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A Failing Correctional System:
State Prison Overcrowding in the United States

State prison overcrowding has grown into a detrimental problem within our American penal system, such that after decades of being ignored by politicians, media outlets, and the lower court system, it has resulted in an ineffective and overcrowded correctional system that craves reformation. Before we can postulate just how severe the problem is today, we must take a look at where our modern correctional system began.

During the Colonial Period, early Americans sought to distance themselves from the English practice of incarceration. Instead, banishment, corporal punishment, and death were utilized to punish lawbreakers. In light of the optimistic and humane philosophy asserted in the Declaration of Independence, new correctional practices began to emerge in the latter half of the 18th century (Clear, 15). “Post-revolutionary reformers questioned the efficacy and morality of colonial laws. Reformers proposed that penal codes should treat individuals with dignity” (Blomberg, 25).

The first of these new practices was introduced as the Pennsylvania System. It hoped to be unlike the failing English prisons by focusing on goals of isolation and penance. In 1790, the Walnut Street Jail was transformed into the very first modern American prison. Within a short amount of time, the Walnut Street Prison became overcrowded. Other prisons were built to meet demands. The prisons under the Pennsylvania System, also called the segregate system, used solitary confinement for all prisoners in order to promote self-reflection and repentance for past crimes. This system was soon found to be costly and architecturally too spread out. As a result, a second prison system was developed.

The Auburn System was introduced in New York in 1819. The congregate system used complete isolation at night, but forced prisoners to perform hard labor during the day in silence. The design of the Auburn System allowed more inmates to be housed in less space. With its tiered design and circle array that enhanced security capabilities, the Auburn System was adopted as the more efficient of the two systems. It was during the reign of this system that the strict disciplinarian tools of the lockstep and prison stripes were first used.

The prison activists of 19th century soon realized that a goal of reformation would be a difficult task with overcrowding (Blomberg, 42). The growth of cities across the United States increased the need for laws. As more laws were created, incarceration became more prevalent. In light of the Industrial Age, a new penal goal was on the horizon: teaching decency and order through labor. These penitentiaries were far larger than prisons of the past century. They were built to encourage stability and order, while terrifying the inmates and outside world alike. While the North attempted to maintain the practices of the Auburn System, by 1860, overcrowding forced the end of separation and isolation. “With penal reform theory all but vanquished, managerial and fiscal concerns ultimately determined the operations of the penitentiary” (Blomberg, 56). The North gravitated towards a new model called the Big House. Big Houses were maximum-security prisons that asserted order through “routines [that] were purposely empty” (Johnson, 30).

In the Southern States, the focus on labor was far more severe. Chain gangs and the convict lease system were created to maximize the efficiency of inmate labor. These industrial prisons operated under the idea that “possession of a convict’s person is an opportunity for the state to make money” (Blomberg, 57). The labor carried out in these prisons was “of the most servile, backbreaking sort; penance was never given as a second thought” (Johnson, 30). In the

aftermath of the Civil War, former African American slaves, many of whom were deemed criminals in the South, were placed in these laborious systems. Often their crimes were as minor as alleged public drunkenness or alleged theft. While the atrocious conditions raised concern in the Northern states, the system survived from 1867 until the early 1900s with little federal intervention (Jackson, 234). The practice of corporal punishment that post-Revolutionary reformers so fervently fought against became key to maintaining order and enforcing regulations in these and future correctional facilities.

The 1870 National Congress on Penitentiary and Reformatory Discipline was committed to correct the failing correctional system. Reformatories, indeterminate sentences, parole, and probation were new tenets introduced to the prison system (Blomberg, 71). These were practices that hoped to reform offenders and reward them for good behavior. While intentions were good, finances and prison administration created major difficulties with implementation. It became quickly apparent that probation and parole officers were responsible for an overwhelming number of cases. Moreover, probation and parole violations led to quickly imposed sentences. Problems in this field only fueled the recidivism rate, which of course exacerbated the overcrowding epidemic. During this same era, corporal punishment and corruption continued to be a problem.

A solution that has been tried and retried to remedy the overcrowding problem is prison expansion. The 1930s showed an influx in prison expansion. It made sense to a Depression Era people to build more prisons, thereby creating new jobs in a suffering economy for those in both the construction and correctional fields. When it was no longer feasible to build new structures, renovated hospitals and other buildings were utilized.

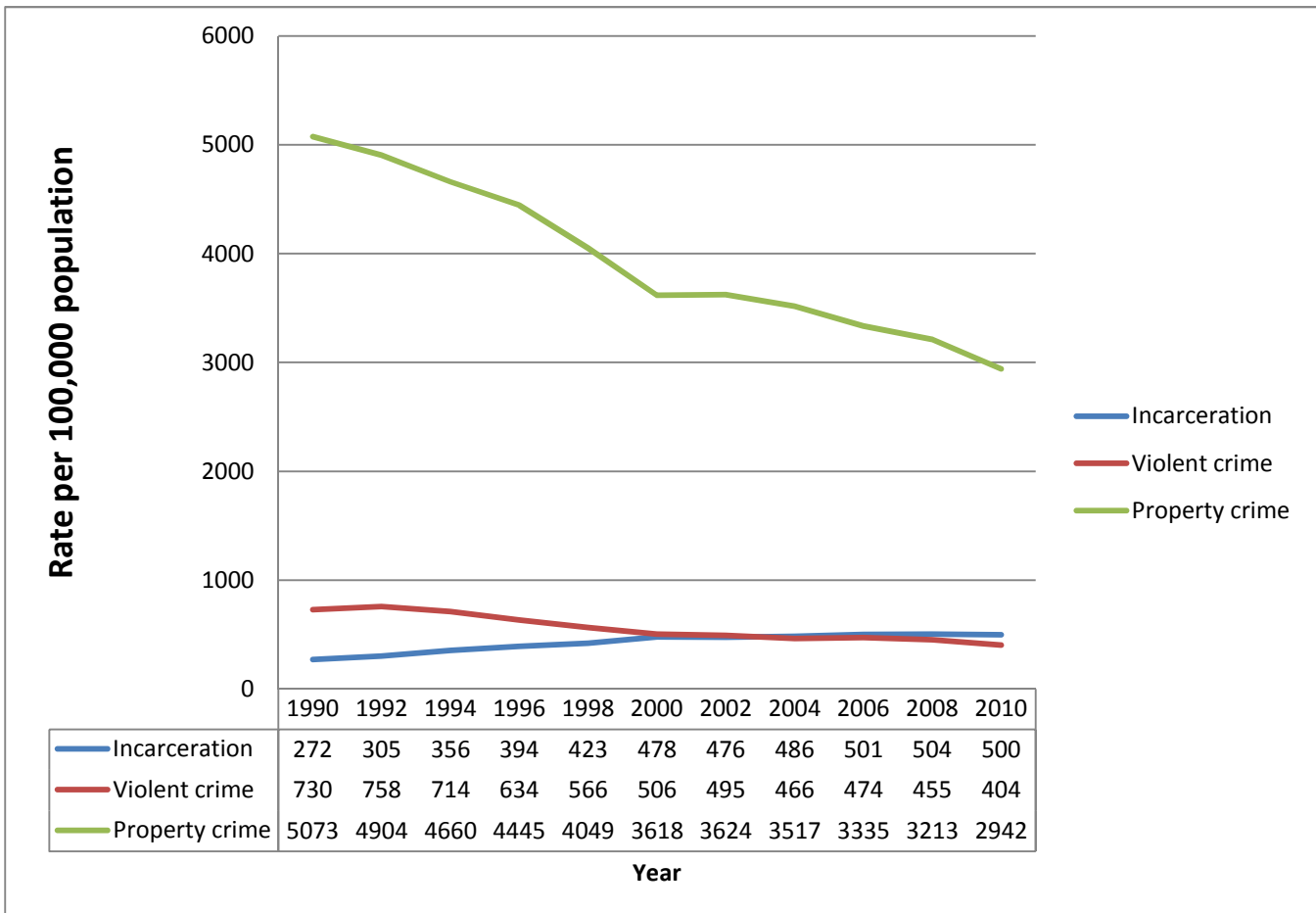
By the 1940s and 1950s, the focus of the American prison system seemed to shift back to one of rehabilitation. In the wake of the Second World War, correctional institutions emerged which toned down the pains of imprisonment recognized in earlier decades. “They were fundamentally more tolerable human warehouses than the Big Houses they supplanted” (Johnson, 34). During this era, more recreational and rehabilitative programs were introduced into the prison system. While overcrowding was certainly not at its peak, it remained a lingering obstacle in the way of true rehabilitation of offenders.

It seems that no matter what prison reformers tried, there was always an obstacle in the way. By the 1970s, the War on Drugs had begun. Laws became stricter as politicians pledged to rid neighborhoods of the evils of drug use. This focus on drugs perpetuated the overcrowding problem by drastically increasing the number of nonviolent offenders being incarcerated. In 1974, Robert Martinson summarized his views on the penal system with the memorable phrase “nothing works”. Apparently, America agrees because no significant changes have been made since to remedy the growing problem. In 2005, during the last state prison census, there were 1,190 state confinement facilities (BJS). Even with limited building space available, this is a 5.5% increase from 2000 (BJS). Building more prisons only expands a failing system. As more prisons are built, they are quickly filled by judges who see incarceration as a viable option again.

The purpose of prisons has become a somewhat ambiguous topic. While some models advocate punishment and societal protection, others promote rehabilitation and reintegration into society. Nonetheless, we continue to fill prisons beyond their capabilities. When dealing with prison capacity, there are three important terms to reference: design capacity, rated capacity, and operational capacity. It is the legal distinctions among these three terms that enable prisons to crowd inmates beyond what is appropriate. Design capacity is the number of inmates the

building was designed by architects to hold. The rated capacity is the capacity as determined by a rating official. Lastly is operational capacity, which is number of inmates that can be handled within the facility according to staff size and facility services (Durham, 34). Depending on which capacity rating is used, a state can stretch the amount of inmates to excessive proportions. For example, a rating official may be persuaded by prison administrators to broaden the rated capacity to accommodate prison needs. This advances a vague interpretation of what overcrowding is according to the law, and what overcrowding is by law is often vastly different from what a reasonable person would deem inappropriate living conditions.

One would assume by the way politicians and the media encourage getting tougher on crime, that lower crime rates would be reflected in those states with heightened incarceration rates. However, those statistics do not reflect such a correlation. Nationally, crime rates have actually been declining over the past two decades, yet the incarceration rates are on the rise. The chart below made from combining statistics available from the Bureau of Justice Statistics and



the FBI's Uniform Crime Reporting statistics shows the incarceration, violent crime, and property crime rates over the past twenty years. Why has the incarceration rate been slowing growing despite the apparent decrease in reported crimes across the United States?

The telltale statistics, however, focus on comparisons in neighboring states. North Dakota and South Dakota are two neighboring states that were examined more closely by one researcher who proposed governors' rhetoric was to blame for the drastic discrepancies between incarceration and crime rates. The two states have drastically different incarceration rates, yet comparable crime rates (Davey, 3). This is a trend that will be later discussed in detail using specific states and regions.

We must look at why this discrepancy exists, and if it is to the detriment of our correctional system. Today, the system fills prisons far beyond their reasonable capacity. When the severity becomes too obvious to ignore, more prisons are built. More recently, because prison expansion is no longer practical, some prisons are being ordered to release inmates. In May of 2011, the Supreme Court ordered California to release over 30,000 inmates in order to alleviate a clear and obvious overcrowding problem (Liptak). A real danger must be present if the Supreme Court is willing to gamble with the safety of California's general population by releasing thousands of prisoners back into society before their sentences are up. There may be no apparent or immediate solution to the overcrowding problem, but there must be something better than aggravating the problem by feeding more offenders into overcrowded and ineffective prisons.

There are three central parties that should be considered when exploring the overcrowding problem in American prisons. The first is politicians. Politicians depend on society's votes to get elected and remain in office. In order to meet this end, politicians must campaign on their philosophies, causes, and objectives. One cause that has been well received by

both Republican and Democratic candidates alike is “get tough on crime”. This theme came to the forefront of political campaigns in the 1970s with Richard Nixon’s war on drugs campaign. It was reinforced with Ronald Reagan’s administration again in the 1980s. By the early 1990s, Bill Clinton began using the war on crime in his campaigns as well with promises of more police officers on the street to protect the public (Lynch, 119).

More police officers on the street naturally led to increased arrests. With nowhere else to house newly arrested offenders, they were crowded into existing prisons. The campaign tactic did work, as Americans do want to hear that their elected officials have their safety in mind. More effective is the fear factor that such campaigns incite in people. If the government calls for heightened surveillance and arrests, then voters begin to fear the alternative. This exaggerated cause has been a defining factor in the excessive incarceration rates across the nation.

The war on crime campaigns, while promising safety for American citizens, have actually focused most attention on catching low-level drug offenders and street criminals (Blomberg, 203). This idea that politicians can have a part in taking drugs off the street sounds appealing to voters on the surface. “So, [taxpayers] continue to buy the empty promises of politicians, who tell them that more prisons, longer sentences, and a more austere existence within prisons will do the job” (Ross, 89). This tactic has created a problem whereby unprecedented numbers of nonviolent offenders are being imprisoned. Not only does this mean that prisons are becoming overcrowded, but also they are failing to serve their intended purpose of protecting society.

Indeed, the tough on crime mentality takes criminals off the street, but this plan is visibly shortsighted. At least 95% of state prisoners will be released (BJS), and an overcrowded system only intensifies recidivism rates. A recidivist is a repeat offender, although definitions of what classifies as a recidivist can vary from state to state. Recidivism rates in general are self-reported

by each particular state, and of course lower recidivism rates are desired. “There are some inconsistencies in the way in which different jailers recorded recidivist data” (Boritch, 147).

While some report recidivists as all repeat offenders who return to prison, others classify persons as recidivists only if they repeated the same crime within a specified number of years. So while there is an inherent haziness to recidivism rates, they can be used loosely to demonstrate the ineffectiveness of prisons, especially as pertaining to the overcrowding problem.

The most recognized researchers on crime control have been those supported by politicians and pushed into the limelight by media outlets. Researchers who dispute the positive effects of increased incarceration rarely receive adequate attention. One such researcher is Todd Clear. He contends that politicians direct criminal justice policies by using their “influence and power to ignore sound research in order to promote their independent crime control agenda” (Lynch, 97).

While presidential candidates can certainly set the tone for the nation, it is the governors of individual states who seem to have the most influence over incarceration rates (Davey, 7). State prisons are built, operated, and funded by the state. They house inmates who have violated state laws. For this reason, the rates of imprisonment are fully dependent on the political atmosphere in the specific state. “A governor who wants to encourage a Draconian approach to the problem of crime can send out a law-and-order message to participants in the state criminal justice system and expect a quick response” (Davey, 7). For example, police officers may be influenced to make more arrests. District Attorneys may refuse pleas by demanding stricter sentences.

In his book The Politics of Prison Expansion, Joseph Dillon Davey hypothesizes that attention should be paid to rhetoric used by governors and other politicians even more so than the

specific laws they authorize. The support for this statement can be found in comparisons between neighboring states' crime and incarceration rates. Davey focuses his attention on the Dakotas. In a study conducted by James Austin and John Irwin in 1991, they found that North and South Dakota had crime rates separated only by 3% (Davey, 3). In 1996, South Dakota had more than three times as many prisoners per 100,000 population as North Dakota (Davey, 3). Davey compared this trend over several years. The results seem to show that, at least in the Dakotas, there was no correlation between increased incarceration and decreased crime rates. This led Davey to contend that there must be some other driving force behind increased incarceration other than a crime control agenda. That driving force was the attitudes of the particular governors within each state.

In the political sphere we cannot forget legislators who have taken cue from their executive counterparts. Several laws have been passed since the 1970s in line with the tough on crime mentality, the most notorious being the three strikes law. The three strikes law, which was intended to deter repeat offenders, has actually had the effect of filling prisons faster with inmates serving lengthy sentences. The premise of the three strikes law is that after an offender commits three felonies, they may be prosecuted under the law and sentenced to an indeterminate life sentence of 25 years. Certainly a harsh law, it was accepted by the public largely because of shocking crimes committed by felonious repeat offenders, more specifically the heinous murder of twelve-year old Polly Klaas in California in 1993 (Fiber, 2). The first three strikes law was passed in Washington of that same year. The law was backed by the public who believed the proposition that the law would enhance the sentence of violent repeat offenders, who no doubt they wanted off the street.

Essentially, the foundation for such a law is rooted in an emotional appeal to the public's fear. Unfortunately, the three strikes law has been used to sentence even non-violent offenders to life in prison. In one case, a man was sentenced under the statute after stealing video tapes. In another notable case, a man was sentenced to life after stealing golf clubs. While both men had indeed committed three felonies during their criminal careers, none of their crimes were violent. Their final crimes before sentencing are most disturbing. Still, since 1993, twenty-four states have adopted some degree of the three strikes law (Fiber, 6). Without accompanying plans for prison expansion—which would also in itself be ineffective—three strikes offenders were crowded into existing prisons.

Clearly, statistics shown above reveal that getting tougher on crime by means of heightened patrol, incarceration, and sentencing enhancers has not affected crime rates. Notably, they have also not addressed the problems faced by inmates already in the system. Although these policies have not served the presumed purpose of public safety, they have certainly served another purpose. That hidden purpose is to secure votes. Appealing to societies' emotion regarding crime has been, since the 1970s, a surefire way to get votes.

Though politicians have been extremely influential in precipitating the tough on crime mentality, and therefore overcrowding problem, they would have not been able to do it without the continued support of the media. The media exacerbates the overcrowding problem by providing politicians and choice scholars with a platform to speak upon. Although there is an overwhelming amount of evidence that points to the failures of the prison system, this evidence is often overlooked by news and media outlets. "Media publicizes the large voice of a minority of scholars who believe in the effectiveness of prisons" (Lynch, 93). The other side, proffered by a majority of scholars, finds the current system futile and expensive.

Ultimately, if society was provided with the full picture of the prison system, they may demand change. It costs on average \$26,000 to house a single prisoner for one year (Schmitt). Although in many states that figure is much higher. That is one statistic Americans rarely hear from politicians or their enabling media counterparts. This is why the average person with access to politics and media will support the tough on crime model. Prisons grow due to public demand.

The most visible mode of spreading the tough on crime agenda that continues to clog American state prisons is unbalanced news reporting. "Crime and fear are good entertainment. Crime rates are down, but public concern with crime is up, way up!" (Altheide, 662) Human interest stories highlighting a young person's achievements are hardly ever presented. Instead, America is informed about violence, deceit, and the failures of a small division of society. Not only does this distort our view of society, but it also creates a very dangerous atmosphere. Despite the fact that only a minute portion of people carry out crime and violence, continued exposure to it on the news can surely unnerve a nation.

A columnist writing after the 1996 presidential election commented on the fear that Americans live with each day:

"Fear stalks this nation every day. Fear of making a wrong turn in a neighborhood in Los Angeles, riding the subway or jogging in Central Park in New York, fear symbolized by locks, guns and alarms to protect ourselves. Fear of talking to those who don't look like us. Fear of growing old in a country that does not have the resources to care for us. Fear of the government and civil war" (Devji).

While some of this fear is no doubt generated by personal experiences and word of mouth, a significant portion is directly related to media consumption. This media generated fear strengthens the tough on crime model by inciting panic in American households. Panic that their children are not safe, or that their streets are unprotected to the dangers that are no doubt lurking. It is American's fear coupled with politicians promise for security through prison sentences that

perpetuates the overcrowding problem. If the public demands incarceration, that is surely what they will get.

The third and final party that is guilty in maintaining the overcrowding problem in American state prisons is the lower courts. Although public demand is critical, and laws are certainly central, the decisions of lower court judges are ultimately what will determine who will be sent to prison and for how long a sentence. The lower courts are the final stop before offenders are transferred to state prisons.

Prison overcrowding and the United States lower courts have a somewhat ironic relationship. First, the lower courts sentence numerous offenders to extended sentences based on a variety of factors. Some judges consider aggravating circumstances such as use of a firearm, whether it was a domestic, and the past history of the offender. Although the legislature outlines specific sentencing guidelines, many sentencing decisions allow for a range of judicial discretion. For example, the penalty for aggravated assault first offense can range from fifteen to twenty-one months in prison. It is left to the judge, then, to determine the precise number of years the offender should be sentenced to.

On a smaller scale, and far more pertinent to the discussion of prison overcrowding, are the decisions judges must make regarding lower level street and drug crimes. The penalty for possession of cocaine can legislatively range from zero to six months imprisonment for a first offense. This means that it is up to the discretion of the sentencing judge whether or not to incarcerate. Across the nation we have seen a rise in probation violators due to small drug infractions. Thirty-five percent of our United States prison population is made up of probation violators (Lawrence). Young offenders are encouraged to consider plea bargains that essentially

tie them to strict probation standards. If they violate the terms of their probation, they are eligible for incarceration.

It is this far less dangerous group of individuals being incarcerated who are most bewildering. On one hand, we are technically getting criminals off the street; but on another hand, we are hardly making a worthwhile difference in making our streets safer. Instead, we are throwing fire into the growing flame that is state prison overcrowding. By inserting numerous non-violent offenders into overcrowded prisons, we increase the likelihood of prisonization, violence to inmates, and psychological problems resulting from incarceration.

In order to fully comprehend the contradictory role lower courts have developed in the overcrowding problem, we must recognize why overcrowding is so detrimental to our correctional system. Overcrowding is a difficult phenomenon to rightfully define. The reason for this is the ambiguity surrounding what constitutes over capacity. Hassine, an inmate sentenced to life without parole, describes overcrowding as a euphemism for what can only truly be recognized from experience on the inside. In Hassine's book, "Life Without Parole", he compares prison overcrowding to life in a ghetto (Hassine, 146). In this metaphor he is referring to the lack of privacy, personal space, and resources necessary to amount to adequate living conditions. Another inmate described the overcrowding problem by comparing prisons to chicken farms. "Prisoners are graded and classified, and officials try to cram as many as possible into a limited amount of space" (Cobb, 74).

This crowding has many detrimental effects on prison life. Although prison is designed to punish offenders, it should not go so far that it prevents the underlying goal of rehabilitation. When cramming an unwarranted number of inmates in a small area, several problems arise including ventilation issues, excessive noise, hygiene and health concerns, programming

availability, and security (Cobb). Although the ventilation and noise problems are self-apparent, hygiene and health concerns are not always the most obvious side effect of overcrowding.

Hygiene becomes an issue when facilities are built to service a certain number of inmates and later used to service sometimes twice that intended amount. Toilet and shower facilities can be shared by an unsanitary number of inmates.

After sentencing offenders to incarceration, it is the lower courts that are petitioned for relief from overcrowded prisoners. This is where the contradictory nature of the lower courts in prison overcrowding comes into play. Not only do many lower courts agree that prisons are overcrowded, but they are also beginning to order mandatory release of prisoners in order to remedy the problem. This hands-on approach that we are experiencing in the courts today is a distant departure from the approach taken prior to the 1960s. The hands-off doctrine operated under the assumption that prison administrators needed the ability to use discretion in order to properly run a prison (Kerper, 278).

In the 1960s, during the civil rights movement, society began getting concerned about the rights of prisoners. Litigation challenging the constitutionality of prison practices and conditions began emerging. Initially, the litigation focused on religious freedom and freedom of expression, but soon notice was taken of the bleak overcrowding conditions plaguing the correctional system.

“Citing violence, malnutrition, inadequate medical care, filth and infestation, and, of course, severe overcrowding, lawyers for the prisoners argued that the combination of these factors, the ‘totality of conditions’ in such institutions, amounted to a violation of the Eighth Amendment’s prohibition against ‘cruel and unusual punishment’” (Angelos, 102).

This totality of the circumstances approach has transitioned the court into a hands-on approach when dealing with prisons.

Despite the totality of the circumstances approach, overcrowding in itself has been deemed by the Supreme Court as not being unconstitutional per se (*Hutto v. Finney*, 1978). This means that conditions must truly be deplorable for judges to intervene. In *Ruiz v. Estelle* (1998) the entire Texas prison system was declared to be afflicted with unconstitutional conditions “in part because of intolerable overcrowding” (Angelos, 101). In Texas, over 1000 inmates were sleeping on floors of prisons that were already holding double the inmates the facility was designed for. While cases like this are discernible, there are dozens more that are found in favor of the state.

Some court decrees today go beyond calling for change in the system. Instead, mandatory release of prisoners is being ordered. In *Brown v. Plata* (2011) the Supreme Court ruled that the overcrowding conditions of the California prison system amounted to a violation of prisoners’ Eighth Amendment right against cruel and unusual punishment. The prison system in California was designed to accommodate just fewer than 80,000 inmates. At the time the Supreme Court made their decision, California was housing double that amount. Justice Kennedy writing for the slim five member majority wrote “it is an uncontested fact that, on average, an inmate in one of California’s prisons needlessly dies every six to seven days due to constitutional deficiencies in the [California prisons’] medical delivery system” (*Brown v. Plata*). In light of those conditions, the Court upheld the District Court order to reduce the prison population to 137.5% its design capacity in two years. Assuming the facility’s design capacity remains the same, anywhere from 38,000 to 46,000 inmates will need to be prematurely released in the next two years. A radical decision such as this shows the uncontestable dangers that overcrowding causes.

Although the *Brown v. Plata* decision aims at reducing the overcrowding conditions in California, many scholars speculate that it will not have much of an effect on the wider

correction system. Instead, it appears that California was a special circumstance due to the extremely discernable unconstitutional conditions. Director of the American Civil Liberties Union's National Prison Project says, "California is an extreme case by any measure...This case involves ongoing, undisputed and lethal constitutional violations. We're not going to see a lot of copycat litigation" (Liptak).

So will similar overcrowded prisons have to wait until they reach undeniably lethal levels before something can be done? Must the American citizenry sit by while politicians and media outlets pollute the airwaves with tough on crime propaganda? Was Robert Martinson right to give up, declaring "nothing works" when it comes to reforming prisoners and the system we condemn them to? As responsible citizens of the world who promote ideals of service and justice, we must recognize that there are positive solutions to the overcrowding problems that prisons are faced with. On the surface, prison overcrowding is an ethical issue as it relates to the conditions inmates are forced to endure. Additionally, it is an even wider social justice issue as we begin to see the effects of prison overcrowding on greater society. Ninety-five of state prisoners will be released (BJS). The people who suffer the dangerous prison conditions are being released to live among us, unchanged and unreformed by a system that has given up on them.

Alternatives to incarceration do exist and should be further explored if we are to truly overcome the overcrowding problem. Ordering mandatory release of inmates prematurely, while necessary, is not a solution that should be depended on if we are to promote safety, security, and rehabilitation in our communities. The first change should be altering the tough on crime model. Sending people to prison for drug offenses and lower level crimes overcrowds prisons and puts inmates at greater risk of prisonization. Instead, the system could sentence these offenders to pay

finer or complete community service hours. These are two alternatives that not only lower incarceration rates, but save tax payer money immensely.

For offenders who must be more closely monitored, probation, parole, and home confinement allow for special attention without incarceration. Electronic monitoring has increased the effectiveness of these programs by constantly tracking offenders by ankle bracelet or other electronic device. Although these programs will require some cost to taxpayers, they have the advantage of costing less than housing a prisoner while still reducing the overcrowding problem. Utilizing the many sentencing alternatives that are available would mean lower rates of overcrowding, heightened opportunity for reintegration into lawful society for those not incarcerated and the chance for violent offenders who are incarcerated to receive the attention and programs necessary for rehabilitation.

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