

Keynote Address

Confronting the Crisis of California Prisons

By THELTON HENDERSON*

THANK YOU VERY MUCH Professor Donovan for that most generous introduction. I am honored to be with this distinguished audience and the superstar panelists assembled for this symposium.

Thanks also to Dean Jeff Brand, Professor Suzanne Mounts, the University of San Francisco, and its Law Review for inviting me to speak here today. Most of my contact for this event has been with a young man named Ed Farrell, and I especially thank him for all he has done to make this day work for me.

Before I begin my remarks, let me remind all of you that judges are barred for ethical reasons from discussing confidential matters pertaining to their active cases, and so I will, of course, limit my comments to observations that are already a matter of public record and public discourse. I ask that you please keep that in mind as you prepare any questions you might have for me following my remarks. And finally, of course, having made all of these necessary disclaimers, you now realize why judges can be so bloody boring: we cannot talk about the things people really want to hear.

When I look at the list of speakers you heard from this morning and whom you will hear from later this afternoon, it is clear that you will be getting a lot more “expert” views on California’s prison conditions and potential solutions than I can offer. But I hope to add at least some additional perspective as you continue to consider these vital and important issues.

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When I first began working as a judge some twenty-seven years ago, I could not have envisioned that I would one day be called upon to order the largest federal takeover of a state prison medical care system in our country's history.¹ Yet, nearly three years ago, I found myself doing exactly that, as I decided that I had no further options other than to appoint a receiver in *Plata v. Schwarzenegger*.² After hearing extensive, compelling, and indeed, often chilling evidence—which was uncontested by the state defendants—I concluded that the State of California was simply incapable of providing constitutionally adequate medical care for its (at the time) 164,000 inmate-patients. I say “at the time” because California's prison population is now over 169,000 inmates, after it reached a peak of over 175,000 inmates in 2007.³

My experience with recent inmate cases has given me renewed interest in what I believe to be one of the most difficult and vexing issues that confronts our society: how to respond to and treat those who break the law—a group which includes some of the most reviled and disfavored members of our society. And mind you this is not a speech about redemption; it is about making our Constitution work as it should. It is about fairly and squarely addressing the uncalled-for human misery existing in our prison system. In many ways, this issue goes to the heart of our social fabric, for it has been said that “if a test of civilization be sought, none can be so sure as the condition of that half of society over which the other part has power.”⁴

It also goes to the very soul of who we profess to be as a nation. It is becoming an increasingly vital issue for us to address because inmate populations continue to soar and swell. Here in California, for example, the number of inmates has grown from 30,000 in 1980⁵ (the year I became a judge) to 169,000 today.⁶ If California were to become

1. *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005).

2. *Id.*

3. WILLIAM J. SABOL ET AL., U.S. DEP'T OF JUSTICE, PRISON INMATES AT MID-YEAR 2007, at 3 (2008).

4. HARRIET MARTINEAU, SOCIETY IN AMERICA 291 (Seymour Martin Lipset ed., Peter Smith 1968) (1837).

5. KATHLEEN AUERHAHN, SELECTIVE INCAPACITATION AND PUBLIC POLICY: EVALUATING CALIFORNIA'S IMPRISONMENT CRISIS 54 (2003).

6. Office of the Governor of the State of Cal., Prison Overcrowding State of Emergency Proclamation (Oct. 4, 2006), available at <http://gov.ca.gov/index.php?/print-version/proclamation/4278/>.

a nation tomorrow, we would have the third-largest prison system in the world.⁷

Nationally, the prison population has multiplied from 330,000 in 1972⁸ to well over two million today.⁹ Notably, in the period from 1920–1970, the nation’s prison population grew just slightly faster than did the general population.¹⁰ But from 1970–2000, the general population rose by less than 40% while the number of inmates rose by more than 500%.¹¹ I believe it is a national shame that today more than one of every one hundred American adults resides in a prison or jail.¹² As Bob Dylan once famously sang: “[S]omething is happening here but you don’t know what it is, do you, Mister Jones?”¹³

I thought I would speak today on how I believe courts can more effectively help states deal with these rising inmate populations—or, as the organizers of this conference so aptly put it, to “confront the crisis.” To put my remarks in some sort of context, I am going to begin with a brief historical overview.

I. Historical Overview

During our country’s early history, and well into the twentieth century, courts uniformly adopted a hands-off approach to the extremely rare petitions that dared to challenge prison conditions. In 1871, for instance, a Virginia court ruled that prisoners were “slaves of the state” and therefore had no constitutional rights.¹⁴ This sounds quite a bit like Justice Taney in 1856, who observed in *Dred Scott v. Sanford*¹⁵ that the Negro “had no rights which the white man was bound to respect.”¹⁶

7. CTR. ON JUVENILE & CRIMINAL JUSTICE, CALIFORNIA PRISON GROWTH, http://www.cjcf.org/cpp/ccf_growth.php (last visited Oct. 26, 2008).

8. MARC MAUER, THE SENTENCING PROJECT, COMPARATIVE INTERNATIONAL RATES OF INCARCERATION I (2003), available at http://www.sentencingproject.org/Admin/Documents/publications/inc_comparative_intl.pdf.

9. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISON STATISTICS (2008), <http://www.ojp.usdoj.gov/bjs/prisons.htm>.

10. RYAN S. KING ET AL., THE SENTENCING PROJECT, INCARCERATION AND CRIME I (2005), available at <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>.

11. *Id.* at 1.

12. Adam Liptak, *More Than 1 in 100 Adults Are Now in Prison in U.S.*, N.Y. TIMES, Feb. 29, 2008, at A14.

13. Bob Dylan, *Ballad of a Thin Man, on HIGHWAY 61 REVISITED* (Columbia Records 1965).

14. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790 (1871).

15. 60 U.S. (19 How.) 393 (1857).

16. *Id.* at 407.

It was not until decades later that some judges began to use more sympathetic language in these cases. In 1952, for example, Justice William O. Douglas wrote a dissent in a case brought by a prisoner who asserted he had been abused by other prisoners and beaten nearly to death by a guard with a nine-pound strap embedded with metal prongs.¹⁷ In language that was unusually strong for that time—or even for today—Justice Douglas wrote that the allegations “make this a shocking case in the annals of our jurisprudence.”¹⁸

Nearly two decades after that, in 1969, a successful challenge to the Arkansas state prison system inaugurated a period of massive judicial intervention in the nation’s prisons and jails.¹⁹ Five years later, the United States Supreme Court pronounced that “there is no iron curtain drawn between the Constitution and the prisons of this country.”²⁰ Some commentators have suggested that the “iron curtain” reference was meant to distinguish us from our cold war enemies in Russia. But the point I want to make here is that more than 150 years after the “slaves of the state” ruling in Virginia, courts finally began to recognize that inmates retained some residual constitutional rights with respect to their confinement conditions.

By 1984, roughly half of the nation’s largest state prisons and jails were operating under the constraint of various court orders and consent decrees.²¹ And I should note that I tried to have my law clerks check out a rumor that at least half of those were filed by the Prison Law Office. On the whole, these cases spurred significant improvement in many prisons—places described by some federal judges as “a dark and evil world completely alien to the free world,”²² or “unfit for human habitation.”²³ Judicial intervention helped to eliminate the routine authorized use of torture and other forms of physical and mental abuse.²⁴

The trial of one of my cases, for example, brought to light the treatment of mentally ill inmates.²⁵ In one particularly horrific and memorable example—I will never forget seeing the pictures of this at

17. *Sweeney v. Woodall*, 344 U.S. 86 (1952).

18. *Id.* at 91.

19. *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970); see also *Hutto v. Finley*, 437 U.S. 678 (1978); *Estelle v. Gamble*, 429 U.S. 97 (1976).

20. *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974).

21. *Bell v. Wolfish*, 441 U.S. 520, 562 (1979).

22. *Holt*, 309 F. Supp. at 381.

23. *Gates v. Collier*, 390 F. Supp. 482, 489 (N.D. Miss. 1975).

24. See, e.g., *id.*; see also *Hutto*, 437 U.S. at 681–83; *Pugh v. Locke*, 406 F. Supp. 318, 328–29 (M.D. Ala. 1976).

25. *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

trial, or hearing the gasps and moans in the courtroom as the testimony unfolded—a mentally ill inmate had smeared himself with his own feces, an act that was a manifestation of his mental illness and not uncommon in prisons.²⁶ The guards punished this inmate by putting him in a special stainless steel infirmary tub that was intended for therapeutic purposes and had a gauge that could turn the water up unusually hot, much hotter than our bathtubs can get.²⁷ The water was so hot that it caused the inmate's skin to peel off and hang in large clumps around his legs; the testimony made it clear that this was no accident.²⁸ A civil suit in another court resolved the inmate's claims. To this day, unconstitutional conditions, such as the one I just described to you, continue to be ferreted out by our judicial system.

By the end of the 1970s, however, federal courts, led by the Supreme Court, began to pull back noticeably.²⁹ In 1979, the Supreme Court reaffirmed in *Bell v. Wolfish* that prisoners' constitutional rights were to be "scrupulously observed."³⁰ At the same time, however, in *Bell* and in subsequent opinions, our highest court heavily stressed that lower courts must give wide deference to the judgment of prison administrators who are dealing with unique populations, and must avoid unnecessary intrusion into the affairs of our state prisons.³¹

And, of course, as you likely heard during today's first panel, the Prison Litigation Reform Act,³² which became federal law in 1996, makes it harder for prisoners to file lawsuits in federal courts in the first place.³³ It also places limits on the remedies a court may order.³⁴

II. The Struggle to Balance Contradictory Directives

Obviously, what I just said barely scratches the surface of the history of prison reform litigation in the United States, but I think even that brief history will help us understand the palpable and difficult tension that courts face today between two competing imperatives: On the one hand, it is clear that the conditions in which prisoners live must satisfy the dictates of the Eighth Amendment and evolving stan-

26. *Id.* at 1166.

27. *Id.* at 1166–67.

28. *Id.* at 1167.

29. *See, e.g., Bell v. Wolfish*, 41 U.S. 520 (1979).

30. *Id.* at 562.

31. *Id.* at 547.

32. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 18, 28, and 42 U.S.C.).

33. 42 U.S.C. § 1997 (2006).

34. 18 U.S.C. § 3626 (2006).

dards of decency.³⁵ On the other hand, judges also have a duty, as established by Supreme Court precedent, to defer to those who run our prisons, and to minimize any intrusions on state branches of government.³⁶ While case law routinely acknowledges these dual obligations, it provides little or no guidance as to how to accommodate them both successfully.³⁷ Just how does a judge go about balancing these usually contradictory directives?

Having had the fortune—or, as some might say, the misfortune—over the years to preside over several cases, including large class actions that involve unconstitutional prison conditions, I have had the opportunity to experience this tension firsthand. So it was with particular interest that I read, a couple of years ago, a law review article by Professor Susan Sturm, now at Columbia Law School, titled *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*.³⁸

I agree with Professor Sturm's assertion that a combination of factors tends to make correctional defendants particularly resistant to courts that are ordering change, and that adopting too passive a judicial approach will result in little or no change whatsoever.³⁹ In my experience, prison personnel can be experts at the waiting game—simply waiting for a passive jurist to go away and turn his attention to other matters on his or her crowded calendar. I have repeatedly said in my cases—and not just my prison cases, I might add—that I am *not* just going to go away. I will be here for the long haul.

I was at a workshop last fall in New York, attended by some of my judicial heroes—Wayne Justice, Jack Weinstein foremost among them. We were discussing how hands-on a judge needs to be, and I was hugely surprised to hear some judges say that they close the case after they find the constitutional violation and do not revisit it unless plaintiffs file a motion. Keeping active is essential to preventing further violations.

As Professor Sturm explains, "Participants in the prison system have strong disincentives to pursue change, due to the political powerlessness of inmates, due to the structural isolation of corrections

35. *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).

36. *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126 (1977) (noting that courts should give wide-ranging deference to the decisions of prison officials); *Pell v. Procunier*, 417 U.S. 817, 827 (1974) (holding that courts should defer to the prison administrator's adoption and implementation of policies needed to ensure order and security).

37. *Pell*, 417 U.S. at 827.

38. Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 38 U. PA. L. REV. 805 (1990).

39. *Id.* at 865–66.

from the larger community, and due to the lack of political consensus and support for reform.”⁴⁰ In addition, she notes that guard unions and senior guards may view court rulings as “illegitimate” and “may exert substantial pressure upon the rank-and-file workers not to engage in reform activity,” and that “those who support reform efforts . . . are often ostracized.”⁴¹

Institutional change also frequently entails significant additional costs for the state, and perhaps political risks for politicians who might support institutional change—which can make it difficult to garner support from legislators and governors, even when the need for change is readily acknowledged. I have been told more than once that it is okay for me—a judge with lifetime tenure—to “hug a thug,” but that it is suicide in the world of electoral politics. Therein lies a very large part of the problem that litigators face, and that I face as a federal judge trying to enforce a consent decree.

Besides the lack of political will, another significant contributing factor to the problem is bureaucratic dysfunction. A few years ago, I was having dinner with my two best friends—they are both distinguished sociologists at U.C. Berkeley; one recently served as president of the American Sociological Association. I was telling them about some of the problems I saw with getting things done in California’s prisons, and they looked at each other and said, “Well, that sounds like trained incapacity.” That was the first time I heard that term, which I later learned was coined by Thorstein Veblen, the same individual who coined the term “conspicuous consumption.”⁴²

“Trained incapacity” refers to a situation in which erecting barriers to change becomes an ingrained means of self-preservation for bureaucrats, so that, when serious institutional problems threaten or challenge the bureaucracy—or require it to bend or flex—we find that those within the institution have actually trained themselves to be incapable of responding.⁴³ In other words, they have trained themselves to say, “it can’t be done,” or “we don’t do it that way,” and devise almost ingenious ways and reasons to make that so. They have trained themselves to be incapacitated and incapable of meaningful change.

While the court’s duty to defer and avoid unnecessary intrusion into state affairs will be satisfied by identifying a problem, issuing an

40. *Id.* at 815.

41. *Id.* at 829.

42. THORSTEIN VEBLEN, *THE INSTINCT OF WORKMANSHIP AND THE STATE OF THE INDUSTRIAL ARTS* 215 (New York, The Macmillan Co. 1914).

43. *Id.*

order, and giving prison administrators wide-ranging deference to correct it, it is my decided experience, as well as that of my colleagues around the country with whom I have talked and met, and of a growing body of academics, that this passive approach is ill-suited to curing unconstitutional conduct. The barriers and obstacles in the correctional environment are often simply too high to surmount without sustained, persistent, and perhaps aggressive judicial intervention of a meaningful type. What we are coming to learn is that giving undue deference to those who have created the constitutional inadequacy in the first place—sometimes knowingly so—may not be such a good idea.

On the other hand, a court that unilaterally imposes remedial policies and practices without including the defendants in the process will also likely prove to be ineffective. As noted by Professor Sturm, such a remedy may be perceived as illegitimate by state officials and prison administrators who are called upon to implement the unilaterally imposed policies.⁴⁴ It also leaves the court open to charges of judicial micromanagement, particularly where the remedy dictates such day-to-day details as the wattage of light bulbs in prison cells.

III. A Proposed Solution: Adhere to the “Catalyst Approach”

So then, what is the solution? I have yet to find a definitive answer. But I can say that when I look back over all the things I have done right and done wrong in my years on the bench, I think there is one clear lesson to be learned: if a court is to have any hope of effecting meaningful and long-term institutional change, while at the same time providing our prison administrators the deference that is their legitimate due, the court must faithfully and consistently adhere to what Professor Sturm has termed the “catalyst approach.”⁴⁵

In essence, this approach aims to prod defendants to take the primary role in both the development and implementation of constitutional remedies that the court orders—and, if necessary, to change the underlying culture in the institution that created the unconstitutional conditions in the first place.⁴⁶ Achieving this is more difficult than I ever would have imagined until I actually started trying to do it.

For this approach to be effective, the court must make clear that it is ready and willing to use—and actually does use when necessary—

44. Sturm, *supra* note 38, at 887.

45. *Id.* at 856–59.

46. *Id.* at 858–59.

all of its available powers. This includes using the leverage of credible deadlines and doable performance measures, accompanied by the threat and imposition of sanctions, including contempt, when necessary.⁴⁷ It may also include appointing special masters⁴⁸ and using independent experts because you often have an institution that says “no can do,” and you have to find people who “can do,” and show them just how it can be done. The court must also sustain involvement in the case through, for example, frequent meetings with the parties, formal hearings in court, and site visitations, because the court behind the ruling must be a real person, and not an abstraction.

At bottom, this approach creates the correct combination of inducements and pressure for prison officials to initiate remedial action on their own, while at the same time avoiding and diffusing some of the resistance that can follow from more unilateral types of intervention. Although this approach is undoubtedly the most labor-intensive—most certainly for a busy court—I am convinced that, in the long run, it is well worth the time, and indeed, is the only effective way for courts to make a positive and lasting contribution in this critical area of law.

*Madrid v. Gomez*⁴⁹ provides vivid illustrations of the catalyst approach at work, even though I did not know at the time there was a term for what I was doing. After a lengthy trial, I ruled in 1995 that medical care, psychiatric care, and use of force at Pelican Bay State Prison, which is near the Oregon border, violated the Eighth Amendment.⁵⁰ My goal was to prod the defendants to engage in the remedial process so they could contribute what knowledge and expertise they did possess, and also, quite importantly, so that they would become vested in that remedy.

There were daunting obstacles, however. The prison administrators and correctional officers seemed strongly resistant to any change, no matter how obviously needed from an outside perspective.⁵¹ As far as they were concerned I was an amateur without sufficient understanding to deal with the “worst of the worst” of California’s prisoners. Bureaucratic rigidity was also a major concern, and the defendants

47. *Id.*

48. *Id.* at 860.

49. 889 F. Supp. 1146 (N.D. Cal. 1995).

50. *Id.* at 1279–80.

51. See, e.g., Special Master’s Final Report Re Dep’t of Corr. “Post Powers” Investigations & Employee Discipline at *34–35, *Madrid v. Woodford*, No. C90-3094-T.E.H., 2004 U.S. Dist. LEXIS 11561 (N.D. Cal. June 24, 2004).

lacked the specialized expertise necessary to develop remedial plans.⁵² All of this made it unrealistic to expect an effective remedy to emerge without sustained and strenuous judicial oversight assistance and intervention.

One example of this occurred very early in the remedial phase of *Madrid*.⁵³ Following the ruling in the case, the defendants could no longer house the seriously mentally ill in the “security housing unit,” or SHU—which meant they now had to identify those with serious mental illnesses, and then house them somewhere other than the SHU as well as provide them with a constitutionally adequate level of mental health treatment.⁵⁴ The defendants immediately responded that it would simply be “impossible” to accomplish the court’s order without seriously compromising prison security⁵⁵—a classic example of the trained incapacity that I described earlier and the “no can do” attitude.

Invoking what I now know is called the “catalyst approach,” I used the court’s inherent equitable powers to appoint a special master, as well as independent psychiatric and corrections experts, to work with defendants to craft and implement a solution.⁵⁶ Through this collaborative process, which also included the valuable input of experienced plaintiffs’ counsel, and which was backed up by credible deadlines and a hands-on approach by the court, defendants were able to develop a program to provide both mental health treatment and security.⁵⁷ They did so by establishing a separate unit within Pelican Bay which was named the psychiatric security unit (“P.S.U.”).⁵⁸

The P.S.U. program was so successful that other states have implemented it, and Pelican Bay staff have repeatedly told me over the years that they would never want to revert to the old ways. The SHU is now a much better place to work because the mentally ill inmates, who caused much of the behavioral problems, are no longer housed there. And given the mental health treatment available in the P.S.U.—which includes needed medications previously denied many inmates

52. *Id.* at *2–4.

53. *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

54. *Id.* at 1256–59.

55. James Sterngold, *U.S. Seizes State Prison Health Care/Judge Cites Preventable Deaths of Inmates, Depravity of System*, S.F. CHRON., July 1, 2005, at A1.

56. *Madrid*, 889 F. Supp. at 1280–82.

57. *Id.*

58. Pelican Bay State Prison, Mission Statement, <http://www.cdcr.ca.gov/Visitors/Facilities/PBSP.html> (last visited Oct. 26, 2008).

when they were in the SHU—inmates in the P.S.U. exhibit few serious behavioral problems.

The achievement of such change was not easy, and an important part of why it happened in this case is that I made abundantly clear to defendants from the start that they were being closely supervised, and that, if necessary, I would use the full range of my equitable powers in order to achieve compliance.

Of course, being an effective catalyst for change means one must not only use sticks but also hold out carrots. When defendants make progress, this must be recognized at hearings, in written orders, and during visits. That is very important in this process, and I have learned that an attentive press will almost always print such positive news on at least the third page of the local newspaper.

Ten years after the remedial process began in *Madrid*, I have now terminated court involvement with most of that process because defendants took ownership of and institutionalized the remedy.⁵⁹ As I hope this case demonstrates, state prisons can overcome the many obstacles to change—including their own resistance and lack of expertise—and successfully develop and implement their own remedies if the court, using the catalyst approach or something very much like it, provides the requisite oversight and expert assistance.

I am sure you all would love to hear where I think we are in the remedial process in *Plata v. Schwartzenegger*⁶⁰ and where I think the receivership is headed, but I will have to stop here to avoid violating judicial ethics. I will say, however, that I will now take a more active role and work more closely with the new receiver, and I believe that through collaborative efforts, growing concern on the part of the executive and legislative branches of government, and increased know-how as we grapple with this huge issue, we will make California's system a national model for prison health care.

Conclusion

As I reviewed my remarks to prepare for this speech, it struck me just how attentive, just how “active,” a judge must be to serve as an effective catalyst for change in the context of prison litigation. Some might even suggest that being so very “active” makes one an “activist” judge, with all the pejorative overtones associated with that term.

59. *Id.*

60. No. C01-1351 TEH, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005).

However, judges should take an active role to induce defendants to comply with their constitutional obligations, and that *does not* make an activist judge. Being actively involved is simply a necessary element of discharging the court's obligation to uphold and enforce the rights so carefully guaranteed by our Constitution.⁶¹

I agree with Judge Harold Baer, a district court judge who oversees reform in the New York City jails, who wrote in a recent law review article, "[w]hile courts may be criticized for their oversight role, it is still their responsibility when litigation is brought before them to determine, and where appropriate protect, the constitutional rights of detainees [and, I would add, prisoners] just like the rights of any one of us."⁶² That is what I hope I accomplished in *Madrid*, and that is what I hope to do through the receivership in *Plata*.

61. U.S. CONST. art. III, § 1.

62. Harold Baer, Jr., *A Necessary and Proper Role for Federal Courts in Prison Reform: The Benjamin v. Malcolm Consent Decrees*, 52 N.Y.L. SCH. L. REV. 3, 63 (2007).