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**Presentation to IPRT Seminar, ‘Prison Conditions as a Constitutional Issue’   
21st July 2011 (5-7pm), Distillery Building, Church St, Dublin 7**

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**DS:** Hi, my name is Donald Specter and I’m Director of the Prison Law Office in Berkeley, California.

**SN:** And I’m Sara Norman and I am the Managing Attorney, working under Don at the Prison Law Office.

**DS:** We’re here on the invitation of Liam and Fíona to explain to you a little about the prisoner rights litigation in California, specifically as it concerns the recent case of *Brown v. Plata*, which was recently decided by the U.S. Supreme Court. We’ll be giving you a kind of overview of the case, in terms of how it started, some of the American laws that are involved in the case, and how it progressed through the Courts to the U.S. Supreme Court.

**SN:** Maybe I’ll just give a very quick overview of the conditions in California prisons that led to this lawsuit and the many others in our 30+ history. The California prison system is enormous. We have 33 prisons, some of which have as many as 6,000 or 7,000 prisoners in each, and the system has been overcrowded at nearly double capacity for many years, making everything disastrous – it’s almost impossible for them to function at a basic constitutional level (in the U.S.) So, we’ve brought law suit after law suit – all of which we win, but none of which the State proves able to comply with. And the two big ones have been State-wide mental health care and State-wide medical care. And it’s because of the State’s inability to bring fundamental medical care and mental health care to the individual prisoners that Don cooked up this idea about going after the overcrowding.

**DS:** So, just to give you a little background about those two cases. One was filed in 1991,that was the case about mental health care; it was called *Coleman v. the Governor* at the time. In 1995 we got a judgment from the Courts saying that the system was completely unconstitutional because basic care couldn’t be provided to mentally ill prisoners, including those who were psychotic. To this day, the conditions have improved although they still remain completely unconstitutional, with hundreds of psychotic prisoners waiting to get to settings where they can be treated, in-patient settings in particular. The basic point is that because of the overcrowding, the prison system has never been able to supply the necessary space or even personnel that are required to provide basic care to the prisoners.

About 10 years later, in 2002, the State of California agreed to what we call a consent decree which is basically a contract between the State and the prisoners, which is ratified by the Court, to improve medical care because - similar to mental health care – the basic medical care that prisoners were receiving was in many cases non-existent. A few years later in the proceedings, when we had contested the proceedings about some of the remedies that were necessary to provide basic care, the Court found, based on the evidence that we had provided, that a prisoner was dying unnecessarily through neglect or malpractice – about one every ten days.

And so, through the years, we have been fighting with the State to improve the medical care - even though we have had a judgment against them in both healthcare contexts. And what we’ve learned – what we’ve found is that all the remedies that we tried, which were numerous – which, in the *Coleman* case, were 70 court orders to improve care, and in the *Plata* case (which is the medical care case) the Court actually took control of the medical care system away from the State officials and placed it in a receiver – a Court-appointed person who was actually instructed to run the medical care system. But the receivership didn’t solve the problems either because the situation was that the prisons were so overcrowded that, again, they couldn’t have enough space or personnel or processes to provide basic care to most of the prisoners who needed it. So that’s where we came up against a recent federal statute called the *Prison Litigation Reform Act* – and I’ll let Sara explain the barriers that that federal legislation put before us.

**SN:** (Great, you’re leaving me the dry statutory explanation!) The *Prison Litigation Reform Act* was signed into law by Bill Clinton, and what it does is drastically reduce the ability of prisoners to file civil rights law suits. So among all the civil rights litigants – people trying to assert their rights in federal courts – prisoners are disfavoured; it throws up a tremendous number of barriers to them even bringing the law suit in the first place.

One of the barriers that it sets up is [that] it bars federal judges from issuing population caps. Population caps are a very common way to solve problems with jails and prisons around the country. You litigate about terrible conditions and the judge says: “alright, I certify that this facility can hold no more than 500 people, so you can’t go above that”. And in fact, prison and jail administrators like that because it helps them keep their population under control, so they can manage them. But [now] federal courts no longer can issue such orders – unless a specially convened panel of judges meets certain incredibly rigorous standards. So, it’s a series of procedural road-blocks that have shut down this remedy in federal courts, for the most part.

So, the situation in both the medical and mental healthcare arenas was so horrendous [that] Governor Schwarzenegger actually issued a statement – an ‘Emergency Proclamation’ – a state of emergency proclamation in the prisons saying that “this is a state of emergency because of the crowding”. It was at that point that we decided that we were going to try to make use of these (torturous) PLRA procedures to try to get a population cap. And since that was Don’s brainchild, I’ll give it back to him.

**DS:** Just some facts so that you’ll understand just how bad the situation was: at the time [that] the Governor declared a state of emergency, the Californian prison population was about 200% of its design capacity, meaning that it had been designed for roughly half the number of prisoners who were there at that moment. In California we have the largest – or one of the largest prison systems in the world, with about 160,000 prisoners in the State prisons system and another 10,000 prisoners in other States (within the United States), who are in private prisons but under the technical custody of the Department of Corrections of California.

So, Governor Schwarzenegger issued the state of emergency in which he agreed with us that conditions were life-threatening for both inmates and staff. Shortly after he issued that proclamation, we filed this motion in two cases – the *Coleman* case and the *Plata* case – which asked the Court to set a cap on the prison population. The judges in this three-judge panel special proceeding convened the Court after they found that the other remedies that they had tried – including issuing 70 orders in the *Coleman* case, and the appointment of a receiver in the *Plata* case – were going to be ineffective in the absence of some relief in the population. And instead of rushing to trial, the Court delayed it several times in order to try and give the parties – us and the state – a chance to resolve the case through settlement. But that proved completely fruitless because of the political problems in California which led to the over-incarceration and overcrowding to begin with: the same political forces that kept sending more and more prisoners into the prison system prevented the State political officials from being able to settle the case.

So, after about two and a half years of discovery and settlement negotiations, the Court sent the case for trial, and we tried it in December of 2008 (which was a long time ago!)

**SN:** To throw one other thing in: throughout this whole process, it was making headlineson occasion –and the response of the State political machinery was to pass an AB900, which was a five billion dollar prison building package. So what they decided was that 160,000 prisoners in the State wasnot enough, they were going to buildmore prisons to house more people.

Fortunately, the State of California is completely inept and incompetent in carrying out a major process like that, so the whole building procedure floundered. All throughout the preparation for trial we thought this would be a problem, that they were building so many new prisons that we would not be able to prevail that overcrowding was leading to the unconstitutional conditions – but fortunately, they were so incapable of even getting their act together to build the prisons that the judges found that you can’t build our way out of this problem: building is actually what got them into the problem in the first place.

So we ended up at trial in front of these three wonderful federal judges – the judge in the *Coleman* case, the judge in the *Plata* case, and then an additional judge who was appointed to sit with them.

[And in fact the judge in the *Plata* case, named Thelton Henderson, was a major civil rights lawyer, who actually worked with the U.S. Justice Department in the South – he was the only African-American lawyer doing civil rights work in the South – and he was fired by the federal government for loaning his car to Martin Luther King to escape a lynch mob. For that he got fired and he went into private practice and eventually became a federal judge. So he’s this extraordinary figure.]

So it was a wonderful experience to appear before these three rather elderly judges in this ground-breaking case, where we put on enormous quantities of evidence; we had experts who had run prison systems in six States (I think), including one former California prison chief, all of whom said this is ridiculous, you can’t run a prison system like this, it is absolutely impossible. So, we had... [SN: how long did the trial last, a month? DS: about a month, yes] … a tremendous amount of testimony… It was a bit of circus because many local government authorities intervened: county executive and district attorneys, the prosecutors, Republican legislators in the State assembly and Senate - so it was a bit of a political zoo.

But in the end the judges sorted through a huge amount of evidence and found overwhelmingly that, first of all, overcrowding was the primary reason for the constitutional violations both in medical and mental health care, and also that it was possible reduce the prison population safely.

**DS:** There was a tremendous amount of concern by the Court and by the State and the elected officials that a population cap would endanger the public – and in fact the *Prison Litigation Reform Act*, which we’ve talked about a little before, requires the Court to consider any injunction in a prisons conditions case, its effect on public safety. So we had experts from other States who had run prison systems – who were, at the time, running prison systems – and we had criminologists testify that studies had shown in other States that prison populations and crime do not necessarily correlate. So, we were able to show the fact that the prison population decrease would not adversely affect the crime rate, which is somewhat counter-intuitive – it was very difficult for even those three wonderful judges to get their head around. But eventually they wrote a 183-page opinion, about 50 pages of which were devoted to the public safety question, and they found that even if you release 30,000-40,000 prisoners over a 2-year period, the number of crimes would not increase; it would be about the same number of crimes, they would just be committed at different times.

But we didn’t even ask the Court to release 33,000 (or more) prisoners, we just wanted to have the Court cap the population; and we left it to the State of California – the Governor and the man who runs the prisons department here – to determine how they were going to reduce the population.

**SN:** I think we have just a little time left, so we might want to jump straight into the Supreme Court. One of the scariest things about the *Prison Litigation Reform Act* procedures that we have to follow is that there is a direct appeal straight to the U.S. Supreme Court. And if you follow U.S. judicial news, you know that the U.S. Supreme Court is no friend to prisoners or to disfavoured populations generally. So, Don’s task was to argue this case at a fairly hostile Supreme Court. (Do you want to talk about that went?)

**DS:** Well, we were very scared. You know, this Court has limited prisoners’ rights in case after case, and year after year, and they are generally hostile to civil rights – and prisoners even more. We tried everything in our power to settle the case beforehand so it wouldn’t go to the Supreme Court, but again the State wouldn’t budge. So in November of last year, November 30th, I argued the case before the Supreme Court, and it was a very powerful experience because my opponent, the lawyer who was representing the State, got up first and he was getting clobbered by one judge after another, and I was writing down on a pad the number of hostile questions he was getting from different judges – there are nine members of the U.S. Supreme Court, and when we got to five hostile questioners, I was very pleased.

And when I got up, I got hostile questions from four members of the Supreme Court – and it was generally a concern on the part of the Conservatives and a belief, I would say – not a fact, but a belief that reducing the prison population would result in a lot of crime in the streets of California, contrary to the specific facts found by the lower court.

So, after that argument in November, we received the decision in May of this year, May 23rd – at 10 o’clock, on the dot – in which the Court, in a five to four vote, affirmed the order of the three-judge Court. And I’ll let Sara tell you what’s happened since then.

**SN:** Well, there were a few parties after that! It was an incredibly exciting opinion, not just because it was a rousing affirmation of the rights of disfavoured populations (which is rare these days) but because it was so… It was really impactful that the Court cared enough to include pictures of the overcrowding, and indeed to talk about individual prisoners’ stories, which was wonderful.

Since that time, as far as we can tell, the State has done almost nothing to actually enforce the orders. […] The order is to reduce the prison population to 137.5% of capacity, over a 2-year period, with specific benchmarks to be met every six months. So, the clock is ticking and they have to meet a benchmark as of December of this year.

Jerry Brown, our current (and past) Governor, has decided on a political solution, which is to have the counties take on the lower level offenders; so the county governments in California (there are 58 counties), they will have to house people in their jails or release people who pose no danger to public safety. The counties are not adverse to this as long as they get tons of money from the State to do it. So there’s been a huge fight over the California budget, and over this provision and others, and it finally seems to have gone through.

As far as we can tell they’ve done nothing to actually implement it, and by itself this measure is not going to be enough, so we anticipate endless fighting ahead. The three-judge panel, it’s back in their hands and they have asked the State to do some regular reporting, and we’ll see what happens – but we anticipate having to continue to fight about this for years to come. So, we’ll see how it goes.

[And I think that is over our time, so maybe we should finish.]

Thank for allowing us this opportunity; it was terrific to hear about some of the issues facing Irish prisoners and prisons from Mary Rogan [Chairperson, Irish Penal Reform Trust] on her visit, so I look forward to more conversations and collaboration with you all.

Thank you.