

**OLD REMEDIES ARE NEW AGAIN:  
DELIBERATE INDIFFERENCE  
AND THE RECEIVERSHIP IN  
*PLATA V. SCHWARZENEGGER***

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INTRODUCTION

In June 2005, Federal District Judge Thelton Henderson put the California state prison health care system into receivership.<sup>1</sup> After months of consent decrees, hearings, expert testimony and negotiation, Judge Henderson commented on the California prison health care system's "depravity" and ruled that it violated the Constitution's Eighth Amendment prohibition against cruel and unusual punishment.<sup>2</sup> Henderson estimated that "on average, an inmate in one of California's prisons needlessly dies every six to seven days."<sup>3</sup> He ordered a receiver to take over the health care functions of the California Department of Corrections (CDC) as soon as possible.<sup>4</sup>

A receiver is a disinterested person or organization who the court appoints to safeguard property that is the subject of diverse claims.<sup>5</sup> In the 1970s, federal courts began to assign receivers to temporarily take over the function of administrative bodies that violated constitutional standards.<sup>6</sup> Throughout the 1970s and 1980s

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1. James Sterngold, *U.S. Seizes State Prison Health Care*, S.F. CHRON., July 5, 2005, at A1.

2. *Id.* Inmates have a constitutional right to health care, which will be discussed *infra* Part I.B.

3. *Plata v. Schwarzenegger*, No. C01-135 (N.D. Cal. Oct. 3, 2005) [hereinafter Findings of Fact] (interim order of findings of fact and conclusions of law regarding appointment of receiver).

4. *Id.*

5. See BLACK'S LAW DICTIONARY 1296 (8th ed. 2004).

6. See Carolyn Hoecker Luedtke, *Innovation or Illegitimacy: Remedial Receivership in Tinsley v. Kemp Public Housing Litigation*, 65 MO. L. REV. 655, 676 (2000) (describing remedial receivership in public housing litigation as part of a general trend of receiverships issued by federal courts over public agencies that began in the 1960s); see also Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1266-68 (1983) (discussing how structural injunctions such as receiverships, monitors and special masters are used by the judiciary in institutional litigation).

courts used receivers to mandate sweeping reforms in prison conditions.<sup>7</sup> One observer commented:

[C]ourt orders had an enormous impact on the nation's jails and prisons by direct regulation, their indirect effects, and the shadow they cast. Among the areas affected were staffing, the amount of space per inmate, medical and mental health care, food, hygiene, sanitation, disciplinary procedures, conditions in disciplinary segregation, exercise, fire safety, inmate classification, grievance policies, race discrimination, sex discrimination, religious discrimination and accommodations, and disability discrimination and accommodations—in short, nearly all aspects of prison and jail life.<sup>8</sup>

But in the early 1990s, after Congress passed the Prison Litigation Reform Act (PLRA), which severely curbed judicial discretion over prison conditions, many scholars and litigators declared prison receiverships moribund.<sup>9</sup> Popular wisdom now holds that receiverships are relics of the past, and scholarly interest in them has dropped off dramatically.<sup>10</sup>

Yet recent research indicates that courts have not stopped using receiverships.<sup>11</sup> In fact, “even after the PLRA, court-order incidence of receiverships remains quite high.”<sup>12</sup> Despite the fact that the PLRA curbs judicial discretion in a number of ways, courts continue to use receiverships to bring prisons and jails in line with constitutional standards. With Judge Henderson's imposition of a receivership in *Plata*, one could even argue that the use of receiverships is increasing in size and scope. *Plata* is the first receivership over an entire state-prison health-care system, and it oversees the second-largest prison system in the United States.<sup>13</sup>

This note will argue that *Plata* is a good jumping off point to re-open the discussion concerning the advantages and disadvantages of receiverships. *Plata* is a particularly good example of why receiverships are still necessary and relevant remedies that scholars and litigators should not overlook. The procedural history of *Plata*

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7. Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 555, 561-62 (2006) (tracing the history of receiverships and institutional litigation and arguing that receiverships are still powerful forces in modern prison litigation).

8. *Id.* at 563-64.

9. *Id.* at 554, 565.

10. *Id.*

11. *Id.* at 602.

12. *Id.*

13. John Pomfret, *California's Crisis in Prison Systems a Threat to Public*, WASH. POST, June 11, 2006, at A03.

demonstrates that receivership was the only way the court could have addressed the constitutional violations in the California prison health care system and provide any relief to prisoners.<sup>14</sup> *Plata* is also, however, a particularly good example of why receiverships are not always good remedies. Receiverships allow administrative agencies to fail at politically unpopular tasks without serious consequences, all while providing grist for the mill of critiques of judicial overreaching. Receiverships also impede the development of judicial standards. This second problem is particularly acute in the case of prison health care because as the prison system grows larger it faces new, system-wide medical problems that current precedent is not designed to handle. In order to ensure that judges take account of changing prison conditions when imposing receiverships, judges should provide in-depth analysis of how facts apply to the relevant legal standards as often as possible.

Section one of this note will provide background on the traditional functions of receiverships and the constitutional standard governing prison health care. Section two will examine the facts and procedural history of *Plata*. Section three will discuss receiverships' effects on other government actors, particularly the way they allow agencies and legislatures to fail. Section four will examine the role of the deliberate indifference standard in *Plata* to argue that using a receivership in such a case may seriously impede efforts to develop the standards governing the constitutionality of prison health care systems.

## I. BACKGROUND

In order to understand the issues at stake in *Plata v. Schwarzenegger*, it is necessary to know something about both receiverships and the legal standards governing prison health care in the United States. This section will give a brief history of receiverships, focusing on their use in prisons, to give the reader some historical context for the receivership ordered in *Plata*. This section will then review the legal "deliberate indifference" standard, which determines when prison health care is unconstitutional.

### A. *Receiverships*

Receiverships are old remedies that courts have developed into tools to oversee administrative functions. A receivership is an equitable remedy that judges historically employed in commercial cases,

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14. Findings of Fact, *supra* note 3, at 42.

particularly bankruptcy proceedings.<sup>15</sup> In those proceedings, receivers were officers of the court who preserved and protected disputed assets while the court determined either how to dispose of the disputed assets, or whether to return them to their original fiduciaries.<sup>16</sup> A receivership is not the only remedy under which the court can appoint someone to oversee an administrative body: courts can also appoint monitors and court-appointed special masters for the same purpose.<sup>17</sup> But the receiver is the most powerful and independent of the judicially-appointed managers.<sup>18</sup> Unlike the monitor and special master, the receiver completely displaces the defendants: the receiver makes large and small decisions, spends the organization's funds, and controls hiring and firing determinations.<sup>19</sup>

Although receiverships began as temporary stewardships to protect assets, they eventually developed into a way for court-appointed officials to actively manage property under court supervision.<sup>20</sup> In some cases, a receiver was not just charged with protecting the property at issue, but also with bringing it into com-

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15. See Luedtke, *supra* note 6, at 676; see also Dewey Roscoe Jones, *Federal Court Remedies: The Creative Use of Potential Remedies Can Produce Institutional Change*, 27 How. L.J. 879, 890 (1984) ("Receivers have been used for centuries to assume the custody and control of property in order to preserve it pending litigation, and to dispose of it in accordance with relief ordered.").

16. Comment, *Equitable Remedies in SEC Enforcement Actions*, 123 U. PA. L. REV. 1188, 1200 (1975) [hereinafter *Equitable Remedies*] (The receiver's job is to be "an officer of the court who stands neutral among all parties and whose primary function is the protection of the property within his control from waste or mismanagement.").

17. Horowitz, *supra* note 6, at 1297 ("Among the more common devices is appointment of a special master, a monitor, a review committee, or, in more extreme cases, a receiver to take over administration of the agency.").

18. *Id.* Luedtke, *supra* note 6, at 677 ("[T]here is a distinct difference between various third party roles, sometimes grouped under the ubiquitous term 'neoreceivers.' 'Special masters' typically assist the court with the formulation of more detailed orders or conduct evidentiary hearings on detailed preliminary factual matters. 'Monitors' typically act as surrogates for the plaintiff class to supervise defendants' compliance with a court order. True receivers are the only third-party brought in by the court to *displace* the defendants and assume the power to run an institution, raising unique concerns about the continuing Article III jurisdiction of federal courts to oversee litigation in which there is arguably no longer a 'case or controversy.' In addition, special masters and monitors are used as early, even as the first, remedial tools to achieve compliance, whereas in public institutional reform litigation, receivership is usually a court's last ditch remedial option.").

19. Horowitz, *supra* note 6, at 1297.

20. See *id.*; see also Jones, *supra* note 15, at 891 ("Courts gradually began using receivers to protect private property, not on behalf of individual owners, but for

pliance with government standards.<sup>21</sup> Receiverships “ma[d]e the federal courts into partners with (or perhaps, better stated, guardians of) the failing company, overseeing, in the person of the receiver or trustee, the day-to-day operation of the company for extended periods of time.”<sup>22</sup>

Judges began to use receivers outside the commercial context in the 1960s to desegregate schools.<sup>23</sup> Although the Supreme Court ruled that racial discrimination in public education was unconstitutional in 1954, federal judges frequently found that school districts simply refused to comply with court orders.<sup>24</sup> Judges’ hands were tied by the fact that “[f]ew in the South accepted the Supreme Court’s offer in *Brown II* of a voluntary process of desegregation . . . and this position of ‘massive opposition’ to civil rights reforms continued.”<sup>25</sup> While judges could order all sorts of changes, their practical ability to end school segregation was limited because state legislatures controlled school district budgets.<sup>26</sup> Encouraged by the Supreme Court’s recommendation to explore their equitable power in desegregation cases, lower court judges began to look for a remedy in their arsenal that would allow them to actually desegregate the schools.<sup>27</sup> Many judges settled on receiver-

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the benefit of creditors and for the public welfare. For instance, courts appointed receivers to organize bankrupt railroads for the benefit of public use.”).

21. *Equitable Remedies*, *supra* note 16, at 1200 (“Often in SEC enforcement cases, however. . . a receiver is appointed simply to bring a company into compliance with all applicable law, as by causing a full audit to be made and by making all required disclosures.”).

22. Charles L. Zelden, *From Rights to Resources: The Southern Federal District Courts and the Transformation of Civil Rights in Education, 1968-1974*, 32 AKRON L. REV. 471, 498 (1999).

23. *Id.* at 471-500.

24. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); Zelden, *supra* note 22, at 471 (“More than a decade after *Brown v. Board of Education* had called for school desegregation, few schools were even marginally integrated.”).

25. Zelden, *supra* note 22, at 472.

26. Billy B. Bridges, *The Forty Year Fight to Desegregate Public Education in the Fifth Circuit and in Particular, the Fifth Circuit*, 16 MISS. C. L. REV. 289, 300 (1996).

27. See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300 (1955) (“In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954 decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective

ships, a remedy that would allow them to take temporary control of recalcitrant school districts and give the court access to school district funds.<sup>28</sup>

After a number of judges successfully desegregated Southern school systems using receivers, courts began appointing receivers to remedy other civil rights violations.<sup>29</sup> During the 1970s, federal judges were able to use receiverships to bring about sweeping reforms in prison conditions.<sup>30</sup> But as judge-ordered remedies became more specific and detailed, specifying the exact amount of space that each prisoner must be given or capping prisoner population levels, both higher courts and Congress began to view receiverships over public administrative bodies with disfavor.

In the 1980s and 1990s, both the Supreme Court and Congress began to curb federal courts' oversight of prisons. The Supreme Court's decisions began to emphasize deference to prison overseers.<sup>31</sup> In 1994 Congress passed the Prison Litigation Reform Act

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manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.”).

28. Horowitz, *supra* note 6, at 1267 (“[Structural injunctions] are administrative in character. In varying measures, they essentially supersede the authority of the defendant body to manage its own business, subject to executive and legislative accountability. In some cases, such decrees entail the formal displacement of the officers of the agency and the substitution of a receiver or some other court-appointed officer to act in their stead.”); Zelden, *supra* note 22, at 527.

29. See Horowitz, *supra* note 6, at 1266 (“Since the 1960’s, however, federal and, to a lesser extent, state courts have issued a relatively small but highly significant number of ‘structural injunctions.’ The defendants have been such governmental bodies as school systems, prison officials, welfare administrations, mental hospital officials, and public housing authorities.”); see also Ira P. Robbins & Michael B. Buser, *Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893, 894 (1977) (“Breaking with prior law and practice, federal courts also started reviewing individual prisoner petitions alleging violation of constitutional rights, and, by the end of the decade, they began intervening in the policies and affairs of state correctional facilities.”). For an account of how judges desegregated schools using receiverships, see Zelden, *supra* note 22, at 500-13.

30. Susan P. Strum, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 662-63 (1993) (citing an example in which prison litigation succeeded in addressing the use of inmates to triage other inmates in the Texas medical system and forced a number of states to adopt new compliance policies).

31. See generally Fred Cohen, *The Limits of the Judicial Reform of Prisons: What Works; What Does Not*, 40 NO. 5 CRIM. L. BULL. 1 (2004) (“[T]he Court’s consistent message is to enlarge deference to prison administrator’s decisions, restrict the growth of existing inmate rights, and certainly reject virtually all claims to significant new rights.”).

(“PLRA”).<sup>32</sup> One of the Act’s stated purposes was to curb judicial discretion over prisons.<sup>33</sup> The PLRA did not eliminate receiverships as a remedy for prison conditions, but it did try to constrain their use. The Act states,

The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.<sup>34</sup>

Many have concluded that the PLRA, along with the Supreme Court’s disapproval and a number of other factors, heralded the end of receiverships. But today, receiverships over prisons and jails are still relatively common.<sup>35</sup> The lower courts were routinely faced with constitutional violations of a sufficiently serious magnitude to merit receiverships.<sup>36</sup> Receiverships have had notable successes and equally remarkable failures, and judges continue to rely on them when faced with intractable civil rights violations.<sup>37</sup>

#### B. *Constitutional Health Care and the Deliberate Indifference Standard*

While federal courts were transforming receiverships into appropriate remedies for constitutional violations, they were also re-examining constitutional standards in light of changing prison conditions. In its landmark 1976 decision in *Estelle v. Gamble*, the Su-

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32. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1559 (2003).

33. 42 U.S.C.A. § 1997(e) (1996). See generally Adam Slutsky, Comment, *Totally Exhausted: Why a Strict Interpretation of 42 U.S.C. §1997E(a) Unduly Burdens Courts and Prisoners*, 73 FORDHAM L. REV. 2289, 2298 (2005) (reviewing the purposes and consequences of the PLRA).

34. 18 U.S.C. § 3626(a)(1)(A) (1997).

35. Schlanger, *supra* note 32, at 553, 555.

36. *Id.* at 553-54.

37. See generally, Luedtke, *supra* note 6, at 656. Luedtke writes about one of the success stories in her article on the Tinsley Public Housing Development receivership. She notes, however, that it took several changes in leadership for the receivership to succeed, and that its success was mostly due to the appointment of a dynamic and energetic receiver. *Id.* For an example of a receivership that seems to have been less successful, see generally Richard J. Pierce, Jr., *Judge Lamberth’s Reign of Terror at the Department of Interior*, 56 ADMIN. L. REV. 235, 236 (2004) (describing one particular receivership over the Department of Interior that he claims overstepped the bounds of judicial discretion), but see Jamin B. Raskin, *Professor Richard J. Pierce’s Reign of Error in the Administrative Law Review*, 57 ADMIN. L. REV. 229, 229-31 (2005) (arguing that the judge whom Pierce criticized was actually responding reasonably to the circumstances).

preme Court held that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton affliction of pain’ . . . proscribed by the Eighth Amendment . . . whether the indifference is manifested by prison doctors in their response to prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care.”<sup>38</sup>

The respondent in *Estelle*, J. W. Gamble, was a prisoner who injured his back while unloading a truck during a prison work assignment.<sup>39</sup> Prison doctors initially prescribed a muscle relaxant and allowed him to rest, but took him off the medication less than a month later and certified him as able to work again.<sup>40</sup> He refused to work because of the pain in his back and was referred to a prison administrative discipline committee, which ordered him to see another doctor.<sup>41</sup> Gamble saw a doctor several more times and received prescriptions for blood pressure medication and muscle relaxants, only some of which were filled.<sup>42</sup> Though the doctor testified to the prison disciplinary committee that Gamble was in “‘first class’ medical condition,” his condition continued to deteriorate, and he began experiencing “blank outs” and migraines.<sup>43</sup> Gamble alleged that this treatment was cruel and unusual punishment under the Eighth Amendment.<sup>44</sup>

The Court in *Estelle* ruled that prisoners did have a right to medical treatment under the Eighth Amendment.<sup>45</sup> But the standard it laid out for medical treatment was not particularly generous: *Estelle* held that only “deliberate indifference” to prisoner’s serious medical needs was prohibited by the Eighth Amendment.<sup>46</sup> In fact, the Court found that Gamble’s complaint itself did not satisfy this standard, because prison officials had not been deliberately indifferent to his health. He had been allowed to see a physician; he had just been incorrectly diagnosed.<sup>47</sup>

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38. 429 U.S. 97, 104-05 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.)).

39. *Id.* at 99.

40. *Id.* at 99, 100.

41. *Id.* at 100.

42. *Id.*

43. *Id.* at 101.

44. *Id.*

45. *Id.* at 103.

46. *See id.* at 104; *see also* Carrie S. Frank, Comment, *Must Inmates be Provided Free Organ Transplants?: Revisiting the Deliberate Indifference Standard*, 15 *GEO. MASON U. CIV. RTS. L.J.* 341, 355 (2005) (“[T]he public sense of morality does not require the medical care provided to inmates be ‘perfect, the best obtainable, or even very good.’”).

47. *Estelle*, 429 U.S. at 107.



In subsequent cases, the Supreme Court clarified *Estelle*'s deliberate indifference standard and broke it down into two components: an objective harm component and a subjective intent component.<sup>48</sup> Both these components must be satisfied in order for a prisoner to have a legitimate claim to medical treatment under the Eighth Amendment.<sup>49</sup>

#### 1. The Objective Component

*Estelle* stated that a prisoner must have a "serious medical need[ ]" that goes untreated in order to qualify for Eighth Amendment protections.<sup>50</sup> In subsequent cases, the Court interpreted this statement to mean that an untreated medical condition or an unsuccessful medical treatment must be objectively bad in order to warrant Eighth Amendment protection.<sup>51</sup> The objective component of the deliberate indifference standard "focuses on the degree of seriousness of the deprivation of medical care."<sup>52</sup>

The Supreme Court has not significantly clarified the objective component of the deliberate indifference standard since *Estelle*.<sup>53</sup> Lower courts seem to examine various factors when determining whether the denial of medical treatment is objectively bad, but never explicitly say that they are trying to satisfy the objective component of the standard. In its decision in *Woodall v. Foti*, for example, the Fifth Circuit instructs the lower court to consider several factors, including the seriousness of the prisoner's illness, the likely duration of his incarceration, the possibility of substantial harm caused by postponing treatment, the prospect of a cure or of a substantial improvement in the prisoner's condition, and the extent to which the prisoner presents a danger to himself or other inmates.<sup>54</sup>

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48. See Frank, *supra* note 46, at 347.

49. *Id.* at 347-48.

50. *Estelle*, 429 U.S. at 104.

51. Frank, *supra* note 46, at 353, 347 ("Courts have discussed the subjective requirements of deliberate indifference in much greater detail than the objective requirements, often leaving the potential for a mistaken impression that deliberate indifference consists of nothing but a subjective component."). See, e.g., *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *Wilson v. Seiter*, 501 U.S. 294, 298-300 (1991).

52. *Coleman v. Wilson*, 912 F. Supp. 1282, 1296 (E.D. Cal. 1995).

53. The closest the Court has come was in *Rhodes v. Chapman*, a 1981 case concerning whether the practice of putting two inmates in the same cell satisfied the objective prong of the deliberate indifference standard. 452 U.S. at 347. The Court held that it did not. *Id.*

54. *Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir. 1981). Like many cases, this case does not directly say that these are the criteria it uses for assessing the objective prong of the deliberate indifference standard, but these are facts that, to the author, appear relevant to the objective component.

Similarly, in order to sustain a claim of deliberate indifference in the Ninth Circuit, the complaint must allege the following elements: (1) an acute physical condition; (2) the urgent need for medical care; (3) the failure or refusal to provide it; and (4) tangible residual injury.<sup>55</sup>

While these criteria provide a useful threshold for courts to consider when they evaluate prisoners' complaints, it is important to note their deficiencies. First, these criteria almost universally require that prisoners be very seriously hurt before they can receive redress, despite the fact that medical facilities in some prisons are so poor that it should be clear that if they are used by prisoners, the prisoners have a significant chance of being hurt by them. In *Plata*, for example, the court noted that in one instance there was no sterilization equipment in rooms designated for treating prisoners.<sup>56</sup> Using unsterilized instruments may result in serious infection or additional injury. The deliberate indifference standard should be able to take into account the inevitability of harm from something like unsterilized equipment. Second, these criteria do not fully consider the possible public health threats of prisoners' illnesses. For example, consider a facility which does not test incoming or transferred inmates for HIV, a disease a number of inmates have.<sup>57</sup> At some point, it must be objectively unreasonable and harmful for prisons not to test incoming inmates, even though no particular inmate is harmed *ex ante*. Courts have not adapted the objective standard to suit deteriorating prison infrastructure or prison growth.

## 2. The Subjective Component

The deliberate indifference standard also has a subjective component,<sup>58</sup> which "focuses on whether defendants acted with 'delib-

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55. *Mayfield v. Craven*, 299 F. Supp. 1111, 1112 (E.D. Cal. 1969).

56. *Plata v. Schwarzenegger*, No. C01-1351, 2005 WL 2932243, at \*4 (N.D. Cal. Oct. 3, 2005) (order requiring defendant to show cause).

57. Bureau of Justice statistics from 2003 (the most recent available) indicate that 2% of all state prisoners and 1.1% of all federal prisoners are HIV-positive. This is more than three times the rate of the general population. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 210344, HIV IN PRISONS, 2003, at 1 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/hivp03.pdf>.

58. Frank, *supra* note 46, at 347 ("The subjective component of deliberate indifference examines what subjective factors—the physician's personal diagnosis, the prison guards [sic] understanding as to which treatment is to be provided, knowledge of a serious risk to the inmate's needs, etc.—constitute a sufficiently culpable state of mind before a constitutional violation can be found to exist. Courts have discussed the subjective requirements of deliberate indifference in much greater detail than the objective requirements, often leaving the potential

erate indifference' to serious medical needs."<sup>59</sup> After *Estelle*, the Supreme Court clarified the subjective component in ways that restrict inmates' potential Eighth Amendment claims. The Court fleshed out the deliberate indifference subjective component in a non-medical case, *Wilson v. Seiter*.<sup>60</sup> The plaintiff in *Wilson* alleged that prison conditions were intolerable because of "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates."<sup>61</sup> The Court ruled that "[i]f the pain inflicted [by imprisonment] is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify [for Eighth Amendment protection]."<sup>62</sup> *Wilson* severely limited the idea of what could actually constitute "punishment" under the Eighth Amendment, ruling that the Eighth Amendment's prohibition on cruel and unusual punishment applied only to the prison sentence itself, unless the prisoner could demonstrate that sub-par prison conditions were actually intended to inflict pain.<sup>63</sup> Even objectively significant harm had to be purposefully inflicted to be a cognizable Eighth Amendment claim.

The Court used the example of a broken boiler to clarify its point: "[petitioner] acknowledges . . . that if a prison boiler malfunctions accidentally during a cold winter, an inmate would have no basis for an Eighth Amendment claim, even if he suffers objectively significant harm."<sup>64</sup> In the Court's view, bad medical treatment, like bad food, cramped living conditions, and poor heating, was just another prison condition rather than a punishment in and

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for a mistaken impression that deliberate indifference consists of nothing but a subjective component."). See also Thomas K. Landry, "Punishment" and the Eighth Amendment, 57 OHIO ST. L.J. 1607, 1618 (1996) ("The *Wilson* Court elevated the punishment rationale to the primary analytical basis for the intent requirement.").

59. *Coleman v. Wilson*, 912 F. Supp 1282, 1296, 1298-99 (E.D. Cal. 1995).

60. 501 U.S. 294, 300 (1991).

61. *Id.* at 296.

62. *Id.* at 300.

63. This is actually a compromise position between two definitions of punishment held by different members of the Court. Justice Thomas claims that the "punishment" referred to in the Eighth Amendment is simply the sentence passed down by the court, so only the sentence cannot be cruel and unusual. *Farmer v. Brennan*, 511 U.S. 825, 859 (1994) (Thomas, J., concurring). Justice Blackmun, on the other hand, has stated that he believes all conditions in prisons are part of the punishment, so the Eighth Amendment protects without the need for a subjective intent requirement. *Id.* at 856-57 (Blackmun, J., concurring).

64. *Wilson*, 501 U.S. at 300.

of itself. Therefore, unless it was inflicted intentionally, it could not rise to the level of deliberate indifference.

In its 1994 decision in *Farmer v. Brennan*, the Court further clarified the subjective intent standard, stating that it was criminal, rather than civil, negligence.<sup>65</sup> The petitioner in *Farmer* was a biological male who had undergone estrogen therapy, received silicone breast implants, and undergone unsuccessful testicle-removal surgery prior to being incarcerated.<sup>66</sup> When she was moved to a penitentiary that was not properly gender-segregated, she was raped within two weeks.<sup>67</sup> The petitioner asked the Court to adopt a civil standard of recklessness for deliberate indifference, arguing that prison officials should have known her surgical status would lead to the assault.<sup>68</sup> The Court, however, adopted a criminal standard:

[w]e hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.<sup>69</sup>

Like the objective component, the subjective component is increasingly problematic as prison infrastructure deteriorates and the prison population grows. Any doctor or prison official, for example, should know that using unsterilized equipment may hurt a patient. Likewise, prison officials should be on notice that failure to examine incoming inmates for serious communicable diseases that are common in prisons poses a significant danger to the inmate population.<sup>70</sup> But the current standard of criminal negligence

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65. *Farmer*, 511 U.S. at 839-40.

66. *Id.* at 829.

67. *Id.* at 830.

68. *Id.* at 837-38.

69. *Id.* at 837.

70. Numerous decisions in state and federal courts have clarified the deliberate indifference standard in cases of individual medical treatment. One district court clarified the objective standard of the deliberate indifference prong, stating, "‘serious’ medical need may fairly be regarded as one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor’s attention." *Pace v. Fauver*, 479 F. Supp. 456, 458 (D.N.J. 1979), *aff’d*, 649 F.2d 860 (3d Cir. 1981); *accord* *Laaman v. Helgemoe*, 437 F. Supp. 269, 311 (D.N.H. 1977). Another court noted that several common complaints demonstrate the existence of an arguable deliberate indifference claim: "The knowledge of the need for medical care and intentional refusal to provide that care has consistently been held to surpass negligence and constitute deliberate indifference . . . . Furthermore, if necessary medical treatment has

makes it doubtful that anyone would be held accountable if unsterilized equipment or an unscreened prisoner hurt someone. The harms of these poor institutional practices can plague entire systems and endanger the general population. But current standards requiring subjective intent narrowly focus on individual litigation rather than on large-scale harms to the population.

## II.

### PLATA V. SCHWARZENEGGER

Before discussing the application of the deliberate indifference standard to large-scale prison litigation, and the advantages and costs of receivership as a remedy for prison health violations, it will be useful to have some idea of what a large-scale deliberate indifference litigation looks like. The next section will review both the facts in the main complaint of *Plata*, as well as its procedural history.

#### A. Facts of a Typical Complaint

The complaint in *Plata v. Schwarzenegger* details many prisoners' stories of inadequate medical treatment, and Plata's treatment is typical—limited access to doctors, triage decisions made by prison guards and officials, and poor facilities, all leading to chronic pain or disability.<sup>71</sup> Plata was a prisoner incarcerated in Salinas Valley State Prison who fell while working in the kitchen at Calipatria State Prison in November of 1997.<sup>72</sup> He injured his knee, back, and head in the fall.<sup>73</sup> A medical technician examined him after his injury, determined that there was nothing wrong with him and sent him back to his cell, which exacerbated the pain from his injuries.<sup>74</sup> Soon afterwards, he submitted a request for medical attention, but did not receive any and fell again after his injured knee buckled.<sup>75</sup> He was unable to move and was taken for x-rays, where he received a referral to an orthopedist.<sup>76</sup> Soon after this second injury, he saw an orthopedist who diagnosed a menengial tear, prescribed

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been delayed for non-medical reasons, a case of deliberate indifference has been made out." *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 704 (11th Cir. 1985).

71. See generally Findings of Fact, *supra* note 3.

72. First Amended Complaint Class Action ¶ 7, *Plata v. Davis*, No. C-01-1351 (N.D. Cal. April 5, 2001), available at [www.prisonlaw.com/pdfs/Medcomplaint.pdf](http://www.prisonlaw.com/pdfs/Medcomplaint.pdf) [hereinafter Complaint].

73. *Id.*

74. *Id.*

75. *Id.* ¶ 8.

76. *Id.*

ibuprofen, and ordered him to be medically unassigned for two weeks.<sup>77</sup>

After this initial examination, Plata's knee began to hurt more and started to lock and buckle.<sup>78</sup> He soon saw another medical technician, who said nothing could be done and sent him back to his cell.<sup>79</sup> Two days later, a correctional officer ordered him to work in defiance of the doctor's two week rest assignment, and Plata fell again after his knee locked and his back spasmed.<sup>80</sup> He was taken to the prison medical clinic in a wheelchair, but the technician said there was no doctor and nothing to be done, and sent him back to his cell.<sup>81</sup>

In January of 1998, four weeks after Plata's initial visit in December, the orthopedist noted that Plata's knee was getting worse, and recommended arthroscopic surgery.<sup>82</sup> In February Plata filed an administrative complaint, and on March 6th, a doctor ordered him to have a neurological consultation for the headaches and dizziness he was experiencing.<sup>83</sup> On March 9th, however, he was transferred to Salinas Valley, and, although an official noted his neurological problems and said he should be seen within twenty-four hours, on March 12th he was only given a psychiatric examination.<sup>84</sup> For the next several months, he continued to request orthopedic consultations but did not always receive them due to lockdowns.<sup>85</sup>

In August, Plata saw another orthopedist who failed to note the previous recommendation for arthroscopic surgery and ordered an x-ray and MRI.<sup>86</sup> The MRI was never conducted.<sup>87</sup> In January of 1999 he went several times for emergency care for migraines and a badly swollen knee which technicians noted was tender to the touch.<sup>88</sup> At his next orthopedic exam, his records were not available, and shortly thereafter he was given a CT lumbar scan which none of his doctors had ordered.<sup>89</sup> From an examination of the CT

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77. *Id.* ¶ 9.

78. *Id.* ¶ 10.

79. *Id.*

80. *Id.* ¶ 11.

81. *Id.*

82. *Id.* ¶¶ 9, 12.

83. *Id.* ¶¶ 14-15.

84. *Id.* ¶¶ 17-18.

85. *Id.* ¶ 20-21.

86. *Id.* ¶ 24.

87. *Id.*

88. *Id.* ¶¶ 25-27.

89. *Id.* ¶¶ 27-29.

scan of Plata's lower back, the doctor determined it was not necessary for Plata to receive a MRI.<sup>90</sup> Three months later, Plata saw another orthopedist who recommended arthroscopic surgery.<sup>91</sup>

In October of 1999, Plata finally received arthroscopic surgery.<sup>92</sup> After the surgery, he was forced to walk back to his cell and received no follow-up care until March of 2000.<sup>93</sup> It is unclear from the complaint whether he sustained lasting damage.

### B. Procedural History of the Class Action

The Prison Law Office filed *Plata v. Davis*<sup>94</sup> in 2001 on behalf of ten prisoners in the California state prison system who, like Plata, had been seriously injured by "defendants' deliberate indifference to their serious medical needs," and on behalf of all other plaintiffs similarly situated.<sup>95</sup> The complaint alleged that "the medical system operated by the California Department of Corrections does not and, with current systems and resources cannot properly care for and treat the prisoners in its custody."<sup>96</sup> The complaint asked the court for an injunction ordering the defendants to provide constitutionally-adequate care, in addition to monetary damages and attorneys' fees.<sup>97</sup>

Judge Henderson did not immediately put the California prison health care system into receivership. After the defendants conceded many of the allegations, the court issued a consent agreement in June 2002.<sup>98</sup> The consent decree required the CDC to check all physicians' credentials, ensure all physicians were board-certified, implement new hiring policies, follow medical protocols when making inter-institution transfers, and set up a number of other policies and procedures that would improve care.<sup>99</sup> The consent agreement instructed the CDC to set up these policies on a

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90. *Id.* ¶ 29.

91. *Id.* ¶ 31.

92. *Id.* ¶ 33.

93. *Id.* ¶¶ 33-36.

94. In 2003, Californians recalled Governor Gray Davis and elected Arnold Schwarzenegger, changing the case name to reflect the substituted defendant.

95. Amended Complaint, *supra* note 72, ¶ 1.

96. *Id.*

97. *Id.* ¶ 1, 214. The Amended Complaint names the Governor of California, the California State Secretary of Finance, the Secretary of the California Youth and Adult Correctional Agency, the California Department of Corrections, the Acting Director of the Department of Corrections, the Deputy Director for Health Care Services, and thirty-eight physicians, nurses, and dentists. *Id.* ¶¶ 145-189.

98. Findings of Fact, *supra* note 3, at 2.

99. *Id.*

staggered basis—seven prisons were ordered to implement the new systems by 2003, followed by five more prisons every year until full implementation was achieved.<sup>100</sup>

To help him oversee the terms of the consent decrees, Judge Henderson appointed a number of experts to study the quality of physicians in the California prison medical centers. In July of 2004, two years after the consent agreement had been issued, these experts reported an “emerging pattern of inadequate and seriously deficient physician quality in CDC facilities.”<sup>101</sup> In response to these findings, the court ordered the CDC, among other requirements, to hire an independent entity to evaluate physician competence, to train deficient physicians, and to develop proposals for the supervision of medical personnel.<sup>102</sup> The defendants were unable to comply with this order.<sup>103</sup> Meanwhile, not a single prison had successfully implemented the terms of the consent agreement, despite the fact that seven prisons were supposed to have done so by 2004.<sup>104</sup>

In February of 2005, Judge Henderson toured the medical facilities at San Quentin, which had been ordered to comply with the terms of the consent decree by 2003. He noted:

Even the most simple and basic elements of a minimally adequate medical system were obviously lacking. For example, the main medical examining room lacked any means of sanitation—there was no sink and no alcohol gel—where roughly one hundred men per day undergo medical screening, and the Court observed that the dentist neither washed his hands nor changed his gloves after treating patients into whose mouths he had placed his hands.<sup>105</sup>

Observations like these on his tour seem to have spurred Judge Henderson to view the prison conditions as in urgent need of repair.

After three days of hearings in July 2005, Judge Henderson ordered the prison health care system into receivership. His oral decision condemned the current system as depraved, and said that the evidence presented at the hearings had convinced him that a re-

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100. *Plata v. Schwarzenegger*, No. C01-1351, 2005 WL 2932243, at \*3 (N.D. Cal. Oct. 3, 2005) (order requiring defendant to show cause).

101. *Id.*

102. *Id.*

103. Findings of Fact, *supra* note 3, at 30.

104. *See generally id.*

105. *Plata*, 2005 WL 2932243, at \*4 (order requiring defendant to show cause).



ceivership was the only possible remedy.<sup>106</sup> In the opinion he issued in October, he wrote, “[d]ecades of neglecting medical care while vastly expanding the size of the prison system has led to a state of institutional paralysis . . . a Receiver can reverse the entrenched paralysis and dysfunction and bring the delivery of health care in California prisons up to constitutional standards.”<sup>107</sup>

Judge Henderson seemed reluctant to order the system into receivership; in fact he commented:

[Receivership] is not a measure the Court has sought, nor is it one the Court relishes. Rather, the Court is simply at the end of the road with nowhere else to turn. Indeed, it would be fair to say that the Receivership is being imposed on the Court, rather than on the state.<sup>108</sup>

The many serious problems with the California state prison medical system made it difficult, if not impossible, for inmates like Marciano Plata to get constitutionally adequate care.<sup>109</sup> The CDC conceded that it failed to improve the medical treatment it provided to prisoners, even after administrative changes and several court settlements.<sup>110</sup> A receivership seems to have been the only solution.

### III. THE EFFECT OF RECEIVERSHIPS ON OTHER GOVERNMENT ACTORS

Judge Henderson faced a problem as old as *Brown*—how does the judiciary force an administrative body to comply with constitutional standards? A receivership is a way for the court to extend its reach and force an administrative agency to comply with its decisions.<sup>111</sup> By design, receiverships are a way for the court to affect other branches of government.<sup>112</sup> But when courts take on non-

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106. See Sterngold, *supra* note 1, at A1.

107. *Plata*, 2005 WL 2932243, at \*2 (order requiring defendant to show cause).

108. Findings of Fact, *supra* note 3, at 47.

109. *Id.* at 35 (“[T]he treatment of prisoners in California constitutes ‘a gross and extreme departure from the standard of care.’”).

110. *Id.* at 44-45.

111. Karla Grossenbacher, *Implementing Structural Injunctions: Getting a Remedy When Local Officials Resist*, 80 GEO L.J. 2227, 2231 (1992) (“The injunction itself can often be quite intrusive because it compels action which displaces the discretionary functions of government administrators and officials. A structural decree usually requires the judge to take an active, administrative role to ensure compliance with her directives. Structural injunctions also have many of the qualities of social legislation, in that they pertain to future acts and are mandatory.”).

112. *Id.*

traditional functions, they are often accused of judicial overreaching.<sup>113</sup>

Traditionally, critics argued that courts were overstepping their bounds and ignoring traditional concepts of deference and separation of powers.<sup>114</sup> These arguments are not terribly strong, however, in light of the serious constitutional violations that courts face when they address prison conditions. That does not mean that the effect of receiverships on other branches of government cannot be criticized, though. One of their most serious flaws is that they enable administrative failure and shift accountability from government agencies to courts. This section will review the arguments for and against deference and separation of powers, and argue that the enabling of administrative failure is much more serious than both.

#### A. Administrative Deference

One reason that many judges and commentators dislike receiverships is that they violate the principle of judicial deference to administrative decisions.<sup>115</sup> Legislatures delegate certain duties to administrative bodies for many reasons—technical expertise, efficiency, the desire to avoid being associated with unpopular choices, or even the desire to create jobs for political allies.<sup>116</sup> Similarly, the judiciary defers to administrators for a number of reasons: administrative bodies have experience confronting the problem, they have superior fact-finding ability, and, most importantly, administrative bodies are a form of legislative expertise.<sup>117</sup>

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113. See, e.g., Stephan O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 *KY. L.J.* 679, 679-80 (1999) (citing examples of Members of Congress lambasting the judiciary for overreaching).

114. See, e.g., John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Authority of the Federal Courts*, 84 *CAL. L. REV.* 1121, 1123 (1996) (arguing that the Constitution does not give federal courts the authority to issue receiverships that oversee other branches of government).

115. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 *COLUM. L. REV.* 857, 861 (1999) (discussing the way in which the remedies outlined by courts become rights that courts look to in future cases).

116. Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 *HARV. L. REV.* 1035, 1036-38 (2006) (summarizing the view that when the legislature passes a statute, it often must decide whether to delegate authority to an agency or to a court, and that this decision is influenced by a number of factors).

117. See Edward L. Rubin & Malcolm M. Feeley, *Judicial Policymaking and Litigation Against the Government*, 5 *U. PA. J. CONST. L.* 617, 620 (2003) (“[P]articulate governmental institutions have distinctive areas of competence. The legislature and the executive are properly assigned the task of making public policy, both because they reflect the popular will and because they can call upon trained spe-

Deference is particularly powerful in prison litigation. There is, as one commentator put it, “a culture of judicial deference that has developed since the end of the [prison] reform movement, in which federal courts defer to the policies of prison administrators in prison affairs.”<sup>118</sup> Before *Estelle*, courts traditionally deferred to prison administrators.<sup>119</sup> In the 1970s, starting with its decision in *Estelle*, the Supreme Court acknowledged that courts could review prison health care.<sup>120</sup> But in subsequent cases, the Supreme Court returned to its practice of encouraging deference to prison administrators, stating its belief, in no uncertain terms, that “the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.”<sup>121</sup> Commentators have observed that the Court now consistently emphasizes the need “to enlarge deference to prison administrator’s decisions, restrict the growth of existing inmate rights, and . . . reject virtually all claims to significant new rights.”<sup>122</sup>

Some aspects of the *Plata* receivership demonstrate why deference is sensible. A receivership will be inefficient—it will require that an outside official be brought in to learn details about the CDC health care system that current administrative personnel already know.<sup>123</sup> Then there is the fact that “[c]ourts possess only imperfect tools for communicating their decrees, and, in fact, they usually

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cialists. But once policy is stated in terms of rules, the courts are properly assigned the task of determining whether particular persons have obeyed or violated those rules, because such determinations depend on reasoned arguments and must be made by following formal procedures.”).

118. Mikel-Meredith Weidman, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. Rev. 1505, 1506 (2004).

119. See, e.g., *Sawyer v. Sigler*, 445 F.2d 818, 819 (8th Cir. 1971) (“[T]he federal courts . . . should not be unduly hospitable forums for the complaints of either State or federal convicts; it is not the function of the courts to run the prisons, or to undertake to supervise the day-to-day treatment and disciplining of individual inmates; much must be left to the discretion and good faith of prison administrators.”); *Lawrence v. Ragen*, 323 F.2d 410, 412 (7th Cir. 1963) (“State prison officials must of necessity be vested with a wide degree of discretion in determining the nature and character of medical treatment to be afforded state prisoners. It is not the function of federal courts to interfere with the conduct of state officials in carrying out such duties under state law.”).

120. *Estelle v. Gamble*, 429 U.S. 97, 105 (1976).

121. *Bell v. Wolfish*, 441 U.S. 520, 548 (1979).

122. Cohen, *supra* note 31, at 21-22 (discussing successful and unsuccessful strategies of judicial intervention in prisons). See Weidman, *supra* note 118, at 1512 (“The Supreme Court has been particularly active in developing standards of deference to constrain lower courts in prison cases.”).

123. Findings of Fact, *supra* note 3, at 45 (“[The Receiver’s goal will be] re-vamping, and perhaps redesigning, the prison medical delivery system.”).

must rely upon the personnel of the institutional defendant to disseminate and to implement their orders.”<sup>124</sup> Because courts must use current personnel to execute changes, a receivership order in which current personnel are usually accused of doing their jobs poorly may alienate the group on which the courts most depend.<sup>125</sup>

However, the receivership in *Plata* also demonstrates why deference is not always the solution. The CDC seems unable to improve health care conditions at the prison, even in the face of heavy court and legislative pressure.<sup>126</sup> If the court deferred to the way the CDC has structured its health care system, it would leave the prisoners without relief. In *Plata*, as in a great deal of prison litigation, the problem is that “the legislature and the executive are not acting, that the grotesquely inhuman conditions in the prisons continue year after year, and there is no other decision maker on the scene who is willing to intervene.”<sup>127</sup> Administrators should be free to manage their institutions, but deference should not bar the victims of cruel and unusual punishment from relief.<sup>128</sup>

### B. Separation of Powers

Additionally, receiverships are criticized because they expand the power of the judiciary beyond its traditional limits.<sup>129</sup> Article III

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124. Yoo, *supra* note 114, at 1138.

125. Judge Henderson noted, “[w]hen appointing receivers, courts often remove officials in charge of the entity responsible for the constitutional violations from power and place the receiver in their stead.” He went on to praise the current leadership for not obstructing the litigation, and to state that “[a]s an expression of the Court’s trust in the current State leadership, the Court will deviate from this practice and will not displace any state officials.” Findings of Fact, *supra* note 3, at 45. In fact, Judge Henderson noted that the CDC seemed eager to enter into the receivership: “[The CDC’s leaders] have been forthright in conceding their failures, have not attempted to obstruct the Receivership process, and have shown good faith and even enthusiasm in discussions with the Court and plaintiffs’ counsel about the prospect of working with a Receiver toward the goal of revamping, and perhaps redesigning, the prison medical delivery system.” Findings of Fact, *supra* note 3, at 45.

126. See Findings of Fact, *supra* note 3, at 6 (noting that the CDC concedes its inability to hire employees, and the fact that health care is not a priority, or an area of special competence).

127. Rubin & Feeley, *supra* note 117, at 633.

128. See *generally id.* (elaborating on this argument).

129. Grossenbacher, *supra* note 111, at 2232-33 (“Structural injunctions involve a potentially intolerable mixture of legislative, executive and judicial functions. . . . In a country that was founded on staunch principles of separation of powers, this mixture of functions suggests serious constitutional difficulties concerning the proper allocation of power among the branches and issues of institutional competency.”).

of the Constitution authorizes federal courts to hear cases and controversies.<sup>130</sup> It does not necessarily authorize courts to supervise the wide-ranging policy deliberations and administrative negotiations involved in receiverships.<sup>131</sup> The power to make policy and oversee administrative bodies is primarily reserved for the democratically-elected legislative and executive branches of government because “[m]any people are uncomfortable with the notion of a federal judge fashioning a structural decree that will effectively usurp the discretionary functions of local officials.”<sup>132</sup>

This separation of powers argument also focuses on the fact that different branches are competent at different things:

The comparative institutional advantage [when it come to fixing prisons] lies with the legislature, which can hold hearings, authorize wide-ranging investigations, freely obtain advice from recognized prison experts and allocate resources. . . . [The judge] cannot do any of these things, and is reduced to dealing with the complex, polycentric problem of prison reform in the context of an adversarial lawsuit.”<sup>133</sup>

In institutional litigation, judges often try to mimic legislative processes like the hearing by appointing expert witnesses to testify.<sup>134</sup> But judges simply cannot gather the same sort of wide-ranging expertise as can legislators and agencies, and the nature of their jobs forces them to rule in isolation without considering the give and take that is an integral part of the legislative process and agency rulemaking.<sup>135</sup> This makes the judiciary a comparatively

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130. U.S. CONST. art. III, § 2.

131. See Luedtke, *supra* note 6, at 677.

132. Grossenbacher, *supra* note 111, at 2233.

133. Rubin & Feeley, *supra* note 117, at 630-31. See also Levinson, *supra* note 115, at 861 (“[B]ecause courts have no special license or ability to make the types of policy decisions that remedies require, and because the political branches possess not only democratic legitimacy but also superior fact-finding and interest-balancing capacities, courts should defer to the political branches about issues of implementing or enforcing rights.”).

134. Jones, *supra* note 15, at 887-88 (“The use of ancillary personnel is not restricted to the post-decree administration of a complex remedy. Outside experts can also be used to aid a court in factfinding. Also, once a court has determined that a plaintiff is entitled to prevail on the merits, but is uncertain about how to structure and implement relief, the court may appoint a master to formulate a remedy for the court’s approval.”). Judge Henderson used expert witnesses in *Plata v. Schwarzenegger*.

135. They can, like Judge Henderson in *Plata*, call on expert witnesses, but they have less discretion to hear from local citizens groups, or other interested parties such as correctional unions or professional organizations, that might have a

poor choice for solving complex, large-scale administrative problems like poor prison health care.<sup>136</sup>

The separation of powers argument is vulnerable to many of the same criticisms as the deference argument. In *Plata*, the court was faced with a government actor who continued to violate constitutional standards despite the court's many admonitions.<sup>137</sup> Legislative action clearly did not fix the problem. The courts were inmates' only avenue for relief.<sup>138</sup>

The political unpopularity of prisoners' rights also argues against relying solely on democratically elected branches of government for remedies. There is little political will to fix an expensive problem like prison health care.<sup>139</sup> Legislators' desire to spend money on things that will get them re-elected may mean they disregard unpopular constitutional obligations. Moreover, many ex-felons are prohibited from voting.<sup>140</sup> As a result, a population with the most direct access to information about prison conditions is either entirely or partially barred from voting based on this information.<sup>141</sup>

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political stake in the outcome, but no legal right to intervene under the Federal Rules of Civil Procedure. See Findings of Fact, *supra* note 3, at 3.

136. See Rubin & Feeley, *supra* note 117, at 641 ("The fact that courts were not the optimal institutions to reform American prisons is clear to any knowledgeable observer.")

137. *Plata v. Schwarzenegger*, No. C01-1351, 2005 WL 2932243, at \*3 (N.D. Cal. Oct. 3, 2005) (order requiring defendant to show cause).

138. One could argue that imposing contempt fines on the government until it improves conditions is one way to force it to comply. But, as Karla Grossenbacher argues, this approach has potentially important consequences:

As more and more money is paid into the federal treasury to satisfy the demands of a contempt fine on the city, essential governmental services could be cut off. It is quite likely that the same class of people who are ostensibly benefitted by the structural injunction are also greatly dependent on public services. They will suffer more than the majority of constituents when these services are eliminated due to lack of governmental funds.

Grossenbacher, *supra* note 111, at 2244.

139. Voters are not particularly sympathetic to the idea of prisoners getting top-of-the-line health care. See, e.g., *60 Minutes: Change of Heart* (CBS television broadcast Sept. 14, 2003) transcript available at <http://www.cbsnews.com/stories/2003/09/12/60minutes/main572974.shtml>.

140. See, e.g., Cal. Elec. Code § 2101 (2007). California's felon disenfranchisement law, while not as draconian as others, prohibits imprisoned convicts and convicts on parole from voting. As of March 2007, statistics indicate that 283,124 people are disenfranchised in California. <http://www.thesentencingproject.org/statsbystate.aspx> (place cursor over California on U.S. map).

141. An additional consideration along these lines is that California has a particularly powerful correctional officers' union, which is very influential in elections.

Arguments about the separation of powers and about deference are thought provoking, but they ultimately end in a stalemate. Very few theorists who say receiverships are illegitimate or unconstitutional have viable alternate theories for enforcement,<sup>142</sup> while others who say that receiverships are legitimate simply argue that a constitutional right (inmates' right to medical treatment) trumps a constitutional norm (the separation of powers).<sup>143</sup> It is important to remember, however, that the Reconstruction Amendments changed the lay of the land when it comes to the separation of powers. Congress explicitly authorized courts to correct legislative bodies that violated individuals' constitutional rights when it passed section 1983.<sup>144</sup> Although separation of powers is an important constitutional norm, in the civil rights context it is clear that constitutional rights should take priority.

### C. Administrative Failure

The arguments for deference and separation of powers address the theoretical legitimacy of receiverships. But the most powerful argument concerning receiverships' effect on other branches of government is that receiverships enable administrative failure. Although commentators sometimes criticize ambitious and overreaching federal judges for forcing receiverships on administrative bodies, it is often the administrative bodies themselves that benefit from both the additional funding and the decreased responsibility that receiverships bring. For example, in a recent article on prison litigation, one jail administrator noted,

To be sure, we used "court orders" and "consent decrees" for leverage. We ranted and raved for decades about getting federal judges "out of our business"; but we secretly smiled as we requested greater and greater budgets to build facilities, hire staff, and upgrade equipment. We "cussed" the federal courts all the way to the bank.<sup>145</sup>

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142. See generally Yoo, *supra* note 114 (against receiverships). Yoo does discuss alternate ways unconstitutional conditions in public facilities can be alleviated, but argues that the political branches of the government should take charge. In the case of *Plata*, it seems clear that the political branches of the government simply will not or are unable to fix the California prisons. Therefore these "alternatives" are not really viable. *Id.*

143. Rubin & Feeley, *supra* note 117 (for receiverships).

144. 42 U.S.C. § 1983 (2000).

145. Schlanger, *supra* note 32, at 563.

Receiverships allow the agencies, the legislature, and the executive to fail without serious consequences, while blaming the judiciary for overreaching.

*Plata* is an excellent illustration of this tendency. *Plata* involves a politically unpopular task that the legislature and the CDC mismanaged for years.<sup>146</sup> Eventually medical care deteriorated to constitutionally prohibited levels and the court was forced to step in. Rather than forcing legislatures or agencies to take responsibility for failing at their jobs, this receivership will force the court to shoulder the burden of making unpopular or expensive fixes, all while being subjected to charges of judicial overreaching.

Judge Henderson aptly stated that:

The Court is simply at the end of the road with nowhere else to turn. Indeed, it would be fair to say that the Receivership is being imposed on the Court, rather than on the State, for it is the State's abdication of responsibility that has led to the current crisis.<sup>147</sup>

In taking on the task of fixing prison medical care in the state of California, the court has assumed an immense burden. As the receiver's first bi-monthly report noted, the effort has so far involved meeting with numerous state and prison officials, interviewing many inmates, starting a non-profit corporation, hiring ten staff members, reviewing thousands of documents, and visiting five state prisons.<sup>148</sup>

So far, the agency itself seems to be reaping the benefits of the court's labor. The state presented the receiver with a proposed plan for \$250 million for improvements to the health care system, on top of the \$1.4 billion proposed by the Governor for the Division of Correctional Health Care Services.<sup>149</sup> The receiver is also negotiating for improved staff compensation.<sup>150</sup> Additionally, staff have reaped some morale benefits. The receiver's report notes that "all clinical personnel expressed hope in the future now that a Receiver had been appointed by the Federal Court."<sup>151</sup>

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146. See, e.g., Receiver's Second Bi-Monthly Report at 2-4, *Plata v. Schwarzenegger*, No. C01-1351 (N.D. Cal. Sept. 19, 2006) (describing the entrenched bureaucratic, legislative and executive incompetence that continues to plague the California prison health care system).

147. Findings of Fact, *supra* note 3, at 47.

148. Receiver's First Bi-Monthly Report at 2, 12-18, *Plata v. Schwarzenegger*, No. C01-1351 (N.D. Cal. July 5, 2006).

149. *Id.* at 22.

150. *Id.* at 23-24.

151. *Id.* at 18.



Receiverships resulting in increased funding and more favorable conditions for the agencies that the court is overseeing are not uncommon. Receiverships are sometimes criticized for encouraging rent-seeking behavior by allowing agencies to bypass the legislative funding allocation process.<sup>152</sup> Two constituencies, such as prisoners and prison administrators, with a mutual interest in getting more funding can lobby the courts to obtain it.<sup>153</sup> School districts, for example, have been scolded for trying to remain under court supervision for segregation in order to get funds for general education.<sup>154</sup> One commentator notes this danger, arguing,

[S]mall groups [that may be] particularly interested in the supervision of a government institution would be more likely to involve themselves in an institutional reform lawsuit because it often worth more to them, per capita, to agree on a rent-granting judicial outcome than it is for the larger public to organize to prevent them from obtaining these rents. . . . Justice Lewis Powell, for example, once accused the parties in a desegregation case of having “joined forces apparently for the purpose of extracting funds from the state treasury.”<sup>155</sup>

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152. See James M. Hirschhorn, *Where the Money is: Remedies to Finance Compliance with Strict Structural Injunctions*, 82 MICH. L. REV. 1815, 1823 (1984) (“[T]he structural decree, while not requiring the payment of specific amounts, imposes a variety of financial burdens which may give rise to obstruction both by recalcitrant defendants and by the legislative authorities on whom defendants depend for funding. The practical effect of the decree may be to require the defendants to spend a larger amount than they would wish in a manner they oppose.”).

153. Horowitz, *supra* note 6, at 1294-95 (“There is commonly also a desire on the part of some officials to use a decree entered against them as a weapon in the political struggle to vindicate their view of the appropriate treatment, rehabilitation, or other policy goal for the institution. An adverse decree that would require additional spending is also a weapon used by officials to augment their budget. Occasionally, the anticipated budgetary increases are thwarted, but very often they are not. Whether the defendants’ friendly view of the suit derives from policy preferences or budgetary aspirations, the decree becomes a shortcut around political constraints. This is one reason why so many consent decrees are entered in institutional reform cases. Nominal defendants are sometimes happy to be sued and happier still to lose.”).

154. See, e.g., *Arthur v. Nyquist*, 712 F.2d 809, 813 (2d Cir. 1983) (“Atkins decried the attempts of school boards throughout the country, operating under desegregation decrees, to secure additional funding ostensibly but, in his view, not realistically needed to carry out court-ordered remedies. In Atkins’ view, school boards were pursuing their private agendas of unmet educational needs, while those advancing the cause of school desegregation were incurring the communities’ wrath for the added financial burdens courts were imposing.”).

155. David Zaring *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1035 (2004).

It can be tempting for administrators to find ways to circumvent the legislature's funding process, particularly when the legislature offers insufficient funding to cure an obvious problem. This situation seems to have been the case with prison health care in California. Despite the fact that the CDC itself admitted that California prison medical care was "a broken system," neither the California executive nor the legislature stepped in to fix the problem.<sup>156</sup> One corrections official testified that it is "not the business of the CDC, and it never will be the business of the Department of Corrections to provide medical care," and went on to state that medical care was not considered a "core competency" of the department, which were both damning admissions that the agency was failing at its job.<sup>157</sup> In early 2006 in California, in the middle of the prison system's budget crisis, the prison chief abruptly quit, saying that he lacked the political support from the governor and legislators to carry out major revisions.<sup>158</sup> The receiver's report was probably correct, observing, "[t]he present crisis was created by, and has been tolerated by, both the Executive and Legislative branches of the State of California."<sup>159</sup> The court's issuance of a receivership was simply a way of cleaning up the other branches' mess.

At this point, a skeptical reader might wonder if it really matters that the agency has obtained necessary funding through the legislature or the courts—why does the source of the funding matter as long as the prison is brought up to constitutional standards? The problem with obtaining the funding through receiverships is that it allows legislatures and agencies the tempting option of delegating politically unpopular tasks to the court. This can erode public support for courts and judges.

As one commentator put it, "[e]lected officials in the United States encourage or tacitly support judicial policymaking both as a means of avoiding political responsibility for making tough decisions and as a means of pursuing controversial policy goals that they cannot publicly advance through open legislative and electoral politics."<sup>160</sup> Funding expensive overhauls of the correctional sys-

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156. See Sterngold, *supra* note 1, at A1.

157. *Id.*

158. Steve Schmidt, *Prison Guards Lock up Bundle in OT Pay*, S.D. UNION TRIB., Feb., 28, 2006, at A1, available at <http://www.signonsandiego.com/news/state/20060227-2124-guards-staff.html>.

159. First Bi-Monthly Report, *supra* note 148, at 4.

160. Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 37 (1993).

tem so that prisoners can receive better health care may be the sort of tough decision that legislatures do not want to have to make. Health care for prisoners probably ranks very low on the list of voters' concerns. As the Supreme Court has observed, it is a "well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime . . . ."<sup>161</sup> Fixing California's failing prison health care system will be immensely expensive since early predictions estimate the cost will run into the billions, which only exacerbates California's budget troubles.<sup>162</sup> Bringing the prison health care system up to constitutional standards will come at the cost of other, inevitably more popular, state budget items.

Judge Henderson recognized that his proposed prison reforms would probably be unpopular: "the expenditure of a significant portion of a limited budget so as to protect the constitutional rights of prisoners is not a paramount concern in the minds of many citizens. In fact, many may inappropriately consider it both an unnecessary and unwarranted expenditure of public funds."<sup>163</sup> Nevertheless, he concluded that the court must enforce the state's constitutional obligation to prisoners.<sup>164</sup> Having courts order unpopular expenditures like this one might seem ideal from the legislature and executive's point of view, because federal judges are theoretically more insulated than the popularly-elected branches. Federal judges are appointed to the bench for life and cannot be dismissed or have their salaries reduced during good behavior.<sup>165</sup> Therefore, they are in a more secure position to mandate an expensive service to an unpopular group because they cannot be voted out for doing so.

Federal judges, however, are not really politically insulated. Although they cannot be voted out of office, the legislature can chide them and curb their powers. As one commentator put it, "[c]ourts are an easy target for popular anger."<sup>166</sup> Members of congress often make blistering attacks on the judiciary for "overreaching" or

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161. *Atkins v. Virginia*, 536 U.S. 304, 315 (2002).

162. See, e.g., Andy Furillo, *Prison Health Care Fix Carries Big Price*, THE SACRAMENTO BEE, July 1, 2005, at A3 (estimating short term costs of repair to be between \$100 and \$200 million).

163. Findings of Fact, *supra* note 3, at 48 (quoting *Shaw v. Allen*, 771 F. Supp. 760, 763 (S.D. W. Va. 1990)).

164. *Id.*

165. U.S. CONST. art. III, § 1 (noting that judges appointed pursuant to Article III shall "hold their Offices during good Behaviour.").

166. Stephen O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 Ky. L.J. 679, 679 (1999).

“activism.”<sup>167</sup> These attacks sometimes take place in the prison context: one congressman stated, “judicial activism is conduct by a judge that egregiously trespasses into legislation. When [judges] run school districts, when they run jail systems and order legislative acts to be initiated that cannot avoid raising taxes, questions arise whether they are not beyond their charter.”<sup>168</sup> Sometimes Congress reacts to accusations of judicial activism by curbing jurisdiction. The PLRA is a good example of this sort of reaction. Congress looked at prison receiverships and interpreted them as judicial overreaching, instead of products of poor legislative or agency performance.<sup>169</sup>

When the courts oversee an administrative body like the CDC, they take ownership of the administration’s problem. Courts spend a great deal of time supervising receiverships: “Not only does the mere entry of [receivership] frequently signal the beginning of extended judicial involvement in a dispute, the actual terms of the decree may entail still greater judicial involvement.”<sup>170</sup> This supervision is obviously necessary in order to achieve change, but it also allows the administrative body to shift responsibility onto another branch of government, avoid unpopular decisions, and rely on an outside authority to fix its problems.<sup>171</sup> With a receivership, not only is an agency relieved of its duty, but it can also complain about judicial overreaching when court orders become onerous.<sup>172</sup> Administrative bodies should be structured to correct their own errors, not fob them off on another branch of government. But the political unpopularity of prisoners, coupled with the disenfranchisement of many ex-felons, makes it difficult to imagine legislative or popular action that would force an organization like the CDC to change its practices.

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167. *Id.* at 679-80.

168. *Interview with Henry Hyde, Hyde on Judging Judges—And Presidents*, INVESTOR’S BUS. DAILY, June 16, 1997, at A32.

169. Kline, *supra* note 166, at 730 (“[The Prison Litigation Reform Act] was a cynical response [by Congress] to ‘activist’ judges who supposedly stretched the applicability of the Eighth Amendment’s prohibition on cruel and unusual punishment and hamstrung the jobs of prison officials and state officers.”).

170. Alan Effron, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 COLUM. L. REV. 1796, 1807 (1985).

171. For a contrary view, arguing that receiverships are actually a way for judges to shift accountability onto another person instead of a way for an agency to shift responsibility onto a judge, see Owen M. Fiss, *Problems and Possibilities in the Administrative State: The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1463 (1983).

172. Administrative griping about judicial oversight in receiver cases is nearly endless. *See generally* Pierce, *supra* note 37.

IV.  
INSTITUTIONAL LITIGATION AND THE  
DELIBERATE INDIFFERENCE STANDARD

The arguments in the previous section focused on the impact that receiverships have on other branches of government. But prison receiverships also impact the courts themselves. Receiverships do not establish binding precedent, but set up standards and requirements for other courts to imitate. They do not “consist of principles announced and then justified, but rather of a list of requirements selected and adopted from case to case.”<sup>173</sup> Although this may be a positive way of providing relief quickly, it has a hidden downside: too much reliance on receivers may impede the development of judicial standards and prevent precedent from keeping up with current conditions.<sup>174</sup> This section will argue that this danger is particularly great when it comes to prison medical care because of the difficulty of applying the deliberate indifference standard to broad institutional or system-wide conditions.

A. *Plata v. Schwarzenegger and Institutional Deliberate Indifference*

The Supreme Court’s jurisprudence on the constitutionality of prison conditions is not generous to prisoners.<sup>175</sup> The Court’s decisions essentially state that poor health care is simply a condition of being confined, and it is not cruel and unusual punishment unless it is objectively bad and criminally reckless. The Court has, how-

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173. Zaring, *supra* note 155, at 1072.

174. This argument is similar to one made by Mikel-Meredith Weidman. *See generally*, Weidman, *supra* note 118.

175. Justice Blackmun disagrees with this contention in his concurrence in *Farmer v. Brennan*:

The Court’s analysis is fundamentally misguided; indeed it defies common sense. ‘Punishment’ does not necessarily imply a culpable state of mind on the part of an identifiable punisher. A prisoner may experience punishment when he suffers ‘severe, rough, or disastrous treatment’ . . . . The Court’s unduly narrow definition of punishment blinds it to the reality of prison life. Consider, for example, a situation in which one individual is sentenced to a period of confinement at a relatively safe, well-managed prison, complete with tennis courts and cable television, while another is sentenced to a prison characterized by rampant violence and terror. Under such circumstances, it is natural to say that the latter individual was subjected to a more extreme punishment. It matters little that the sentencing judge did not specify to which prison the individuals would be sent; nor is it relevant that the prison officials did not intend either individual to suffer any attack. The conditions of confinement, whatever the reason for them, resulted in differing punishment for the two convicts.

511 U.S. 825, 854-55 (1994).

ever, remained silent on whether large-scale institutional failures in the prison medical system can constitute deliberate indifference. With prisons growing at a record pace and old infrastructure forced to accommodate this increase in population as well as new medical challenges, it is likely that certain arrangements for administering medical care or certain failures to maintain equipment are deliberately indifferent under the Court's current standard. It is also possible that new public health threats and infrastructure problems might lead the court to reconsider its draconian standards. None of these options can happen, however, if cases settle via receivership instead of trial.

The receivership order in *Plata* never discusses the deliberate indifference standard.<sup>176</sup> Although the Complaint alleges that the CDC violated both the objective and subjective prongs of the deliberate indifference standard, the Findings of Fact do not mention deliberate indifference.<sup>177</sup> Most of the legal analysis is devoted to discussing the standards governing receivership and the grounds for putting the CDC into receivership, rather than to the constitutional standard and the specific instances of deliberate indifference to inmates' medical needs.<sup>178</sup>

There are two possible approaches a court could take to determine whether aggregated prison conditions or the system itself violates the deliberate indifference standard, both of which the court used in *Plata*.<sup>179</sup> The first option is to aggregate individual claims of deliberate indifference. If the court examines enough complaints that rise to the level of deliberate indifference, which are then aggregated class actions, the court probably has good reason to declare that there is system-wide deliberate indifference.<sup>180</sup> But because the court neither discussed the deliberate indifference

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176. See Findings of Fact, *supra* note 3, at 32-49.

177. See Complaint, *supra* note 72, ¶¶ 197-213.

178. Findings of Fact, *supra* note 3, ¶¶ 32-49.

179. The court does not explicitly say it is using these two approaches, but considers both kinds of evidence from the complaint in its Findings of Fact. These two approaches are like traditional civil rights class action lawsuits in other areas, such as employment discrimination, that consist of either individual claims, or claims regarding policy and practices. See, e.g., Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 744 (2005) ("Claims of excessive subjectivity in decisionmaking can arise in individual cases challenging a particular employment decision, or in class action suits more broadly challenging an employer's policies and practices.").

180. This situation is analogous to cases challenging particular employment discrimination. See *id.*

standard in its opinion nor applied it to the individual cases, the analysis was not as strong as it could have been.

The previously discussed case of Marciano Plata is a good example of this lack of analysis. Plata's care was certainly deplorable: his initial injuries were ignored and left to worsen until they required surgery, which, despite multiple recommendations, was not performed for years.<sup>181</sup> On several occasions the system denied him access to a doctor despite his obvious ongoing and debilitating medical condition.<sup>182</sup> But Plata also received a great deal of medical attention: he saw several different doctors and medical technicians, received several very expensive tests, and eventually received a necessary operation.<sup>183</sup> His treatment may not meet the objective threshold of the deliberate indifference standard. The Ninth Circuit has stated that in order to satisfy the objective component of the deliberate indifference test an inmate needs to establish: (1) an acute physical condition; (2) the urgent need for medical care; (3) the failure or refusal to provide it; and (4) tangible residual injury.<sup>184</sup> Although the discussion of Plata's care meets some of these requirements, such as the acute physical condition and the urgent need for medical care, it does not meet others. There was no outright failure or refusal to provide treatment, just a shocking series of administrative mistakes. It is also unclear whether there was a tangible residual injury.<sup>185</sup>

It is also not clear whether Plata's treatment satisfies the subjective component of the deliberate indifference standard. The court's opinion does not say who it believes was responsible for the objectively significant harm, nor does it indicate who met the requisite standard of criminal recklessness. The court does not explicitly consider who is responsible: the prison for failing to transfer medical records, the individual physicians responsible for failing to request medical records, the prison guards responsible for imposing lock downs and preventing Plata from seeking medical attention, or the prison management responsible for setting up a medical system that allowed these sorts of situations. Without further analysis it is difficult to distinguish between mere malpractice and the level of

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181. Complaint, *supra* note 72, ¶¶ 6-41.

182. *Id.* ¶¶ 6-21.

183. *Id.* ¶¶ 6-33.

184. *Mayfield v. Craven*, 299 F. Supp. 1111, 1112 (E.D. Cal. 1969).

185. Plata's complaint actually looks similar to *Gamble's* in many respects: multiple visits to different doctors, disciplinary action for illness, and prison policies that led to deprivation of treatment. *Estelle v. Gamble*, 429 U.S. 97, 99-102 (1976).

culpability required to satisfy the deliberate indifference standard. All the travails Plata underwent were certainly awful, but not all of them were deliberately indifferent to his medical needs. Receiving a lumbar scan instead of an MRI, for example, is not nearly as damaging as being forced to walk back to a cell immediately after a knee operation. Doctors order the wrong tests and procedures for their patients with alarming frequency, which is usually considered negligence or medical malpractice.<sup>186</sup> Forcing a patient to walk back to a cell without post-operative care is profoundly serious and certainly evinces a higher level of intent, but this distinction is not made in the court's discussion.<sup>187</sup>

The second way that a court can find that an entire system violates the deliberate indifference standard is by looking at the infrastructure of the system itself. If the court concludes that it is so likely to commit harm and that the high likelihood of this harm is so obvious, then it cannot be anything but deliberately indifferent.<sup>188</sup> The court in *Plata* also used this approach. *Plata's* complaint, after all, is simply representative of the medical complaints of prisoners all across California.<sup>189</sup> What makes the CDC deliberately indifferent system-wide is not the fact that some individuals received sub-standard care, but the fact that the entire prison medi-

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186. In a recent report, the Institute of Medicine found:

In a study of 815 consecutive patients on a general medical service of a university hospital, it was found that 36 percent had an iatrogenic illness, defined as any illness that resulted from a diagnostic procedure, from any form of therapy, or from a harmful occurrence that was not a natural consequence of the patient's disease . . . In a study of 1,047 patients admitted to two intensive care units and one surgical unit at a large teaching hospital, 480 (45.8 percent) were identified as having had an adverse event, where adverse event was defined as 'situations in which an inappropriate decision was made when, at the time, an appropriate alternative could have been chosen.

INSTITUTE OF MEDICINE, *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM* 31 (NATIONAL ACADEMIES PRESS 2000). For examples of malpractice cases where an incorrect diagnostic test was one of the primary issues, see *Daniels-Recio v. Hosp. Del Maestro, Inc.*, 109 F.3d 88, 90 (5th Cir. 1992) (finding incorrect diagnosis of "silent asthma" based on objective test results); *Power v. Arlington Hosp. Ass'n*, 42 F.3d 851, 854-55 (4th Cir. 1994) (alleging that defendant hospital failed to provide "appropriate medical screening" on her visit to the emergency room); *Price v. Neyland*, 320 F.2d 674, 676-77 (D.C. Cir. 1963) (noting that defendant doctor's lab tests upon which a diagnosis was based "were wrong").

187. After a lengthy search, I was unable to find a medical malpractice claim in the federal or state courts with a similar fact pattern that did not concern prison medical care. See, e.g., *Lowrance v. Coughlin*, 862 F. Supp. 1090, 1095-97 (S.D.N.Y. 1994) (deciding that plaintiff-prisoner was "deprived of adequate medical care").

188. This is analogous to a policy and practice lawsuit.

189. Complaint, *supra* note 72, ¶¶ 192-95.



cal system is set up in such a way as to make it almost impossible to administer constitutional care.<sup>190</sup> However, by failing to discuss the deliberate indifference standard, the court's analysis is not as strong as it could be.

Admittedly the deliberate indifference standard seems murkiest and most difficult to apply on an institutional and system-wide level. Care on a system-wide level is both a compilation of individual medical decisions and a complex array of staffing arrangements, administrative procedures, information policies and organizational structures.<sup>191</sup> Determining which of these features is deliberately indifferent to inmates' medical needs can be challenging.

Nevertheless, some institutional factors in the California prison system seem like they would easily satisfy the deliberate indifference standard. The court's observation in *Plata* that facilities lack the capacity to sterilize instruments or doctors' hands<sup>192</sup> is an example of a condition that seems to satisfy both the objective and subjective component of the deliberate indifference standard. If used, many kinds of unsterilized instruments may cause bodily harm or injury.<sup>193</sup> In some cases (such as when it transmits life-threatening diseases), that harm will be objectively significant. When doctors and prison officials know that instruments are not regularly sterilized, they should be on notice that using those instruments is criminally reckless.

Nonetheless, the opinion makes very little distinction between factors that are bad and those that are deliberately indifferent. The *Plata* Findings of Fact on CDC organizational structures, for example, notes that California reorganized the prison structure in 2005 and that ". . . it fails to provide sufficient authority to the medical leadership . . . the new organization also splits health care operations and policy, thereby creating unnecessary room for conflict and inefficiency."<sup>194</sup> This statement may point out one cause of institutional failure, but it does not seem deliberately indifferent. In contrast with the court's findings on data collection:

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190. See, e.g., Findings of Fact, *supra* note 3, ¶¶ 6-15.

191. *Id.*

192. *Plata v. Schwarzenegger*, No. C01-1351, 2005 WL 2932243, at \*4 (N.D. Cal. Oct. 3, 2005) (order requiring defendant to show cause).

193. See, e.g., Kenneth Reich, *Suit Calls Prison Haircutting Unsanitary: Lawsuit; Activists Claim that Use of Unsterilized Instruments Has Exposed Thousands of Inmates to HIV and Hepatitis*, L.A. TIMES, Mar. 12, 2002, at B7 (noting that some prisoners may have been exposed to HIV or hepatitis as a result of unsanitary haircutting practices).

194. *Plata*, 2005 WL 2932243, at \*7 (order requiring defendant to show cause).

[t]he CDCR's system for managing appointments and tracking follow ups does not work . . . . These data management failures mean that central office staff cannot find and fix systemic failures or inefficiencies. As just one of innumerable examples, there are patients in the general prison population who need specialized housing but the CDCR does not track them and headquarters staff is unaware of how many specialized beds are needed.<sup>195</sup>

The inability to track patients' illnesses would seem to qualify as deliberate indifference—the facility permits a serious threat to inmates' health by ignoring needs that it knows exists, but which it fails to track.

The *Plata* Findings of Fact do not analyze the CDC's system-wide shortcomings in relation to the deliberate indifference standard, or specify how the current system necessarily leads to the deliberately indifferent treatment of prisoners.<sup>196</sup> Yet the Findings would not have to be structured much differently in order to allege deliberate indifference. At one point, for example, Judge Henderson concludes, “the incompetence and indifference of these CDRC physicians has directly resulted in an unacceptably high rate of patient death and morbidity.”<sup>197</sup> Another sentence, indicating that the CDC was deliberately indifferent in its employment of these physicians would make the decision more precise, and would flesh out more details of the deliberate indifference standard.

But it is important to acknowledge that many institutional policies may meet this standard. A prison system that refuses to hire board-certified medical professionals even after a series of incidents with non-certified professionals is probably deliberately indifferent.<sup>198</sup> A prison that makes it impossible for doctors to diagnose serious conditions because it does not provide charts is probably deliberately indifferent. It would be extremely valuable for prison advocates if courts explicitly found these sorts of behaviors to be deliberately indifferent, instead of imposing receiverships that become de facto standards rather than binding precedent.<sup>199</sup>

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195. *Id.* at \*6.

196. For a discussion of the CDC doctors, see *id.* at \*8-11.

197. *Id.* at \*9.

198. The CDC, for example, had a reputation of hiring “any doctor who had a license, a pulse and a pair of shoes.” Findings of Fact, *supra* note 3, at 8.

199. Of course, there is always the risk that courts will decide that these sorts of organizational structures are permissible, but given the evidence of prisoner mistreatment that was on display in *Plata*, it would be a difficult assertion for a court to make.

C. *The Disadvantages of an Underdeveloped Standard: A Brief Hypothetical*

If receiverships afford inmates the possibility of quicker relief, why is it a problem that they do not develop judicial standards? It may be helpful to flesh out possible problems through comparison to another, more highly developed set of cases about the constitutional right to professional assistance: cases about the right to legal assistance. Had litigants tried to promulgate standards through receiverships rather than non-binding precedent, our current understanding of the Sixth Amendment might be quite different.

The Sixth Amendment gives criminal defendants the right to the effective assistance of counsel.<sup>200</sup> But there are limits to the quality of legal assistance that the Constitution provides (much as there are limits to the quality of medical care the Constitution ensures). The Sixth Amendment does not entitle a defendant to a good lawyer or a lawyer who picks the correct strategy; it simply provides for “reasonably effective assistance.”<sup>201</sup> The Supreme Court has outlined a two-part test to determine whether assistance was inadequate. First, a criminal defendant alleging ineffective assistance of counsel must demonstrate that “counsel’s performance was deficient.”<sup>202</sup> Second, the criminal defendant must demonstrate that the poor performance prejudiced the outcome of his or her case.<sup>203</sup> The Supreme Court has made it clear that a court must be highly deferential when evaluating the reasonableness of counsel’s strategy,<sup>204</sup> but that deference must be balanced against the need to secure the defendant’s constitutional rights.

With these general guidelines in place, the Supreme Court and a number of lower courts have been able to flesh out exactly what kind of representation falls below Sixth Amendment standards. Ignorance of the law or never objecting to objectionable questions qualifies as inadequate assistance of counsel.<sup>205</sup> Other questionable behavior, however, such as decisions not to present mitigating evi-

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200. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (“[T]he Court has recognized that ‘the right to counsel is the right of the effective assistance of counsel.’”) (citation omitted).

201. *Id.* at 687.

202. *Id.*

203. *Id.*

204. *Id.* at 689 (“Judicial scrutiny of counsel’s performance must be highly deferential.”).

205. *See, e.g., Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (“The justifications [that the defendant’s] attorney offered for his [failure to conduct any discovery in preparation for trial] betray a startling ignorance of the law. . . .”); *United States v. Wolf*, 787 F.2d 1094, 1099 (7th Cir. 1986) (“[T]o have a *policy* of

dence or not to ask a key witness to testify is often treated as a valid (if unsuccessful) strategy, rather than ineffective assistance.<sup>206</sup>

Imagine if, instead of being litigated in the lower courts, inadequate assistance of counsel cases were litigated as class action cases that went into receiverships. Instead of judging the facts of individual cases, the parties would negotiate over remedies and the best way to fix systemic problems. Although litigants, practicing attorneys and judges would still have the same bare-bones set of rules handed down by the Supreme Court, they would probably lack many of the examples and different circuit standards that give us a much clearer idea of when assistance is adequate and that take into account changing cultural circumstances.

*D. The Necessity of Standards: Open Questions in  
the Deliberate Indifference Jurisprudence*

Prison activists have steered cases towards receiverships in order to ensure that prisoners receive remedies: “[a]dvocates learned through experience that formal legal victories [do] not mean actual success in achieving correctional reform. In many cases, defendants simply ignore[ ] court orders requiring major changes in prison policy and practice.”<sup>207</sup> It is easy to see why prisoners’ advocates might prefer receiverships as remedies. Because poor medical treatment of inmates is such an urgent issue, prisoners’ rights advocates have every reason to begin negotiating for change as soon as possible. When the goal is to begin negotiations quickly, it does not make sense for the court to describe in detail which individual aspects of the health care system are deliberately indifferent to prisoners’ medical needs. It could also be the case that by encouraging defendants to concede points and begin negotiations early, both parties adopt a spirit of cooperation, making it easier to adopt reforms.<sup>208</sup> Arguably, this outcome is better for everyone involved.

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never objecting to improper questions is forensic suicide. It shifts the main responsibility for the defense from defense counsel to the judge.”).

206. *Jones v. Page*, 76 F.3d 831 (7th Cir. 1996); *Stringer v. Jackson*, 862 F.2d 1108 (5th Cir. 1988).

207. *Strum*, *supra* note 30, at 712-13 (observing that prison litigation has moved to the new model of large-scale institutional litigation that we see in receiverships like *Plata v. Schwarzenegger*).

208. However, given the Supreme Court’s hesitation to recognize new rights for prisoners or to expand existing ones, the fewer cases that go up on appeal, the better off prisoners’ advocates may be. This argument is somewhat undermined, however, by the Court in *United States v. Georgia*, which held that state prisons must comply with the Americans with Disabilities Act. 126 S. Ct. 877, 882 (2006). This

The problem with this sort of negotiation is that if it happens enough, it is unclear where potential litigants will get the standards to determine what exactly constitutes a constitutional violation. Higher courts review very few cases.<sup>209</sup> Cases that are successfully appealed usually debate the terms of the receivership, rather than the original constitutional violation.<sup>210</sup> There are several areas of the deliberate indifference standard that present courts with outstanding issues or that still need to be tested.

The dangers of constitutional standards becoming divorced from developments in prison conditions is illustrated by Mikel-Meredith Weidman in his article on supermaximum (“supermax”) prison conditions.<sup>211</sup> Supermax prisons are “uniquely harsh, high tech facilities that house inmates typically identified as ‘the worst of the worst.’”<sup>212</sup> Weidman argues that supermax prisons may be qualitatively different entities that should be held to different standards because of their particular designs and purposes.<sup>213</sup> On the other hand:

[B]ecause these features were not contemplated by the prison cases of the reform movement, the case law is silent on their constitutionality. . . [a]n assumption exists that because the period of prison reform is ‘over’ and the rules for constitutional prisons have already been set, no new development in prison design or management that complies with existing standards can ever be held unconstitutional.<sup>214</sup>

Pausing the effort to develop constitutional standards will inevitably lead to dangerously outdated standards.

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ruling will probably be a significant source of rights and new legal claims for prisoners.

209. One article notes, “Almost all of the important prison conditions cases have been at the trial court level, and the handful of appellate court rulings on the subject have generally reaffirmed the lower court decisions . . . .” Rubin & Feeley, *supra* note 117, at 659. Another laments the fact that, “[g]iven the number of cases decided by the lower federal court, the Supreme Court has heard relatively few prison cases in which large-scale institutional reforms were at issue.” William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 *YALE L.J.* 635, 684-85 (1982) (footnote omitted); *see also* Horowitz, *supra* note 6, at 1268 (“[D]espite their innovative character, these decrees have proved remarkably resistant to appellate review.”).

210. *See, e.g.*, Horowitz, *supra* note 6, at 1300-03 (describing courts’ limited review of the actions and acceptable discretion of receivers themselves, rather than of the constitutionality of individual actions).

211. *See generally* Weidman, *supra* note 118.

212. *Id.* at 1506.

213. *Id.* at 1506-67.

214. *Id.* at 1544.

Applying this sort of reasoning to the prison medical context, there are several open questions regarding prison health care that have emerged since the supposed heyday of receiverships in the 1970s and 1980s.<sup>215</sup> For example, one of the most interesting issues in determining whether an institution has been deliberately indifferent is the question of notice. What sort of circumstances or incidents should put a system on notice? The Supreme Court has stated its belief that the deliberate indifference standard does not include “an official’s failure to alleviate a significant risk that he should have perceived but did not” because it cannot “be condemned as the infliction of punishment.”<sup>216</sup> But some prisons are structured so that they do not find out about poor medical treatment. The CDC, for example, not only lacks data tracking systems to get information about sick prisoners, but does minimal intake screening and does not keep decent medical records.<sup>217</sup> Despite its commitment to deference to prison officials, surely the Supreme Court would not tolerate institutional arrangements that are so shoddy that they shield prison officials from culpability.

Another open question is to what extent public health may be taken into account under the deliberate indifference standard. The prison population is aging and facing more chronic illnesses like HIV/AIDS and Hepatitis-C.<sup>218</sup> These diseases require chronic care, and may affect the deliberate indifference standard.<sup>219</sup> Some researchers estimate that between fifteen and thirty percent of prisoners may be infected with Hepatitis-C, a serious, chronic condition that is spread through contact with bodily fluids.<sup>220</sup> A prison that fails to test its inmates regularly for Hepatitis-C is not only present-

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215. Schlanger, *supra* note 32, at 602 (discussing what counts as the “heyday” of prison receiverships).

216. *Farmer v. Brennan*, 511 U.S. 825, 838 (1994).

217. Findings of Fact, *supra* note 3, at 4-21.

218. RE-ENTRY POLICY COUNCIL, REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY 157 (2005), available at <http://reentry.microportals.net/reentry/ASP.Net/Components/AX.CMS.DocumentViewer/Download.aspx?DocumentID=1152> (“The prevalence of chronic illnesses, communicable diseases, and severe mental disorders among people in jail and prison is far greater than among other people of comparable ages. Significant illnesses afflicting corrections populations include coronary artery disease, hypertension, diabetes, asthma, chronic lung disease, HIV infection, hepatitis B and C, other sexually transmitted diseases, tuberculosis, chronic renal failure, physical disabilities, and many types of cancer.”).

219. See John V. Jacobi, *Prison Health, Public Health: Obligations and Opportunities*, 31 AM. J. L. & MED. 447, 450 (2005).

220. National HCV Prison Coalition, *Hepatitis-C Awareness News*, JAN/FEB 2006, at 2, available at [http://www.hcvinprison.org/docs/Jan\\_Feb\\_06b.pdf](http://www.hcvinprison.org/docs/Jan_Feb_06b.pdf).

ing a serious danger to inmates' health, but also to public health. The increased prevalence of Hepatitis-C in prisons today may mean that the failure to test or to provide Hepatitis-C vaccines is deliberately indifferent—after all, it is a very serious health condition and the high level of incidence in prison systems means that administrators and doctors are on notice.

It is worth recognizing that the Supreme Court's analysis of the deference due to prison administrators may change now that these diseases (and others endemic to prison populations such as tuberculosis) are so prevalent. Diseases like HIV, Hepatitis-C and tuberculosis present serious public health concerns that are not limited to prisons themselves—these diseases are often spread when a prisoner re-enters the community.<sup>221</sup> Deference to prison administrators may not extend to decisions that seriously imperil the health of people outside the prison. A court which is not moved by a complaint like Clifford Gamble's may be more shocked by a situation in which prison health officials allow a serious disease to spread in the prison population that can be a serious risk to the public health once released prisoners re-enter their communities.<sup>222</sup>

One final problem with imprecise standards of constitutionality is that under the PLRA, a judicial remedy must be specifically tailored to remedy the constitutional defect. As William Fletcher observes,

A trial court remedial decree may . . . involve an abuse of discretion if it exceeds the permissible scope of equity in remedying a constitutional violation. For example, a judge in a remedial order may do more than bring a prison system up to the line between the unconstitutional and the bad-but-constitutional; he or she may require further that the prison system be made a humane and decent place.<sup>223</sup>

The PLRA requires more than just a common sense determination that a prison system's health care is deliberately indifferent to inmates: it requires an analysis of exactly which aspects are unconsti-

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221. Jacobi, *supra* note 219, at 451 ("The rate of infection with communicable diseases among prisoners is startlingly high.").

222. The standard of criminal negligence laid out in *Wilson* seems inappropriate for a situation where prisoners' illnesses may pose a serious threat to public health. A court reviewing a deliberate indifference complaint alleging that prison staff failed to test prisoners for dangerous and highly contagious diseases like tuberculosis or hepatitis, despite evidence that it was present in the prison population, would inevitably feel hard-pressed to hold someone accountable for such a serious risk to public health. In situations like this, a standard of civil negligence seems much more appropriate.

223. Fletcher, *supra* note 209, at 660-61.

tutional and a precisely tailored remedy.<sup>224</sup> The more constitutional doctrine is handled by receiverships and consent decrees, however, the more difficult it will become to assess when treatment is unconstitutionally bad and to produce narrowly-tailored remedies.

Under the PLRA, remedies that are not specifically tailored to the harm must be vacated.<sup>225</sup> The enactment of the PLRA itself demonstrates that judicial management of prisons is politically perilous, and an easy target for politicians. It may only take a mild political shake-up for the delicate negotiation system aligning prison advocates and correctional officials to be disturbed, and to cause the balance of power to shift towards vacating receiverships that are not narrowly tailored. If that were to happen, prison advocates would be left without binding standards from years of large-scale negotiations over prison medical conditions. If excessive use of receiverships prevents courts from clarifying constitutional standards, receiverships may start to be ruled unconstitutionally overbroad, and higher courts may undo them.

### CONCLUSION

The ultimate conclusion of this paper is not that receiverships are good or bad, but that they are central to prison reform even though they are not terribly good remedies. The fact that judges have routinely used them since the 1970s to reform prison conditions indicates a failure in the system.<sup>226</sup> Receiverships have too many problems—both theoretical ones of legitimacy and administrative dependence, and practical ones of judicial underdevelopment—to be comfortable and oft-used remedies. Yet advocates continue to push for them because they are the best way to get re-

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224. 18 U.S.C. § 3626(a)(1) (“Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.”).

225. *Id.* § 3626(b)(2) (“In any civil action with respect to prison conditions, a defendant or intervenor shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.”).

226. Horowitz, *supra* note 6, at 1307.



lief for their clients, and judges continue to grant them (or be forced into them by administrative agencies).

It is both heartening and disturbing that a receivership has been imposed over a state prison health care system. It is heartening because prison health care has been failing on many fronts for years: it is sporadic, inadequate and a danger to public health.<sup>227</sup> Prisons are notorious breeding grounds for diseases, and prisoners introduce diseases like tuberculosis and Hepatitis-C into their communities when they are released.<sup>228</sup> It is disturbing, however, because judges view receiverships as dubious remedies, and because it portends the under-development of prison health care jurisprudence at a time when the medical needs of prisoners as a group are changing in ways that require consistent medical intervention and investments in preventative care and medication.<sup>229</sup>

Courts have actually become good at overseeing administrative bodies. They have access to independent experts to whom they can assign fact-finding tasks. They can put defendants under consent decrees so that the proceedings are less adversarial, so that they are overseeing a negotiation, rather than a trial. And they can appoint leaders with as much or more experience with administrative functions than the current one. The administrative role of the courts seems to have become entrenched. The expansion of receiverships, however, and the case of *Plata* should prompt us to ask ourselves whether this development is a good thing.

Perhaps the only solution available to judges is to pay more attention to the deliberate indifference standard in their written orders. Instead of finding that “the totality of prison conditions creates an environment so atrocious that it crosses a subjective line of judicial sensibility,” in cases where they confront deliberate indifference judges should flesh out the contours of the deliberate indifference standard as clearly as possible when they evaluate a prison medical system, so that the standards appear narrowly-tailored and more substantial.<sup>230</sup>

Clear, written statements would help change the situation that now exists, where courts do not expressly pronounce certain practices unconstitutional, and rights emerge in an unprincipled manner.

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227. *Jacobi*, *supra* note 219, at 451, 453.

228. *Id.* at 451 (noting that compared to the general population, prison rates of HIV infection are eight to ten times higher, rates of Hepatitis-C are nine to ten times higher, and rates of tuberculosis four to seven times higher).

229. *See generally id.*

230. *Levinson*, *supra* note 115, at 879.

Initially, conditions of confinement are found to violate the Eighth Amendment when the totality of prison conditions creates an environment so atrocious that it crosses a subjective line of judicial sensibility. . . . Not surprisingly, subsequent litigants have then pointed to these remedial norms as benchmarks of constitutional prison conditions. . . . A subtle inversion of right and remedy thus occurs. Remedies are used by courts to define a constitutional standard that would otherwise be impossible to articulate, and those remedies become the normative criteria by which constitutional violations are judged.<sup>231</sup>

This inversion of rights and remedies may produce standards that skeptics view as too individualized to specific prison systems to be truly Constitutional requirements. It seems clear that institutions cannot provide decent health care for inmates without certain basic, universal policies and capabilities regarding medical records, staffing, hiring policies, triaging, and facilities. But it may be difficult to convincingly argue that these are universal constitutional standards when they come from something as complicated and individualized as policies instituted by a receiver.

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231. *Id.* at 879-80.