character of the prisons built.

A clear example of the influence on California incarceration was the construction of California's giant supermax prison in Pelican Bay (and the parallel repurposing of another large and recent prison to supermax use). With the opening of these giant highly repressive prisons California was able to transfer all of the *Toussaint* class members to the new prisons and thereby effectively terminate the case. The new prisons were designed to comply with *Toussaint* and other orders while implementing an even harsher version of the total lockdown model that California had only been rehearsing in San Quentin and Folsom.

With new prisons, presumably, the problems presented to the courts in *Toussaint* of prisoners locked down in conditions both repulsive to modern sensibilities and unhealthful, e.g., the constant smell and sometime presence of human fecal matter, had been resolved by modern construction and plumbing. But in terms of its essential elements, California through its giant investment in supermax style incarceration was embracing a model of "total incapacitation" in which prisoners were assumed to present a high, unchanging risk of violence against which only physical isolation was deemed a reliable protection.<sup>13</sup> California prisons had since World War II been the site of multiple influences, including the federal government, scientific research, and progressive legislation, encouraging a more humane and optimistic view of prisoners. In the era of mass incarceration, securely in place by the end of *Toussaint*, judicial demands had become the major normative force preventing degrading treatment of prisoners.

The result of this experiment in prisons where constitutional norms were the sole source of restraint on the repression of prisoners was revealed a decade

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<sup>12</sup> The research of criminologist Keramet Reiter turned up clear evidence that *Toussaint* and other cases were on the minds of prison managers given primary responsibility for determining how to spend the vast new sums of borrowed money flowing to the state to build new prisons beginning then. Keramet Reiter, *The Most Restrictive Alternative: The Origins, Functions, Control, and Ethical Implications of the Supermax Prison, 1976–2010* (dissertation, UC Berkeley, JSP Program 2012).

<sup>13</sup> See Jonathan Simon, Total Incapacitation: The Penal Imaginary and the Rise of an Extreme Penal Rationale in California in the 1970s, in Malsch, M. & Duker, M.J.A. *Incapacitation: trends and new perspectives*. (2012). Aldershot: Ashgate.



later when another judge in the same federal district court found the new supermax prison at Pelican Bay in violation of the Eighth Amendment on a number of issues. *Madrid v. Gomez*,<sup>14</sup> decided in 1995 declined to hold that confinement in supermax-style incarceration, with near total confinement in a cell (albeit a more modern cell than the ones in San Quentin and Folsom), was inherently “cruel and unusual” punishment, but Judge Thelton Henderson’s lengthy opinion exposed horrific treatment and ordered sweeping changes in the administration of the regime. The court held that mentally ill prisoners could not be held in supermax style isolation due to its clear negative effect on mental health.

Coming nearly a decade after *Toussaint* as California’s prison population continued to soar, *Madrid v. Gomez* was a sobering assessment of where a prison system guided only by the goal of incapacitation and the restraints of the Eighth Amendment was heading. Both facts are, in a sense, evidence of the success of the state’s strategy in defying the courts. For brevity’s sake I will highlight the ways in which the *Toussaint* issues re-emerged in *Madrid*.

A great deal of the focus of the *Toussaint* court was on the inhuman conditions created by locking prisoners down in the archaic confines of 19th century prison cells, often with a cellmate. The ultra modern Pelican Bay state prison had no problem with plumbing or temperature extremes, but the theme of inhumanity re-emerged now in the form of “cell extractions” where prisoners deemed non-compliant were removed from their cells by teams of guards using tasers and other weapons, followed by binding in restraint positions or being caged naked exposed to the northern California weather.

As in *Toussaint*, the failure of health care was a major constitutional violation. Here, however, failure was designed into new prisons built with exacting attention to the violence threat posed by prisoners but with what courts would determine to be “deliberate indifference” respecting the health, mental and physical of prisoners. Judge Henderson described these practices as evidence of “a callous and malicious intent to inflict gratuitous humiliation and punishment and other torture like punishments.”<sup>15</sup>

The court in *Toussaint* had expressed great concern about the lack of due process granted to prisoners facing the potential of prolonged and sometimes indefinite detention in total lockdown conditions to contest the grounds on which they were held. Prisoners in Pelican Bay were provided even less due process with most of them confined on the basis of their identification as a prison gang associate. In both instances the courts largely deferred to the state’s judgments regarding the dangerousness of the particular prisoners in the class despite voicing

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<sup>14</sup> 889 F.Supp. 1146 (N.D. Cal. 1995).

<sup>15</sup> *Madrid v. Gomez*, at 1172.

clear alarm at the measures utilized by the state to control these risks. In both cases courts also maintained this deference despite the perception of systematic resistance to compliance by prison officials that the court noted in *Toussaint* continued in *Madrid* where Judge Henderson complained of a:

“code of silence” at Pelican Bay. As the evidence clearly shows, this unwritten but widely understood code is designed to encourage prison employees to remain silent regarding the improper behavior of their fellow employees, particularly where excessive force has been alleged. Those who defy the code risk retaliation and harassment.<sup>16</sup>

The regime for prisoners in *Toussaint* remained largely improvised and potentially temporary. At Pelican Bay it was a planned and permanent approach consistent with an overall focus on incapacitation. The scale at which California built super-max capacity reflected a clear recognition by prison managers that managing the enlarged California prison population without parole or other inducements would entail a permanent gang threat. By 1995 California’s prison population had reached more than four times its level when *Toussaint* was filed.

### 3 The Road to *Brown v. Plata*

Later the same year that *Madrid v. Gomez* was decided another federal court, this one in the central district of California, decided the first of a series of cases that would culminate in *Brown v. Plata* and the injunction that for the present has effectively ended mass incarceration in California. *Coleman v. Wilson*<sup>17</sup> differed from the start in one very significant sense from *Toussaint v. McCarthy* and *Madrid v. Gomez*. Whereas those cases had dealt with specialized high security units, *Coleman* involved a class of prisoners with serious mental illness that was distributed across the entire California prison system (although many of them had been concentrated in the high security units, itself a sign of the system’s basic problem with recognizing the humanity of prisoners).

The *Coleman* case, like the earlier ones, was strongly contested and, as with the earlier ones, the court found significant violations of the Eighth Amendment requiring profound reforms. The court found that California lacked adequate infrastructure to identify prisoners with mental illnesses, properly diagnose them, prescribe a treatment regime, see that treatment was delivered, screen for

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<sup>16</sup> *Madrid v. Gomez*, at

<sup>17</sup> 912 F.Supp. 1282 (E.D. Cal. 1995) <http://rbgg.com/wp-content/uploads/Coleman-v-Wilson-912-F-Supp-1282-ED-Cal-1995.pdf>.

prisoners whose mental condition was deteriorating, and ultimately prevent suicides by prisoners whose condition had deteriorated.

In 1994 the Supreme Court strengthened the protection for state prison defendants by requiring prisoners to show that defendants had an actual awareness of the objectively cruel and unusual conditions before they could be found to have violated the rights of prisoners. In both *Madrid* and *Coleman* the courts found that the defendants knew about the severe mental health needs of prisoners and were deliberately indifferent to meeting that need. In *Coleman* the district court ordered the state to hire additional mental health professionals and create systems to screen and track mentally ill prisoners.

As a result of the litigation certification of the class of prisoners with mental illness, the scale of the problem of mental illness in state prisons became quantifiable in California for the first time. At the time of the 1995 decision, the court estimated that between 13,000 and 18,000 California prisoners were deemed to have a serious enough mental illness to require treatment in order to prevent degeneration and profound illness. Another 4000 probably met the terms but had not yet been identified.<sup>18</sup> As the courts in *Toussaint* and *Madrid* had, Judge Lawrence Karlton in *Coleman* appointed a special master to assist the parties in implementing the remedies and monitoring compliance.

In 2002 the second part of the *Brown v. Plata* injunction took shape in *Plata v. Davis*,<sup>19</sup> a class action similar to *Coleman* but focusing on the lack of medical care for prisoners with significant illnesses and injuries. The case was brought in the Northern District of California and Judge Henderson, who had decided *Madrid v. Gomez*, was assigned this case as well. This time the state entered into a consent decree, conceding that its prisons lacked adequate personnel or infrastructure to sufficient to prevent pain and suffering the violated the Eighth Amendment. The state agreed to a remedy within three years.

In 2005, finding that the state had failed to make adequate progress on this remedy, Judge Henderson placed the entire prison medical system into receivership while expressing alarm at a “culture of indifference to the humanity of prisoners in California prisons.”<sup>20</sup> The receiver appointed by Judge Henderson had even more power than the special masters appointed in the other cases (who act as advisers leaving the executive authority in the hands of state defendants).

The final step came in 2009 when lawyers for the prisoners returned to court seeking a population cap on California prisons. For much of the previous decade,

<sup>18</sup> *Coleman v. Wilson*, at 1299.

<sup>19</sup> (N.D. Cal. 2002, stipulated agreement) <http://www.clearinghouse.net/chDocs/public/PC-CA-0018-0005.pdf>.

<sup>20</sup> *Plata v. Schwarzenegger*, Findings of Fact and Conclusions of Law Re Appointment of a Receiver, 27.

the California prison system had been operating at effectively 200–300% 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 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 in history, and the first major structural reform order since the *Prison Litigation Reform Act of 1996* (PLRA) came into effect and helped end the era of prison condition lawsuits.<sup>21</sup> Because of one of the PLRA's requirements, a special three-judge court would have to find that prison overcrowding was the cause of the unconstitutional conditions, that removing the overcrowding was necessary to remedying those conditions, and that no other approaches would remedy them before a population reduction order could be imposed. Even if essential to a remedy, the court had to give special weight to the potential impact of any prisoner release on public safety.

The resulting trial and order of the special three-judge court (which included Judge Henderson of the *Plata* case, and Judge Karlton of *Coleman*) put mass incarceration on trial and opened a new chapter in the history of court reform of prisons. The final opinion and order of August of 2009 was a textbook on the pathologies of mass incarceration, summarizing a growing body of expertise (much of it collected during the trial itself) on how to reduce prison populations without increasing crime, and compelling the state to take the first step in decades to trim its reliance on state prison.<sup>22</sup>

The decision marked the return of a theme that has long played an important role in backstopping the humanity of prisons: the fear of prisons as a danger to the health of society. Holding that California's policies of routine imprisonment for low level felonies and parole violations was itself to blame for the state's failure to create constitutionally adequate health conditions in its prisons, the court issued the largest prison population reduction order in history, mandating that California reduce overcrowding to 137% of design capacity, a target that could only practically be achieved by drawing the prison population down by approximately forty-thousand prisoners.

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<sup>21</sup> 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.

<sup>22</sup> *Coleman v. Schwarzenegger; Plata v. Schwarzenegger*, Three-Judge Court, NO. CIV S-90-0520 LKK JFM P, Opinion and Order, August 4, 2009, 6.

The *Coleman/Plata* litigation, running from 1995 until the Supreme Court decision in 2011 affirmed its population cap, marks the middle and possibly end of mass incarceration in California, just as the *Toussaint v. McCarthy* litigation, which began in 1976 and ran until 1991 marked the beginning. The comparison suggests a number of lesser-known and disturbing features of California penal bureaucracy and culture and leaves the prospect of judicially led reform in California penal policy, philosophy and practice shrouded in doubt.

The lockdown regime of total incapacitation, invented in the new *ad hoc* secure housing units and formalized in the supermax style Pelican Bay prison, has metastasized to become a generalized regime. Educational and rehabilitative programming, denied to prisoners in secure housing units, also withered in the general population prisons as population growth outstripped the resources available, and as severe overcrowding eventually absorbed all available space in most prisons that could be allocated to irregular housing units.

Some of the worst effected units were the reception centers, which operated at 300% of design capacity for much of the last decade before the Plata injunction. These were units where incoming prisoners, many of them parole violators back on minor technical violations, often languished for their entire sentence before being released back into the community. Thus, a regime justified as necessary to control the most dangerous prisoners in the system, gradually came to characterize the experience of even those who posed the least risk.

The prison conditions that came to light in *Toussaint* as incompatible with contemporary standards of decency, including the lack of attention to medical and mental health needs were largely the product of older prisons being thrown back into an active role as the high security population, as defined by the state, surged ahead of the overall prisoner boom that was to come. The prison litigation that began with *Madrid* and *Coleman* in 1995 and continued with *Plata* in 2002, revealed that a massive modern prison system had been constructed in the 1980s and 1990s without allowance for the space, infrastructure, and personnel to deliver medical and mental health care to a population they were planning to massively increase with people they could anticipate would have a wide array of serious medical and mental health problems.

California in the 1970s was considered to provide an overall good level of health care to prisoners and medical personnel were plentiful in a system that still considered the “medical model” its operating strategy. The mass incarceration approach that developed in the course of the 1980s largely expelled medicine from its conception of the prison and prison management. This is what led the judges from *Madrid* on to speak of “deliberate indifference” on the part of state defendants to the humanitarian needs of prisoners, and, to an increasingly

strong degree, to question whether California continued to recognize the humanity of prisoners.

Although the state of California changed its formal legal posture briefly during the period of the consent decree in *Plata* in 2002, throughout most of the period 1976 to 2011 it not only sought to litigate out all of the issues challenged by prisoners, but to an alarming degree in both periods adopted a policy of passive aggression, appearing to accept the courts authority while ignoring its mandates and dragging its feet in all required reforms. Perhaps most importantly, during the *Toussaint* case, which may have operated to establish the legal consciousness of the California penal bureaucracy coming as it did during a time of great crisis for that agency, the state adopted a culture in which constitutional legal rights were to be treated as the absolute maximum degree of recognition that prisoners should receive (rather than the absolute minimum). Prisoners, their lawyers, and even the judges have been viewed quite simply as enemies of the state.

Throughout the first litigation cycle the federal district court judges expressed deference to the state's difficult task in managing prisoners the courts largely presumed to be dangerous. While the judges in both *Toussaint* and *Madrid v. Gomez*, expressed some skepticism at the state's rationale for incapacitating prisoners in near total lockdown units, and to some extent reformed procedures, they deferred to the state's policy of incapacitation. During the second cycle, because of the focus on general population prisoners and sick ones at that, the relevant courts were more willing to question the security justifications and ultimately the need for the widespread use of imprisonment at all.

## 4 Conclusion

A look back at *Toussaint* from the perspective of *Brown v. Plata* highlights the danger that California's incarceration friendly political and law enforcement elites will ultimately turn realignment into a new phase of mass incarceration. A look back at the arc of mass incarceration in California and its relationship to litigation suggests that in many ways the intensive litigation over California prisons may have accelerated and clearly did not slow the explosive growth of either prisons or prisoners in California. More alarmingly, combined with a sense of being threatened by violent inmates, the prison bureaucracy internalized litigation as an ongoing war with inmates and designed prisons to be minimally compliant while as punitive as possible.

The reasons for optimism lie in the ways that litigation culminating in *Brown v. Plata* differs from the *Toussaint* litigation. Although the long and much delayed

path of *Coleman* and *Plata* replicated the path of total defiance that California displayed and evolved in the course of the *Toussaint* litigation, the population cap case and the Supreme Court decision affirming it reflect a judicial response to this defiance unlike anything earlier. The three-judge court recognized the problem was not particular prisons but a system of indiscriminate use of imprisonment by California in the management of its felon population.

The court put the state's total incapacitation policies on trial and found they were not convincing. The Supreme Court affirmed this despite numerous technical grounds on which they could have reversed the court and given California more time to address the overcrowding crisis on its terms. Instead, the narrow but passionate majority used words including torture in describing the nature of the Eighth Amendment values offended by California and recognized the political systems failure to respect constitutional obligations.

The fate of realignment itself depends on the courts holding their position against continuing resistance by the administration of Governor Jerry Brown who has indulged in court bashing rhetoric reminiscent of the culture of resistance to recognizing prisoner rights inside California prisons during the arc of mass incarceration. Many counties, precisely the ones who sent a high portion of their low-level felons to state prison during the period of California's prison growth, are already expanding their jail capacity. Other counties, including some of the state's most populous, are investing in enhanced probation, drug treatment, mental health delivery, and other mechanisms that criminologists have long asserted could suppress crime without relying on incarceration.

Whether the overall trend in the state is toward less reliance on incarceration (at the prison or jail level) depends on what the next few years brings in the way of crime trends, jail costs (they will face many of the same health care demands blowing up the state's prison budget), and public reckoning with the consequences of California's extreme version of mass incarceration. A lot also depends on whether the courts are willing to keep the pressure on California to meet the population cap targets on time.