

## Prison Litigation and District Court's Effect on the Electoral Process

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I was likely invited here because of my involvement in litigation concerning the California prison system; two of the cases I was involved in sought significant social change. The first case, *Coleman v. Wilson*,<sup>1</sup> deals with the problem of providing adequate care for the mentally ill who are in prison. This is an extraordinarily complex problem, exemplified by the fact that the case was decided over twenty-five years ago, and we are still working out the resolution today. The second case came while I was a member of a three-judge court that was convened under the Prison Litigation Reform Act.<sup>2</sup>

First, we should discuss the issue of *how* to litigate cases concerning significant social change. To begin with, judges do not go out and find cases that they think would lead to socially desirable ends. Instead, they sit in court and wait until a case shows up in front of them. Moreover, my district, like most every district in the United States Courts, has elaborate rules that seek to avoid forum shopping.<sup>3</sup> That is not to say that dedicated lawyers cannot get to the judge that they think will have some sympathy toward their position, but it is to say that getting to said judge requires great resourcefulness.

There are some significant differences in prison litigation, because

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1. 912 F. Supp. 1282, 1293 (E.D. Cal. 1995).

2. *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 885, 918 (E.D. Cal. 2009).

3. See, e.g., Richard Maloy, *Forum Shopping? What's Wrong With That?*, 24 QUINNIPIAC L. REV. 25, 54 (2005) ("Judge made rules have . . . developed in order to combat forum shopping. . . . Judge Jon O. Newman of the Second Circuit has written . . . 'Forum shopping is to be discouraged and litigants generally ought not to have the option of selecting a particular judge to adjudicate one-judge motions.'") (quoting *Rios v. Wigen*, 863 F.2d 196, 199 n.1 (2d Cir. 1988)); cf. *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (1990) ("[In] *Van Dusen* [we] sought to fashion a rule that would not create opportunities for forum shopping. . . . [T]his meant that we could not allow defendants to use a transfer to change the law.") (referring to *Van Dusen v. Barrack*, 376 U.S. 612, 636 (1964)). In an effort to prevent future forum shopping by plaintiff's after they had already filed suit, "the Supreme Court rul[ed in *Ferens*] that when a transfer initiated by a plaintiff occurs, the transferor court's choice-of-law rules apply." Maloy, *supra* at 36. For a number of examples of when federal courts have and have not allowed various forms of forum shopping, see *id.* at 33–60.

of its relationship to the aim of social change, as compared to other areas of the law. The American system of justice is a system ultimately structured to deal with disputes between individuals, and the questions to be resolved are questions of application of law to those individual cases. But litigation that looks toward significant social change is really quite different because it deals with questions of *systemic failure*, not of individual failure.

One realization I have come to over the many years that I have been involved in these kinds of cases is one that many lawyers have not yet come to grips with: that the function of plaintiffs' lawyers is really to demonstrate systemic failure, while the function of the defense lawyers is to demonstrate errors, mistakes, and even bad people. But individual errors, mistakes, and bad people do not result in the kinds of judgments that provide mental health services to prisoners.

Let me say something else that I have experienced, and I cannot imagine any judge in my position that has not experienced it. It is self-evident that, if you are a lawyer and you have an important question or issue of fact, your first duty is to sit down and ask yourself, "how do I assure that this evidence is *admissible*?"

The district judge, however, has a very different job. His question, assuming that the plaintiffs prevail, is "how to structure his opinion so that it will survive appellate review." In a circuit such as mine, where there are approximately thirty court of appeals judges,<sup>4</sup> this becomes very difficult. Ultimately, what you are left with is narrowly structuring the opinion based on the very complex facts that have been generated in the lawsuit.

The *Wilson* judgment ultimately determined that the provision of mental healthcare to persons in California's prisons was so insufficient that it violated the Eighth Amendment of the Constitution.<sup>5</sup> In that case, I appointed a special master.<sup>6</sup> His first job was to work with the prison authorities to develop a program guide, which would ultimately resolve itself into a satisfaction of the constitutional violations that had been found. His second job was to implement it. The first job was relatively easy, especially when examined in light of the extraordinary difficulty of the second job. The reasons for that difficulty are extremely complex. At least in part, though, the problem in California and throughout the country is that we no longer have adequate care for the severely mentally ill.<sup>7</sup>

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4. *Active Judges of the United States Court of Appeals for the Ninth Circuit*, U.S. CTS. FOR NINTH CIRCUIT, [http://www.ce9.uscourts.gov/ninthcircuit/active\\_senior\\_judges.html](http://www.ce9.uscourts.gov/ninthcircuit/active_senior_judges.html) (last visited Oct. 14, 2014).

5. *Coleman*, 912 F. Supp. at 1323.

6. *See* FED. R. CIV. P. 53.

7. *See* Anasseril E. Daniel, *Care of the Mentally Ill in Prisons: Challenges and Solutions*, 35

What we do, instead, is we *criminalize* mental illness. About a third of the prisoners in California's prisons are persons suffering from serious mental illness.<sup>8</sup> And if that does not worry us, it ought to.

In *Wilson*, the federal court was effectively requiring the State to alter its procedures and laws. Part of the problem that arises in this situation is the nature of the confrontation. This is a democracy, and those being ordered to change their behavior are elected officials, or at least officials appointed by elected officials. Put another way, orders of judges whose tenure is *not* subject to periodic approval by the citizenry are issued to elected officials. In some sense, the democratic process is being frustrated. Let me assure you that elected officials recognize that fact and either purport to, or actually do, deeply resent such orders.<sup>9</sup> But, the older I get and the more I have been in this business, I cannot help but admire the wisdom of the founders. They recognized that there were certain fundamental rights, which the citizenry just could not override, and then they created a system to ensure those rights by having unelected judges.<sup>10</sup> But the inevitable, anti-democratic posture of such orders requires judges to act with discretion and awareness of the particular character of their relationship to the elected officials. I know there are elected officials in California who do not think that I believe that,<sup>11</sup> but I do. I believe that it is important for judges to recognize their relationship to the elected official, and, at the same time, recognize their obligation to the Constitution of the United States. And that is not an easy balance to strike.

Having at least briefly talked about the difficulties that federal

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J. AM. ACAD. PSYCHIATRY & L. 406, 406–09 (2007); NAT'L ALLIANCE ON MENTAL ILLNESS, GRADING THE STATES 23–46 (2009), available at <http://www.nami.org/gtsTemplate09.cfm?Section=Findings&Template=/ContentManagement/ContentDisplay.cfm&ContentID=75255>.

8. See CAL. CORR. STANDARDS AUTH., JAILS AND THE MENTALLY ILL: ISSUES AND ANALYSIS 3–4 (2009), available at [http://www.cdcr.ca.gov/comio/docs/mentally\\_ill\\_in\\_jails\\_paper%20.pdf](http://www.cdcr.ca.gov/comio/docs/mentally_ill_in_jails_paper%20.pdf) (stating that approximately one-third of California prison inmates were subjected to a mental health query); Council on Mentally Ill Offenders, *Incarcerated Mentally Ill: A Growing Issue in California*, CAL. DEP'T CORR. & REHAB., <http://www.cdcr.ca.gov/comio/Legislation.html> (last visited July 6, 2014) (discussing the rising percentage of people with severe mental illness as a proportion of the population in California state prisons); Press Release, Bureau of Just. Stat., Study Finds More than Half of All Prison and Jail Inmates Have Mental Health Problems (Sept. 6, 2006), available at <http://www.bjs.gov/content/pub/press/mhppjpr.cfm>.

9. A paradigmatic example of this is the reaction of many states to *Brown v. Board of Education*, 347 U.S. 483 (1957), which mandated the racial desegregation of public schools. See generally Molly Townes O'Brien, *Brown on the Ground: A Journey of Faith in Schooling*, 35 U. TOL. L. REV. 813, 814 (2004) (describing many southern states' campaigns of "massive resistance" to *Brown*).

10. See U.S. CONST. art. III, § 1.

11. Sam Stanton & Denny Walsh, *Major Progress Cited in Prison Inmate Care*, SACRAMENTO BEE (Dec. 12, 2014, 4:58 PM), <http://www.sacbee.com/news/politics-government/article4746207.html>.

judges face when confronted with issues of significant public change, let me turn for a moment to the nature of the three-judge court.

As you may know, the three-judge court was the creation of Congress in 1995 when it passed the so-called Prison Litigation Reform Act (“PLRA”).<sup>12</sup> Under that statute, when a district judge determines that a constitutional violation in a state prison system exists, and it relates to overcrowding, the judge may request the convening of a three-judge court to determine whether or not the judges should issue an order reducing the population of the prisons.<sup>13</sup> Before that can occur, under the PLRA, the three-judge court must determine that overcrowding was the primary cause of the constitutional violation<sup>14</sup> and must then issue an order narrowly prescribed to relieve the overcrowded condition.<sup>15</sup>

As you may or may not know, there are two cases in California dealing with the provision of medical care in prisons. The first is mine, *Coleman v. Brown* (previously referred to as *Wilson*), and the other is *Plata v. Brown*.<sup>16</sup> *Plata* is the responsibility of my colleague in the Northern District, Thelton Henderson.<sup>17</sup> In that case, then-governor Schwarzenegger issued a public declaration of emergency in the prison system because of overcrowding.<sup>18</sup> That declaration was required in order to move California prisoners out of the state prison system and into private prisons. This was a prerequisite to the lawyers in both *Coleman* and *Plata* bringing a request for a three-judge court. I believe that I was the first judge who had to decide whether to request the formation of a three-judge court. My first response was to continue that matter for six months to see if the state officials could solve their problem; Judge Henderson followed suit by also issuing a six-month stay.<sup>19</sup> At the end

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12. Prison Litigation Reform Act of 1995 (“PLRA”), Pub. L. No. 103-134, tit. VIII, 110 Stat. 1321-66 (1996) (codified in scattered sections of 11, 18, 28, and 42 U.S.C.).

13. 18 U.S.C. § 3626(a)(3)(B)–(E) (2012).

14. *Id.* § 3626(a)(3)(E) (“The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that . . . crowding is the primary cause of the violation of a Federal right . . .”).

15. *Id.* § 3626(a)(1) (“Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.”).

16. *Coleman v. Brown*, 938 F. Supp. 2d 955, 959 (E.D. Cal. 2013); *Plata v. Schwarzenegger*, 556 F. Supp. 2d 1087, 1093 (N.D. Cal. 2008).

17. *Plata*, 556 F. Supp. 2d at 1089; see also *Senior District Judge Thelton E. Henderson*, U.S. DISTRICT CT. N.D. CALIF., <http://www.cand.uscourts.gov/teh> (last visited Oct. 19, 2014).

18. *Prison Overcrowding State of Emergency Proclamation*, OFF. GOVERNOR EDMOND G. BROWN JR., <http://gov.ca.gov/news.php?id=4278> (last visited Oct. 19, 2014).

19. See Order Re: Defendants’ January 7, 2013 Motion to Vacate or Modify at 2, *Coleman v. Brown*, 938 F. Supp. 2d 955 (E.D. Cal. 2013) (No. 2:90-cv-0520), available at <http://www>.

of the six months, it was clear that the State could not or would not solve the problem, and so both Judge Henderson and I requested the formation of the three-judge court.<sup>20</sup> That request went to the Ninth Circuit Court of Appeals. We indicated that it would be wise for the three-judge court to have the both of us on it so as to avoid multiple litigation and the possibility of conflicting judgments. Judge Reinhardt of the Ninth Circuit was appointed as the third judge on the case. Thus, a three-judge court was convened.<sup>21</sup> We were the very first court of that sort to come into existence, and so we sort of made up the process as we went along. That process may have ramifications throughout the rest of the country. However, I think that the institution of three-judge courts ought to be relatively rare because of the very stringent conditions for it to be able to issue an order.

In any event, the initial defendants were the Governor and the Secretary of the California Department of Corrections, now Corrections and Rehabilitation—but, even if you call a cat a dog, it is still a cat. Anyway, we had a significant number of motions to intervene: the Republican members of the California legislature as a body intervened, we had a large number of district attorneys and sheriffs who sought to intervene on the part of the defendants, and we had a motion to intervene by the prison guard’s union, who moved to intervene on behalf of the plaintiffs because it was their position that the conditions were so serious that not only were inmates in danger, but the prison guards were also in danger.<sup>22</sup> All of those motions were granted, and we then undertook trial.

The trial took fourteen days. I would like to tell you all about it, but we would be here all day if I did. I will tell you that at the end of it, the three-judge court issued a 184-page decision.<sup>23</sup> The court first found that the crowding was a primary cause of the underlying Eighth Amendment violations, and that no relief other than an order limiting the number of

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cand.uscourts.gov/filelibrary/1192/2013-01-29%20order%20re%20motion%20to%20modify.pdf (“[T]his Court modifies the June 30, 2011 Order by [granting] defendants a six-month extension in which to comply with its terms and provisions.”); *see also* Plata v. Brown, No. C01-1351 (N.D. Cal. Jan. 29, 2013).

20. Order Granting Plaintiffs’ Motion to Convene Three-Judge Court at 10, Plata v. Schwarzenegger, No. C 01-1351-TEH, 2007 WL 2122657, at \*6 (N.D. Cal. July 23, 2007).

21. Solomon Moore, *New Court to Address California Prison Crowding*, N.Y. TIMES (July 24, 2007), [http://www.nytimes.com/2007/07/24/us/24calif.html?\\_r=0](http://www.nytimes.com/2007/07/24/us/24calif.html?_r=0).

22. Trial Transcript at 33, Plata v. Schwarzenegger, No. C 01-1351-TEH, 2008 WL 8633587 (N.D. Cal. Nov. 18, 2008) (“[California Correctional Peace Officers Associations (“CCPOA”)] intervened in this case . . . because of the massive overcrowding in our prisons, which is exacerbated by chronic understaffing and dilapidated facilities[.] California’s prisons present an increasingly unsafe working condition for staff and unsafe custody conditions for inmates.”).

23. *See* Coleman v. Schwarzenegger, 922 F. Supp. 2d 882, 885–87 (E.D. Cal. 2009) (table of contents for opinion and order).

prisoners would resolve the constitutional violations.<sup>24</sup> And that the order, as required by the statute, was narrowly drawn, was the least intrusive remedy, and extended no further than necessary to address the overcrowding.<sup>25</sup> The court also, as required by statute, examined the impact of such an order on public safety and the criminal justice system, finding that neither of those considerations would contraindicate the order that we proposed to issue.<sup>26</sup>

The State appealed the decision directly to the Supreme Court, as provided for by the statute, and that Court ultimately affirmed the three-judge court's determination in *Brown v. Plata*.<sup>27</sup> That order was issued on May 23, 2011, and, if you are as naïve as I was, you would have assumed that that would have been the end of the issue and that the court's determination that the prison system should be limited to 137.5% of designed capacity would be obeyed.<sup>28</sup> How foolish. In reality, what happened afterwards demonstrates the difficulty of the political problem as separate from the legal problem.

The first thing that happened was that the State moved in my case, *Coleman*, to terminate and dismiss the action pursuant to 18 U.S.C. § 3626(b)<sup>29</sup>—and more attempts by the State to avoid the judgment are likely on their way. It is a funny problem, and I want to talk a little bit about this. I have the sense that no one reads the opinion or cares; I am not even sure litigants read them. You know, judges write opinions because that is what we do. In any case, the question presented by the State's motion was “has the State achieved constitutional satisfaction?” The State *has* in the past twenty years made huge progress, and that is not an exaggeration—huge progress. But, when you start from behind your own end zone and you make great progress, you wind up at the 50-yard line. That is the real world. And to say “yes you have made great progress” and then “you're done” is not right—you are not done.

The motion was denied on April 5, 2013.<sup>30</sup> End of the story? No. Then there was a motion before the three-judge court to vacate or modify the population reduction order, and that was denied in another long opinion on April 11, 2013.<sup>31</sup> That decision ordered the defendants to stop delaying and to obey the order, and it ordered the State to file a plan

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24. *Id.* at 949.

25. *Id.* at 962.

26. *Id.* at 970–99.

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

28. *See id.* at 1944 (“The three-judge court concluded that the population of California's prisons should be capped at 137.5% of design capacity. This conclusion is supported by the record.”).

29. *Coleman v. Brown*, 938 F. Supp. 2d 955, 955, 959 (E.D. Cal. 2013).

30. *Id.* at 955, 990.

31. *Coleman v. Brown*, 922 F. Supp. 2d 1004, 1004, 1008 (E.D. Cal. 2013).

with the court explaining how they were going to go about it.<sup>32</sup> They filed a nonconforming plan, and that resulted in a further issue for the three-judge court.<sup>33</sup> You might wonder why, by now, we had not issued an order to show cause and contempt, but if you go back to my initial position which is to recognize the very complex difficulty of federal judges ordering state elected officials to do their duty, you can see why that order would be a last resort.

That is where we stood when the political process took over and the state legislature passed a statute that basically said that the State was going to spend a lot of money in attempting to solve the problem of recidivism, which is one of the very serious reasons for overcrowding of California prisons, *if you can give us two years*.<sup>34</sup> I am not telling tales out of school when I tell you that the three judges had a great deal of difficulty with this proposition because what we needed to do was not simply to reduce the population to 137.5%; we needed a durable solution, one that was going to last long after we were gone. The State was at least suggesting a significant step in that direction. Ultimately, we issued an order in February of 2014, which approved of the State's two year plan, but only upon the State's representation that they will not appeal two additional orders: one, the appointment of a compliance officer who would have the authority to release people if the State did not meet the population reduction goals that were established, and, two, that the State would not appeal any orders of the three-judge court arising out of the existence of the compliance officer.<sup>35</sup> There are going to be people who say you seriously undermine the litigation process by restricting the ability of people to ask for review of legal decisions, but our own experience has been that the appeals have essentially been to delay compliance with the order, and our view is that the State, having proposed this solution, should have at least some difficulty the next time they attempt to appeal.

I think I want to close by saying that I do not know very much about other kinds of litigation that involve such profound effects upon the electoral process. I have done many water cases, which are very important in California, and they have significant effects upon where

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32. *See id.* at 1049–54.

33. *See id.* at 1014–22.

34. *See* MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE, THE 2014–15 BUDGET: ADMINISTRATION'S RESPONSE TO PRISON OVERCROWDING ORDER 1–17 (2014), available at <http://www.lao.ca.gov/reports/2014/budget/three-judge-panel/three-judge-panel-022814.pdf>; Bob Egelko, *Court Gives California Two Years to Lower Prison Population*, SFGATE (Feb. 11, 2014, 1:49 AM), <http://www.sfgate.com/crime/article/Court-gives-California-2-years-to-lower-prison-5221828.php>.

35. *Coleman v. Brown*, No. 2:90-cv-0520 (E.D. Cal. Feb. 10, 2014); *see also* *Plata v. Brown*, No. C01-1351 (N.D. Cal. Feb. 10, 2014).

people live, what people do for a living, what the rivers look like, and so forth.<sup>36</sup> But there is, at least in my opinion, nothing that compares with the difficulties that have been generated by these two cases.

Thank you very much.

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36. *See, e.g.*, *Natural Res. Def. Council v. Duvall*, 777 F. Supp. 1533, 1534–43 (E.D. Cal. 1991).