

AN INTERSECTION OF LAW AND ORDER: FEDERAL
COURTS, OVERCROWDED CONDITIONS INSIDE
ALABAMA'S PRISON SYSTEM, AND THE SCOPE OF
POSSIBLE REMEDIAL RELIEF AFTER *BROWN V. PLATA*

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“THE DEGREE OF CIVILIZATION IN A SOCIETY CAN BE JUDGED BY ENTERING
ITS PRISONS.”

—DOSTOEVSKY, *THE HOUSE OF THE DEAD*²

INTRODUCTION

Alabama's prison system currently houses nearly twice as many inmates as it was designed to handle.³ As a result, prison officials pack over 200 inmates into single dormitories without air conditioning or adequate toilet and shower facilities.⁴ These tight living conditions often cause violence amongst inmates, much of which goes unreported.⁵ Moreover, the system suffers from a critical shortage of guards.⁶ Because of understaffing one guard is often responsible for overseeing an entire dormitory, making riots a constant and very real threat.⁷

In 2011, the U.S. Supreme Court upheld a decision by a lower federal court ordering California to release large numbers of inmates due to overcrowding.⁸ Since that time, many have speculated that Alabama's prison system will someday meet a similar fate.⁹ And recently, reports of officer-on-inmate physical and sexual

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² Haywood Burns, *The Black Prisoner as Victim*, 1 BLACK L.J. 120, 120 (1971).

³ Kala Kachmar, *Prisons in Peril (Part 2 of 3): Fear Behind Bars*, MONTGOMERY ADVERTISER, Sept. 15, 2013, available at <http://archive.montgomeryadvertiser.com/article/20130915/NEWS02/309150043/PRISONS-PERIL-Part-2-3-Fear-behind-bars>.

⁴ *Id.* According to former inmates, most dormitories at Stanton Correctional Facility required sixty-eight inmates to share two showers and three toilets, but in one dormitory 360 inmates shared six showers. *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *See id.*

⁸ *Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011).

⁹ *See, e.g.,* Susan Watson, *The Clock is Running Out for Crowded Prisons*, MONTGOMERY ADVERTISER, Sept. 15, 2013, at D4.

abuse at a number of Alabama's prisons have helped to stoke these concerns.¹⁰ Some state officials now fear a flash-back to a time in the 1970s when a federal court declared Alabama's prison system unconstitutional and placed it in receivership.¹¹ Today, this type of order could cost the State as much as \$593 million.¹²

This Comment explores the prospect of future federal court intervention in Alabama's prison system. First, Part I provides a brief history of the early Alabama prison system and discusses federal court involvement in the system during the 1970s. Next, Part II outlines the effects of the Prison Litigation Reform Act on remedial relief available to inmates and surveys the U.S. Supreme Court's interpretations of the Act in *Brown v. Plata*. Then, Part III probes potential constitutional violations in Alabama's present-day penal system by presenting statistical information, discussing recent prison litigation, and examining a report issued by the Department of Justice concerning conditions inside Julia Tutwiler Prison for Women. Finally, Part IV examines the scope of a potential federal remedial order aimed at curing overcrowding in Alabama's current prison system, taking into account the Prison Litigation Reform Act and the U.S. Supreme Court's findings in *Brown v. Plata*.

I. ALABAMA'S PRISON SYSTEM: A TROUBLED PAST

a. *A Brief History of the Alabama Prison System from 1840–1970*

Alabama's prison system opened in 1842 when Wetumpka State Penitentiary received its first inmate—a man sentenced to twenty years for harboring a fugitive slave.¹³ Once fully established, the new prison's population was approximately 99% white and 1% “free blacks.”¹⁴ Originally, the prison was supposed to operate self-

¹⁰ See Sebastian Kitchen, *Prisons in Peril (Part 1 of 3): Hard Time: Alabama Prisons at Risk for Federal Takeover*, MONTGOMERY ADVERTISER, Sept. 8, 2013, available at <http://archive.montgomeryadvertiser.com/article/99999999/NEWS02/399990295/Hard-time-Alabama-prisons-risk-federal-takeover-Part-1-3->.

¹¹ Sebastian Kitchen, *Prisons in Peril: No Quick Fixes for Alabama*, MONTGOMERY ADVERTISER, Sept. 22, 2013, available at <http://archive.montgomeryadvertiser.com/article/99999999/NEWS02/399990322/Prisons-perilPNo-quick-fixes-Alabama>. See generally *Newman v. Alabama (Newman II)*, 466 F. Supp. 628, 635–36 (M.D. Ala. 1979) (placing Alabama's prison system in receivership); *Pugh v. Locke*, 406 F. Supp. 318, 328 (M.D. Ala. 1976) (declaring conditions in Alabama's prisons unconstitutional).

¹² Kitchen, *supra* note 11.

¹³ ALA. DEP'T OF CORR., *History of the ADOC*, DOC EMPLOYEE HANDBOOK, available at <http://www.doc.state.al.us/History.aspx> (last visited Jan. 24, 2014).

¹⁴ *Id.* Laws during that time allowed owners to punish “enslaved blacks” outside of the penal system. *Id.*

sufficiently, but it quickly required taxpayer support after its manufacturing industry failed to bring in necessary funds to support itself.¹⁵ By 1846, Alabama allowed private individuals to lease the prison's facilities and the convicts who worked in the facilities.¹⁶

After the Civil War, the makeup of Alabama's prison system shifted drastically. By 1866, African-Americans constituted 99% of the prison system's population, and the State had enacted laws that allowed private individuals to lease convict labor outside of prison facilities.¹⁷ The State passed such laws—at least in part—because it lacked necessary funds to rebuild prisons destroyed during the war, and it saw leasing as a way to relieve overcrowding.¹⁸ As a result, companies often leased inmates to repair railroads, mine coal and iron, and work in timber and turpentine production.¹⁹ The system created profits for the State and helped fuel Alabama's industrial expansion, but it was also marked by numerous reports of “cruelty and barbarism.”²⁰ For example, prisoners often slept chained together on wooden benches in temporary huts while dogs maintained security.²¹ If a convict attempted to escape, guards generally shot him on sight or returned him to the prison camp to be strung up by his thumbs.²² Conditions were so inhumane that an Alabama physician in 1883 “estimated that most convicts died within three years.”²³

Throughout the early 1900s, conditions in Alabama prisons became only marginally better. Slowly, the State erected a handful of new prisons with slightly better sleeping, dining, and bathing facilities.²⁴ In 1923, the State passed legislation that made it unlawful for anyone to lease a convict; however, the new legislation did not preclude convicts from working in “state operated” mines and labor camps.²⁵ Consequently, hard labor practices continued in the

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Christopher R. Adamson, *Punishment After Slavery: Southern State Penal Systems, 1865-1890*, 30 SOC. PROBS. 555, 564 (1983).

¹⁹ ALA. DEP'T OF CORR., *supra* note 13.

²⁰ *See id.*

²¹ Adamson, *supra* note 18, at 566. Also, convicts were often kept in “rolling cages” while working on the railroads. *Id.*

²² *Id.* This type of punishment was especially prevalent when African-American inmates attempted to escape. *See id.* at 555–56.

²³ *Id.* at 566.

²⁴ *See* ALA. DEP'T OF CORR., *supra* note 13.

²⁵ *Id.*

prison system for years.²⁶ In fact, shortly after passing the legislation, the State established the now-infamous “road camps,” where prisoners worked to build new state and national road systems.²⁷

By the late 1950s, only eight states had a higher prison population than Alabama, and only the District of Columbia had a higher percentage of prisoners per capita.²⁸ So, with the prison system already stretched to capacity and the population increasing at approximately 10% per year, prison overcrowding was a prevalent issue.²⁹ In fact, then-Governor Jim Folsom questioned openly why Alabama had so many prisoners, and some commentators began calling for either population reduction or new prison construction.³⁰ Nonetheless, as the system progressed through the 1960s and into the 1970s it remained notoriously overcrowded and became increasingly dangerous.³¹

b. *McCray v. Sullivan: Overcrowding and Rumblings of a Federal Intervention*

As circumstances inside Alabama prisons deteriorated and prisoners began filing civil rights actions challenging the conditions of their confinement,³² the stage was set for a collision between the federal courts and the Alabama prison system. *McCray v. Sullivan*,³³ in some ways, marked the opening salvo in that collision. In *McCray*, Judge William Brevard Hand examined whether Alabama violated prisoners’ constitutional rights by confining them in

²⁶ See *id.* Notably, in 1927, the Board of Administration for the Convict Department removed white convicts from mine labor and employed them in cotton mills. *Id.* Evidently, no such quarter was given to African-American inmates. See *id.*

²⁷ *Id.*

²⁸ J.M. McCullough, *Alabama Prisons Today*, 19 ALA. LAW. 380, 382 (1958). Perhaps even more significant, Alabama’s prison population—5,400 inmates—was more than double prison populations in many other southern states at the time. *Id.* at 381–82. Mississippi had a prison population of 2,000 inmates; Arkansas had 1,700 inmates; South Carolina had 1,800 inmates; Tennessee had 2,700 inmates. *Id.* at 382.

²⁹ See *id.*

³⁰ *Id.*

³¹ Rick Harmon, *Prisons in Peril: Alabama Trial Had Huge Impact on U.S. Prisons*, MONTGOMERY ADVERTISER, Sept. 15, 2013, available at <http://archive.montgomeryadvertiser.com/article/99999999/NEWS02/399990298/PRISONS-PERIL-Alabama-trial-had-huge-impact-U-S-prisons> (discussing conditions in Alabama prisons before federal court intervention in the 1970s).

³² See, e.g., *Lake v. Lee*, 329 F. Supp. 196, 197 (S.D. Ala. 1971) (African-American inmates sought declaratory and injunctive relief to remedy alleged Eighth Amendment violations).

³³ *McCray v. Sullivan (McCray II)*, 399 F. Supp. 271 (S.D. Ala. 1975).

severely overcrowded and understaffed prisons.³⁴ Soon, this issue would ignite a firestorm of legal action.

Initially, Robert McCray sought injunctive relief in federal court under 42 U.S.C. § 1983³⁵ alleging that “homosexuals [in prison] frequently are the cause of violent assaults causing injury and death and that prison authorities condone many such occurrences.”³⁶ The district court, however, ruled adversely to McCray, and he appealed to the Fifth Circuit Court of Appeals.³⁷ On appeal, the Fifth Circuit combined McCray’s action with appeals from other prison related claims and affirmed in part, reversed in part, and remanded in part the district court’s decisions.³⁸ Specifically, on remand the Fifth Circuit ordered the district court to examine whether Alabama prison practices led to constitutional violations by exacerbating violence, and if so, to determine what corrective measures might be appropriate.³⁹ McCray then petitioned the district court to allow the suit to proceed as a class action, to which the court agreed.⁴⁰

On remand, Judge Hand first noted that Alabama prison officials are “handicapped in the implementation of their policies [to prevent violence] due to severely overcrowded institutions and a dire shortage of custodial personnel.”⁴¹ At the time of the decision, the four major male prisons in Alabama had a design capacity of 2,212 inmates but housed 3,698 inmates.⁴² Additionally, the prisons were understaffed by 309 personnel, causing “on any given shift a single guard [to have] the responsibility of overseeing and controlling approximately two hundred inmates.”⁴³ As a result, Judge Hand found that guards were less likely to observe and thwart vio-

³⁴ *Id.* at 275–76.

³⁵ 42 U.S.C. § 1983 (2012). Section 1983 provides a private cause of action for violations or “deprivation of any rights, privileges, or immunities secured by the Constitution.” *Id.*

³⁶ *McCray v. Sullivan (McCray I)*, 509 F.2d 1332, 1334 (5th Cir. 1975) (alteration in original).

³⁷ *Id.*

³⁸ *Id.* at 1337.

³⁹ *Id.* at 1334. The court also remanded issues regarding prisoner mail, punitive isolation, and access to courts for further consideration by the district court. *Id.* at 1335–37.

⁴⁰ *McCray II*, 399 F. Supp. at 273–74, 277.

⁴¹ *Id.* at 274.

⁴² *Id.* Hence, the prison system was at 167% capacity with respect to its four major male institutions. *See id.* at 274.

⁴³ *Id.* at 275.

lence in the prisons.⁴⁴ Moreover, the judge noted that the lack of space caused by overcrowding often prohibited guards from segregating dangerous inmates.⁴⁵

Somewhat cautiously, Judge Hand ultimately found that violence caused by overcrowding and understaffing in Alabama prisons constituted an Eighth Amendment violation of the plaintiff class's rights.⁴⁶ In his findings, the judge largely blamed the State Legislature for allowing "a legitimate function of its government to so deteriorate that Constitutional requirements are not being met and the rights of basic humanity are being violated."⁴⁷ Although Judge Hand stated he was prepared to enforce his findings through "appropriate Orders," he instead delayed any injunctive relief and urged the State Legislature to rectify the problem.⁴⁸ Hence, Judge Hand did not directly intervene to alleviate constitutional violations caused by overcrowding, but he did place the State on strong notice regarding the federal judiciary's obligation to effectuate the constitutional treatment of prisoners.⁴⁹

c. *Pugh v. Locke: A Federal Judge Says, "No More!"*

In 1973, inmates severely beat fellow inmate, Jerry Lee Pugh, during a prison riot at G.K. Fountain Correctional Center in Atmore, Alabama.⁵⁰ In response, Pugh brought suit against the State and various state officials.⁵¹ Pugh's suit, which alleged that the State

⁴⁴ *Id.* Inmates actually testified that guards often observed violence and homosexual activity but condoned the acts by failing to break them up. *McCray II*, 399 F. Supp. at 275. However, Judge Hand rejected this notion. *Id.*

⁴⁵ *Id.*

⁴⁶ *See id.* In doing so, Judge Hand noted that prison officials are better trained to manage prisons than the courts and should be given broad latitude to do so. *Id.* Nonetheless, the judge found that the current state of Alabama prisons created inhumane conditions. *See id.*

⁴⁷ *McCray II*, 399 F. Supp. at 276. Judge Hand lamented,

It is distressing to see that the Alabama judicial system is carrying the brunt of the public complaint about the breakdown in law and order. This is particularly so when past history demonstrates that it has been the Legislature that has refused to provide adequate facilities to house those who violate the law and must be incarcerated, and to provide the means for segregating or discriminating between and among the more violent criminal, the recidivist, and those most likely to cause repeat performances by new inmates confined under present conditions, but that is the condition that actually exists.

Id.

⁴⁸ *Id.*

⁴⁹ *Id.* at 276-77.

⁵⁰ Harmon, *supra* note 31.

⁵¹ *Id.*

failed to adequately protect inmates from violence, was filed on behalf of “all inmates of the state penal system who have been or may be confined to G.K. Fountain Correctional Center.”⁵² Later, in 1975, a court consolidated the suit with two other class-action suits brought by inmates.⁵³ One of those suits dealt with inadequate health care for prisoners and the other dealt with inmates’ rights to access rehabilitative services while incarcerated.⁵⁴ All of the suits sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 for violations of the prisoners’ Eighth and Fourteenth Amendment rights.⁵⁵

After consolidation, the suits were tried before district Judge Frank M. Johnson.⁵⁶ Eventually, the trial ended “with the admission by defendants’ lead counsel, in open court, that the evidence conclusively established aggravated and existing violations of plaintiffs’ Eighth Amendment rights.”⁵⁷ Then-Attorney General, Bill Baxley, would later note that, in light of the indefensible practices taking place in the Alabama prison system, the State simply conceded to constitutional violations “so that it could enter the remedy phase.”⁵⁸ According to Baxley, “The conditions [in Alabama prisons] were shocking.”⁵⁹

In *Pugh*, Judge Johnson released a memorandum opinion that meticulously documented the gross constitutional inadequacies in Alabama prisons and ultimately marked the zenith of federal court involvement in the State’s prison system. But first, Judge Johnson found the prisoners’ suits maintainable as class actions and certified a class of “all persons presently confined by the Alabama Board of Corrections or who may be so confined in the future.”⁶⁰ The judge also found, based upon the State’s refusal to improve conditions inside Alabama prisons, that declaratory and injunctive relief were appropriate remedies for the admitted violations.⁶¹

Next, Judge Johnson noted that prison overcrowding caused and exacerbated all of the constitutional violations within the State prison system.⁶² According to trial testimony, inmates in quarantine

⁵² *Pugh v. Locke*, 406 F. Supp. 318, 321–22 (M.D. Ala. 1976).

⁵³ Harmon, *supra* note 31.

⁵⁴ *Id.*

⁵⁵ *Pugh*, 406 F. Supp. at 321.

⁵⁶ See Harmon, *supra* note 31.

⁵⁷ *Pugh*, 406 F. Supp. at 322.

⁵⁸ Harmon, *supra* note 31.

⁵⁹ *Id.*

⁶⁰ *Pugh*, 406 F. Supp. at 321.

⁶¹ *Id.*

⁶² *Id.* at 323.

at Kilby Corrections Facility during that time had to sleep on mattresses on floors and next to urinals because of extreme overcrowding.⁶³ Further, bunks in many prisons were packed together so tightly that there was no walking space in between them, making security and sanitation almost impossible to maintain.⁶⁴ Such conditions added stress to a prison system that was already dilapidated and unsanitary.⁶⁵ In most facilities, prisoners slept on “[o]ld and filthy cotton mattresses [which led] to the spread of contagious diseases and body lice.”⁶⁶ And in at least one facility, over 200 men shared one functioning toilet.⁶⁷ Also, many windows were broken and unscreened, and testimony revealed that roaches, mosquitoes, flies, and other vermin were abundant.⁶⁸ Insects even infested food storage units.⁶⁹ In fact, after touring Alabama’s four major male prisons, one United States public health officer testified that the facilities were “wholly unfit for human habitation according to virtually every criterion used for evaluation by public health inspectors.”⁷⁰

Perhaps even more damning were the court’s findings regarding violence within Alabama prisons. At that time, the State’s prisoner-classification system was dysfunctional at best.⁷¹ The State had made efforts to implement a better classification process, but as Judge Johnson noted, overcrowding and understaffing had rendered those efforts predominately fruitless.⁷² Because of the broken system, most inmates were assigned to particular dorms based upon available space, not likelihood of aggression or special needs.⁷³ Moreover, an inordinate number of prisoners received maximum security classifications, and inmates with severe mental disorders frequently entered the system unchecked.⁷⁴ Also, new

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See id.*

⁶⁶ *Pugh*, 406 F. Supp. at 323.

⁶⁷ *Id.*

⁶⁸ *Id.* “A public health expert testified that he found roaches in all stages of development—a certain indicator of filthy conditions. This gross infestation is due in part to inadequate maintenance and housekeeping procedures, and in part to the physical structure of the buildings themselves.” *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 323–24.

⁷¹ *See Pugh*, 406 F. Supp. at 324. Judge Johnson stated that the degree to which lack of a proper prisoner classification system impedes the proper function of a penal system cannot be overstated. *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *See id.*

inmates awaiting classification were restricted to overcrowded living spaces and denied access to visitors and recreation.⁷⁵ Judge Johnson found that a lack of proper classification allowed violent inmates to freely roam the prisons and prey on younger, weaker, and more timid prisoners.⁷⁶ Incidentally, robbery, rape, extortion, and assault were everyday occurrences at the State's prisons.⁷⁷

Guard understaffing further exacerbated the violence. Testimony revealed that the four major male facilities needed a minimum of 692 guards but operated with only 383.⁷⁸ As a result, Judge Johnson observed that “[g]uards rarely enter[ed] the cell blocks and dormitories, especially at night when their presence [was] most needed.”⁷⁹ Also, personal interaction with inmates was almost impossible because guards spent most of their time trying to maintain control or protect themselves.⁸⁰ The understaffing created “rampant violence and jungle atmosphere” throughout the prison system.⁸¹ Most inmates carried a weapon of some sort for self-protection, and statistics of inmate-on-inmate violence were virtually impossible to fully ascertain.⁸² In chilling testimonial evidence, one twenty-year-old inmate explained that “he was raped by a group of inmates on the first night he spent in an Alabama prison. On the second night he was almost strangled by two other inmates who decided instead that they could use him to make a profit, selling his body to other inmates.”⁸³ Judge Johnson found that such violence in Alabama prisons created “an environment that not only makes it impossible for inmates to rehabilitate themselves but also makes debilitation inevitable.”⁸⁴ Ultimately, the judge attributed the violence to two basic underlying causes—overcrowding and understaffing.⁸⁵

In light of the evidence before him, Judge Johnson declared he had a duty to require the State “to remedy the massive constitutional infirmities which plague Alabama’s prisons.”⁸⁶ To that end, the judge noted that the U.S. Supreme Court has outlined three

⁷⁵ *Id.*

⁷⁶ *Pugh*, 406 F. Supp. at 324.

⁷⁷ *Id.*

⁷⁸ *Id.* at 325.

⁷⁹ *Id.* Judge Johnson also noted that guards often used inmates to control other inmates, which led to blackmail, bribery, and extortion. *Id.*

⁸⁰ *Id.*

⁸¹ *Pugh*, 406 F. Supp. at 325.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 326.

⁸⁵ *See id.* at 325.

⁸⁶ *Id.* at 328.

legitimate functions of a penal system: deterrence, rehabilitation, and institutional security.⁸⁷ Penal policies that fail to serve one of those valid functions cannot stand.⁸⁸ And according to Judge Johnson, the living conditions inside Alabama prisons at that time lacked a reasonable relationship to legitimate penological interest.⁸⁹ Instead, they created an atmosphere “in which inmates [were] compelled to live in constant fear of violence, in imminent danger to their physical well-being, and without opportunity to seek a more promising future.”⁹⁰ Accordingly, Judge Johnson condemned the State’s prison practices as violative of the Eighth and Fourteenth Amendments.⁹¹

Next, Judge Johnson issued a comprehensive injunctive order requiring the State to meet minimum constitutional standards for inmates.⁹² Importantly, the order required authorities to reduce institutional populations to design capacity and prohibited the prison system from receiving new inmates until it complied with population limits.⁹³ Additionally, the order mandated that the State improve living conditions and health care, make upgrades to facilities, employ an adequate custodial staff in compliance with minimum standards set by the court,⁹⁴ reduce violence, improve vocational and educational training, and fulfil a host of additional requirements.⁹⁵ Judge Johnson also put the State on notice that failure to comply with the order would “necessitate the closing of those several prison facilities herein found to be unfit for human confinement.”⁹⁶ And he made clear that lack of funding by the Alabama Legislature would not serve as an excuse for non-compliance by stating:

⁸⁷ *Pugh*, 406 F. Supp. at 328 (citing *Pell v. Procunier*, 417 U.S. 817, 822–23 (1974)).

⁸⁸ *Id.*

⁸⁹ *Id.* at 329.

⁹⁰ *Id.*

⁹¹ *Id.* at 329–30.

⁹² *Id.* at 331–32.

⁹³ *Pugh*, 406 F. Supp. at 332. The judge did allow the state to return escaped inmates or parole violators to prisons. *Id.*

⁹⁴ Judge Johnson set minimum staff levels as follows: Draper-184; Kilby-171; Fountain-178; Holman-159. *Id.* at 335. In all, this would have increased the total custodial staff at the state’s four major prisons to 692 employees. *See id.*

⁹⁵ *See id.* 332–35. The order was extremely inclusive and specific. The additional requirements were outlined as the minimum number of working toilets for inmates; rules for fighting infractions; the amount of living space the state had to provide each inmate (sixty square feet); policies for correspondence and visitation; quality of prison food; where guards should be stationed inside prisons; and many additional details. *Id.*

⁹⁶ *Id.* at 331.

[A] state is not at liberty to afford its citizens only those constitutional rights which fit comfortably within its budget. The Alabama Legislature has had ample opportunity to make provision for the state to meet its constitutional responsibilities in this area, and it has failed to do so. It is established beyond doubt that inadequate funding is no answer to the existence of unconstitutional conditions in state penal institutions.⁹⁷

Cautiously, the judge also recognized that prisons should not be run as “hotels or country clubs,” but he rejected the notion that “responsible state officials, including the Alabama Legislature, can be allowed [to use that argument] to operate prison facilities that are barbaric and inhumane.”⁹⁸ Thus, Judge Johnson intervened in the State prison system in a way that no federal judge had previously done,⁹⁹ and he unequivocally ordered the State to cleanse its penal institutions of ubiquitous constitutional violations.¹⁰⁰

d. *State Action After Pugh: The Tortoise State*

Immediately following *Pugh*, Alabama officials took little action to improve prison conditions.¹⁰¹ Instead, then-Governor George Wallace accused Judge Johnson of trying to turn Alabama’s prisons into “luxury hotels” and the State legislature largely ignored the problems outlined in Judge Johnson’s decree.¹⁰² Thus, by 1979 Judge Johnson was fed up with Alabama’s complacency.¹⁰³ The

⁹⁷ *Pugh*, 406 F. Supp. at 330.

⁹⁸ *See id.* at 331.

⁹⁹ *See* Harmon, *supra* note 31.

¹⁰⁰ *See Pugh*, 406 F. Supp. at 331–35.

¹⁰¹ *See* Harmon, *supra* note 31.

¹⁰² *See id.* The State did, however, appeal to the Fifth Circuit, which affirmed the order but modified some of its requirements. *See Newman v. Alabama (Newman I)*, 559 F.2d 283, 287–92 (5th Cir. 1977), *rev’d in part sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978). Importantly, the circuit court left requirements for population reduction and custodial staff increases untouched. *See id.* However, the Fifth Circuit modified requirements for rehabilitative programs, housing, visitation, and prisoner classification because it felt that the district court exceeded its remedial powers by not implementing less intrusive but equally effective measures. *See id.* at 288–92. The circuit court also found that the injunction should not apply to the Alabama governor because he played no role in day to day prison operations. *Id.* at 291–92. Later, the United States Supreme Court granted certiorari to determine whether the Eleventh Amendment barred enforcement of the injunction against the State of Alabama and the Alabama Board of Corrections. *Pugh*, 438 U.S. at 783 n.2. In a short opinion, the Court held that the Eleventh Amendment did bar the two parties and remanded the case accordingly. *Id.* at 782. However, the Court’s ruling had no real impact on the effectiveness of relief because the injunction was still effective against state officers and agency heads. *Id.* 782–83 (Stevens, J., dissenting).

¹⁰³ *See* Harmon, *supra* note 31.

judge found that the State reduced prison populations to required levels, but only by backlogging some 1,800 inmates in city and county jails.¹⁰⁴ This created overcrowding in the smaller jails and spawned unconstitutional living conditions in those facilities.¹⁰⁵ Additionally, evidence showed that robbery, rape, and assault remained constant threats inside Alabama prisons, and the State made no attempt to curb violent behavior amongst inmates.¹⁰⁶ Problems also persisted with living conditions, health care, staffing levels, and the prisoner classification system.¹⁰⁷ Judge Johnson stated, "Time does not stand still, but the Board of Corrections and the Alabama Prison System have for six years. Their time has now run out."¹⁰⁸ With that, the judge appointed newly-elected Governor Fob James as Receiver for the prison system¹⁰⁹ and charged him with promptly implementing remedial measures.¹¹⁰

Under Governor James's leadership, Alabama made great strides towards improving its prisons.¹¹¹ Governor James eventually convinced the Alabama Legislature to build several new institutions and to appropriate more funding to the prison system.¹¹² Still, a number of problems continued. For instance, as part of a consent decree between the State and the district court, the State was supposed to periodically reduce the number of state inmates held in county jails.¹¹³ When this did not happen, a district judge specifically named 400 inmates and ordered the Alabama Department of Corrections to release the prisoners.¹¹⁴ The Eleventh Circuit Court of Appeals later vacated this order because prisoners already possessed a remedy through the consent decree, which was enforceable through the court's contempt power.¹¹⁵ However, the situation

¹⁰⁴ *Newman v. Alabama (Newman II)*, 466 F. Supp. 628, 630 (M.D. Ala. 1979).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 632. "The Board has not taken the first steps to curb this pattern of violence which makes a mockery of the Eighth Amendment's protection against cruel and unusual punishment." *Id.*

¹⁰⁷ *Id.* at 630-35.

¹⁰⁸ *Id.* at 635.

¹⁰⁹ Notably, Governor Fob James asked for appointment as Receiver on his own volition. Harmon, *supra* note 31. Many have since praised Governor James's efforts to improve the prison system and attribute the system's eventual progress to Governor James's commitment. *Id.*

¹¹⁰ *Newman II*, 466 F. Supp. at 636-38.

¹¹¹ See Harmon, *supra* note 31.

¹¹² *Id.*

¹¹³ *Newman v. Alabama (Newman III)*, 683 F.2d 1312, 1315 (11th Cir. 1982).

¹¹⁴ *Id.* at 1316.

¹¹⁵ *Id.* at 1321.

illustrated the ever-tedious relationship between Alabama prisons and the federal courts.

As a result of federal court intervention, capacity levels in state prisons ultimately increased from 3,000 beds to around 10,000 beds, and the state stifled, if not solved, a number of other major problems.¹¹⁶ Nevertheless, overall prisoner treatment remained a serious concern. For example, in 1995 the State reintroduced the chain gang.¹¹⁷ Under that program, guards chained prisoners together in five-man groups where they worked twelve to thirteen hours per day for six days of the week.¹¹⁸ If a prisoner refused to work or talked back to guards, the guards chained him to a “hitching post” where he stood exposed to the elements for as long as ten hours.¹¹⁹ In at least one case, a guard chained an inmate to the hitching post for ten hours after the inmate suffered a seizure because the guard thought the inmate was refusing to work.¹²⁰ Eventually, a federal magistrate judge held that the hitching post constituted a violation of the Eighth Amendment and recommended a permanent injunction to keep the State from using the device.¹²¹ Yet, the fact that the State chose to use the hitching post as recently as the mid-1990s illustrates its general willingness to flirt with the line between constitutional and unconstitutional punishment. And, in some ways, use of the hitching post succinctly sums up Alabama’s historical approach to inmate treatment.

¹¹⁶ See Harmon, *supra* note 31.

¹¹⁷ Wendy Imatani Peloso, *Les Miserables: Chain Gangs and the Cruel and Unusual Punishments Clause*, 70 S. CAL. L. REV. 1459, 1468 (1997).

¹¹⁸ *Id.* at 1468–69.

¹¹⁹ *Id.* at 1469.

¹²⁰ *Id.* at 1470. Inmate stories about the hitching post illustrated barbarism. In another case, “an inmate testified that after he defecated in his pants while tied to the hitching post, he was left to hang by the bar for four and one-half hours.” *Id.* at 1469.

¹²¹ *Id.* at 1471. The Southern Poverty Law Center brought suit to enjoin the state from shackling prisoners together, using the hitching post, failing to provide toilet facilities, and denying visitation. Peloso, *supra* note 117, at 1470. Following the suit, prisoners worked fewer days of the week, and the state dispensed of the hitching post; however, prisoners now had to work in barbed-wire enclosures where they hammered large rocks into smaller rocks. *Id.* at 1471.

II. THE CONTEMPORARY APPROACH: DEFINING EQUITABLE REMEDIES IN PRISON LITIGATION TODAY

a. *The Prison Litigation Reform Act: Congress Tightens the Screws*

Between 1985 and 1995 civil rights actions filed by prisoners doubled nationwide.¹²² In fact, by the mid-1990s, with more than 40,000 suits filed annually, prison litigation “accounted for more than 13% of all civil cases filed in the federal district courts.”¹²³ Perhaps even more striking, the estimated cost of these inmate lawsuits was in the neighborhood of \$81 million.¹²⁴ In response, Congress passed the Prison Litigation Reform Act¹²⁵ (PLRA) in 1996.¹²⁶ With the PLRA, Congress substantially altered the law of procedure and remedies in federal court prison litigation.¹²⁷

Notably, Congress designed the PLRA purportedly “to provide reasonable limitations on the remedies available in lawsuits concerning prison conditions.”¹²⁸ Under the PLRA, any form of prospective relief related to prison conditions must be narrowly drawn, must extend no further than necessary to correct the violation of the federal right, and must be the least intrusive means necessary to correct the violation.¹²⁹ Furthermore, the PLRA lays out a laundry list of stipulations which courts must follow before remedying a civil rights violation by releasing prisoners.¹³⁰ Amongst these limitations, the PLRA states that a court may only release prisoners if: 1) the court previously entered an order for less intrusive relief and that order failed to provide relief; 2) the defendant had a reasonable amount of time to comply with the previous order; 3) a three-judge court is convened; and 4) the three-judge court finds that overcrowding is the primary cause of the civil rights violation and that “no other relief will remedy the violation of the Federal right.”¹³¹ Also, the PLRA specifically states that a court may not use its reme-

¹²² Denise M. Pennick, *Limitations on Relief; Prisoner Litigations*, HAW. B. J., Sept. 1997, at 6.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ 18 U.S.C. § 3626 (2012).

¹²⁶ Pennick, *supra* note 122, at 6.

¹²⁷ Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1627 (2003).

¹²⁸ Pennick, *supra* note 122, at 9–10 (quoting *Plyler v. Moore*, 100 F.3d 365, 369 (4th Cir. 1996)) (internal quotation marks omitted).

¹²⁹ 18 U.S.C. § 3626(a)(1)(A).

¹³⁰ *See id.* § 3626(a)(3).

¹³¹ *Id.*

dial powers to order the construction of prisons or a hike in taxes.¹³²

Between 1995 and 1997, the number of civil rights actions filed by inmates in federal district courts declined by 33%.¹³³ Additionally, by the early 2000s, federal courts spent an estimated \$20 million less per year on prisoner litigation than before passage of the PLRA.¹³⁴ Still, there is reason for skepticism regarding the PLRA's overall success. Arguably, the PLRA has "imposed new and very high hurdles so that even constitutionally meritorious cases are often thrown out of court."¹³⁵ In addition, provisions in the legislation, combined with other outside factors, may reduce inmates' ability to obtain adequate legal representation.¹³⁶ Hence, there is debate as to whether the PLRA blocks a substantial number of inmate-initiated suits that raise genuine constitutional concerns.¹³⁷

b. Brown v. Plata: The U.S. Supreme Court Weighs in

In *Brown v. Plata*,¹³⁸ the United States Supreme Court applied the PLRA and examined the scope of a federal court's powers to remedy prison overcrowding.¹³⁹ The Court's opinion in *Brown* was the culmination of two separate class action suits in two federal district courts—one filed on behalf of prisoners with serious mental disorders and one filed on behalf of prisoners with serious medical conditions.¹⁴⁰ Both suits alleged violations of prisoners' Eighth Amendment rights.¹⁴¹

The first of the suits, *Coleman v. Brown*, was filed in 1990.¹⁴² After a trial in 1995, a district court found "overwhelming evidence of the systematic failure to deliver necessary care to mentally ill inmates' in California prisons."¹⁴³ The court also found that California's prisons were severely understaffed.¹⁴⁴ Consequently, mentally ill inmates often suffered for extended periods of time—sometimes years—without receiving adequate mental care.¹⁴⁵ Based upon its

¹³² *Id.* § 3626(a)(1)(C).

¹³³ Schlanger, *supra* note 127, at 1634.

¹³⁴ *See id.* at 1643.

¹³⁵ *Id.* at 1644.

¹³⁶ *Id.*

¹³⁷ *See id.*

¹³⁸ 131 S. Ct. 1910 (2011).

¹³⁹ *Id.* at 1922–23.

¹⁴⁰ *Id.* at 1922.

¹⁴¹ *See id.*

¹⁴² *Id.* at 1926.

¹⁴³ *Id.* (quoting *Coleman v. Wilson*, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995)).

¹⁴⁴ *Brown*, 131 S. Ct. at 1926.

¹⁴⁵ *Id.*

findings, the court appointed a Special Master to monitor the State's implementation of a remedial action plan aimed at curing the constitutional violations.¹⁴⁶ Nevertheless, twelve years later, the Special Master indicated that mental health care in California prisons was worsening as a result of overcrowding.¹⁴⁷ According to the Special Master, "[A] rise in [prison] population had led to greater demand for care, and existing programming space and staffing levels were inadequate to keep pace."¹⁴⁸

The other suit, *Brown v. Plata*, began in 2001 and involved prisoners with serious medical conditions who complained of inadequate health care in California prisons.¹⁴⁹ Initially, California conceded to violations of the prisoner class's Eighth Amendment rights and stipulated to a remedial injunction.¹⁵⁰ However, the State ultimately failed to comply with the injunction and the court appointed a Receiver to direct remedial efforts.¹⁵¹ During proceedings, the district court found that "on average, an inmate in one of California's prisons needlessly dies every six to seven days due to constitutional deficiencies in the [prison system's] medical delivery system."¹⁵² It also found that prison medical facilities were understaffed, medical personnel were often inept, and many facilities lacked adequate medical equipment.¹⁵³ Later, in 2008, the Receiver submitted a report describing continued deficiencies in prison

¹⁴⁶ *See id.* at 1926, 1929–30.

¹⁴⁷ *Id.* at 1926.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Brown*, 131 S. Ct. at 1926.

¹⁵¹ *Id.*

¹⁵² *Id.* at 1927 (internal quotation marks omitted) (citation omitted). The district court also made specific findings of neglect. *Id.* The court illustrated one such finding as follows:

[A] San Quentin prisoner with hypertension, diabetes and renal failure was prescribed two different medications that actually served to exacerbate his renal failure. An optometrist noted the patient's retinal bleeding due to very high blood pressure and referred him for immediate evaluation, but this evaluation never took place. It was not until a year later that the patient's renal failure was recognized, at which point he was referred to a nephrologist on an urgent basis; he should have been seen by the specialist within 14 days but the consultation never happened and the patient died three months later.

Id. (alteration in original) (internal quotation marks omitted).

¹⁵³ *Id.* The court also found that medical equipment was often not disinfected in accordance with prescribed standards. *Brown*, 131 S. Ct. at 1927.

medical care and citing chronic overcrowding and understaffing as the primary sources of the deficiencies.¹⁵⁴

As a result of the separate reports on overcrowding, both plaintiff classes believed that a decrease in prison population was the only way to remedy the constitutional violations in California's prison system.¹⁵⁵ Accordingly, the plaintiffs in both suits moved their respective district courts to convene a three-judge panel with the authority to order a population reduction under the PLRA.¹⁵⁶ Both courts granted the request, and the cases were consolidated for further proceedings before a single three-judge court.¹⁵⁷

After fourteen days of testimony, the three-judge panel found that California continually violated prisoners' Eighth Amendment rights by failing to provide adequate mental and physical health care, and that overcrowding precipitated the constitutional violations.¹⁵⁸ As a result, the panel ordered California to reduce its prison population from near 200% of the prison system's design capacity to 137.5% design capacity.¹⁵⁹ However, the court did not explicitly tell the State how to achieve the reduction.¹⁶⁰ The judges instead "ordered the State to formulate a plan for compliance and submit its plan for approval by the court."¹⁶¹ Thus, the State could comply with the order in a number of ways, including building new prisons.¹⁶² Absent such construction, however, the order effectively required the State to release between 38,000 and 46,000 prisoners.¹⁶³ Not surprisingly, California quickly appealed the order to the United States Supreme Court, and the Court granted certiorari to determine whether the three-judge panel's order was in accordance with the requirements of the PLRA.¹⁶⁴

¹⁵⁴ *Id.* According to the Receiver, overcrowding caused regular "crisis situations" in California prisons that took time away from implementing remedial efforts. *Id.* Moreover, the exploding prison population led to rapid spread of infectious diseases and caused regular violence, which resulted in extended lockdowns. *Id.* These lockdowns thwarted the delivery of medical care and increased the number of personnel needed to provide quality treatment. *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Brown*, 131 S. Ct. at 1927–28.

¹⁵⁷ *Id.* at 1928.

¹⁵⁸ *See id.* at 1928, 1936, 1947.

¹⁵⁹ *See id.* at 1923, 1928. The court ordered the reduction to take place over the course of two years. *Id.* at 1928.

¹⁶⁰ *Id.*

¹⁶¹ *Brown*, 131 S. Ct. at 1928.

¹⁶² *Id.* at 1923, 1931.

¹⁶³ *Id.* at 1928.

¹⁶⁴ *Id.* at 1922. Amongst other things, California alleged that the panel had been prematurely convened and that the judges overstepped their authority under the PLRA by ordering such a widespread reduction. *See id.*

i. The Majority Opinion

In *Brown*, Justice Kennedy, writing for the majority, began by outlining the effects of overcrowded conditions inside California prisons. At the time of the opinion, California prisons had operated at close to 200% capacity for around eleven years.¹⁶⁵ In fact, an independent review panel appointed by the California governor had previously declared the system “severely overcrowded, imperiling the safety of both correctional employees and inmates.”¹⁶⁶

As a result, “[p]risoners [were] crammed into spaces neither designed nor intended to house inmates,” there was a high risk of spreading infectious disease, and the prison system had a suicide rate of approximately one inmate per week.¹⁶⁷ Also, it took as long as one year for inmates to receive mental health care, and as many as fifty inmates waited together in 12-by-20 foot cages for five hours at a time to receive treatment for physical illnesses.¹⁶⁸

After highlighting the effects of overcrowding, the Court next sought to determine whether the three-judge panel’s order was consistent with requirements outlined in the PLRA. At the outset, the Court noted that the federal judiciary must act cautiously when impinging upon a state’s interest in punishment, and courts should show deference to the experience and expertise of prison administrators.¹⁶⁹ Still, Justice Kennedy explained, “[i]f government fails to fulfill [its obligation to treat prisoners humanely], the courts have a responsibility to remedy the resulting Eighth Amendment violation.”¹⁷⁰ Thus, courts cannot allow constitutional violations inside state prisons to continue simply because “a remedy would involve intrusion into the realm of prison administration.”¹⁷¹

In *Brown*, however, California argued that a remedial action through formation of a three-judge panel was premature because the State was not given a reasonable amount of time to implement

¹⁶⁵ *Id.* at 1923–24. California prisons held approximately 156,000 inmates during this time. *Brown*, 131 S. Ct. at 1923.

¹⁶⁶ *Id.* at 1924 (internal quotation marks omitted).

¹⁶⁷ *Id.* As many as two hundred prisoners were housed in converted gymnasiums, and up to fifty-four inmates shared a single toilet. *Id.* Also, California prison suicides were approximately 80% higher than the national average. *Id.*

¹⁶⁸ *Id.* at 1924–25. Suicidal inmates were also treated poorly. The Court found that “[b]ecause 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.” *Brown*, 131 S. Ct. at 1924 (citation omitted).

¹⁶⁹ *Id.* at 1928 (citing *Bell v. Wolfish*, 441 U.S. 520, 547–48 (1979)).

¹⁷⁰ *Id.* (citing *Hutto v. Finney*, 437 U.S. 678, 687 n. 9 (1978)).

¹⁷¹ *Id.* at 1928–29.

less intrusive remedial orders entered by the district courts.¹⁷² To buttress this complaint, the State noted that when the three-judge panel was convened, preliminary plans of action for new prison construction, staff hiring, and other procedural reforms had already been filed with the district courts.¹⁷³ Therefore, the State claimed that the PLRA required the district courts to give the action plans adequate time to succeed before assembling a three-judge panel with the power to order population reductions.¹⁷⁴

The Court roundly rejected this argument. To that end, Justice Kennedy first noted that the PLRA's previous order requirement "is satisfied if the court has entered one order, and this single order has 'failed to remedy' the constitutional violation."¹⁷⁵ Here, the *Coleman* district court satisfied that requirement when it appointed a Special Master, and the *Plata* district court met the requirement through approval of the consent decree and stipulated injunction.¹⁷⁶ Next, specifically addressing the State's argument regarding reasonable time for action, Justice Kennedy found that the *Plata* court had engaged in remedial efforts with the state for five years, and the *Coleman* court had engaged in remedial efforts with the state for twelve years.¹⁷⁷ During that time, both courts entered multiple remedial orders, and the State made only meager efforts to comply with those orders.¹⁷⁸ According to Justice Kennedy, when a court enters numerous orders to remedy an "entrenched constitutional violation" in a prison system, each additional order "must be given a reasonable time to succeed" in accordance with the PLRA.¹⁷⁹ However, a court should assess reasonableness "in light of the entire history of the court's remedial efforts."¹⁸⁰ Any other interpretation of the PLRA's reasonable time requirement would force a court to place a moratorium on new remedial efforts before imposing population limitations.¹⁸¹ Congress did not intend to create this type of conundrum when it passed the PLRA.¹⁸² Accordingly, the Court found that the district courts "were not required to wait to see whether their more recent

¹⁷² *See id.* at 1930–31.

¹⁷³ *Id.* at 1931.

¹⁷⁴ *See Brown*, 131 S. Ct. at 1931.

¹⁷⁵ *Id.* at 1930; *see also* 18 U.S.C. § 3626(a)(3)(A)(i) (2012) (stating that a court must enter an order for less intrusive relief before convening a three-judge panel).

¹⁷⁶ *Brown*, 131 S. Ct. at 1930.

¹⁷⁷ *Id.* at 1931.

¹⁷⁸ *See id.*

¹⁷⁹ *See id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1931.

¹⁸² *Brown*, 131 S. Ct. at 1931.

efforts would yield equal disappointment” before moving to convene a three-judge panel.¹⁸³ Given the circumstances, the district courts’ independent decisions to convene the panel were in accord with the PLRA.¹⁸⁴

The Court next examined whether the three-judge panel correctly found that overcrowding was the primary cause of the violations of prisoners’ constitutional rights. In order to reach its determination, the panel largely relied on evidence at trial detailing the effects of overcrowding on mental and physical health care.¹⁸⁵ While the panel found that gross overpopulation was the primary culprit in fostering an unconstitutional medical treatment system, it also noted the impact of understaffing.¹⁸⁶ “At the time of trial, vacancy rates for medical and mental health staff ranged as high as 20% for surgeons, 25% for physicians, 39% for nurse practitioners, and 54.1% for psychiatrists.”¹⁸⁷ These staffing numbers often required medical professionals to handle larger caseloads, making them less effective.¹⁸⁸ Understaffing also encouraged violence, as a shortage of guards made it more difficult for staff to monitor inmates and respond to specific needs.¹⁸⁹ But perhaps even more discouraging, evidence suggested that, even if staffing was brought to appropriate levels, sheer lack of physical space often hampered efforts to improve conditions at California prisons.¹⁹⁰ To that point, an expert testified that California prisons were “designed with clinic space which is only one-half that necessary for the real-life capacity of the prisons.”¹⁹¹ Hence, the three-judge panel found that overcrowding was not the *only* cause of constitutional violations in California prisons, but it was the “foremost cause” of the violations and it served to exacerbate other underlying conditions.¹⁹²

Justice Kennedy agreed with the panel’s decision to order a population reduction even though overcrowding was not the only

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1931–32.

¹⁸⁵ *Id.* at 1932.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Brown*, 131 S. Ct. at 1932.

¹⁸⁹ *Id.* at 1933. “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.” *Id.* at 1933–34.

¹⁹⁰ *Id.* at 1933.

¹⁹¹ *Id.* (internal quotation marks omitted). In some facilities, medical staff operated out of converted bathrooms, storage rooms, closets, and visiting rooms. *Id.* at 1933.

¹⁹² *Brown*, 131 S. Ct. at 1936. Numerous experts testified at trial that overcrowding was the primary cause of poor medical treatment at California prisons. *Id.* at 1934.

element leading to constitutional violations.¹⁹³ Specifically, Justice Kennedy found that the PLRA does not require that overcrowding be the sole cause of an identified violation before a court can act to release prisoners.¹⁹⁴ Instead, a court must simply find that overcrowding is the “foremost, chief, or principal cause of the violation.”¹⁹⁵ If Congress intended to limit remedial efforts to circumstances where overcrowding was the sole source of a constitutional violation, then it would have explicitly said so in the text of the PLRA.¹⁹⁶ Moreover, by adopting the PLRA, Congress did not intend “to place undue restrictions on the authority of federal courts to fashion practical remedies when confronted with complex and intractable constitutional violations.”¹⁹⁷ In Justice Kennedy’s view, courts should assume that Congress took real world problems into account when it fashioned the PLRA.¹⁹⁸ Thus, the three-judge panel’s finding that overcrowding was the primary source of the constitutional violations was within the scope of the PLRA, even though additional actions beyond simply relieving overcrowding would be necessary to comprehensively remedy the violations.¹⁹⁹

Another issue the Court had to address was whether the three-judge panel correctly determined that no remedy aside from population reduction would serve to alleviate the constitutional violations. On that point, California argued that transferring prisoners to out-of-state facilities, constructing new facilities, and hiring more staff were all reasonable alternatives to releasing prisoners.²⁰⁰ However, the Court quickly dismissed these arguments. In short, Justice Kennedy explained that, while undertaking these alternative measures may have been useful—even necessary—towards alleviating violations, they all required the state to expend large amounts of money.²⁰¹ And the Court could not, and should not, ignore the fact that the California Legislature was unlikely to appropriate adequate funding for such endeavors.²⁰² The State’s long history of

¹⁹³ *See id.* at 1936–37.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 1936.

¹⁹⁶ *Id.*

¹⁹⁷ *See Brown*, 131 S. Ct. at 1937.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* “A reading of the PLRA that would render population limits unavailable in practice would raise serious constitutional concerns.” *Id.* (citing *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)).

²⁰⁰ *Id.* at 1937–38.

²⁰¹ *Id.* at 1938.

²⁰² *Brown*, 131 S. Ct. at 1938–39.

slow action and indifference towards remedial orders, coupled with the realities of the political climate, served to qualify the panel's finding that population reduction was the only realistic remedy available to prisoners.²⁰³

Finally, and perhaps most controversially, the Court examined the PLRA's requirement that all prospective relief must be narrowly drawn and extend no further than is necessary to correct the constitutional violation.²⁰⁴ When handing down its order, the three-judge panel had openly admitted that the order's requirements might affect inmates outside of the plaintiff class—inmates without serious mental or physical needs.²⁰⁵ This is largely because compliance with the order would require California to consider revisions in parole, good-time release, sentencing, and other related policies.²⁰⁶ California, however, claimed that these so-called “collateral consequences” of the order indicated that the order was broader than necessary.²⁰⁷

Yet here again, the Court rejected California's argument. Previously, the Court had overturned remedial orders in cases that attempted to change prison conditions other than those that violated the Constitution.²⁰⁸ However, in this situation, Justice Kennedy found that neither prior precedent nor the PLRA precluded application of a narrow and otherwise proper remedy that would have collateral effects.²⁰⁹ Instead, the PLRA only requires that the scope of the order “be determined with reference to the constitutional violations established by the specific plaintiffs before the

The common thread connecting the State's proposed remedial efforts is that they would require the State to expend large amounts of money absent a reduction in overcrowding. The Court cannot ignore the political and fiscal reality behind this case. California's Legislature has not been willing or able to allocate the resources necessary to meet this crisis absent a reduction in overcrowding. There is no reason to believe it will begin to do so now, when the State of California is facing an unprecedented budgetary shortfall.

Id. at 1939.

²⁰³ *See id.* at 1938.

²⁰⁴ *See* 18 U.S.C. § 3626(a) (2012).

²⁰⁵ *Brown*, 131 S. Ct. at 1939.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *See, e.g., Lewis v. Casey*, 518 U.S. 343, 357 (1996).

²⁰⁹ *Brown*, 131 S. Ct. at 1940. In addressing narrow tailoring, the Court stated that “[t]he scope of the remedy must be proportional to the scope of the violation, and the order must extend no further than necessary to remedy the violation.” *Id.*

court.²¹⁰ Here, any prisoner in a California prison could have eventually become afflicted with a serious illness and become part of the plaintiff class.²¹¹ Therefore, if a court targeted relief only at present class members it would fail to protect future class members.²¹² Consequently, Justice Kennedy upheld the panel's order compelling the release of non-plaintiff class prisoners because releasing those prisoners would provide prophylactic relief from future Eighth Amendment violations.²¹³ Also, release of non-class prisoners would allow better allocation of resources towards the care of class members, many of whom suffered from mental illnesses that prohibited their release for public safety reasons.²¹⁴

Furthermore, Justice Kennedy determined that the order was not overbroad even though it encompassed the entire prison system rather than select facilities.²¹⁵ Administrators managed the delivery of health care at a system-wide level; thus, failure to provide proper care was a system-wide problem.²¹⁶ Utilizing a comprehensive remedial order granted the state flexibility in gaining system-wide compliance because the State could discretionally shift prisoners amongst institutions.²¹⁷ This arrangement, according to Justice Kennedy, should not be construed as violative of the PLRA's narrow tailoring requirement.²¹⁸

In sum, the Court affirmed the order set forth by the three-judge panel.²¹⁹ In doing so, the Court held that, under the PLRA, reasonable time for state actions should be assessed in light of past remedial efforts, overcrowding need not be the sole cause of a constitutional violation before ordering population reduction, and collateral releases of prisoners is in accord with the PLRA when those releases will serve to benefit the plaintiff class or provide

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* "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 bystanders in California's medical care system. They are that system's next potential victims." *Id.*

²¹³ *See Brown*, 131 S. Ct. at 1940.

²¹⁴ *See id.* at 1940–41.

²¹⁵ *Id.* at 1940.

²¹⁶ *See id.*

²¹⁷ *Id.* at 1941. The order allowed state officials to shift prisoners to facilities where overcrowding was less of a problem, or to move prisoners out of facilities that have extreme shortages in medical staff. *Id.* This arrangement only serves to provide flexibility to the California prison system; it does not make the order overbroad. *Brown*, 131 S. Ct. at 1940–41.

²¹⁸ *See id.* 1940–41.

²¹⁹ *Id.* at 1947.

prophylactic relief for future class members.²²⁰ Essentially, the Court took a broad interpretation of the requirements set forth in the PLRA, leaving room for lower courts to work within the boundaries of the statute while fashioning realistic remedies.

ii. Scalia's Dissent

In dissent, Justice Scalia argued forcefully against prison population reduction as prophylactic relief. By his calculations, “[T]he mere existence of [an] inadequate [medical delivery] system does not subject to cruel and unusual punishment the entire prison population in need of medical care”²²¹ Instead, Justice Scalia contended that courts can only extend remedial relief to prisoners whose constitutional rights the state specifically violated.²²² So, in this case, “the persons who have a constitutional claim for denial of medical care are those who are denied medical care—not all who face a ‘substantial risk’ . . . of being denied medical care.”²²³ Therefore, because the remedial order in *Brown* extended beyond individual claims of constitutional violations to the prison system as a whole, Justice Scalia argued that the order violated the PLRA’s narrow tailoring requirement.²²⁴ According to him, the PLRA allows courts to release prisoners only if the state violated the *individual* prisoner’s rights and “[the prisoner’s] release, and no other relief, will remedy that violation.”²²⁵ However, Justice Scalia also noted that injunctive relief affecting an entire prison system is sometimes warranted. For example, if a state maintained temperatures in prison cells “so cold as to violate the Eighth Amendment,” a prison-wide injunctive order to remedy the wrong may be appropriate because the violation would run to all prisoners in the facility.²²⁶

Hence, Justice Scalia would interpret the PLRA more narrowly than the majority and only extend relief to those California prisoners who received constitutionally inadequate medical care. This approach, in one sense, seems to appeal to traditional notions of fairness because it keeps prisoners who have not suffered any constitutional harm from receiving a “free ticket out of jail.” Further, it provides less ambiguity in the prisoner release process by strictly

²²⁰ *Id.* at 1931–32, 1936, 1940–41.

²²¹ *Id.* at 1951 (Scalia, J., dissenting).

²²² *See id.* at 1951–52.

²²³ *Brown*, 131 S. Ct. at 1951 (Scalia, J., dissenting).

²²⁴ *Id.* at 1952. Indeed, as Justice Scalia quickly points out, the actions brought by California prisoners in this case were not based on a single event of deficient care, but rather on “system-wide deficiencies.” *Id.* at 1951.

²²⁵ *Id.* at 1957–58.

²²⁶ *Id.* at 1958.

limiting the pool of potential releases. However, it also affords states less flexibility in fashioning remedies for pervasive, but not universal, constitutional violations within prison systems. As a result, a state could theoretically have to release more dangerous prisoners under Justice Scalia's approach than under the majority approach.

On the other hand, under Justice Kennedy's approach, it seems difficult to determine what type of relief courts should count as overbroad. Anticipatorily allowing the release of prisoners whose constitutional rights a state has not yet violated gives federal courts expansive remedial powers, which judges may successfully use to curb constitutional impingements. However, the majority opinion poorly defines just how imminent a future violation must be before courts can extend prophylactic relief. This is partly because Justice Kennedy equivocates in his analysis. In one sense, the majority indicates that releasing non-plaintiff class prisoners is a collateral effect of forging a narrowly tailored remedy. Yet, in another sense, it argues that releasing non-class members is necessary to protect inmates from future constitutional violations. Not only does the majority never fully reconcile these two points, but it also fails to provide concrete reasons why either type of relief is appropriate under traditional notions of equitable remedies. Instead, Justice Kennedy leaves it to the lower federal courts to decipher the boundaries of a sticky legal point. Perhaps these courts will ultimately focus on more established doctrines addressing imminent harm in injunctive relief and injunctive burdens on non-parties in order to crystalize the collateral effects and prophylactic relief doctrines.²²⁷

III. ALABAMA PRISONS TODAY: CONSTITUTIONAL VIOLATIONS AND THE POTENTIAL FOR FEDERAL INTERVENTION

a. *By the Numbers*

Today, Alabama's prison system operates at approximately 200% design capacity.²²⁸ More specifically, according to a monthly

²²⁷ See, e.g., *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20–22 (2008) (discussing the need for *likely* injury before issuance of a preliminary injunction); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (discussing the need to balance burdens on non-parties with judicial deference to Congress's legislative intent when issuing injunctive orders). Admittedly, when a court orders prophylactic relief, such relief would *benefit* a non-party rather than burden it. However, courts may consider whether this logic should carry over to the collateral effects doctrine.

²²⁸ Kitchen, *supra* note 10.

report released by the Alabama Department of Corrections (ADOC) at the end of May 2014, the State's "close security" prison populations were at 157.8% design capacity and medium security prison populations were at 207.5% design capacity.²²⁹ Additionally, the State's minimum security prison population was at 160% design capacity; minimum security work center populations were at 259.6% design capacity; and minimum security work-release center populations were at 174.6% design capacity.²³⁰

While the report indicated that no state facility operated below 100% capacity,²³¹ some facilities were worse than others. For example, Kilby Correctional Facility, a close security institution, has a design capacity of 440 beds but housed 1,346 inmates at the end of May 2014.²³² This amounted to a 305% population rating.²³³ Likewise, officials designed the Decatur Minimum Security Work Center to house only 37 prisoners, but instead the facility was jammed with 432 prisoners—a 1,167% population mark.²³⁴ The population of Alabama's only close security women's prison, Julia Tutwiler Prison, stood at 163.3% design capacity.²³⁵ Moreover, the report indicated that the state housed 613 inmates in "leased or contract beds" and 1,964 inmates in county jails.²³⁶ The Department uses contract facilities and county jails to provide supplemental bed space for prisoners sentenced by a court to serve time in ADOC.²³⁷ In all, the report stated that ADOC had a total jurisdictional population of 32,174 inmates.²³⁸ Of those inmates, approximately 20,000 were serving time in close or medium security prisons,²³⁹ and approximately 14,000 inmates were serving sentences of twenty years or more.²⁴⁰

²²⁹ KIM T. THOMAS, ALA. DEP'T OF CORR., MONTHLY STATISTICAL REPORT FOR MAY 2014, at 3 (2014), available at <http://www.doc.state.al.us/docs/MonthlyRpts/2014-05.pdf>.

²³⁰ *Id.*

²³¹ *See id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ THOMAS, *supra* note 229, at 3. Other close security prison populations were as follows: Holman Correctional Facility, 139.2%; St. Clair Correctional Facility, 131.3%; Donaldson Correctional Facility, 151.1%; Limestone Correctional Facility; 139%. *Id.*

²³⁶ *Id.* at 4.

²³⁷ *See id.*

²³⁸ *Id.* at 6. Jurisdictional population includes inmates serving time in ADOC facilities, programs, and contract facilities. *Id.* at 1.

²³⁹ THOMAS, *supra* note 229, at 9.

²⁴⁰ Kitchen, *supra* note 11.

The May report also indicated serious staff shortages at Alabama prisons. In total, the report showed that Alabama prisons were staffed at only 60.7% of their state authorized level.²⁴¹ Close security prisons maintained only 58.2% of authorized support staff and 67.3% of authorized correctional security staff.²⁴² This led to an average ratio of 8.9 inmates per correctional officer at those facilities.²⁴³ Medium security prisons were staffed at 63.2% of their authorized support staff and 50.1% of their authorized correctional security staff, with an average inmate to correctional officer ratio of 26.1 inmates per officer.²⁴⁴ Significantly, the national average for inmate to officer ratios at correctional facilities is 5 inmates per every 1 officer.²⁴⁵

A September 2013 report from ADOC captured reported incidents of violence in Alabama prisons over the entire 2013 fiscal year.²⁴⁶ According to that report, there were 663 inmate-on-inmate assaults in Alabama prisons between October 2012 and September 2013.²⁴⁷ Of those assaults, 79 produced “serious injury” and 3 resulted in homicide.²⁴⁸ The report also indicated that there were 705 inmate-on-inmate fights, and that inmate-on-inmate violence resulted in 629 “victims” throughout the year.²⁴⁹ The report also showed there were 266 inmate-on-staff assaults, ten of which resulted in serious injury.²⁵⁰ Finally, two inmates committed suicide in ADOC facilities last year, and seventeen inmates attempted suicide.²⁵¹

²⁴¹ THOMAS, *supra* note 229, at 15.

²⁴² *Id.*

²⁴³ *Id.* Individual facility ratios were reported as follows: Holman Correctional Facility, 8.7; Kilby Correctional Facility, 9.8; St. Clair Correctional Facility, 7.6; Tutwiler Prison for Women, 14.7; Donaldson Correctional Facility, 7.2; Limestone Correctional Facility, 5.6. *Id.*

²⁴⁴ *Id.*

²⁴⁵ Kala Kachmar, *Prison Overcrowding Concerns Committee*, MONTGOMERY ADVERTISER, June 21, 2012, at C1.

²⁴⁶ Alabama’s fiscal year runs from October 1 to September 30 each year. ALA. CODE § 1-3-4 (2012). Hence, September 2013 was the last month in fiscal year 2013, and October 2013 was the first month of fiscal year 2014. *See id.*

²⁴⁷ KIM T. THOMAS, ALA. DEP’T OF CORR., MONTHLY STATISTICAL REPORT FOR SEPTEMBER 2013, at 11 (2013), *available at* <http://www.doc.state.al.us/docs/MonthlyRpts/2013-09.pdf>.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

b. *Through the Looking Glass: Comparing the Present with the Past*

As previously discussed, federal courts intervened in the Alabama prison system during the 1970s to remedy gross constitutional violations.²⁵² Although Congress—through the PLRA—subsequently altered the means by which courts can divvy out remedial relief to prisoners, the courts' findings in *McCray v. Sullivan* and *Pugh v. Locke* regarding Eighth Amendment violations remain applicable today. Thus, in ascertaining the breadth by which Alabama prisons may currently be violating prisoners' constitutional rights, it is useful to compare current conditions inside Alabama prisons with the conditions declared unconstitutional by Judge Hand and Judge Johnson.

The judges in *McCray* and *Pugh* both found that overcrowding in Alabama prisons was extreme.²⁵³ At that time, the four major male penal facilities in the state had a total design capacity of 2,212 inmates yet housed 3,698 inmates.²⁵⁴ This equated to a population mark of approximately 167% design capacity.²⁵⁵ Nowadays, Alabama's close security prisons operate at approximately 157.8% design capacity and Alabama's medium security prisons operate at approximately 207.5% design capacity.²⁵⁶ The prison system as a whole—including all close, medium, and minimum security facilities—houses about twice as many prisoners as it was designed to handle.²⁵⁷ Hence, Alabama prisons today are at least as crowded, if not more crowded, than Alabama prisons in the 1970s.

The *McCray* and *Pugh* courts also cited massive understaffing of correctional officers in their decisions.²⁵⁸ Again examining the four major male facilities, Judge Hand noted in *McCray* that the institutions needed 692 correctional officers to adequately fill all posts, but the facilities employed only 383 officers.²⁵⁹ This indicates the State prison system had a custodial staffing level of about 55.3 percent.²⁶⁰ Further, considering the prison population at that time, the overall inmate to guard ratio at Alabama's major male facilities was

²⁵² See *supra* Part I.b–c.

²⁵³ See *Pugh v. Locke*, 406 F. Supp. 318, 322–23 (M.D. Ala. 1976); *McCray II*, 399 F. Supp. 271, 274–75 (S.D. Ala. 1975).

²⁵⁴ *McCray II*, 399 F. Supp. at 274.

²⁵⁵ See *id.*

²⁵⁶ See *supra* note 229 and accompanying text.

²⁵⁷ See *supra* notes 228–30 and accompanying text.

²⁵⁸ *Pugh*, 406 F. Supp. at 325; *McCray II*, 399 F. Supp. at 274.

²⁵⁹ *McCray II*, 399 F. Supp. at 274.

²⁶⁰ The author made this determination by dividing the number of employed staff members by the total number of needed staff members. See *id.*

approximately 9.7 inmates per every guard.²⁶¹ Today, Alabama's close security prisons employ about 67% of their authorized custodial staff and medium security prisons employ about 50% of their authorized custodial staff.²⁶² This yields inmate to officer ratios of around 9-to-1 in close security prisons and 26-to-1 in medium security prisons.²⁶³ So, here again, present-day Alabama prisons are about as understaffed as they were during the 1970s, and inmate to guard ratios are as bad or worse as they were during that era.

Importantly, in *McCray* and *Pugh* the judges found that overcrowding and understaffing exacerbated constitutional violations; they did not find that these conditions, by themselves, constituted constitutional violations.²⁶⁴ Instead, the courts identified extreme violence, inadequate medical care, inhumane living conditions, and lack of rehabilitative opportunities as underlying Eighth Amendment violations in need of remedy.²⁶⁵ To establish these violations, the courts largely relied on testimonial evidence;²⁶⁶ hence, present statistical information is less useful in detailing the extent of current violations against past violations. Still, some useful analogies may be extracted from the *McCray* and *Pugh* courts' findings in these areas.

Likely the most constructive is the judges' reasoning regarding violence in Alabama prisons. ADOC kept no accurate statistics of prison violence in the 1970s.²⁶⁷ Nonetheless, both courts concluded that violence permeated throughout Alabama prisons and constituted an egregious constitutional violation whereby prisoner safety was put in constant jeopardy and inmates were stripped of any hope of rehabilitation.²⁶⁸ Of course, today ADOC does keep records of reported violence inside Alabama prisons.²⁶⁹ And while

²⁶¹ The overall prison population was 3,698 inmates and the prison system employed 383 custodial staff members. *Id.* The author determined overall inmate to guard ratio by dividing the prison population by the number of staff members in employment. *See id.*

²⁶² *See supra* notes 242, 244 and accompanying text.

²⁶³ *See supra* notes 243–44 and accompanying text.

²⁶⁴ *See Pugh v. Locke*, 406 F. Supp. 318, 323–25 (M.D. Ala. 1976) (“As will be noted, overcrowding is primarily responsible for and exacerbates all the other ills of Alabama's penal system.”); *McCray II*, 399 F. Supp. at 274–77 (“This Court finds that the State of Alabama has violated the Constitutional rights of the plaintiff class by confining them in overcrowded and understaffed prisons where their lives and safety are constantly in danger and that corrective measures are demanded.”).

²⁶⁵ *See Pugh*, 406 F. Supp. at 323–30; *McCray II*, 399 F. Supp. at 274–77.

²⁶⁶ *See Pugh*, 406 F. Supp. at 323–25; *McCray II*, 399 F. Supp. at 274–75.

²⁶⁷ *Pugh*, 406 F. Supp. at 325.

²⁶⁸ *See id.* at 324–26, 328; *McCray II*, 399 F. Supp. at 274–76.

²⁶⁹ *See supra* notes 248–51 and accompanying text.

those records illustrate a dangerous prison environment with nearly a thousand inmate related assaults and multiple homicides per year,²⁷⁰ they may only tell part of the story. As Judge Johnson observed in *Pugh*, “A cardinal precept of the convict culture is that no inmate should report another inmate to officials.”²⁷¹ Therefore, the comprehensiveness of ADOC’s current statistics on violence is somewhat suspect.

However, even without the aid of hard numbers, similarities in staffing levels and overcrowding may offer some comparative value in examining prison violence today versus prison violence in the 1970s. For example, in *Pugh*, Judge Johnson commented that the prison system’s then-extremely high inmate to guard ratio caused guards to spend much of their time trying to maintain control of the prison or protect themselves rather than interact with prisoners or patrol dormitories.²⁷² This, according to Judge Johnson, caused persistent violence in the State’s prisons.²⁷³ Today, inmate to guard ratios are similar—in some cases worse—to the ratios Judge Johnson commented on, which seems to indicate that current understaffing may continue to cause violence in Alabama’s prisons. Likewise, in *McCray*, Judge Hand found that overcrowding contributed to prison violence because it allowed inmates to commit heinous acts without detection and prohibited guards from segregating violent inmates.²⁷⁴ Here as well, there is reason to believe these observations may have corollaries in today’s equally overcrowded prisons.

Ultimately, there are a number of similarities between the Alabama prisons of today and the Alabama prisons of the 1970s federal intervention era. Perhaps most striking are the similarities between overcrowding and understaffing during the two timeframes. These connections are particularly important because Judge Hand and Judge Johnson both found that overcrowding and understaffing were the primary culprits in fostering an oppressive, unconstitutional prison system. Accordingly, these statistics should give present-day state officials reason to pause and consider whether Alabama’s current prison system would pass constitutional muster before a federal court.

²⁷⁰ See *supra* notes 248–51 and accompanying text.

²⁷¹ *Pugh*, 406 F. Supp. at 325.

²⁷² *Id.*

²⁷³ See *id.*

²⁷⁴ *McCray II*, 399 F. Supp. 271, 275 (S.D. Ala. 1975).

c. *Recent Legal Signs: A Road of Unconstitutional Treatment?*

In more recent years, a number of legal factors, including inmate filed litigation and reports issued by the U.S. Department of Justice, have either directly or indirectly given Alabama officials notice of unconstitutional conditions inside state prisons. Examining these legal road signs is useful to determine the extent of any constitutional violations within the prison system and the likelihood of state legislative correction. These elements, in turn, may serve to influence a federal court's decisions regarding intervention.

i. *Brown v. Plata*

Because of the comprehensiveness of the U.S. Supreme Court's findings in *Brown v. Plata*, the Court's decision should serve to give Alabama officials indirect notice of potential constitutional violations in Alabama's prisons. Thus, it is beneficial to examine the parallels between California's prison system at the time of federal intervention and Alabama's prison system today. Conditions in state prisons like those described in *Brown* may militate towards a finding of pervasive unconstitutionality in Alabama's penal system.

At first glance, the most obvious similarity between California's former prison system and Alabama's current prison system is the level of overcrowding. In *Brown*, the U.S. Supreme Court noted that California's prisons operated at close to 200% capacity.²⁷⁵ This closely matches the level of overpopulation in Alabama prisons.²⁷⁶ Because of overcrowded conditions in California, the Court found that the State's prison system had the physical space to serve the medical needs of only half of the inmate population.²⁷⁷ As a result, many California inmates unnecessarily suffered or even died.²⁷⁸ Given these observations, it stands to reason that Alabama penal institutions may also lack adequate space to meet the medical needs of a population twice as large as the one it was designed to serve. Therefore, as in *Brown*, a court reviewing Alabama prison conditions may very well find that inadequacies in medical care arising from insufficient space and resources constitute a violation of Alabama prisoners' Eighth Amendment rights.

In *Brown*, the Court also acknowledged the impact of severe understaffing in the facilitation of unconstitutional medical treat-

²⁷⁵ *Brown v. Plata*, 131 S. Ct. 1910, 1923–24 (2011).

²⁷⁶ *See supra* notes 228–30 and accompanying text.

²⁷⁷ *Brown*, 131 S. Ct. at 1925.

²⁷⁸ *See id.* at 1925–27.

ment.²⁷⁹ Because of shortages in medical staff, many doctors, psychologists, and nurses handled enormous caseloads, which often led to subpar medical care.²⁸⁰ At the time, vacancy rates for medical and mental health staff ranged as high as 54 percent.²⁸¹ Similarly, a May ADOC report indicated that support staffing in the Alabama prison system sits at only 61% of its authorized level.²⁸² Based upon the report, it is unclear what types of support positions are understaffed.²⁸³ However, if understaffing significantly impairs the ability of medical professionals to deliver sound mental and physical health care to overpopulated facilities, then a court may find that these inadequacies rise to the level of constitutional impermissibility. Hence, although *Brown* did not directly affect Alabama prisons, similarities between the California and Alabama prison systems suggests that constitutional violations parallel to those identified in *Brown* may persist in Alabama.

ii. *Laube v. Haley*

In *Laube v. Haley*,²⁸⁴ fifteen female inmates brought suit challenging the constitutionality of conditions at Julia Tutwiler Prison for Women (Tutwiler), Edwina Mitchell Work Release Center (Mitchell), and Birmingham Work Release Center (Birmingham).²⁸⁵ The prisoners commenced the suit in 2002, claiming the State violated the plaintiff class's Eighth Amendment rights by housing inmates in overcrowded, understaffed prisons with excessive violence, poor ventilation, and extreme heat during the summer months.²⁸⁶ Ultimately, Judge Myron Thompson denied injunc-

²⁷⁹ *Id.* at 1932.

²⁸⁰ *Id.* at 1932–33.

²⁸¹ *Id.* at 1932.

²⁸² See *supra* note 241 and accompanying text.

²⁸³ See THOMAS, *supra* note 229.

²⁸⁴ (*Laube I*), 234 F. Supp. 2d 1227 (M.D. Ala. 2002).

²⁸⁵ *Id.* at 1230.

²⁸⁶ *Id.*

In support of their claims, the plaintiffs assert that the following conditions exist at Tutwiler: overcrowding, inadequate supervision in open dorms, improper or inadequate inmate classification, inmate violence, the availability of weapons, the small number of segregation cells, inadequate living space, inadequate ventilation and extreme heat during the summer. They assert that the following conditions exist at Mitchell: overcrowding, inadequate supervision in open dorms, inadequate living space, and inadequate ventilation. And they assert that the following conditions exist at Birmingham: inadequate supervision of the segregation unit and overall inadequate ventilation in the facility.

Id.

tive relief to inmates at Mitchell and Birmingham, but issued a preliminary injunction with respect to certain conditions at Tutwiler.²⁸⁷

In *Laube*, Judge Thompson found that overcrowding and understaffing caused unconstitutionally unsafe conditions inside Tutwiler.²⁸⁸ At the time of the decision, Tutwiler housed 1,017 inmates, well over its original design capacity of 364.²⁸⁹ Consequently, officials placed anywhere between 60 and 228 inmates in a single open dormitory with bunk beds “laid in rows and arranged head to toe, within inches of one another.”²⁹⁰ Because of the arrangement of the bunks and the open layout of the dormitories, officers were greatly hindered in observing inmate activity.²⁹¹ Further compounding problems, the court found that Tutwiler was tremendously understaffed.²⁹² Judge Thompson noted that in 1979 Tutwiler employed a custodial staff of 87 guards to supervise 169 inmates, and by 2002 Tutwiler added 884 inmates to its population but only increased its custodial staff by five officers.²⁹³ As a result, one guard was often assigned to supervise over 200 inmates at a time.²⁹⁴ Dormitory patrols frequently took over one hour, leaving inmates ample time to engage in unsupervised activity and making it difficult for guards to respond to unrest or emergencies in the dorms.²⁹⁵

According to Judge Thompson, overcrowding negatively impacted inmate safety at Tutwiler in three ways: “(1) inmates [could not] retreat from conflicts; (2) inmates [fought] to access limited resources; and (3) fights and tension [had] increased.”²⁹⁶ Incidents involving violence—sometimes with razors fashioned into weapons—were frequent at Tutwiler.²⁹⁷ Further, the court noted that inmate-on-inmate violence was likely much higher than statistical reports alleged because most altercations between inmates go un-

²⁸⁷ *Id.* at 1252.

²⁸⁸ *Id.* at 1253.

²⁸⁹ *Laube I*, 234 F. Supp. 2d at 1232. By the author’s calculations, this constitutes a prison population mark of 279% (1,017 divided by 364). *See id.*

²⁹⁰ *Id.* at 1232–33. The court also found that “[t]he health-care unit is so short on space that three beds have been placed in the hall to house inmates who are waiting for or returning from operations; these inmates share the hallway with everyone entering and leaving the health care unit.” *Id.* at 1232.

²⁹¹ *Id.* at 1233.

²⁹² *Id.*

²⁹³ *Laube I*, 234 F. Supp. 2d at 1233.

²⁹⁴ *Id.* at 1234.

²⁹⁵ *Id.* at 1233–34.

²⁹⁶ *Id.* at 1236.

²⁹⁷ *Id.* at 1237.

reported to correctional officers.²⁹⁸ Ultimately, Judge Thompson found that inmates at Tutwiler were at a substantial risk of serious harm caused by severe overcrowding and understaffing.²⁹⁹ With that in mind, he stated:

[T]he court is not only convinced that these unsafe conditions have resulted in harm, and the threat of harm, to individual inmates in the immediate past, it is also convinced that they are so severe and widespread today that they are essentially a time bomb ready to explode facility-wide at any unexpected moment in the near future.³⁰⁰

Accordingly, Judge Thompson issued a preliminary injunction ordering the State to take affirmative steps to cure constitutional violations at Tutwiler.³⁰¹ As part of the injunction, the judge also required the State to submit a remedial action plan outlining how it intended to immediately and fully redress the violations.³⁰² However, after the State submitted the plan, Judge Thompson found it was inadequate in two ways. First, the State's plan requested that Judge Thompson temporarily restrain the transfer of female inmates from county jails to Tutwiler.³⁰³ To that request, the judge asserted that he lacked the power to issue such an order because it would amount to a "prisoner release order," which under the PLRA only a three-judge panel can issue.³⁰⁴ Second, Judge Thompson found that the State's plan was inadequate because the State "indicated at . . . oral argument that their proposed remedial measures are constrained by the fact that they lack adequate funds."³⁰⁵ But Judge Thompson emphasized that "budgetary concerns are not a defense to constitutional violations."³⁰⁶ Accordingly, the judge ordered the State to submit a new action plan which assumed the State legislature would make necessary funding available.³⁰⁷

²⁹⁸ *See id.* "Fights are prevalent within Tutwiler, and for the most part go unreported. For this reason, the court believes that the situation is worse than the cited figures indicate, as these figures only represent reported fights." *Laube I*, 234 F. Supp. 2d at 1237.

²⁹⁹ *Id.* at 1252.

³⁰⁰ *Id.*

³⁰¹ *Id.* at 1253.

³⁰² *Id.*

³⁰³ *Laube v. Haley (Laube II)*, 242 F. Supp. 2d 1150, 1152 (M.D. Ala. 2003).

³⁰⁴ *Id.* Judge Thompson also noted that the State lacked the power to restrain the transfer of inmates because of other pending litigation. *Id.*

³⁰⁵ *Id.* "In the words of their counsel, 'the problem is, we've run out of money, pure and simple.'" *Id.*

³⁰⁶ *Id.* (quoting *Laube I*, 234 F. Supp. 2d at 1249).

³⁰⁷ *See Laube II*, 242 F. Supp. 2d at 1152.

In 2004, Judge Thompson approved a settlement agreement between the plaintiff class and the State and incorporated the agreement into a permanent injunctive order.³⁰⁸ The agreement called for the State to continue making a number of changes to combat overcrowding, improve inmate living conditions, provide adequate custodial and medical staffing, and expand medical care.³⁰⁹ If these conditions were not met, the court retained the ability to order appropriate relief through its contempt powers.³¹⁰

iii. Pro Se Litigation

Undoubtedly, prisoners file a number of frivolous lawsuits alleging constitutional violations every year. And in most cases, these lawsuits should be dismissed as just that—frivolous. However, patterns in prisoner litigation alleging substantially the same types of inhuman conditions inside Alabama prisons cannot be completely ignored. Prisoners file many of these suits in a *pro se* capacity, often leading to dismissal on technical grounds. Still, a cautious examination of some of the facts behind these cases gleans evidence of unconstitutionality, or at least the potential for unconstitutionality, inside Alabama prisons.

In *Ford v. DeLoach*, filed in 2005, an inmate at Draper Correctional Facility (Draper) brought suit *pro se* alleging constitutional violations at the facility and requesting injunctive relief from overcrowding, understaffing, and other conditions of confinement.³¹¹ Russell Ford averred in his complaint that Draper housed twice as many inmates as it was designed to hold and that the facility employed an inadequate number of custodial officers.³¹² Because of the shortage in officers, Ford contended that many staff members had to work double shifts, which resulted in fatigue and caused “tension between inmates and staff.”³¹³ More specifically, Ford alleged that, as a result of overcrowding and understaffing, inmate-on-inmate and officer-on-inmate assaults were increasingly common and progressively violent.³¹⁴ Further, the complaint stated that many assaults went unreported, and that inmates commonly walked the halls of Draper with “black eyes and ‘knocked-our [sic]

³⁰⁸ *Laube v. Campbell (Laube III)*, 333 F. Supp. 2d 1234, 1247–48 (M.D. Ala. 2004).

³⁰⁹ *See id.* at 1248–51, 1256–60.

³¹⁰ *See id.* at 1251–52.

³¹¹ *Ford v. DeLoach*, No. Civ. A. 03-B-0110-N, 2005 WL 1243346, at *1 (M.D. Ala. May 25, 2005).

³¹² *Id.*

³¹³ *Id.* (internal quotation marks omitted).

³¹⁴ *Id.* at *6.

teeth.”³¹⁵ Besides incidents of violence, Ford’s complaint also averred that inmates at Draper lived under a number of “[o]ffensive living conditions.”³¹⁶ These conditions included insect infestation, inadequate ventilation, inadequate shower and toilet facilities, lack of window screening, and poor medical treatment.³¹⁷

In response, the State roundly denied Ford’s allegations. The warden admitted that the facility was understaffed, but claimed the prison was trying hard to hire qualified guards.³¹⁸ Also, with respect to Ford’s claims regarding general living conditions, the State claimed that an exterminator visited the facility once a month, industrial fans were used during the summer to increase ventilation, and it had received no inmate complaints regarding lack of adequate heating.³¹⁹ The State concluded by asserting, “While Draper is the oldest facility in the Alabama prison system and is well over its designed capacity, this facility is clean, well maintained and orderly. All inmates are treated in a humane manner.”³²⁰ Ultimately, a federal court dismissed a number of parties from Ford’s complaint and granted summary judgment in favor of the remaining defendants.³²¹

Later, in *Griggs v. Thomas*, an inmate at Holman Correctional Facility (Holman) filed a complaint alleging Alabama violated his Eighth and Fourteenth Amendment rights by housing him in an overcrowded prison.³²² In the complaint, which was filed in 2012, the prisoner averred that overcrowding at Holman “fosters a hostile living environment, creates opportunity for inmate-on-inmate assaults as well as inmate assaults by prison personnel, and results in the denial of food, clothing, shelter, medical care, access to courts, sanitation, rehabilitation, and opportunity for release.”³²³ The inmate then went on to describe conditions inside Holman with greater detail. According to the complaint, inmates with mental disorders lack proper supervision at Holman, “food is served cold

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Ford*, 2005 WL 1243346, at *6–7.

³¹⁸ *Id.* at *6. “The plaintiff’s claim regarding the shortage of security staffing is true. However, the Alabama Department of Corrections had made every effort to employ qualified correctional staff. Our efforts have included running newspaper advertisements, radio advertisements, and sending recruiters to the state employment office.” *Id.*

³¹⁹ *Id.* at *7.

³²⁰ *Id.*

³²¹ *Id.* at *10.

³²² *Griggs v. Thomas*, No. 2:12-CV-843-TMH WO, 2012 U.S. Dist. LEXIS 170524, at *1 (M.D. Ala. Oct. 4, 2012).

³²³ *Id.* at *3.

and lacks sufficient nutrition,” and “the law library lacks adequate space.”³²⁴ Further, the complaint alleged that facilities at the prison have leaking roofs, broken windows and doors, and inadequate ventilation.³²⁵ Griggs also contended that the medical department at Holman is understaffed and poorly trained, and that the facility experiences frequent outbreaks of lice and staph infection.³²⁶ Eventually, a district judge transferred the suit from the Middle District of Alabama to the Southern District of Alabama for adjudication.³²⁷ The author has discovered no record of final disposition.

iv. The Department of Justice Investigation

In 2012, The Equal Justice Initiative filed a complaint with the U.S. Department of Justice (DOJ) on behalf of women incarcerated at Tutwiler.³²⁸ The complaint alleged that numerous women had been subjected to sexual abuse inside the prison, and that prison guards had repeatedly raped and even impregnated several women over a five-year timeframe.³²⁹ After the complaint, ADOC invited a division of DOJ to inspect conditions at the women’s prison.³³⁰ The initial visit revealed that rape hotlines in the prison sometimes did not function, that prison staff had little understanding of their responsibilities under the Prison Rape Elimination Act, and that female inmates had very little privacy from male guards while showering.³³¹ Additionally, the State admitted that guards had impregnated two inmates.³³² Subsequently, in March 2013, DOJ informed ADOC that it intended to conduct a full-scale investigation into conditions at Tutwiler.³³³

In January 2014, DOJ sent a letter to Governor Robert Bentley declaring conditions at Tutwiler unconstitutional.³³⁴ In the letter,

³²⁴ *Id.* at *3–4.

³²⁵ *Id.* at *4.

³²⁶ *Id.*

³²⁷ Griggs, 2012 U.S. Dist. LEXIS 169195, at *1.

³²⁸ Robin DeMonia, *Guards at Alabama Women’s Prison Accused of Widespread Sexual Abuse of Inmates*, BIRMINGHAM NEWS, May 22, 2012, available at <http://s.al.com/AUaFesI>.

³²⁹ *Id.*

³³⁰ Tim Lockette, *Prison Chief Tells of Abuses at Tutwiler*, ANNISTON STAR, Jan. 30, 2013, available at http://www.annistonstar.com/news/article_9987767f-d087-5b54-b189-8b0c37a41ab7.html.

³³¹ *Id.*

³³² *Id.*

³³³ Matt Okarmus, *DOJ Expands Investigation into Tutwiler Prison*, MONTGOMERY ADVERTISER, Jan. 18, 2014, available at <http://on.mgmadv.com/1e2VFQy>.

³³⁴ *Id.* See generally OFFICE OF THE ASSISTANT ATTORNEY GEN., U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE JULIA TUTWILER PRISON FOR WOMEN

DOJ indicated that inmates at Tutwiler “‘universally fear for their safety[,] . . . live in a sexualized environment with repeated and open sexual behavior,’ including abuse actions and language; and were subjected to a staff member-condoned ‘strip show’ and ‘deliberate cross-gender viewing’ of inmates as they bathed and used bathrooms.”³³⁵ Federal investigators also found that over half of Tutwiler’s staff “‘have been involved in some form of sexual misconduct and male guards regularly have sexual interaction with inmates.’”³³⁶ Some guards even forced women to engage in sexual acts in exchange for basic needs like clothing and hygiene products.³³⁷ Furthermore, the letter noted that sexual abuse in the prison went underreported for nearly twenty years.³³⁸

Based upon these findings, DOJ concluded that “the state of Alabama violates the Eighth Amendment . . . by failing to protect women prisoners at Tutwiler from harm due to sexual abuse and harassment from correctional staff.”³³⁹ The Department also informed Governor Bentley that it intended to widen its investigation, stating, “[T]he systemic deficiencies at Tutwiler that facilitated staff sexual misconduct may also lead to excessive use of force, constitutionally inadequate conditions of confinement, constitutionally inadequate medical and mental health care, and discriminatory treatment based on national origin, sexual orientation, and gender identity.”³⁴⁰ Thus, the letter put ADOC on distinct notice of constitutional violations inside the State’s prison system and left open the possibility, perhaps even the likelihood, of uncovering more violations in the future.

v. The Southern Poverty Law Center Report

In June 2011, the Southern Poverty Law Center (SPLC) released a report stating that the “ADOC is ‘indifferent’ to the serious medical needs of inmates, and that [inmates are] condemned to facilities where ‘systematic indifference, discrimination and dan-

AND NOTICE OF EXPANDED INVESTIGATION (2014), *available at* http://www.justice.gov/crt/about/spl/documents/tutwiler_findings_1-17-14.pdf.

³³⁵ OFFICE OF THE ASSISTANT ATTORNEY GEN., *supra* note 335.

³³⁶ *DOJ Orders Reforms at Alabama Prison*, UPI, Jan. 20, 2014, *available at* http://www.upi.com/Top_News/US/2014/01/20/DOJ-orders-reforms-at-Alabama-prison/UPI-17051390251109/.

³³⁷ *Id.*

³³⁸ *DOJ Probe Finds Sexual Misconduct at Ala. Prison*, ASSOCIATED PRESS STATE & LOCAL, Jan. 19, 2014, *available at* <http://www.washingtontimes.com/news/2014/jan/19/doj-probe-finds-sexual-misconduct-at-ala-prison/>.

³³⁹ *Id.*

³⁴⁰ *Id.*

gerous' conditions are the norm."³⁴¹ In preparing the report, SPLC inspected fifteen ADOC facilities, interviewed one hundred prisoners, and conducted an extended review of "thousands of pages of medical records, depositions, policies and contracts with companies that provide health and mental health care."³⁴² According to SPLC, inmates in Alabama prisons are frequently given the wrong medication, serious medical conditions often go misdiagnosed or undiagnosed by ADOC medical staff, and ADOC lacks "an effective system for managing infectious diseases, including scabies and tuberculosis."³⁴³ As a result, a number of inmates have been subjected to unnecessary amputations, seizures, physical suffering, and even death.³⁴⁴ The report also notes that inmates with disabilities, such as blind inmates or those confined to wheelchairs, and inmates suffering from mental illnesses receive particularly inadequate care and are often subjected to ridicule from prison staff.³⁴⁵

After releasing the report, SPLC filed a law suit in the Middle District of Alabama on behalf of forty inmates housed at various ADOC facilities.³⁴⁶ The suit alleges that ADOC discriminates against inmates with disabilities and violates prisoners' Eighth and Fourteenth Amendment rights.³⁴⁷ For relief, SPLC requests that a United States district judge "require [ADOC] to provide constitutionally adequate medical care and mental health care" and "comply with the Americans with Disabilities Act and the Rehabilitation Act."³⁴⁸ At the time of filing, SPLC representatives also noted that "overcrowding and health care issues are 'deeply intertwined.'"³⁴⁹ The suit was still active in United States district court at the time of this writing.

³⁴¹ Kala Kachmar, *Study Cites "Egregious" Alabama Prison Health Care Issues*, MONTGOMERY ADVERTISER, June 11, 2014, available at <http://www.montgomeryadvertiser.com/story/news/2014/06/10/study-cites-egregious-ala-prison-health-care-problems/10304581/>.

³⁴² *Id.*

³⁴³ *Id.* In fact, according to the report, active tuberculosis was found amongst inmates or ADOC staff at St. Clair Correctional Facility, Tutweiler Prison for Women, and Donaldson Correctional Facility. *Id.*

³⁴⁴ *See id.*

³⁴⁵ *See id.*

³⁴⁶ Mike Cason, *Southern Poverty Law Center Sues Alabama Department of Corrections Over Inmate Healthcare*, AL.COM (June 17, 2014, 2:26 PM), http://www.al.com/news/index.ssf/2014/06/splc_story_on_inmate_health_ca.html.

³⁴⁷ *Id.*

³⁴⁸ *See id.*

³⁴⁹ *Id.*

d. *Pulling it all Together*

A review of available information seems to indicate that Alabama's prison system is susceptible to findings of unconstitutionality before a federal court. Alabama's current prison populations and staffing levels are all too similar to populations and staffing levels examined by federal judges in *McCray*, *Pugh*, and *Brown*. Predicated upon the courts' findings in those cases, these similarities present a strong likelihood of excessive violence, subpar medical care, and inadequate living conditions inside Alabama's present-day penal facilities. These suspicions are heightened by SPLC's recent report, and confirmed, at least in regard to Tutwiler, by direct findings from Judge Thompson and DOJ.

However, federal intervention is not a forgone conclusion. Recently, Governor Bentley launched a study under the Justice Reinvestment Initiative to "examine what causes inmate growth in Alabama prisons and suggest ways the state could contain costs without risking public safety."³⁵⁰ This task force, which is run by the nonpartisan Council of State Governments Justice Center, may find ways to decrease overcrowding and understaffing without involving the federal courts.³⁵¹ Unfortunately, such solutions generally require politically unpopular decisions, such as extra funding,³⁵² and it seems unlikely that the Alabama Legislature will vote to substantially increase ADOC's \$365 million annual budget.³⁵³ Hence, absent significant revisions in the State's sentencing and parole guidelines, federal intervention might be the only vehicle to effect major change inside Alabama's prison system—making future federal court involvement highly probable, if not imminent.

IV. FIXING THE WRONGS: A PICTURE OF FEDERAL REMEDIAL ACTION IN ALABAMA'S PRISONS

a. *A Basic Timeframe: Is Prisoner Release Right Around the Corner?*

When a state systematically violates prisoners' constitutional rights, federal courts have a responsibility to remedy the violation.³⁵⁴ That responsibility persists even if the remedy would "in-

³⁵⁰ Kim Chandler, *Alabama Prison-Overhaul Study Launched*, ASSOCIATED PRESS STATE & LOCAL WIRE, June 11, 2014, available at <http://www.washingtontimes.com/news/2014/jun/10/study-begins-on-alabama-prison-overhaul/>.

³⁵¹ *See id.*

³⁵² *See id.*

³⁵³ *See* Lockette, *supra* note 330.

³⁵⁴ *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) (citing *Hutto v. Finney*, 437 U.S. 678, 687 (1978); *Cruz v. Beto*, 405 U.S. 319, 321 (1972)).

volve intrusion into the realm of prison administration.”³⁵⁵ Consequently, if a federal court identifies constitutional injustices inside Alabama prisons, it must act to correct those injustices.³⁵⁶ As previously discussed, federal district courts in Alabama have taken such actions in the past.³⁵⁷

Initially, this relief takes the form of an injunctive order aimed at curing the constitutional violation.³⁵⁸ As part of that order, a judge may require the state to submit plans to fully redress identified infirmities.³⁵⁹ Further, the judge may oversee implementation and long-term adherence to the order, either directly or through appointment of a Special Master.³⁶⁰ Theoretically, the scope of such an order could be very broad. For example, it might mandate physical structure and security upgrades, increased staffing levels, or even prison cell temperature settings.³⁶¹ But notably, District Judge Hand’s unilateral injunctive order in *Pugh v. Locke* requiring the state to immediately stop accepting inmates into its prison facilities would probably not take place today.³⁶² As outlined by Judge Thompson in *Laube v. Haley*, such an order is tantamount to prisoner release; therefore, under the PLRA’s stringent requirements it must come from a three-judge panel.³⁶³ However, if a federal judge determines overcrowding is the primary cause of the violation, she may eventually move for formation of a three judge-panel with the authority to release prisoners.³⁶⁴

So, given the grossly overcrowded conditions inside Alabama prisons, how soon could a federal court move for formation of a three-judge panel with authority to release Alabama prisoners or halt the flow of new prisoners into the prison system? Unfortunately, the answer to that question is not concrete. The PLRA does not specifically dictate how long a federal judge must wait between issuance of an injunctive order and request for formation of a panel.³⁶⁵ Instead, the statute simply states that the defendant must have had a “reasonable amount of time” to comply with an order “for

³⁵⁵ *Id.* at 1928–29.

³⁵⁶ *See id.*

³⁵⁷ *See Laube I*, 234 F. Supp. 2d 1227, 1253 (M.D. Ala. 2002); *Pugh v. Locke*, 406 F. Supp. 318, 331 (M.D. Ala. 1976).

³⁵⁸ *See* 18 U.S.C. § 3626(a)(2) (2012).

³⁵⁹ *See Laube I*, 234 F. Supp. 2d at 1253.

³⁶⁰ *See Brown*, 131 S. Ct. at 1926.

³⁶¹ *See Laube III*, 333 F. Supp. 2d 1234, 1248–51, 1260–63 (M.D. Ala. 2004).

³⁶² *See Pugh*, 406 F. Supp. at 332.

³⁶³ *See Laube II*, 242 F. Supp. 2d 1150, 1152 (M.D. Ala. 2003).

³⁶⁴ 18 U.S.C. § 3626(a)(3)(A) to (E) (2012).

³⁶⁵ *Id.* § 3626(a)(3)(E).

less intrusive relief” before the judge makes the request.³⁶⁶ Also unclear through a plain text reading of the PLRA is whether the statute’s reasonable time requirement attaches only to a judge’s initial injunctive order or to each subsequent order thereafter.³⁶⁷ This question is often critical because judges generally have to issue multiple orders in cases involving pervasive, systematic constitutional violations.³⁶⁸

The U.S. Supreme Court provided some clarity on these points in *Brown v. Plata*. In that case, the Court held that five years of remedial efforts satisfied the PLRA’s reasonable time requirement.³⁶⁹ Further, the Court found that the PLRA’s order requirement is met if a court has issued one order and “this single order has ‘failed to remedy’ the constitutional violation;” hence, multiple orders are not mandatory.³⁷⁰ If a judge chooses to enter multiple orders, those subsequent orders do not necessarily toll the PLRA’s reasonable time requirement.³⁷¹ Instead, although each order issued by a court “must be given a reasonable time to succeed,” courts should assess reasonableness “in light of the entire history of the court’s remedial efforts.”³⁷² In *Brown*, because California had previously shown an unwillingness to comply with remedial orders, the Court found that the district courts were not required to wait and see if their most recent orders would gain traction before moving for formation of a panel.³⁷³

Thus, if a federal court in Alabama issues an order for remedial relief in the State’s prison system, the amount of time the State has to comply with that order before formation of a three-judge panel may largely depend on the State’s conduct.³⁷⁴ If the State makes earnest strides towards complying with the court’s orders and remedying identified constitutional violations, the PLRA’s reasonable time requirement might extend for a number of years. However, if the State makes only meager improvements or attempts to dodge remedial implementation by refusing to appropriate proper funding, the timeframe could, theoretically, be greatly shortened. The U.S. Supreme Court’s broad reading of the PLRA in *Brown* gives lower courts room to adapt the Court’s holding to fit

³⁶⁶ *Id.* § 3626(a)(3)(A).

³⁶⁷ *See id.*

³⁶⁸ *See Brown v. Plata*, 131 S. Ct. 1910, 1931 (2011).

³⁶⁹ *See id.*

³⁷⁰ *Id.* at 1930.

³⁷¹ *See id.* at 1931.

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *See Brown*, 131 S. Ct. at 1931.

the circumstances of an individual case.³⁷⁵ So, after *Brown* it seems clear that five years definitely meets the PLRA's reasonable time requirement, but noncompliant behavior from Alabama coupled with the State's sordid history of unconstitutionality in its prison system may give a federal court cause to shorten that timeframe. After all, the court need only enter one order that fails to rectify the constitutional violation before moving for more aggressive intervention; it does not have to wait to see if later orders will fail.³⁷⁶ This rings especially true when a defendant is bent towards non-compliance or slow compliance.³⁷⁷

b. A Host of Underlying Causes

After formation of a three-judge panel under the PLRA, the panel can only order prisoner releases if it finds clear and convincing evidence that "crowding is the primary cause of the violation of a Federal right."³⁷⁸ However, in Alabama, it is likely that a court will identify a number of underlying causes contributing to violations of prisoners' constitutional rights. Evidence suggests that overcrowding in Alabama prisons causes or exacerbates violence, poor medical care, inhumane living conditions, lack of rehabilitative opportunities, and sexual assault—all potential constitutional violations.³⁷⁹ But factors such as understaffing, poor custodial and medical training, and lack of funding likely also play a role in aggravating these conditions.³⁸⁰ Therefore, can a three-judge panel in Alabama order prisoner releases even though constitutional violations will likely persist unless the State also addresses factors other than overcrowding?

Yes. In *Brown*, the U.S. Supreme Court asserted that "[o]vercrowding need only be the foremost, chief, or principal cause of the violation. If Congress had intended to require that crowding be the only cause, it would have said so"³⁸¹ Accordingly, the Court upheld the release of thousands of California prisoners even though understaffing, poor training, and lack of physical space were co-contributors to identified constitutional violations.³⁸² Thus, here again, the Court interpreted a provision of the

³⁷⁵ *See id.*

³⁷⁶ *See id.*

³⁷⁷ *See id.*

³⁷⁸ 18 U.S.C. § 3626(a)(3)(E)(i) (2012).

³⁷⁹ *See supra* Part III.

³⁸⁰ *See supra* Part III.

³⁸¹ *Brown*, 131 S. Ct. at 1936.

³⁸² *See id.* at 1936–37.

PLRA broadly, giving lower courts room to “fashion practical remedies when confronted with complex and intractable constitutional violations.”³⁸³ So, even though curing constitutional violations in Alabama’s prison system would likely require comprehensive efforts beyond mere population reduction, a three-judge panel need only find that the overcrowding is the *foremost* cause of identified violations to satisfy the PLRA’s causation requirement. Because courts in *Pugh*, *McCray*, and *Brown* all found that overcrowding was the primary cause of constitutional violations in those cases, there is reason to believe that federal courts will have little trouble identifying prison population as the main cause of constitutional inadequacies in Alabama’s present-day, equally overcrowded penal system.³⁸⁴

c. *Alternatives to Releasing Prisoners*

Before releasing prisoners, a three-judge panel must also find that “no other relief will remedy the violation of the Federal right.”³⁸⁵ In *Brown*, California argued that building new prisons and hiring additional staff instead of releasing prisoners could have remedied problems in its prison system.³⁸⁶ And if faced with a similar order to release prisoners, Alabama might very well make the same argument. This argument, however, did not work for California in *Brown*, and it is unlikely to work for Alabama in any future proceedings.³⁸⁷

First, in its *Brown* decision the U.S. Supreme Court noted that California could in fact comply with the panel’s remedial order by building new prisons or transferring prisoners to out-of-state prisons.³⁸⁸ Indeed, the State could employ any number of remedial efforts of its choosing to comply with the panel’s population limit.³⁸⁹ But absent significant population improvements through those methods, the release order would stand.³⁹⁰ Second, the Court agreed with the panel’s finding that hiring more staff was an unrealistic remedial route because without simultaneous population reduction or facility construction there would be inadequate work-

³⁸³ *Id.* at 1937.

³⁸⁴ *See id.* at 1936; *Pugh v. Locke*, 406 F. Supp. 318, 323 (M.D. Ala. 1976); *McCray II*, 399 F. Supp. 271, 275 (S.D. Ala. 1975).

³⁸⁵ 18 U.S.C. § 3626(a)(3)(E)(ii) (2012).

³⁸⁶ *Brown*, 131 S. Ct. at 1937.

³⁸⁷ *See id.*

³⁸⁸ *Id.* at 1937–38.

³⁸⁹ *Id.* at 1937.

³⁹⁰ *See id.*

space for the new staff.³⁹¹ Critically, the Court found that all of California's alternative proposals "would require the State to expend large amounts of money."³⁹² The Court doubted the California Legislature would ultimately approve funding for the proposed remedial solutions and refused to "ignore the political and fiscal reality behind [the] case."³⁹³

When faced with implementation of a remedial order, ADOC has a history of arguing that it lacks adequate funding to fully comply with the order.³⁹⁴ And indeed, the Alabama Legislature has historically shown a general unwillingness to fund ADOC beyond the bare minimum.³⁹⁵ Hence, at a time when the State is facing major financial difficulties,³⁹⁶ a federal court may view any commitment from the State to dedicate funds to prison construction or prisoner transfer with skepticism. This viewpoint may be galvanized by the State's actions in 2012, when it borrowed \$437 million from the State's trust fund to help fund the prison system, but instead used most of the money to fund Medicaid.³⁹⁷ Such an action seems to precisely align with the type of financial and fiscal realities that the U.S. Supreme Court in *Brown* advised lower federal courts to consider. Ultimately, the U.S. Supreme Court's interpretation of the PLRA gives judges relatively broad discretion to order prisoner releases over more costly remedial measures. Thus, it seems unlikely that a three-judge panel in Alabama would refrain from ordering prisoner releases in lieu of alternative measures unless the State showed an immediate, concrete commitment towards implementing those measures.

d. Narrowly Tailored Remedies: So, Who Gets a Ticket Out of Jail?

Under the PLRA, prospective relief "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs."³⁹⁸ In *Brown*, California charged that the three-judge panel violated this provision because the panel's remedial order provided for collateral consequences.³⁹⁹ The Court,

³⁹¹ *Id.* at 1938.

³⁹² *Brown*, 131 S. Ct. at 1939.

³⁹³ *Id.*

³⁹⁴ *See, e.g., Laube II*, 242 F. Supp. 2d 1150, 1152 (M.D. Ala. 2003).

³⁹⁵ *See, e.g., McCray II*, 399 F. Supp. 271, 276–77 (S.D. Ala. 1975).

³⁹⁶ *See Lockette, supra* note 330 ("Last year, voters approved an amendment that allowed the state to take \$437 million out of a state trust fund to patch a hole in the state budget.").

³⁹⁷ *Id.*

³⁹⁸ 18 U.S.C. § 3626(a)(1)(A) (2012).

³⁹⁹ *Brown*, 131 S. Ct. at 1939.

however, disagreed and found that the scope of the order was appropriate even though it would “have positive effects beyond the plaintiff class.”⁴⁰⁰ To that end, the Court advised that any prisoner in California’s prison system might someday receive inadequate health care due to overcrowding.⁴⁰¹ Therefore, providing prophylactic relief for future class members did not violate the PLRA’s narrow tailoring requirement.⁴⁰² The Court also found that the order was “not overbroad because it encompass[ed] the entire prison system” and the delivery of medical care was run at a system-wide level.⁴⁰³ These findings, of course, touched off a firestorm of controversy as Justice Scalia announced his view that, generally speaking, a court may only release a prisoner who has personally suffered a constitutional violation.⁴⁰⁴

This argument between the justices, coupled with the specific set of facts the majority based its holdings on in *Brown*, somewhat convolutes the PLRA’s narrow tailoring requirement. On the one hand, it seems clear through the majority opinion that when a constitutional violation flows from a system-wide practice or error, a prisoner release order may encompass an entire prison system instead of only those prisons that most egregiously commit the violation.⁴⁰⁵ Unconstitutional delivery of medical care seems to naturally fit this bill because there is often some departmental cohesion in its administration. However, violence and inhumane living conditions are different. Factors such as individual facility management, facility security classification level, and date of facility construction may make these problems specific to a single prison rather than an entire prison system. Therefore, because of the U.S. Supreme Court’s open-ended findings in *Brown*, judges presented with releasing prisoners in Alabama would have to carefully consider the overarching source of constitutional violations when determining whether a prisoner release order should impact a few prisons or all the prisons in Alabama’s system.⁴⁰⁶

As to collateral effects of prisoner release, this area is equally complex. Here again, the majority opinion seems to make clear that when system-wide deprivation of medical care is the constitu-

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* at 1940.

⁴⁰² *See id.*

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* at 1957–58 (Scalia, J., dissenting).

⁴⁰⁵ *See Brown*, 131 S. Ct. at 1940–41 (majority opinion).

⁴⁰⁶ *Cf. Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 417 (1977) (stating that a system-wide remedy to cure school segregation went beyond the scope of tailoring needed to cure specific violations).

tional violation in question, courts may authorize prophylactic prisoner releases.⁴⁰⁷ But this logic arguably strays from the Court's traditional interpretation of narrow tailoring in prison litigation, and it is unclear just how far it should carry.⁴⁰⁸ If excessive violence within the system is the constitutional infirmity at issue, should a court authorize the release of prisoners who have never been subjected to violence because other prisoners or guards *might* attack the prisoner in the future? The majority opinion seems to answer this question in the affirmative, but it does not clearly state how imminent future violence must be before protective relief is appropriate.⁴⁰⁹

What is apparent from the Court's reasoning is that inadequate health care was a pervasive and systematic problem within California's penal system at the time of the decision.⁴¹⁰ The Court emphasized that unaffected prisoners were not "remote bystanders in California's medical care system."⁴¹¹ Instead, the Court described these prisoners as the "system's next potential victims" without trying to calculate the likelihood of an average prisoner actually becoming a member of the plaintiff class.⁴¹² The Court also found that providing relief for only current class members would inadequately protect future class members.⁴¹³ This reasoning would seem to indicate a fairly liberal construction of imminence, in which virtually any chance of non-class members becoming part of the plaintiff class warrants prophylactic relief. Hence, a federal court in Alabama faced with providing prophylactic relief may consider whether the identified constitutional violation is as ubiquitous as the violations described in *Brown* by taking into account whether limiting relief to the plaintiff class would offer adequate protection to future class members. Further, a court may attempt to ground itself in the parameters of imminent and irreparable harm outlined

⁴⁰⁷ *Brown*, 131 S. Ct. at 1940.

⁴⁰⁸ *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343, 350 (1996) (stating that the distinction between the judicial and executive branches would be extinguished if courts invoked remedial relief absent actual or imminent harm). In *Brown*, the Court distinguished *Lewis* and other prior opinions by stating that "the precedents do not suggest that a narrow and otherwise proper remedy for a constitutional violation is invalid simply because it will have collateral effects." *Brown*, 131 S. Ct. at 1940. Instead, the Court found that the PLRA only requires "that the scope of [an] order must be determined with reference to the constitutional violations established by the specific plaintiffs before the court." *Id.*

⁴⁰⁹ *See Brown*, 131 S. Ct. at 1939–40.

⁴¹⁰ *See id.* at 1924–26.

⁴¹¹ *Id.* at 1940.

⁴¹² *See id.*

⁴¹³ *Id.*

by the U.S. Supreme Court in matters requiring preliminary injunctive relief.⁴¹⁴ Although it is unclear whether the Court intends for this standard to play a role in determining the scope of prophylactic relief in prison litigation, this line of cases at least provides a jumping off point for analysis.

It is worth noting that nothing in *Brown* indicates that a court *must* provide prophylactic relief.⁴¹⁵ In fact, the Court stated that California could move the three-judge panel for modification of the order to apply only to sick and mentally ill inmates if the State wished.⁴¹⁶ Thus, judges adhering to Justice Scalia's more rigid interpretation of the PLRA's remedial scope could theoretically provide relief only to those prisoners whose rights have been specifically violated.⁴¹⁷ However, the Court in *Brown* cautioned that this option provides less flexibility.⁴¹⁸ A number of members of a plaintiff class may have qualities that make their releases highly undesirable.⁴¹⁹ Prophylactic relief allows authorities greater latitude in determining which prisoners to release while still addressing constitutional violations caused by overcrowding.⁴²⁰ In this way, a state may continue to incarcerate dangerous class members, but provide remedial relief to the class members through non-class member releases.⁴²¹ Because Alabama officials often note that up to 75% of inmates incarcerated in the State are violent offenders,⁴²² this type of flexibility may be particularly advantageous if the State is faced with a prisoner release order.

CONCLUSION

Inhumane prisoner treatment has been a black mark on Alabama's image for a long time. Indeed, it is difficult to find a time period in Alabama's penal history when some level of mistreatment within the State's prison system was not prevalent. Overcrowding, understaffing, and underfunding have been pervasive over the years, and these factors have continually fostered a prison system forged from oppression rather than rehabilitation. Human beings—even prisoners—should not have to live in filth or constant

⁴¹⁴ See, e.g., *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20–22 (2008) (discussing the need for *likely* injury before issuance of a preliminary injunction).

⁴¹⁵ See *Brown*, 131 S. Ct. at 1940.

⁴¹⁶ *Id.*

⁴¹⁷ See *id.* at 1957–58 (Scalia, J., dissenting).

⁴¹⁸ *Id.* at 1940 (majority opinion).

⁴¹⁹ See *id.*

⁴²⁰ See *id.*

⁴²¹ See *Brown*, 131 S. Ct. at 1940–41.

⁴²² Kitchen, *supra* note 11.

fear of physical violence. This type of penal environment serves only to strip inmates of the chance to use their incarceration in a meaningful manner. It fails the inmate, and it fails society.

In order to correct problems within Alabama's prison system, state officials must adopt a comprehensive solution. The Alabama Legislature must allocate needed funding to fill staff shortages and renovate or build prisons. Yet, it must also consider reforms in sentencing guidelines and parole. Absent sweeping, state-initiated changes, it seems likely that a federal court will eventually intervene in the State's prison system. Not only could federal intervention prove expensive, it would represent abdication to the federal government of the State's role in constitutionally carrying out one of its key functions. Thus, if the Alabama Legislature is serious about states' rights, it will cure constitutional violations in the State's prison system on its own volition.