on the ground that, should they die now, they will have benefited from fewer life years than the old would should *they* die now, factual uncertainty matters less. Premature death involves fewer life years by definition. So the avian flu allocation question is less clearly about the distribution of good or bad chance. It may be about how to distribute good or bad personal outcomes.

Partly for didactic reasons, many philosophical discussions of distributive justice focus on good and bad outcomes (and on real opportunities to secure good outcomes). They ask what is the most ethical way to allocate personal good. But when resources (or opportunities, etc.) are allocated in the real world, there is no way of telling with certainty how they will affect a given individual. Uncertainty remains. Even receiving the better of two medications can cause one's early, painful death—for example, if a rare side effect of that superior medication materializes in one's case. Indeed, in rare cases, even the process of being connected to a ventilator can cause immediate death. What we can debate at the time when the medication or the ventilator are being allocated is primarily who will receive those craved resources and the alteration in personal prospects and risks that they represent. Since the future remains outside our full control and our perfect knowledge, we cannot debate at that point the fairness of any pattern of actual-world future outcomes.

Some thinkers provide deeper reasons to consider chances a proper "currency" of justice. When there is nothing that we can do to ensure fairness in the distribution of good and bad outcomes, the intuition is often that we should at least distribute chances more equally or in some other "fair" manner. For instance, assume that two patients with liver failure and equal claims to a liver transplant compete for the only available liver lobe. Their outcomes will probably be very unequal. A liver lobe cannot be split in two, so one patient will have to die, though the other may live. We have a strong intuition that it would be fairest to decide who will receive that liver lobe and who will not by using a lottery that gives each an equal chance—for example, by flipping an even coin. We shouldn't reason, "Since outcomes will be unequal and unfair either way, we might as well give the lobe to the patient who is our buddy, without a lottery, or rig the lottery in her favor." That intuition might be thought to show that fairness pertains not only to the distribution of outcomes but also to that of chances. To decide in favor of our chum without a lottery or to flip a rigged coin would intuitively seem unfair toward the other patient. So-called "fair" lotteries and many "fair" procedures often assume that the distribution of chance falls within the ambit of fairness considerations.

Is it correct to extend distributive justice considerations to the area of chance, though? By virtue of what would justice considerations apply to chancy currencies? My personal position, these introductory comments notwithstanding, is that justice does not properly apply to chance. Although there are often good reasons to use even coins and other lotteries, chance is not a proper currency of distributive justice. I plan to defend my position elsewhere. But suppose that I am wrong, and distributive justice does apply to considerations of chance, another question arises: Do distributive "patterns" that work best for good or bad outcomes as currencies also work best for good or bad chances? Suppose that on matters of personal good, you believe in distributive patterns such as equality, priority to the worse off, and proportion to desert. Should you endorse the same patterns when it comes to personal chance and risk? These are some of the questions that our 2015 Pacific APA panel will address.

Here's hoping to discuss these questions with many of you in Vancouver, and other questions at the intersection of philosophy and medicine in Philadelphia and in St. Louis.

ARTICLES

Correctional Health Care: Further Reflections

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In his articulate and impressive framing of the broad ethical issues surrounding correctional health care, Ken Kipnis makes three important assumptions:

> that punishment is a permissible response to those who have been identified as having committed serious wrongdoings;
>
> that all those so identified have either been properly convicted of serious wrongdoing, or are being properly held in temporary custody pending definitive adjudication; and
>
> that the penal forfeiture of liberty is, here and now, an appropriate form of punishment; that the prison—more or less as we understand it—is an appropriate means of implementing such a punishment.[1]

There are often decent philosophical reasons for making certain assumptions or bracketing certain issues so that others may become the object of concentrated attention. It's a complicated world out there and we want to focus specifically and narrowly on one issue without being distracted by others. That is, we want to ask what responsibility correctional officers have for the health care needs of inmates. And that may be sufficient to enable us to identify rights or develop principles that should govern prison health care. But *once we have to apply those precepts*, once we have to draw conclusions about what they mean in practice, the brackets must come off, especially if there exists a situation in which the principles are not being observed. It is my contention that when it comes to Kipnis's prescriptions on the basis of those rights or principles, then these bracketed assumptions come back to haunt him. That, at least, is the burden of my paper.

In the course of drawing attention to rights and responsibilities regarding health care, Kipnis notes that

as captives of the state, inmates have certain rights, not only by virtue of their personhood but also by virtue of their custodial situation. In particular, they have rights to appropriate living conditions in the context of their custodial situation—not, perhaps, the same entitlements that people have on the outside, but nevertheless certain important minima. Kipnis guides us through some Supreme Court decisions concerning this, and then confronts the fact that many prisoners in the United States get far less health care than is due to them. And because "individuals and agencies should not take on responsibilities they cannot manage" (383) some action is called for. What action?

Kipnis is a bit slippery on this. His initial response is that if, as is true in a number of states, "funds are insufficient to provide a decent minimum for inmates, . . . the only solution is to reduce the inmate population to a level at which the available resources will be sufficient" (383), but later he goes on to suggest that "we should decriminalize the least harmful [offenses]" (ibid.). And then, in closing, he offers without comment the following options: "decriminalization, amnesty, prison alternatives, and reduced sentences, so that the available resources can meet the needs of a smaller inmate population" (ibid.).

In an earlier draft of his paper, Kipnis referred to a pending Supreme Court case that has now been decided and which, he notes in passing, was decided in a way that is "largely consistent with the conclusions" for which he argues.

Now I don't want to hold Kipnis too strictly to this observation. However, insofar as the case in question, *Brown v. Plata*,[2] was related to correctional health care, I want to bring it or at least the arguments it raises to bear on some of the issues at stake. I'm not sure that Kipnis would disagree with all that I have to say here, even by way of criticism, for some of my remarks may simply clarify and develop a position with which he would otherwise be sympathetic. I say this because most of his prescriptive remarks come near the end of the paper and are not developed at any great length.

BROWN V. PLATA

Briefly put, *Brown v. Plata* had its origins in a 1990 case, *Coleman v. Brown*, in which it was found that Californian prisoners with serious mental illnesses did not receive minimally adequate care for their mental health conditions. That led to some oversight of the Californian system. Ten years later, in another case, it was argued that the general medical well-being of Californian prisoners had not improved but was deteriorating even further, to the point that inmates' Eighth Amendment rights were not being met. By 2005, there still had been no compliance with an injunction that was stipulated in 2001 (*Plata v. Brown*), and a three-judge court, which accepted that overpopulation was the prime cause of deficient health care, then used a provision of the federal Prison Litigation Reform Act (PLRA, 1996) to mandate reductions in the prison population, and ordered the state of California to reduce its prison population—within a couple of years—from almost double to 137.5 percent of its capacity. The effect of this would have been to release, all told, up to 46,000 prisoners. It was this decision that, in *Brown v. Plata*, the Supreme Court reviewed and affirmed.[3] As has become common in the Roberts Court, the decision was 5-4, with the usual suspects—the liberals lining up on one side, with Kennedy providing the swing vote in their favor, and, for the minority, Thomas backing Scalia, and Roberts backing Alito. I'll return to some of the sticking points a bit later.

The majority in *Plata* accept that failures in correctional health care—for both mentally disturbed and other medically needy prisoners—is *primarily the result of overcrowding in prisons*, with its consequent dilution of resources, and that this dilution is not practicably fixable by an infusion of money from the state of California, because the latter is financially too cash-strapped to do so.[4] That is the main reason why it accepts the earlier court's decision that the state should divest itself of 46,000 inmates. Releasing prisoners will increase the availability of resources. And that is the option toward which Kipnis initially gravitates.

As a relatively quick-fix solution, the release option has something to be said for (as well as against) it, though what I think it should also have done in Kipnis's case is force a review of his initial assumptions. For, *given those assumptions*, prematurely releasing 46,000 inmates into the community would constitute a fairly drastic solution. That is an issue on which the minority tends to harp. If, however, we question some of those assumptions, then a rationale for release becomes much more plausible.

REVIEWING THE CASE AND KIPNIS

(A) IMPRISONMENT AND THE MENTALLY ILL

One factor that might trigger our immediate concern is the association of mental illness with imprisonment. Some dimensions of that concern relate simply to the conditions under which the mentally ill are incarcerated, especially, though not exclusively, in view of the overcrowding. Data provided in *Plata* concerning prison suicides, assaults by mentally disturbed prisoners, the isolation of mentally disturbed prisoners without treatment and the consequent worsening of their condition, and so on, make it pretty clear that a Californian prison, and maybe prison itself, is not a good place for a mentally disturbed person to be.

There have been various studies of mental disorder in prisons, and estimates of significant disorder tend to range between 15 percent to 25 percent of those incarcerated. Given the *Plata* figures, that amounts to between 23,440 and 39,000 of prisoners suffering from significant mental disorders.

Now, I accept that mental illness per se does not relieve one of responsibility for wrongdoing, and may also not relieve one of responsibility for crime. But the numbers are worrying enough to suggest that a significant number of people in prison should probably be in different facilities or, alternatively, be receiving treatment on the outside. Since the de-institutionalization initiatives of the 1960s and 1970s, and the subsequent collapse of alternative treatment initiatives, prison has become a convenient way of dealing with people whose mental disorders have given rise to social disruptions or violations of one kind or other.

Already we are nibbling at Kipnis's assumptions about the legitimacy of imprisoning those who are currently incarcerated. The problem is not that some of these people are getting inadequate care in prison—presuming that it would be possible to get adequate care there—but that they should probably not be in prison in the first place. Maybe some of them should be in another secure facility; but it is just as likely that some of them should simply be receiving a different kind of care from what, even in better circumstances, a prison would offer them.[5]

(B) OVERCRIMINALIZATION

The majority in *Plata* allow that prison overcrowding is the "primary" reason for the California's correctional health care deficiencies. "Primary" is the weasel word here. It is certainly a convenient reason. It is, however, the plausibly primary reason only if you make the kinds of assumptions that Kipnis does at the beginning of his paper. I would be more inclined to say that overcrowding provides a good reason not only for the parlous state of correctional health services in Californian prisons but also for reviewing the paper's initial assumptions and perhaps questioning them. That may give us better (whether or not more politically viable) insight into the most acceptable practical strategy for dealing with the correctional health problem. Let me explain.

The United States has by far the highest incarceration rate in the world—in 2009, 743 per 100,000 residents compared to 577 per 100,000 in Russia, the runner up. By contrast, the figures for the United Kingdom were about 155 and, for Canada, 117. Obviously we can speculate about the possible reasons—Does the United States have more bad citizens than others? Does it have a more efficient criminal justice system? Does it incarcerate people for longer periods than other comparable societies? and so on—The simplest truth of the matter is that American society and its criminal justice system are very punitive. Furthermore, many of those in prison are there because of American attitudes to drug use—the criminalization and punishment of drug use. Many drug offenders are non-violent, yet there has been a massive increase in the prosecution and imprisonment of non-violent drug offenders since the mid 1980s.

Were the American response to drugs and drug-related offenses, and to criminalization more generally, different from what it is—more like that in comparable countries—the prison population would look very different and be much smaller.

In his recent book, *Overcriminalization*, Douglas Husak powerfully argues that a distinguishing feature of the United States is its tendency to overcriminalize, one of the effects of this being an inordinate and successful if questionable reliance on plea bargaining.[6] Some 95 percent of U.S. criminal cases are resolved as a result of plea bargains, and although there are supposed to be safeguards to ensure that defendants get a fair shake, the simple fact of the matter is that plea bargaining is more efficient than fair. Because of overcriminalization, defendants are hit with a fistful of charges for single acts deemed to have violated a large number of criminal rules, and then offered the opportunity to have most of them dropped if they plead guilty to one or two. Such offers are often irresistible and, no doubt, sometimes coercive, especially for the resource-poor, as the plea-bargained offense is likely to result in a significantly lighter sentence than would be the case were the multiple charges to succeed in court.[7] Even so, offenses in the United States tend to attract longer prison sentences than elsewhere.

Overcriminalization is, of course, a reason for moving in the direction in which Kipnis wants to go. But it—along, perhaps, with mental illness—also helps to identify the 46,000 (or more) people who ought to be released from prison. Kipnis speaks generally about releasing people. But he doesn't really have anything to say about who they might be. Is it those who are currently getting inadequate treatment, or should they stay so that they can get better treatment while others are released? Should other criteria—such as dangerousness, length of time to serve, etc.—be involved? These are questions to which I will return.

THE IMPORTANCE OF GOING BACK TO ASSUMPTIONS

One of the problems of bracketing off the sort of issues that Kipnis does is that it easily skews the range of practical options that are seen to be available and that ought to be considered. Or, if not that, it leaves us without a practical handle on release decisions. What is noticeable about the minority responses to the *Plata* decision is their firm belief in the reasonableness of Kipnis's initial assumptions and therefore of—as they see it—the very radical nature of any decision to release prisoners. They do their best to argue for alternatives. They point to the potential problems involved in releasing prisoners and use these to advocate other options.

As usual, Justice Scalia seeks to press the buttons of fear. He says of such releasees: "Most of them will not be prisoners with medical conditions or severe mental illness; and many will undoubtedly be fine physical specimens who have developed intimidating muscles pumping iron in the prison gym" [5]. A similar worry is also expressed by Justice Alito. Given that the overpopulation of Californian prisons is not itself unconstitutional, he argues that the remedy needs to be tailored to the need, and writes: "Instead of crafting a remedy to attack the specific constitutional violations that were found—which related solely to prisoners in the two plaintiff classes—the lower court issued a decree that will at best provide only modest help to those prisoners but is very likely to have a major and deleterious effect on public safety" [2]. He talks of "the premature release of approximately *46,000 criminals—the equivalent of three army divisions*" [2, his emphasis]. If the public safety issue can be pumped up sufficiently, a search for alternatives to release becomes much more plausible and pressing.

I happen to disagree with the fear mongering, and think that there are ways of releasing prisoners that are socially unproblematic. But it does require some weakening of the initial assumptions. The majority does not say so in so many words, partly because it is not in a position to say so. It is, however, willing to indicate ways of discriminating among

prisoners. Although it leaves it to California to decide how it might go forward with the prisoner release,[8] it talks about the use of good-time credits, and the diversion of low-risk offenders and technical parole violators to community-based programs [3, 33, 39]. It is not difficult to read between the lines and see that the majority is of the opinion that some of the people who are behind bars can be safely released or ought not to be there.

There is, unfortunately, an ambiguity about "release" that Kipnis does not pick up on but which partly meets the Californian dilemma. And that is the shifting of prisoners from overcrowded facilities to less overcrowded but still incarcerative ones. In the majority's opinion, Justice Kennedy notes that since the time of and in response to the three-judge court decision and the Supreme Court's hearings, some 9,000 prisoners had been released, leaving only 37,000 to go. It turns out though, that many of these prisoners had simply been shifted to less crowded *county jails*. Although that may have ameliorated the situation that led to the Supreme Court decision, it almost certainly did not constitute a morally adequate alternative—*unless of course you accept the legitimacy of Kipnis's background assumptions*. Even though I think that Kipnis is on the side of the angels, this Californian strategy does, unfortunately, go some way to responding to his "release" prescription.

The court majority refrained from greater prescriptivity as a matter of policy. Even so, affirming the earlier court's decision aroused the ire of the minority. They argued, albeit not on the basis of a different principle, that how a state runs its prisons is for the state itself to determine, and that by affirming the earlier court's decision the majority overstepped the bounds of its competence and mandate. Although the Supreme Court is to some extent the guardian of the Constitution and its interpretation, it is for the states themselves to determine how best to run their prison systems.

There may be some justification for this in the political division of labor that underlies federalism. There is at least an argument for saying that states are generally better placed to run their own institutions than the federal government or federal courts. Although that won't always be the case, it might be argued that it is true often enough to make the federal courts extremely wary of intervening, restricting their interventions to cases in which constitutional violations have become embedded.

It is also arguable that the courts are not well equipped to administer prisons. Justice Scalia quotes from an earlier case in which the court stated: "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government" [11, quoting from *Turner v. Safley*, 482 US 78, 84-85 (1987)]. Now, that may be true as a general matter, just as we may think it appropriate for parents to determine the needs of their children. But on some occasions parents overstep important moral or other boundaries and others must intervene. So it might also be argued here. Scalia cannot go from what may be true as a general principle to what must be true in every case.[9]

Justice Scalia also has a different, though related, jurisprudential concern when he claims that the majority's decision constitutes a "structural injunction," by means of which judges "engage in a form of factfinding-as-policymaking that is outside the traditional judicial role" [7]. In its deliberations the court accepts as fact findings that are part of the record and therefore not open to review. As Scalia puts it, "it is impossible for judges to make 'factual findings' without inserting their own policy judgments, when the factual findings *are* policy judgments" [9]. He takes this kind of "dressing up of policy judgments as factual findings" to be "an unavoidable concomitant of institutional-reform litigation" [9]. Structural injunctions invite "judges to indulge *incompetent* policy preferences" [9].

CONSTITUTIONAL VIOLATIONS

Kipnis is right to draw attention to the constitutional protections that prisoners have, first of all, as "captives" of the state, and then as entitled to a level of care that does not violate the Eighth Amendment protection against "cruel and unusual punishment."

Neither the liberal nor the conservative members of the court disagree about the state's responsibility for correctional health care. What they disagree about is whether the problems in the Californian system constitute the kind of Eighth Amendment violation for which the response that Kipnis canvasses is appropriate:

> Medical needs are not being met.
>
> As a result some prisoners are suffering from what amounts to cruel and unusual punishment.
>
> The failure to meet those medical needs arises primarily from a dilution of resources arising from prison overcrowding.
>
> Therefore enough prisoners need to be released to alleviate the burden on resources.

This is not a very tight argument, and the conservative members of the court do what they can to drive a truck through it. They accept that some medical needs are not being met. They even accept that some prisoners are thereby suffering what sinks to the level of "cruel and unusual punishment," though they are not convinced that all of these cases display the "deliberate indifference" that *Estelle* requires before an Eighth Amendment violation can be said to occur. Such "deliberate indifference" is said to reside in the fact that, for well over a decade, the Californian system had shown little improvement, despite mandates that it should. Now there is a factual issue here about which the majority and minority disagreed, but which I will not pursue.[10] And, of course, even if it could be shown that the Californian system had shown little improvement, it still needs to be established that this constitutes "deliberate indifference." Failing to respond to needs adequately because one is strapped for cash or resources or even gridlocked does not automatically translate into "deliberate indifference."

Of course, pointing out the difficulties in a constitutional argument is not the same as pointing out difficulties in a moral argument. Even without a constitutional claim we can assert with some confidence that the Californian authorities had badly failed their medically needy inmates (and no doubt their inmates more generally) in not providing adequate space and health care resources and, further, that strong rectificatory measures were—*morally speaking*—called for. Failure does not have to sink to the level of "cruel and unusual punishment" for correctional authorities to be morally obligated to address it.

The minority gives qualified acceptance to the idea that the problems have arisen primarily as a result of overcrowding. But they are very skeptical that the proposed remedy is the only one available. As I've noted, part of their motivation for pointing out the gaps in the argument lies in their acceptance of Kipnis's original assumptions: these people belong behind bars, and we should look for solutions that keep them where they belong.

Probably the main contention of both Alito and Scalia is that there is a mismatch between the problem and the remedy. Starting from the contention of almost all court witnesses that the primary problem in the Californian system is overcrowding, they point out that overcrowding as such does not constitute a constitutional violation. Only a subgroup of prisoners—and only a proportion of those with medical needs—fail to get "the minimal civilized measure of life's necessities" that the Eighth Amendment requires [Alito, 2].[11] There is, Alito thinks, therefore no clear or direct connection between releasing 46,000 inmates and remedying the situation of that subgroup.

What about the argument that the court makes, and that I think Kipnis accepts, that if 46,000 inmates are released, there will be enough medical services to go around, thus remedying the situation of such people? Although I have no doubt that there is something to this argument, there may not be as much as we would like. It surely depends on who the 46,000 will be.

(1) Allow that some [perhaps all] of them will be people with medical and mental health needs. Will they have those needs met "on the outside"? Not obviously. Some of them might receive appropriate treatment because, as non-captives, they will be at liberty to access suitable health care. At least they will not be prevented from getting it by virtue of their captivity. But whether they will get it, or get adequate care on the outside, is more problematic. They might simply find themselves in the position of a lot of people in the country who do not have, for reasons of cash or geography, access to the care that they need. Of course, they will no longer be a *constitutional* problem, as only inmates have a constitutional right to health care.[12]

(2) Now allow that some (perhaps all) of the prisoners who remain inside are those with medical needs but who are now in circumstances in which their constitutional right to adequate health care can be met. Will their needs be met? Well, they are likely to be better off than they were. But how much better off will depend on a number of considerations to which both the majority and minority allude but to which they do not give a great deal of attention. Insofar as the remedy is not directed specifically at the health care needs of those whose constitutional rights are being violated, there is plenty of room for slippage between the remedy and the cure. There are several factors involved here:

(a) A general factor is that the court did not want to be too hands-on with regard to its remedy. It saw the task of running prisons to be that of the state and its agents. I will say no more about that. The court itself is going to do little about ensuring better health care.

(b) Another factor is distributional. What the court required was an overall reduction in the number of inmates to 137 percent of capacity. But—as the court itself acknowledged—that did not prevent the state from making reductions in a way that left some facilities grossly overcrowded and without adequate health care resources.

(c) A third factor is that in any case the prison system had a large number of correctional health care vacancies that it had budgeted for and had been unable to fill. In other words, it was not a simple matter of inadequate financial resources but also an inability to attract qualified staff. It was reported to the court that budgeted vacancy rates ranged as high as 20 percent for surgeons, 25 percent for physicians, 39 percent for nurses, and 54 percent for psychiatrists [20]. Even with 137.5 percent overcrowding, it is unlikely that correctional health care would have been an attractive option for most competent and professional providers.

(d) Unfortunately, "qualified staff" in a prison setting does not always amount to much. Those who offer services in prisons often do so because their services are not wanted elsewhere. In the 2001 *Plata* case, it was reported that prisons were reduced to hiring "any doctor who had a license, a pulse, and a pair of shoes'" [10, citing the District Court, 926]. That's not always true, of course, and I don't mean it to cast aspersions on those who work within prisons, but it may be true often enough to make it unlikely that prison health care is very good overall.[13] True, it may be better than the health care that prisoners will actually get on the outside. It may not fail constitutional standards, but it may be poorer than the care that prisoners need.

(e) Yet another factor that is often overlooked is the conflict that health care professionals may experience within a prison setting. The institutional demands for security and order may well clash with health care best practice, and particularly, though certainly not exclusively, where the provision of mental health services is concerned.

WHO SHOULD BE RELEASED?

I've already made certain comments on this that encroach back on Kipnis's assumptions. And, of course, when it comes to the practical crunch, Kipnis himself does. At the very end of his paper he talks about decriminalization—presumably because some of the people who are in prison don't deserve to be labelled as criminals, and are therefore not meet for imprisonment. And when he refers to prison alternatives, he concedes that though the deprivation of liberty may be a punishment option, it need not be the

appropriate option for all. The option of reduced sentences also takes us back to the initial assumptions: some may be punished too severely. And that then leaves us with amnesty.

Now, as I hope I have made clear, I do not think we should dismiss the release option. It does, however, need to be implemented in a way that, on the one hand meets the constitutional claims of those who are currently being shortchanged and, on the other hand, does not create an unacceptable public safety problem. We have already noted some of the problems associated with either releasing those with medical needs so that they are no longer constitutionally violated or, not releasing them so that adequate medical resources will be available to them.

As I have also noted, in the majority opinion several other options are canvassed without being mandated—moving inmates to other, less crowded facilities, parole reform (including the release to community programs of people who have been re-admitted for technical violations of parole), sentencing reform (including the use of good time credits, the release of inmates who appear to pose no social danger). These all represent legitimate ways of selecting among inmates, though all of them require some qualification of Kipnis's background assumptions. One of Kipnis's background assumptions in particular should come up for reconsideration. Even if, in a liberal society, it makes good sense to punish people by depriving them of one of their most important liberal goods, it is at least arguable that that form of punishment should be largely restricted to those who would otherwise pose an ongoing danger to society. In that case, the release of those who pose no ongoing social danger would not merely satisfy the public safety concerns of release but also provide a moral argument for not ordinarily using imprisonment as punishment in the absence of some ongoing social danger.

NOTES

1. These principles are stated in Kenneth Kipnis, "Social Justice and Correctional Health Services," *Medicine and Social Justice*, ed. Rosamond Rhodes, Margaret Battin, and Anita Silvers, 375–76 (Oxford University Press, 2012). Page numbers in round brackets refer to this paper.
2. *Brown v. Plata* 563 U.S. ____ (2011) [No. 09–1233. Argued November 30, 2010—Decided May 23, 2011], available at http://www.supremecourt.gov/opinions/10pdf/09-1233.pdf.
3. The minority makes something of a meal of the number in question (46,000) because, by the time the court decided the case, the number had been reduced to 37,000, and the system was not prevented from releasing the remainder in a measured way—say, by using good-time credits and diversion of low-risk offenders and technical parole violators to community-based programs.
4. Proposals to ship prisoners out of state had not been implemented and building new facilities was not budgetarily possible. Furthermore, even budgeted health-care positions were not being filled. There was only a remote possibility that diminished numbers would make the provision of health-care services in Californian prisons a more attractive option for health-care providers.
5. This involves what may be a questionable assumption—viz. that the mental health care they receive on the outside is *likely to* (and not simply *could*) be better than the care received in prison. As Kipnis notes, prisoners are the only people with a constitutional right to health care (*Estelle*), and it is arguable that, with all its faults—and they are many—people *actually* do better in prison than they would on the outside, even though one *can* get better quality health care outside prison. See Sung-Suk Violet Yu, Jeff Mellow, Hung-En Sung, and Carl Koenigsmann, "When Incarceration Leads to Improved Health Outcomes: Importance of Previous Health in Predicting Health Outcomes in Custody," unpublished, submitted *to Journal of Urban Health*.
6. Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (NY: Oxford University Press, 2008).
7. Although plea agreements are judicially reviewed, such reviews are often perfunctory. On plea bargaining generally, see Richard L. Lippke, *The Ethics of Plea Bargaining* (NY: Oxford University Press, 2011).
8. *Brown v. Plata*, 35. See Jennifer Medina, "California Sheds Prisoners but Grapples with Courts," *New York Times*, January 21, 2013, available at http://www.nytimes.com/2013/01/22/us/22prisons.html?_r=0.
9. Moreover, as I suggested earlier, it is not just an issue about how to run a prison but of what gets or keeps people in prison in the first place. The Supreme Court may feel some obligation to make Kipnis's initial assumptions. Kipnis himself is not under a similar constraint.
10. Whereas the minority argued that an earlier court deliberately excluded evidence of improvement, the majority argued that there was no salient evidence.
11. From *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).
12. We have some evidence from the studies conducted by Yu and Pezzella that the general health of prisoners with pre-existing health problems is likely to improve inside prison.
13. There have been a number of studies and exposés to this effect. Prison health care is usually tendered, and the companies who win such tenders are often flawed providers.

Undermining Retributivism

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1. INTRODUCTION

The focus of my paper is the relationship between free will and conceptions of punishment. In particular, I wish to examine how our conception of free will is related to the notion of retributive punishment. Retributivist conceptions of punishment rely on the notion of "desert," which requires that individuals be able to choose their actions.

In this paper, I will review some empirical evidence that is sometimes used to argue that the concept of free will required to buttress the notion of moral and legal responsibility is either entirely false or very different from what has been previously assumed. I will discuss how this empirical evidence points to the more general problem of the purported incompatibility between scientific determinism and free will. I argue that in so far as there are limitations to the human ability to control behavior, then the notion of retributive punishment is undermined because decreased free will results in decreased responsibility. My argument, however, does not follow from a defense of scientific determinism. Finally, I will argue that if incarceration is not conceived of as punishment in the retributive sense, this is further reason to argue that the state has custodial responsibilities towards prisoners with regards to their health care.