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Brown v. Plata: The Struggle to Harmonize Human Dignity with the Constitution

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I. Introduction

In May 2011, the Supreme Court decided the case of *Brown v. Plata*, affirming a lower court's decision to grant a prison population reduction order in accordance with the Prison Litigation Reform Act of 1996 ("PLRA"), affecting the imprisonment of thousands of prisoners in the State of California.[1] The nature of the Court's decision makes *Plata* perhaps the most noteworthy prisoners' rights decision of the past quarter-century.[2] In reaching this decision, the Court applied the provisions of the PLRA governing the grant of prison population reduction orders.[3] Despite the seemingly simple application of the PLRA, understanding this decision requires one to examine the Court's recognition of the human dignity of all persons, even those who have voluntarily forfeited some portion of their liberty by committing crime, and its role in determining the content of important constitutional rights. Human dignity as a constitutional value has affected the Court's decision-making only since the 1940's.[4] In the ensuing

* J.D. Candidate – Pace University School of Law, May 2013. I would like to first thank my family and friends for their love and support throughout the writing of this Article and my time in law school, without it I would not be where I am today. I would also like to thank Professor Michael B. Mushlin, who was instrumental in providing the spark that inspired my research in this area of the law—without his encouragement, constant guidance, and keen interest in my writing, this Article would never have escaped beyond my mind's eye.

1. Brown v. Plata, 563 U.S. ____, 131 S. Ct. 1910 (2011).

2. 3 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 17:1.60 (4th ed. Supp. 2009).

3. 18 U.S.C. § 3626 (2006).

4. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L.

seventy years the Court has increasingly relied on human dignity as a value considered in its interpretation of the Constitution. Even philosophically estranged members of the Court have found common ground on the issue.[5]

In *Plata*, the Supreme Court, in an opinion authored by Justice Anthony Kennedy, held that prisoners alleging conditions of confinement claims retain some degree of human dignity despite their lawful incarceration.[6] Accordingly, federal courts must enforce the constitutional rights of prisoners when they are violated, even if this culminates in the release of some individuals from captivity. This is in stark contrast to previous cases where the federal courts have simply deferred to the judgment of prison administrators.[7] *Plata* emphatically affirms the judiciary's role in protecting prisoners' rights, noting that court inaction in the face of ongoing and persistent constitutional violations cannot remain simply because of prison administrators' protestations and despite the admittedly radical nature of the remedy being considered.[8]

Part II of this Article briefly discusses the evolution of human dignity as a constitutional value during the course of the twentieth century. This Article will explain the philosophical development of human dignity in general terms and as it was developed by the Supreme Court, with some particular attention given the Court's Eighth Amendment jurisprudence. Part III will discuss *Plata* and its underlying facts. Part IV concerns how *Plata* may influence the use of human dignity as a constitutional value in the years to come, specifically discussing the relationship between *Plata* and the troublesome 2012 decision: *Florence v. Board of Chosen Freeholders*.[9] As a result of cases like *Plata* and *Florence*, the vitality of human dignity as a constitutional value today

REV. 169, 188 (2011).

5. *See Plata*, 131 S. Ct. at 1928 (majority opinion by Kennedy, J.); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 680-81 (1989) (Scalia, J., dissenting); Furman v. Georgia, 408 U.S. 238, 270 (1972) (Brennan, J., concurring); Rochin v. California, 342 U.S. 165, 174 (1952) (majority opinion by Frankfurter, J.).

6. *Plata*, 131 S. Ct. at 1928.

7. 1 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 1:3 (4th ed. 2009).

8. *Plata*, 131 S. Ct. at 1928-29.

9. 566 U.S. ____, 132 S. Ct. 1510 (2012).

remains somewhat in flux. However, this is not to say that it is irrelevant to the Court's decision-making process. Only as future cases are decided will commentators be able to determine which case holds greater import in the area of Eighth Amendment jurisprudence, and thus evaluate the durability of human dignity as a constitutional concern.

II. Human Dignity as a Constitutional Value

A. *Human Dignity & Philosophy*

Human dignity has only recently emerged as a value relevant to interpreting the Constitution.[10] Moreover, it is a concept that is not susceptible to easy definition. The ephemeral nature of human dignity has led some legal scholars to declare that human dignity is either not an independent constitutional value, or that human dignity can be reduced to another, more concrete and readily discernible value like personal autonomy or equality.[11] Despite the philosophic debate, it is increasingly apparent that the Supreme Court has relied on some human dignity value, whatever that may be, in reaching decisions on a wide-ranging number of issues.[12]

Human dignity originated separately as both a religious and philosophical concept. The religious underpinnings of human dignity derive from the Judeo-Christian belief that all human beings are created in the image of God.[13] Each individual therefore contains a fragment of the so-called "divine spark," imbuing him or her with a dignity that cannot be denied or in any way disparaged by others.[14] This conception of human dignity explains rudimentary notions of human equality, best demonstrated by the retributivist belief in "blood for blood" that is enshrined in many ancient legal and religious

10. Henry, *supra* note 4, at 188.

11. *Id.* at 182-85.

12. *See* Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 753 (2006).

13. Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 205 (2008).

14. *Id.* at 206.

texts.[15]

Philosophically, the idea that human dignity is a source of human rights can be traced to the work of the eighteenth century German philosopher Immanuel Kant.[16] Kant based his understanding of human dignity on the individual autonomy he believed was possessed by all people.[17] Individual autonomy, to Kant, was the same as positive freedom, which is derived from a person's inherent rationality and ability to self-govern.[18] Kant's conception of human dignity is particularly interesting in examining human dignity as a constitutional value because his work was an intellectual product of the Enlightenment, much like the Constitution. This is not to imply that Kant's philosophy directly inspired the Framers in drafting the Constitution; however, it does show that political and legal thought at the time was concerned to some degree with human equality and its relationship to the inherent dignity of all people.[19]

B. *The Supreme Court and Human Dignity*

During the first 150 years of the Nation's existence, the word "dignity" appeared in Supreme Court opinions to describe only the sovereignty possessed by the several states, typically in cases concerning the application of the Eleventh Amendment.[20] Human dignity as an independent constitutional concept did not enter the Supreme Court lexicon until the middle part of the twentieth century. It was not until the 1940's that this new understanding of "dignity" was first recognized as a means of vindicating individual rights under

15. *Id.*

16. *Id.*; William A. Parent, *Constitutional Values and Human Dignity*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY & AMERICAN VALUES 47, 53 (Michael J. Meyer & William A. Parent eds., 1992).

17. Rao, *supra* note 13, at 206.

18. Michael J. Meyer, *Introduction* to THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY & AMERICAN VALUES, *supra* note 16, at 1, 7.

19. *Id.*; *see also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

20. *See, e.g.*, *Ex parte* Young, 209 U.S. 123, 149-50 (1908); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 451 (1793) (opinion of Blair, J.).

the Constitution.[21] This change can in part be explained by the global response to the Holocaust and other World War II era atrocities, resulting in the signing of great international agreements such as the United Nations Charter, and the Universal Declaration of Human Rights.[22]

1.Justice Frank Murphy

The individual most responsible for developing human dignity as a constitutional value in the twentieth century was Justice Frank Murphy.[23] President Franklin Delano Roosevelt appointed Justice Murphy to the Court in 1940.[24] Prior to his appointment, Justice Murphy served as Mayor of Detroit and Governor of Michigan, where he developed an accentuated sensitivity to the severe problem posed by extreme racism in America.[25] Deeply affected by what he saw in elected office, Justice Murphy's jurisprudence assumed that the Constitution protected the inherent dignity of all persons by virtue of their shared humanity.[26] While his philosophy was mostly expressed in dissent,[27] using dignity to inform the Court's understanding of the Constitution set the foundation for its growth during the latter half of the twentieth century.

The particular phrase "human dignity" was first used to vindicate individual rights in Justice Murphy's dissenting opinion in *Korematsu v. United States*.[28] Railing against the Court's decision to uphold President Roosevelt's wartime Japanese exclusion policy, Justice Murphy condemned the

21. Rao, *supra* note 13, at 202.

22. Goodman, *supra* note 12, at 750; U.N. Charter preamble; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 1, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

23. Goodman, *supra* note 12, at 753-54.

24. In Memory of Mr. Justice Murphy, 340 U.S. v, xii (1951).

25. *Id.* at ix–x.

26. *See* NOAH FELDMAN, SCORPIONS: THE BATTLES & TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 184, 248-49 (2010).

27. *In re* Yamashita, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting); Screws v. United States, 325 U.S. 91, 134-35 (1945) (Murphy, J., dissenting); Korematsu v. United States, 323 U.S. 214, 233-35 (1944) (Murphy, J., dissenting).

28. 325 U.S. at 240 (Murphy, J., dissenting).

policy as unalloyed racism.[29] The detention of persons based on their race, "destroy[ed] the dignity of the individual . . ." and was a policy more worthy of the enemy Axis Powers than of the United States.[30] In one of the Court's lowest historical moments,[31] Justice Murphy fully grasped the implications of allowing the government's position to stand unchallenged by the Constitution's clear commands. If one thing distinguished the United States from its enemies, Justice Murphy believed it was the nation's constitutional commitment to protect human dignity. To him, even the arguable exigencies of war were insufficient to vitiate the clear commands of the Constitution and the rights that it protects.[32]

Justice Murphy also relied on the constitutional recognition of human dignity in his dissent in *Screws v. United States*.[33] In *Screws*, the issue was whether local officials, acting under the color of Georgia law, could face federal prosecution for a racially motivated murder. The defendants in *Screws* arrested an African American male charged with the theft of a tire, and proceeded to viciously beat the suspect to death, clearly without any due process.[34] The Court upheld the validity of the prosecution, but reversed the defendants' conviction due to inadequate jury instructions.[35] In his dissent, Justice Murphy argued that both the prosecution and the conviction should have been affirmed, writing:

> I dissent. Robert Hall, a Negro citizen, has been deprived not only of the right to be tried by a

29. *See id.* at 239-42.

30. *Id.* at 240.

31. *See* FELDMAN, *supra* note 26, at 243; Dawinder S. Sidhu, *First* Korematsu *and Now* Ashcroft v. Iqbal*: The Latest Chapter in the Wartime Supreme Court's Disregard for Claims of Discrimination*, 58 BUFF. L. REV. 419, 425 (2010); Nathan Watanabe, Note, *Internment, Civil Liberties, and a Nation in Crisis*, 13 S. CAL. INTERDISC. L.J. 167, 185 (2003).

32. *Cf. Ex parte* Milligan 71 U.S. (4 Wall.) 2, 120–21 (1886) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.").

33. 325 U.S. 91, 134-35 (1945) (Murphy J., dissenting).

34. *See id.* 92-93 (majority opinion).

35. *Id.* at 107.

> court rather than by ordeal. He has been deprived of the right of life itself. That right belonged to him not because he was a Negro or a member of any particular race or creed. That right was his because he was an American citizen, because he was a human being. As such, he was entitled to all the respect and fair treatment that befits the dignity of man, a dignity that is recognized and guaranteed by the Constitution.[36]

To Justice Murphy, the issue in *Screws* transcended the technical question of whether federal jurisdiction was proper. The crime committed in *Screws*, a brutal and racially motivated murder, implicated the Constitution because Robert Hall failed to receive even the smallest degree of due process and was instead beaten to death. The local officials, according to Justice Murphy, could not have been unaware that their actions, taken under color of state law, were violative of the due process guarantees enshrined in the Constitution.[37] "Knowledge of a comprehensive law library is unnecessary for officers of the law to know that the right to murder individuals in the course of their duties is unrecognized in this nation."[38] That due process is constitutionally compelled, and that it was disregarded in the instant case was clear to Justice Murphy because of his understanding of the Constitution as a document grounded on respect for human dignity.

Justice Murphy was a tireless advocate for advancing the cause of human dignity in American jurisprudence. He recognized that many of the basic rights enumerated in the Constitution were themselves tools to protect the inherent dignity of humanity. However, he was unable to see this constitutional theory blossom any further; he died, still on the bench, on July 19, 1949.[39] Several years would pass before another jurist would take up the mantle on behalf of

36. *Id.* at 134-35 (Murphy, J., dissenting).
37. *Id.* at 135.
38. *Id.* at 136-37.
39. In Memory of Mr. Justice Murphy, 340 U.S. v, vi (1951).

constitutional human dignity.

2.Justice William J. Brennan, Jr.

Justice William J. Brennan, Jr., picked up the fight for constitutional human dignity where Justice Murphy left off and went on to become its leading champion for the remainder of the twentieth century. Appointed to the Supreme Court by President Dwight D. Eisenhower in 1956, Justice Brennan served on the Court for over thirty years, becoming perhaps the most ardent supporter of the constitutional importance of human dignity in the Court's history, past and present.[40] Discussing the human dignity of the incarcerated, Justice Brennan once famously wrote, "even the vilest criminal remains a human being possessed of common human dignity."[41] Justice Brennan thought that the Fourteenth Amendment, and the revolution in constitutional jurisprudence that it fostered, was the crucial provision that made human dignity a constitutionally relevant value, protecting it from depredations by state governments on individual rights.[42] Justice Brennan consistently argued that human dignity was the paramount value underlying the Eighth Amendment's prohibition on "cruel and unusual punishment."[43] He understood that "conceptions of 'liberty' have come to recognize the undeniable proposition that prisoners and parolees retain some vestiges of human dignity."[44] While human dignity and liberty may be constitutionally related, this did not make one a mere derivative of the other.

Justice Brennan discussed his conception of human dignity and its constitutional dimensions at great length in *Furman v.*

40. *See* Stephen J. Wermiel, Essay, *Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 WM. & MARY BILL RTS. J. 223, 228 (1998).

41. Furman v. Georgia, 408 U.S. 238, 273 (1972) (Brennan, J., concurring).

42. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 536 (1986).

43. U.S. CONST. amend. VIII.

44. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 492 (1977).

Georgia,[45] where the Court held that the death penalty, as then applied throughout the United States, was unconstitutional.[46] Despite finding the Eighth Amendment incapable of precise definition, Justice Brennan strongly believed that the amendment embodies certain values central to American government.[47] Building on the foundation laid in *Trop v. Dulles*,[48] Justice Brennan concluded that a punishment, in this case the death penalty, is "cruel or unusual" when "it does not comport with human dignity."[49] He concluded that, at the most general level, government action does not violate the Eighth Amendment where it respects the intrinsic value of the individual subjected to punishment.[50]

Going much further than the *per curiam* opinion, Justice Brennan applied a four-factor analysis in concluding that the death penalty absolutely violated the Eighth Amendment by denigrating human dignity. "The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings."[51] The severity of the punishment referenced by Justice Brennan does not simply refer to the infliction of pain, but also to punishments that "treat members of the human race as nonhumans, as objects to be toyed with and discarded."[52] A punishment also violates human dignity where the sheer enormity of the punishment imposed on the convicted is degrading in and of itself, as was the case in *Trop*.[53] Moreover, severe punishment is inconsistent with human dignity where it is arbitrarily inflicted by the State.[54] Punishment is arbitrarily inflicted "when, without reason, [the State] inflicts upon some people a severe punishment that it does not inflict upon others."[55] Human dignity is also affected where a punishment is inflicted that is considered

45. 408 U.S. 238 (1972).
46. *Id.* at 257 (Brennan, J., concurring).
47. *Id.* at 258.
48. 356 U.S. 86 (1958).
49. *Furman*, 408 U.S. at 270 (Brennan, J., concurring).
50. *Id.*
51. *Id.* at 271.
52. *Id.* at 272-73.
53. *Id.* at 273.
54. *Id.* at 274.
55. *Id.*

"unacceptable to contemporary society."[56] A determination that a punishment has been rejected by contemporary society, as a depredation on human dignity, requires the presence of "objective indicators," such as the contemporary and historical use of the punishment being examined, demonstrating a society's current acceptance of that form of punishment.[57] Finally, severe punishment does not comport with human dignity where it is "excessive," that is, "unnecessary."[58] "The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the *pointless* infliction of suffering."[59] Where a significantly less severe punishment is available, a severe punishment is unnecessary because it is disproportionate to the offense.[60]

In summary, Justice Brennan concluded that a punishment violates the Eighth Amendment when it degrades human dignity. The four general principles that he elucidated in his concurring opinion were aimed at providing "means by which a court can determine whether a challenged punishment comports with human dignity."[61] Each of the above-mentioned factors merely provides a judicial gloss to the term human dignity. Justice Brennan's analysis assumes that human dignity was the core value that the Framers wanted to protect through the enactment of the Eighth Amendment.[62] His analysis in *Furman* used human dignity as the metric to determine when punishment crosses the line, but did not alter the ability of the government to reduce the liberty of individuals convicted of committing a crime. His analysis assumed that these individuals possess a lesser degree of constitutional liberty than the rest of society. However, Justice Brennan was convinced that commission of crime was not a blank check for the deprivation of all rights. No commentator has seriously challenged this contention; however, there has been strong disagreement as to when the line between

56. *Id.* at 277.
57. *See id.* at 278-79.
58. *Id.* at 279.
59. *Id.* (emphasis added).
60. *Id.*
61. *Id.* at 282.
62. *See id.* at 270.

constitutional and unconstitutional punishment has been crossed. Justice Brennan's approach to human dignity attempts to create some predictability in drawing this constitutional line, while also championing the basic understandings of the Framers with regard to the Eighth Amendment.

Justice Brennan also identified human dignity as a constitutional value in his majority opinion in *Goldberg v. Kelly*.[63] In *Goldberg*, the Court considered whether welfare recipients were entitled to any due process, such as an evidentiary hearing, prior to the termination of their welfare benefits.[64] Conducting evidentiary hearings after the termination of welfare benefits was problematic because, without those benefits, individuals dependent on welfare were generally left without any other means to provide for themselves. "[The] need to concentrate upon finding the means for daily subsistence, in turn, adversely affects [the welfare recipient's] ability to seek redress from the welfare bureaucracy."[65] Finding that due process requires a pre-deprivation hearing, Justice Brennan upheld what he termed to be "the Nation's basic commitment . . . to foster the *dignity* and well-being of all persons within its borders."[66] *Goldberg* recognized that human dignity is relevant not only where the government acts to impinge upon the liberty of its citizens, but also where the government positively acts to assist the plight of the most unfortunate members of society.

C. The Eighth Amendment & Human Dignity[67]

The Eight Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[68] The Supreme Court first highlighted of the obvious connection between the Eighth Amendment and

63. 397 U.S. 254 (1970).
64. *Id.* at 260.
65. *Id.* at 264.
66. *Id.* at 264–65 (emphasis added).
67. *See also* discussion of the *Furman* case supra Section II.B.
68. U.S. CONST. amend. VIII.

to the concept of human dignity in *Trop v. Dulles*, the landmark decision that defined the scope of that amendment.[69] *Trop* considered whether expatriation of a wartime deserter was valid punishment under the Eighth Amendment.[70] In finding this punishment to be "cruel and unusual," Chief Justice Warren explained, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[71] In essence, the driving force behind the Eighth Amendment was to protect and preserve human dignity from severe encroachments by government.[72] Moving on from that premise, the Court concluded that whether some form of punishment is compatible with the Eighth Amendment depends on whether it is "within the limits of civilized standards."[73] This fluidic concept "draw[s] its meaning from the *evolving standards of decency* that mark the progress of a maturing society."[74] Justice Brennan, in *Furman v. Georgia*, considered in greater detail how contemporary values concerning punishment implicated human dignity and related values.[75] The protections afforded by the Eighth Amendment were made applicable to the states by the Court in *Robinson v. California*, decided in 1962.[76]

The prisoners' rights movement is just one area of Eighth Amendment jurisprudence where human dignity as a constitutional value has played a role in the Court's decision-making process. Implicit in the application of the Eighth Amendment to prisoners' conditions of confinement claims is the idea that prisoners retain some degree of human dignity and are therefore vested with limited constitutional protection. While this does not mean that the incarcerated cannot be deprived of liberties possessed by law-abiding citizens, it recognizes that certain aspects of personal liberty remain after

69. 356 U.S. 86 (1958).

70. *Id.*

71. *Id.* at 100.

72. *See* Furman v. Georgia, 408 U.S. 238, 258, 270 (1972) (Brennan, J., concurring).

73. *Trop*, 356 U.S. at 100.

74. *Id.* at 101 (emphasis added).

75. *See supra* notes 55-56.

76. 370 U.S. 660 (1962).

conviction and incarceration.[77] Many Supreme Court decisions in this field recognize this fact; however, these decisions usually balance the rights retained by prisoners against the interests of prison administrators in operating the prison system safely and efficiently.[78] In the past, courts have given great deference to the prerogatives of these administrators. In *Estelle v. Gamble*,[79] one of the first landmark prisoners' rights cases, the Court held that *deliberate indifference* to an inmate's serious medical condition constituted "cruel and unusual punishment" under the Eighth Amendment. The Court recognized that the Eighth Amendment "embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ."[80] Unfortunately, in the ensuing decades, human dignity has not played a prominent role in many of the Court's opinions.[81] When references to human dignity appear in the pages of the United States Reports, they have mostly been confined to concurrences[82] and dissents.[83] *Brown v. Plata* marks, perhaps, a change in the opposite direction due to its strong language embracing the vitality of human dignity as an appropriate concern for the courts in vindicating the rights of

77. 1 MUSHLIN, *supra* note 7, at § 2:2.

78. *See* Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012); Turner v. Safley, 482 U.S. 78 (1987).

79. 429 U.S. 97 (1976).

80. *Id.* at 102 (internal quotation marks omitted).

81. *See, e.g.*, Overton v. Bazzetta, 539 U.S. 126, 138 (2003) (Stevens, J., concurring) ("[I]t remains true that the restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual.") (internal quotation marks omitted); Hope v. Pelzer, 536 U.S. 730, 745 (2002) ("Hope was treated in a way antithetical to *human dignity*-he was hitched to a post for an extended period of time . . . .") (emphasis added); Hudson v. McMillian, 503 U.S. 1, 10-11 (1992) (quoting the dignity language from Estelle v. Gamble, 429 U.S. 97, 102-03 (1976)); Hutto v. Finney, 437 U.S. 678, 685 (1978).

82. Farmer v. Brennan, 511 U.S. 825, 851 (1994) (Blackmun, J., concurring); Rhodes v. Chapman, 452 U.S. 337, 361, 372 (1981) (Brennan & Blackmun, JJ., concurring).

83. Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1527 (2012) (Breyer, J., dissenting); O'Lone v. Estate of Shabazz, 482 U.S. 342, 368 (1987) (Brennan, J., dissenting); Bell v. Wolfish, 441 U.S. 520, 579, 592-93 (1979) (Marshall & Stevens, JJ., dissenting); Meachum v. Fano, 427 U.S. 215, 232-33 (1976) (Stevens, J., dissenting); Wolff v. McDonnell, 418 U.S. 539, 597 (1974) (Douglas, J., dissenting).

prisoners in Eighth Amendment cases.

III. The Supreme Court's Decision in *Brown v. Plata*[84]

A. *The Decisions Below*

The Supreme Court's decision in *Brown v. Plata* is the culmination of over twenty years of litigation brought on behalf of a class of Californian prisoners concerning the State's inadequate delivery of health-care and related services.[85] The plaintiff class in *Plata* was a consolidation of two separate actions brought against the State of California: *Coleman v. Brown* and *Brown v. Plata*.[86]

1.*Coleman v. Brown*

The *Coleman* plaintiffs, a class of mentally ill prisoners, originally brought suit against the State of California in 1995 claiming that it had failed to provide mental health care services required by the Eighth Amendment.[87] The district court agreed with the plaintiffs, finding that the provision of mental health care to inmates in the state fell well below constitutionally acceptable levels.[88] The district court ordered a battery of remedial measures that attempted to ensure greater access to mental health care and to improve on-site facilities and conditions.[89] After years of continued failure, the district court appointed a special master to oversee the prison system's rehabilitation.[90] Despite such remedial efforts, a continued lack of progress caused the plaintiffs to request the empanelling of the three-judge panel under the PLRA to consider the issuance of a prison population reduction order.[91]

84. 131 S. Ct. 1910 (2011).
85. *Id.* at 1922.
86. *Id.* at 1926.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 1927-28.

2.*Plata v. Brown*

The plaintiffs in the *Plata* class action originally brought suit in 2001, alleging the inadequate provision of medical care to California's inmate population.[92] The State stipulated to the constitutional violations, seeking to commence the remedial phase of the litigation.[93] Following several years of remedial failure, in 2005 the court placed California's prison system into receivership.[94] Less than one year later, the plaintiffs moved to empanel a three-judge court because of the lack of any appreciable progress at correcting the underlying violations.[95]

3.Prospective Relief Under the PLRA

Only a three-judge panel may issue a prison population reduction order under the PLRA.[96] This expresses Congress's desire that such orders be granted sparingly and only after much deliberation. To convene a three-judge panel under the PLRA, a plaintiff must show that the originating court previously issued "an order for less intrusive relief that has failed to remedy the deprivation . . ." of a federal right,[97] and that "the defendant has had a reasonable [opportunity] to comply with the previous court orders."[98] Once a three-judge panel has been convened, a prison population reduction order may be granted if the plaintiffs show, with clear and convincing evidence, that: (1) that overcrowding is the primary cause of the constitutional violation;[99] (2) that no other relief will be able to remedy this violation;[100] (3) that the relief be narrowly drawn, extend no further than necessary to correct the constitutional violation, and be accomplished through the least

92. *Id.* at 1926.
93. *Id.*
94. *Id.* at 1926-27.
95. *Id.* at 1927-28.
96. 18 U.S.C. § 3626(a)(3)(B) (2006).
97. *Id.* § 3626(a)(3)(A)(i).
98. *Id.* § 3626(a)(3)(A)(ii).
99. *Id.* § 3626(a)(3)(E)(i).
100. *Id.* § 3626(a)(3)(E)(ii).

intrusive means;[101] and finally (4) that the court "give substantial weight to any adverse impact on public safety . . . caused by the relief."[102]

4.The Three-Judge Panel's Decision

The three-judge panel, following a lengthy discovery process and trial, granted the plaintiffs' request for a prison population reduction order. The court issued extensive factual findings detailing the horrific conditions experienced by plaintiffs' class as a result of the overcrowded nature of the California prison system.[103] For instance, suicidal inmates were placed in holding cells no better than cages for hours on end, with many committing suicide at a rate almost eighty percent higher than the national average.[104] Inmates suffering from physical aliments were subjected to similarly deplorable conditions, leading the court to find that the amount of preventable deaths in the prison system "was extremely high."[105] Ultimately, the three-judge panel concluded that a reduction in the prison population to 137.5 % of capacity within two years was permissible under the PLRA and would remedy the system's constitutional deficiencies, leaving the specifics on how to achieve that goal to the State's discretion.[106]

B. *The Supreme Court Decides*

On May 23, 2011, the Supreme Court affirmed the three-judge panel's decision to issue a prison population reduction order. In a five to four decision,[107] Justice Kennedy found that the panel was properly convened under the PLRA, and that its

101. *Id.* § 3626(a)(1)(A).

102. *Id.*

103. Brown v. Plata, 131 S. Ct. 1910, 1928 (2011).

104. *Id.* at 1924.

105. *Id.* at 1925 (internal quotation marks omitted).

106. *Id.* at 1928.

107. Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan comprised the Court's majority affirming the lower court order, whilst Chief Justice Roberts and Justices Scalia, Thomas, and Alito voted to reverse. *Id.* at 1921.

decision to grant the prison population reduction order was properly granted.[108] The Court's opinion was phrased in very narrow terms, giving the State significant discretion in determining how best to reach the 137.5% population cap ordered by the three-judge panel.

Beginning the Court's discussion is language that strongly affirms the role of the federal courts in upholding the constitutional rights of all persons, including prisoners.[109] The Court prominently relied on how the inherent human dignity of prisoners compelled the Court's result. Justice Kennedy wrote:

> As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of *human dignity inherent in all persons*. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.[110]

The Court emphasizes that when individuals are incarcerated they are deprived of the ability to provide for themselves the most basic of life's necessities. For instance, prisoners depend on the State to provide them with adequate food and medical care.[111] A failure to provide inmates with these necessities "may actually produce physical torture or a lingering death."[112] Where the government has neglected its duties, in violation of the Eighth Amendment, it is up to the judiciary to ensure that a remedy is provided. While courts must give some amount of deference to the concerns of prison administrators, because of their expertise in housing large numbers of dangerous convicts and legitimate interest in criminal punishment, the courts cannot permit ongoing constitutional violations "simply because a remedy would

108. *Id.* at 1923.

109. *Id.* at 1928–29.

110. *Id.* at 1928 (emphasis added).

111. *Id.*

112. *Id.* (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)) (internal quotation marks omitted).

involve intrusion into the realm of prison administration."[113]

The Court's strong language is crucial to understanding its holding within the context of prisoners' rights law. Historically, courts have been cautious to act with any vigor where inmates allege constitutional violations concerning conditions of confinement.[114] While the prisoners' rights movements of the latter twentieth century gradually called into doubt the notion that prisoners lose all their liberties upon incarceration,[115] Justice Kennedy's language in this section of the Court's opinion is an important step forward in how the federal judiciary conceives of its role in protecting these rights. The Court's opinion affirms the judiciary's power to correct constitutional violations in the prison context, and directly states that the courts must not shirk this responsibility when doing so is necessary despite the protests of prison officials.[116]

The Court then considered whether the three-judge panel was properly convened under the PLRA. The plaintiffs were required to show that the lower court had previously issued an order for a less intrusive remedy that failed to rectify the violation of a federal constitutional right, and that the defendant had been given an appropriate amount of time to comply with the lower court's previous orders.[117] Both of these requirements were met.[118] As to the first requirement, the record was replete with examples of past court orders of a less intrusive nature than a population reduction order.[119] Remedial efforts had been ongoing for over twelve years to no avail for the *Coleman* class action plaintiffs, and for nearly five years for the *Plata* class action plaintiffs at the time the three-

113. *Id*. at 1929.

114. 1 MUSHLIN, *supra* note 7, at §§ 1:3, 2:4 (discussing the 19th-20th Century "hands-off" doctrine and the highly deferential test announced in *Turner v. Safely*, 482 U.S. 78 (1987), applied in many prisoners' rights cases); *see also* Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012) (giving great deference to the needs of prison administrators in upholding strip search of misdemeanor arrestee).

115. 1 MUSHLIN, *supra* note 7, at § 1:4.

116. *Plata*, 131 S. Ct. at 1929.

117. 18 U.S.C. § 3626(a)(3)(A)(i)-(ii) (2006).

118. *Plata*, 131 S. Ct. at 1930–31.

119. *Id.*

judge panel convened.[120] The more difficult question before the Court was whether the State had been given sufficient time to comply with these past remedial efforts, especially in light of the recent appointment of a receiver in the *Plata* case only one year earlier.[121] The Court declined to read this section of the PLRA literally as advocated by California.[122] To do otherwise would require that for a period of time no remedial efforts be undertaken, prolonging the period of the court's involvement, anathema to the judiciary's exercise of equitable jurisdiction.[123] While each new remedial order "must be given a reasonable time to succeed, . . . [this] must be assessed in light of the entire history of the court's remedial efforts."[124]

Having answered the question of whether the three-judge panel was properly convened, the Court moved on and determined that the lower court had not erred in finding that "crowding [was] the primary cause of the violation of a Federal right."[125] In making this determination, the Court was required to give deference to the factual findings of the three-judge court.[126] The record below clearly demonstrated to the Court that the overcrowding of California's prisons had a drastic impact on the provision of medical care.[127] Justice Kennedy pointed out that the vacancy rates for key medical personnel ranged from twenty percent for surgeons, to over fifty percent for psychiatrists.[128] Furthermore, even if an overwhelming majority of those positions could be have been filled with proficient medical professionals, the State's prisons still lacked the necessary space for the additional personnel to deliver adequate care to the prisoner population.[129] The overcrowding was also the primary cause of the significant delays in

120. *Id.* at 1930.
121. *Id.* at 1931.
122. *Id.*
123. *Id.*
124. *Id.*
125. 18 U.S.C. § 3626(a)(3)(E)(i) (2006).
126. *Plata*, 131 U.S. at 1932 (citing Salve Regina Coll. v. Russell, 499 U.S. 225, 233 (1991)).
127. *Id.*
128. *Id.*
129. *Id.* at 1933.

treatment to both mentally ill and physically ill inmates.[130] In the most extreme cases, these delays in treatment gave sick inmates sufficient time to commit suicide when this result may have been entirely preventable.[131] While overcrowding took a toll on the delivery of medical care, it also fostered unsafe and unsanitary conditions creating more sickness to be treated, compounding the problems of delivery.[132] In one instance, prison staff did not learn about the preventable death of an inmate, who had been assaulted, until several hours afterwards, because of severe overcrowding.[133] In another case, two inmates were given the opportunity to hang themselves after they had been placed in cells containing noose attachment points that could have easily been removed.[134] The attachment points had not been removed because prison officials had no place to put the inmates while the repair was being made.[135] Further, increased violence in overcrowded prisons has required administrators to increasingly rely on lockdowns to maintain order.[136] During these lockdowns prisoners must either be escorted to the medical facilities or the medical personnel must be brought to the prisoners.[137] This has increased the strain placed on the prison medical system, and has resulted in the suspension of programming specifically designed to treat mentally ill prisoners.[138]

The Court also rejected the contention raised by the defendants, that the three-judge panel failed to allow enough time for adequate discovery prior to trial and that accordingly, the plaintiff presented insufficient evidence about current prison conditions.[139] The three-judge panel extensively relied upon expert testimony of near-current prison conditions, and maintained that "[o]rderly trial management may require

130. *See id.*
131. *Id.* at n.6.
132. *Id.* at 1933.
133. *Id.* at 1933-34.
134. *Id.* at 1934.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 1935.

discovery deadlines . . . ."[140] This result was further compelled by the fact that the three-judge panel's decision was limited to granting a remedy rather than a re-litigation of the constitutional violations alleged.[141] Discovery was appropriately limited with these goals in mind.

Although the plaintiffs admitted that the violation of their constitutional rights was caused by other factors in addition to overcrowding, such an admission did not serve to invalidate the three-judge panel's conclusion that the overcrowding was the *primary* cause of these violations.[142] To find that overcrowding was the *primary* cause of the violation, it must be found that overcrowding was "the foremost, chief, or principal cause of the violation."[143] General canons of statutory interpretation suggest that if Congress intended that overcrowding be the *only* cause of the violation, it would have expressly said so when the PLRA was enacted into law.[144] The Court stressed that the PLRA should not be construed so as to place strictures on a federal court's power to fabricate "practical remedies when confronted with complex and intractable constitutional violations."[145]

The Court next considered whether the three-judge panel appropriately found, by clear and convincing evidence, that "no other relief will remedy the violation . . ."[146] of the protected right.[147] The Court considered, and rejected the argument of the State that it could adequately remedy the ongoing constitutional violations through the construction of new facilities, out-of-state transfers of prisoners, increased hiring of medical personnel, continued adherence to the work of the special master and receiver, or a combination of these four remedies.[148] The State's proposal to remedy the constitutional violations by increasing out-of-state prison transfers was

140. *Id.*
141. *Id.*
142. *Id.* at 1936.
143. *Id.*
144. *Id.*
145. *Id.* at 1937.
146. 18 U.S.C. § 3626(a)(3)(E)(ii) (2006).
147. *Plata,* 131 S. Ct. at 1937.
148. *Id.*

inadequate because such transfers are considered a population reduction by the PLRA.[149] Even if California could transfer a sufficient number of prisoners out-of-state to alleviate the overcrowding, the remedy, a form of population reduction, would not technically be considered a less restrictive alternative to the three-judge panel's order.[150] The Court also rejected the State's argument that it can build its way out of the overcrowding problem, noting California's current fiscal crisis.[151] The State's inability to construct new medical facilities also undercuts the State's argument that a remedy could be achieved through hiring additional personnel. Even if a sufficient number of medical personnel were hired, there would still be insufficient space in which the additional personnel could work.[152]

The Court also rejected the argument that the special master in *Coleman* and the receiver in *Plata* should be given more time to continue their efforts at remedying the inadequacies inherent in the prison system's medical care delivery.[153] Reports filed by the receiver and special master essentially stated that continued efforts on their part would fail to correct the system unless something was done to alleviate the problem posed by the overcrowding.[154] The Court also found the State's final argument, that all of the aforementioned remedies combined could remedy the ongoing constitutional violations, to be unpersuasive. Absent a population reduction, all of the State's solutions ultimately required California to expend large sums of money, a fiscal impossibility at the current time.[155] Furthermore, the State's attempts to remedy this situation had been ongoing for nearly two decades, suggesting that the current "solutions" were insufficient to solve the problem.[156]

Under the PLRA prospective relief must be narrowly

149. *Id.*
150. *Id.* at 1938.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 1938-39.
155. *Id.* at 1939.
156. *Id.*

drawn, extend no further than is necessary to alleviate the violation, and must be the least intrusive means necessary to remedy the violation of a federal right.[157] In making this determination, courts are required to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system."[158] The State argued that the collateral consequences of the prisoner release order is evidence that the remedy is not narrowly tailored, and that as a result, its sweep is far too broad.[159] An order is not excessively broad simply because it has effects that will be felt beyond the plaintiffs' class. For a remedy's scope to be narrowly tailored, it must be proportional to the violation that it purports to correct.[160] Simply put, collateral effects that emanate from the correction of a constitutional violation do not, alone, render a remedy inappropriate under the PLRA.[161] Collateral effects violate the narrowly tailored requirement only when the courts seek to alter prison conditions outside of the scope of the constitutional violation alleged by the plaintiffs.[162] Justice Kennedy pointed out that "[e]ven prisoners with no present physical or mental illness may become afflicted, and all prisoners in California are at risk so long as the State continues to provide inadequate care."[163] The Court noted the associated dangers in releasing prisoners only within the plaintiff class, especially with regards to the high recidivism rates among the mentally ill.[164] The overcrowding problem would not be solved as those prisoners would inevitably find themselves back in prison before too long, solving the overcrowding problem not one bit. Releasing those individuals who are less likely to commit "fresh" crimes would go a long way to truly relieve the pressure on the prison medical care system caused by overcrowding. Importantly, the three-judge panel's prisoner release order gives:

157. 18 U.S.C. § 3626(a) (2006).
158. *Id.*
159. *Plata*, 131 S. Ct. at 1939.
160. *Id.* at 1939-40.
161. *Id.* at 1940
162. *Id.*
163. *Id.*
164. *Id.*

> [T]he State substantial flexibility to determine who should be released. If the State truly believes that a release order limited to sick and mentally ill inmates would be preferable to the order entered by the three-judge court, the State can move the three-judge court for modification of the order on that basis.[165]

The lower court's remedy was not overbroad because it targeted the entire California prison system instead of each individual prison facility. It is undisputed that the constitutional violations are systemic in nature.[166] This approach is logical because focusing on the entirety of the state prison system allows California greater discretion in how it achieves the population numbers ordered by the lower court.[167] Because of the systemic nature of this approach, each prison facility need not reach a population of 137.5 % of maximum capacity.[168] Some of the State's prison populations may be well in excess of that limit, so long as other facilities are able to fall below that number, thus reducing the population levels in the entire system to the parameters set out by the lower court's order.[169] This systemic approach gives the State flexibility in how it decides to comply with the three-judge panel's order, allowing it to take into account the very real differences between many of the State's prison facilities. For instance, the State may be able to shift prisoners to facilities that are better able to handle overcrowding without causing further constitutional violations.[170] Importantly, the lower court's order leaves those decisions up to the State, and *not* unelected, life-tenured federal judges.[171] The Court, in addition to stressing the deference given to the State by the lower court's order, also indicated that the State is free to move the three-judge panel

165. *Id.*
166. *Id.*
167. *Id.* at 1940-41.
168. *Id.* at 1941.
169. *Id.*
170. *Id.*
171. *Id.*

for modification of the remedial order.[172] Moving the three-judge panel to modify the remedial order is entitled to serious consideration as "time and experience . . . reveal targeted and effective remedies that will end the constitutional violations even without a significant decrease in the general prison population."[173]

Next the Court considered whether the three-judge panel gave "substantial weight" to the effects of a prisoner release order on public safety in accordance with the requirements of the PLRA.[174] The PLRA's language does not require the court to ensure that there be no adverse effects resulting from a release order, only that "substantial weight" be given to possible detrimental outcomes in deciding to order a population reduction. The lower court gave significant attention to the issue of public safety; ten days of trial were allocated to this issue, and the court frequently referred to the problem of public safety in its final opinion.[175] Weighing these possible outcomes, it was acceptable for the panel to rely on expert testimony from prison administrators throughout the country.[176] When making difficult factual findings, reliance on informed expert testimony is indispensable for the court to fashion injunctive relief appropriate to remedy constitutional violations. The experts that testified before the three-judge panel "testified on the basis of empirical evidence and extensive experience in the field of prison administration."[177] Several points were salient to the Court's conclusion that the three-judge panel fulfilled its statutory goal in that regard. Many of the experts testified that prison populations can be reduced in a manner that does not increase crime, but may actually have the effect of promoting and improving the public safety.[178] Additionally, the experts testified about statistical evidence demonstrating that prison

172. *Id.*

173. *Id.*

174. *See* 18 U.S.C. § 3626(a)(1)(A) (2006). The PLRA requires that the court give "substantial weight" to possible detrimental outcomes when deciding to order a population reduction. *Id.* A court is not required to ensure no adverse effects will result from a release order.

175. *Plata*, 131 S. Ct. at 1941.

176. *Id.* at 1942.

177. *Id.*

178. *Id.*

populations have been lowered in other jurisdictions without also undermining the public safety.[179] Other methods available to prison administrators, like the use of good-time credits to release prisoners less likely to be recidivist, and the diversion of low-risk offenders to community programs also serves to reduce overcrowding, while minimally affecting public safety.[180] Once again, the State has significant discretion in deciding how best to comply with the three-judge panel's order. "The decision to leave details of implementation to the State's discretion protect[s] public safety by leaving sensitive policy decisions to responsible and competent state officials."[181]

Penultimately, the Court considered whether the three-judge panel had erred in concluding that California prison population should be reduced to 137.5% of capacity in order to bring the system into compliance with the Constitution.[182] Again, the Court considered whether the lower court gave substantial weight to public safety concerns and whether the remedy was narrowly tailored to the constitutional violation.[183] The narrow tailoring requirement demands that the court order the release only of the fewest prisoners necessary to remedy the constitutional violation. The lower court did not commit clear error by capping the prison population at 137.5%; in fact the Court found evidence that even a more drastic remedy would have been appropriate.[184] Contrary to the State's argument, the Court found no evidence that the experts who testified before the lower court improperly expressed their own policy preferences instead of the narrowest cure for the ongoing constitutional violations.[185] The lower court's decision was supported by evidence that the problems posed by overcrowding could be cured with a population cap of anywhere between 130 % and 145 % of prison capacity.[186] The lower court did not act improperly by "splitting the difference," especially

179. *Id.* at 1942-43.
180. *Id.* at 1943.
181. *Id.*
182. *Id.* at 1944.
183. *Id.*
184. *Id.* at 1945.
185. *Id.* at 1944-45.
186. *Id.* at 1945.

since it had given both sides a chance to present their views on the issue and where scientific precision may be impossible to achieve.[187]

Finally, the Court considered whether the three-judge panel acted properly by ordering the State to reduce its prison population to 137.5 % of design capacity within a two-year time span.[188] This compliance period would not commence until after the Court's decision was announced, meaning that the State had, up until this time, been given a two-year head start.[189] In that time, the State had reduced the prison population by some nine thousand inmates, and "[began] to implement measures to shift 'thousands' of additional prisoners to county facilities."[190] However, if the State requests an extension, the three-judge panel should "remain open to a showing or demonstration by either party that the injunction should be altered . . . ."[191] The State has thus far failed to move the three-judge panel to extend the deadline. The Court baldly suggested that if the State moved to extend the deadline, that request should be granted.[192]

IV. The Future of Human Dignity & the Constitution?

A. *In General*

The importance of *Plata* on prisoners' rights law will become clear only if and when its underlying logic is applied in the future. The Court affirmed not just the power of the federal courts to enforce constitutional rights of prisoners, but also held, using strong and deliberate language, that prisoners' human dignity animates the rights afforded them by the Eighth Amendment. Taken together, these two concepts encourage the courts to take a more active role in vindicating the constitutional rights of the imprisoned. In *Plata*, by

187. *Id.*
188. *Id.* at 1945-46.
189. *Id.* at 1946.
190. *Id.*
191. *Id.*
192. *Id.* at 1946-47.

arguing that human dignity animates the Eighth Amendment protections afforded prisoners, the Court suggests that the judiciary cannot hide behind deference to the decisions of prison administrators and decline to enforce the rights of prisoners where such egregious violations of constitutional rights persist.[193] However, one must be careful in overstating the importance of this rule. The magnitude of the constitutional violations at issue in *Plata* is quite rare. Justice Kennedy might simply be marking out the boundaries; where the clear and continuous violations of the Eighth Amendment mandate the imposition of a drastic remedy. In that case, *Plata* serves merely as an outlier.

The Court's holding is all the more interesting in light of the general scholarly consensus that the PLRA has acted to restrict the prisoners' access to the legal system.[194] This restriction would prevent prisoners from preserving their constitutional rights.[195] However, at the very least the *Plata* decision is a sign that the judiciary will not use the PLRA to intentionally frustrate the ability of prisoners to access the legal system, which is in essence the approach urged by Justice Scalia in his dissent:

> There comes before us, now and then, a case whose proper outcome is so clearly indicated by tradition and common sense, that its decision ought to shape the law, rather than vice versa. One would think that, before allowing the decree of a federal district court to release 46,000

193. *Id.* at 1929.

194. *See generally* Michael B. Mushlin, *Unlocking the Courthouse Door: Removing the Barrier of the PLRA's Physical Injury Requirement to Permit Meaningful Judicial Oversight of Abuses in Supermax Prisons and Isolation Units*, 24 FED. SENT'G REP. 268 (2012) (discussing how the PLRA's requirement permitting prisoners to bring claims of mental or emotional injury only if accompanied by some non-*de minimis* physical injury has severely restricted prisoners' access to the courts specifically erecting a barrier between the Constitution and prisoners held in solitary confinement); Margo Schlanger, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139 (2008); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, *passim* (2003).

195. *See* sources cited *supra* note 194.

> convicted felons, this Court would bend every effort to read the law in such a way as to avoid that outrageous result.[196]

Despite the fears of judicial activism espoused by the dissenting justices,[197] the Court's opinion is a leading example of "judicial restraint." The majority opinion tightly applies the various applicable sections of the PLRA, and gives great deference to the lower court's findings of fact. Additionally, the prisoner release order itself gives discretion to state officials in determining the precise measures by which the State's prisoner population will be reduced.[198]

Remedying violations of constitutional rights, especially those of unpopular minority groups, has been one of the most important roles of the federal courts since World War II. Respect for human dignity should play a part in this calculus, as it is integral to any understanding of the Eighth Amendment. *Plata* recognizes that violations of human dignity provide clear examples of instances where the courts must act to effectuate constitutional guarantees. The problem with using human dignity as a tool of constitutional interpretation results from the ambiguity of the term itself, and therefore, the indefiniteness of determining when government action crosses that purported line. It may be that the courts, possibly like in *Plata*, are reduced to analyzing these questions in a manner similar to Justice Potter Stewart's famous "I know it when I see it" retort in *Jacobellis v. Ohio*.[199]

B. Florence v. Board of Chosen Freeholders*: An About-Face on Human Dignity?*

One case decided in 2012, *Florence v. Board of Chosen Freeholders*,[200] raises significant questions about the breadth of the *Plata* decision, particularly the relevance of human dignity

196. *Plata*, 131 S. Ct. at 1950 (Scalia, J., dissenting).
197. *See id.* at 1950, 1959 (Scalia & Alito, JJ., dissenting).
198. *Id.* at 1920 (majority opinion).
199. 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
200. 132 S. Ct. 1510 (2012).

to constitutional analysis. The Court once again pays significant deference to the concerns of prison administrators allowing for the proliferation of troublesome practices at the expense of prisoners.[201] Most unsettling is that Justice Kennedy is the author of the Court's opinion in *Florence*.[202] At issue in *Florence* was whether, consistent with the Fourth Amendment, prison officials could subject a detainee introduced into the general prison population to a visual strip search.[203] Albert Florence had been arrested seven years prior to the events at issue before the Court for fleeing from the police. He plead to the lesser of the offenses charged and was sentenced to pay a fine, due in monthly installments.[204] Florence fell behind on these payments, and a bench warrant for his arrest was issued after he failed to make an appearance at an enforcement hearing. He caught up on his payments, but the bench warrant was somehow never removed from the police computer system.[205] In 2005, Florence was pulled over by the police while driving in Burlington County with his wife. The police proceeded to arrest Florence because of the outstanding bench warrant that had never been removed from the computer system. Florence was detained at two separate detention facilities where he was subject to a visual "strip search" prior to being introduced to the general prison population.[206] The search procedures utilized by each detention center required detainees to remove all of their clothing while officers would check for contraband, wounds, and gang-related body marks.

201. *See id.* In fact, Justice Kennedy begins his opinion with a paean to the judicial deference due institutional administrators: "Correctional officials have a legitimate interest, indeed a responsibility, to ensure that jails are not made less secure by reason of what new detainees may carry in on their bodies." *Id.* at 1513.

202. *Id.*

203. *Id.*

204. *Id.* at 1514.

205. *Id.*

206. *Id.* The Court was uncomfortable with using the term "strip search" to describe the search procedure endured by Florence because of its relative imprecision. The Court noted that the term could be applied to a broad array of search procedures, including physical searches of detainees' bodies. Query whether the Court's discomfort with using the term "strip search" to describe the treatment received by Florence aided its ultimate decision to defer to prison administrators. *See id.* at 1515.

Officers would also, without touching, peruse detainees' mouths and genital areas. These procedures applied to every individual processed by the detention centers.[207]

Florence argued that the mandatory strip search procedures were unconstitutional as applied to individuals arrested for minor offenses. Strip searches of this nature could be utilized only if officials had reasonable suspicion that a detainee was concealing contraband.[208] The district court agreed with Florence and found the challenged strip search policy unconstitutional. The Third Circuit reversed, finding that the challenged search procedures properly balanced the privacy interests of the detainees with the security needs of the detention centers.[209]

Finding the strip search procedures employed against Florence constitutionally permissible, the Court anchored its analysis in a sympathetic discussion of the tough decisions faced by prison administrators and the high degree of deference that courts should give to those decisions.[210] Acknowledging that the constitutionality of a particular search method must be analyzed by balancing the State's need for search against its invasion into personal privacy,[211] much of the Court's opinion focused on the threats to prison security that would ensue if prison officials were unable to conduct visual strip searches, even on individuals detained for petty offenses.[212] An individual may be arrested for petty offenses without a warrant by virtue of the Court's decision in *Atwater v. Lago Vista*.[213] The parade of horribles trotted out by the majority in this regard included gang violence, contagious diseases, and contraband-induced violence.[214] The Court even went out of its way to suggest that individuals arrested for petty offenses may in some cases turn

207. *Id.* at 1514

208. *Id.* at 1515.

209. *Id.*

210. *Id.* at 1515 (citing Turner v. Safley, 482 U.S. 78, 84-85, 89 (1987)). Indeed, the Court's analysis opens by stating: "The difficulties of operating a detention center must not be underestimated by the courts." *Id.*

211. *See* Bell v. Wolfish, 441 U.S. 520, 559 (1979).

212. *See Florence*, 132 S. Ct. at 1518-22.

213. 532 U.S. 318 (2001).

214. *See Florence*, 132 S. Ct. at 1518-20.

out to be some of the most dangerous criminals imaginable, and that this is a reasonable concern for prison officials to consider when crafting a detainee search policy.[215] Finally, the Court's opinion dwelled upon the general impracticability of administering the "reasonable suspicion" approach favored by the plaintiff in *Florence*. Prison administrators have a strong interest in possessing easily administrable rules that a "reasonable suspicion" test would greatly impair.[216] This evidence led Justice Kennedy to conclude in *Florence* that submitting all individuals entering detention facilities, regardless of the charged offense, to a strip search struck "a reasonable balance between inmate privacy and the needs of the [prison] institutions."[217] The evidence suggested to the Court that the needs of prison administrators outweighed prisoners' privacy interests despite the affront to dignity engendered by invasive strip searches policies.

Florence clearly affects how one must view *Plata*'s broader impact on prisoners' rights issues and the larger meaning of human dignity as a constitutional value. The Court in *Plata* was quick to begin its discussion of the legal issues by highlighting the inherent rights and liberties retained by prisoners, despite their lawful imprisonment.[218] In contrast, *Florence* focuses almost entirely on the deference that courts must give to prison administrators, highlighting the dangers that undermine an orderly prison system.[219] Furthermore, the Court's opinion is replete with language espousing strong judicial deference to the concerns of prison administrators.[220]

215. *Id.* at 1520. The Court also suggested that persons arrested for minor offenses may be susceptible to coercion by others to smuggle contraband into prison, and that the effect of treating low level offenders differently from individuals who have committed more serious offenses would lead to a greater amount of contraband entering the detention center. *Id.* at 1521.

216. *Id.* at 1522.

217. *Id.* at 1523.

218. Brown v. Plata, 131 S. Ct. 1910, 1928 (2011).

219. *Florence*, 132 S. Ct. at 1515.

220. Some examples of the Court's language are instructive. The opinion begins as follows: "Correctional officials have a legitimate interest, indeed a responsibility, to ensure that jails are not made less secure by reason of what new detainees may carry in on their bodies." *Id.* at 1513. "Maintaining safety and order at these institutions requires the expertise of correctional officials

Most surprising is Justice Kennedy's insinuation that strip searches of low-level offenders are always constitutionally permissible. Yet, this sweeping rule in *Florence* is at odds with the concerns for human dignity held by Justice Kennedy's opinion in *Plata*. That such an insinuation is present in *Florence* is made clear by the separate concurring opinions written by Chief Justice Roberts and Justice Alito.[221] It remained Justice Breyer's responsibility in his dissenting opinion to remind the Court of the important dignity interests retained by prisoners and of the affront to that dignity caused by an invasive strip search policy, such as the one in *Florence*.[222] Thus human dignity as a constitutional value clearly did not play as prominent a role in the *Florence* decision as it had in *Plata* only one year earlier. This is troubling because it casts doubt on the durability of the concept of human dignity as a readily discernible constitutional value, particularly when the same Justice authors the contrasting opinions. Justice Kennedy's decision to elide any discussion of human dignity in *Florence* suggests that the concept of human dignity may be one of style rather than of substance. If the phrase "human dignity" is used only as a means to justify opinions that vindicate individual rights rather than as a normative principle that compels the result in such a case, then the concept runs the risk of becoming a superfluous turn of phrase devoid of any concrete legal meaning.

Despite the seemingly huge substantive disparities that exist between *Plata* and *Florence*, the cases may be reconcilable. The alleged constitutional violations at issue in

who must have substantial discretion to devise reasonable solutions to the problems they face." *Id.* at 1515. "People detained for minor offenses can turn out to be the most devious and dangerous criminals . . . . Reasonable correctional officials could conclude these uncertainties mean they must conduct the same thorough search of everyone who will be admitted to their facilities." *Id.* at 1520.

221. *Id.* at 1523-24 (Roberts, C.J. & Alito, J., concurring). "The Court makes a persuasive case for the general applicability of the rule it announces. The Court is nonetheless wise to leave open the possibility of exceptions . . . ."*Id.* at 1523 (Roberts, C.J., concurring).

222. *Id.* at 1525 (Breyer, J., dissenting). "Those confined in prison retain basic constitutional rights . . . . I doubt that we seriously disagree about the nature of the strip search or about how the serious affront to human dignity and to individual privacy that it presents." *Id.* at 1525, 1527.

each case are arguably of different magnitude. In *Plata*, the Court considered the appropriateness of remedial efforts pertaining to long-standing and systemic constitutional violations that directly impacted the immediate health and safety of thousands of inmates held in California's prisons.[223] In *Florence*, the alleged violation occurred during a close visual inspection of an arrestee's naked body by jail officials.[224] Strip searches implicate important privacy interests of prisoners, however, for Justice Kennedy, the invasion of privacy in *Florence* did not rise to an affront to human dignity in the same way that it had in *Plata*.

Judicial policies of deference may also explain the similarity of results in both cases. In *Plata* the Court was reviewing the decision of a lower court as to the appropriateness of a particular remedial measure. Because of the lower court's proximity to the factual determinations, the Supreme Court was obliged to give deference to its findings of fact so long as the lower court did not make a "mistake."[225] In *Florence* the Court felt compelled to give deference to the concerns of administrators unless their reasoning was found to be unreasonable when compared to the privacy interests of the detainees.[226] Finally, the Court in *Plata* was not tasked with determining whether the California medical care delivery system was constitutionally deficient; the Court needed to decide only the propriety of the remedy granted by the three-judge court.[227] In contrast, the Court in *Florence* considered the constitutionality of a prison strip search policy on the merits rather than simply assuming that a constitutional claim was valid in the first place. While the *Plata* Court discussed the underlying factual claims that gave rise to the constitutional challenge, it was not asked to specifically weigh in on the

223. *Plata*, 131 S. Ct. at 1922.

224. *Florence*, 132 S. Ct. at 1514.

225. *Plata*, 131 S. Ct. at 1929-30. "The three-judge court's findings of fact may be reversed only if this Court is left with a definite and firm conviction that a mistake has been committed." *Id.* at 1930 (internal quotation marks omitted).

226. *Florence*, 132 S. Ct. at 1517.

227. *See Plata*, 131 S. Ct. at 1926. "The [three-judge] court reasoned that its decision was limited to the issue of remedy and that the merits of the constitutional violation had already been determined." *Id.* at 1935.

applicability of the Eighth Amendment in the same way that it discussed the Fourth Amendment in *Florence*.

Both *Florence* and *Plata* demonstrate the difficulty that inheres in using human dignity to understand the substantive protections of the constitution. What is the real difference between the violations at issue in either case? There is no easy way to make these distinctions. This legal analysis is unsatisfying, leaving us without any ability to distinguish between those cases where human dignity will be implicated, and those where it will not. Human dignity as a constitutional value should not remain "off the table" until the point when we can craft a test for readily determining when, and if, there is a constitutional violation. While *Plata* seems to open a door for more active judicial involvement in prisoners' rights cases, *Florence* certainly inspires some level of caution. *Plata* perhaps stands as an example of the extreme; the facts presented such an egregious situation that the Court had to say to prison administrators that enough was enough. Despite cases like *Florence*, it is not likely that the Court will completely ignore human dignity considerations when deciding prisoners' rights cases. Human dignity's impact on such decisions will merely be limited to those cases that present the most egregious examples of prisoner treatment, cases very much akin to those which "shock the conscience" of the judiciary in cases decided under the Fourteenth Amendment.[228] Perhaps what makes the Court's decision in *Florence* so unsettling is that instead of declaring that the strip search policy undermined the plaintiff's human dignity, the Court simply ignored the implications of that policy on human dignity altogether. If the Court had couched its argument in favor of upholding the strip search policy, by stating that the policy did not denigrate the plaintiff's dignity, the court would at least provide some content to that principal in delineating what level of conduct improperly affect an individual's human dignity. By failing to mention human dignity altogether, the court did nothing the assist lower courts, and the nation, in determining what it means when it uses that phrase. Human dignity, as a value embodied by the Constitution, is more than a nebulous concept,

228. *See* Rochin v. California, 342 U.S. 165, 172 (1952).

as decisions like *Plata* make clear, but the Court needs to consistently apply the concept, rather than mention it only where it is convenient to do so.

V. Conclusion

Human dignity, a constitutional principle that is important to the protection and vindication of individual rights, is conceptually still very much in its intellectual infancy. Human dignity is a principal that has been increasingly utilized by the Court over the past fifty years, and has been legitimized at a breakneck pace. The *Plata* decision sets a high-water mark for the application of human dignity as an underlying constitutional value in the field of prisoners' rights. *Plata* suggests that the Court will be willing to intervene when it finds that the constitutional rights of an exceedingly unpopular minority have been violated. Yet, this is in tension with the usual judicial proclivity towards deference to prison administrators. However momentous the decision in *Plata*, one must be careful in prognosticating too far into the future when it comes to the Supreme Court in this field of constitutional law. In less than a year after *Plata*, the Court's decision in *Florence*, also written by Justice Kennedy, should make any optimist pause before overestimating the magnitude of importance of human dignity as a value in constitutional interpretation. The Court has indicated that it will still defer, in many cases, to the concerns expressed by prison administrators.

Whether the forceful language concerning human dignity used by the majority in *Plata* shall be reserved to only those cases that present the most egregious examples of prisoner abuse remains to be seen. Even if human dignity has its greatest constitutional application only where conduct shocks the judicial conscience, this more consistent approach will allow for the future development and legal solidity of a value that animates the fundamental guarantees of the Constitution. The "evolving standards of decency that mark the progress of a maturing society"[229] require us to constantly strive to

229. Trop v. Dulles, 356 U.S. 86, 100 (1958).

reevaluate how we treat all in our society, even those who have committed great offenses. Acknowledging the human dignity of prisoners, as the Court did in *Plata*, merely demonstrates a continued commitment and strong reaffirmation to one of the principals enshrined in the Constitution.