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# Prisoners' Rights Lawyers' Strategies for Preserving the Role of the Courts

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# Prisoners' Rights Lawyers' Strategies for Preserving the Role of the Courts

MARGO SCHLANGER\*

*This Article is part of the University of Miami Law Review's Leading from Below Symposium. It canvasses prisoners' lawyers' strategies prompted by the 1996 Prison Litigation Reform Act ("PLRA"). The strategies comply with the statute's limits yet also allow U.S. district courts to remain a forum for the vindication of the constitutional rights of at least some of the nation's millions of prisoners. After Part I's introduction, Part II summarizes in several charts the PLRA's sharp impact on the prevalence and outcomes of prison litigation, but demonstrates that there are still many cases and situations in which courts continue to play a role. Part III looks at three methods by which plaintiffs and defendants can jointly obtain injunctive-type relief in prison cases—by crafting stipulations that comply with the PLRA's constraints, by structuring the relief as a conditional dismissal, or by setting up the possibility of state-court enforcement. Part IV examines plaintiffs' coping methods for the PLRA's provisions that ease the path to termination of decrees, whether litigated or by consent. Two types of preparation for a termination motion have emerged: First, the parties sometimes agree to stretch out the remediation period more than the PLRA's default two years. Second, plaintiffs have worked to ensure that they are collecting sufficient information to inform their potentially hurried response to a termination motion. It is my hope that the examples presented below can help counsel and judges in prisoners' rights cases thread the needle that the PLRA presents. More theoretically, the examples demonstrate that litigation tactics and procedures are dynamic—that rule changes affect the parties' bargaining positions but rarely eliminate bargaining altogether.*

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\* Henry M. Butzel Professor of Law, University of Michigan. Thanks to Grady Bridges for data management assistance, and to John Boston and David Rudovsky for comments. And thanks to the participants in the *University of Miami Law Review's Leading from Below Symposium* for their feedback on the presentation that preceded this Article. Like that Symposium, this Article is dedicated to Judge Jack Weinstein, who needs less help from lawyers than anyone has any right to expect. I wish to acknowledge the generous support of the William W. Cook Endowment of the University of Michigan.

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## I. INTRODUCTION

In 1996, Congress imposed draconian restrictions on the litigated remediation of unconstitutional conditions of confinement in jails and prisons. The Prison Litigation Reform Act (“PLRA” or “Act”),<sup>1</sup> a statute enacting part of the Newt Gingrich “Contract with America,”<sup>2</sup> made it harder for prisoners to bring, settle, and win lawsuits.<sup>3</sup> The PLRA conditioned court access on prisoners’ meticulously correct prior use of onerous and error-inviting prison grievance procedures.<sup>4</sup> It increased filing

1. Prison Litigation Reform Act, Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to -77 (1996) (codified at 11 U.S.C. § 523 (2012); 18 U.S.C. §§ 3624, 3626 (2012); 28 U.S.C. §§ 1346, 1915, 1915A (2012); 42 U.S.C. §§ 1997–1997h (2012)). The PLRA was part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

2. CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 53 (Ed Gillespie & Bob Schellhas eds., 1994).

3. For in-depth examination of the PLRA’s impact on damage actions, see Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003) [hereinafter Schlanger, *Inmate Litigation*]. For in-depth examination of the PLRA’s impact on injunctive litigation, see Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006) [hereinafter Schlanger, *Civil Rights Injunctions*].

4. 42 U.S.C. § 1997e(a) (“No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”). See *Woodford v. Ngo*, 548 U.S. 81 (2006). A good deal has been written about this provision. See, e.g., Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139 (2008); Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771 (2003); Alison M. Mikkor, *Correcting for Bias and Blind Spots in PLRA Exhaustion Law*, 21 GEO. MASON L. REV. 573 (2014); Eugene Novikov, Comment, *Stacking the Deck: Futility and the Exhaustion Provision of the Prison Litigation Reform Act*, 156 U. PA. L. REV. 817 (2008); Giovanna Shay, *Exhausted*, 24 FED. SENT’G REP. 287 (2012).

fees,<sup>5</sup> decreased attorneys' fees,<sup>6</sup> and limited damages.<sup>7</sup> It subjected injunctive settlements to the scope limitations usually applicable only to litigated injunctions.<sup>8</sup> It made population caps—previously common—far more difficult to obtain.<sup>9</sup> And it put in place a rule inviting frequent relitigation of injunctive remedies, whether settled or litigated.<sup>10</sup>

All of this together has had a very drastic effect on jail and prison litigation. Filings took an immediate dive in 1996 and decreased steadily for a number of years subsequent; more recently, there has been a plateau.<sup>11</sup> And court orders governing jail and prison conditions have grown much rarer.<sup>12</sup> Yet district judges continue to enter and enforce remedies against unconstitutional conditions of confinement. They are able to do this in large part because there remains an active prisoners' rights bar continuing to litigate in federal district courts.

I have previously written to urge observers to remember that American judges are far from autonomous:

[T]he rules of litigation largely confine judicial response to the record developed and the arguments presented by the parties; for a plaintiff's judgment, there must be a connection between the order a court

5. 28 U.S.C. § 1915(b) (excluding prisoners from the ordinary in forma pauperis ability to file without payment of fees). *See* 28 U.S.C. § 1914(a) (2012) (setting the fee for a district court civil action at \$350).

6. 42 U.S.C. § 1997e(d)(2)(3) (capping defendants' liability for attorneys' fees in civil rights cases at 150% of the rate paid publicly appointed defense counsel). In addition, the PLRA has been read to further cap defendants' liability for attorneys' fees in monetary civil rights cases at 150% of the judgment. 42 U.S.C. § 1997e(d)(2); *see, e.g.*, *Robbins v. Chronister*, 435 F.3d 1238 (10th Cir. 2006) (en banc) (reversing district court and disagreeing with appellate panel, holding that this limitation applies even to fees awarded for a lawsuit involving a pre-incarceration claim). At least one court has held, however, that the statutory text does not support this latter limitation. *Harris v. Ricci*, 8 F. Supp. 3d 583 (D.N.J. Mar. 28, 2014), *rev'd in part*, Nos. 14-1998, 14-2102, 2014 WL 7389905 (3d Cir. Dec. 30, 2014).

7. 42 U.S.C. § 1997e(e) ("No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act."). *See, e.g.*, Hilary Detmold, Note, *'Tis Enough, 'Twill Serve: Defining Physical Injury Under the Prison Litigation Reform Act*, 46 SUFFOLK U. L. REV. 1111 (2013).

8. 18 U.S.C. § 3626(a)(1)(A) (2012) ("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."). *See infra* Part III.A.

9. 18 U.S.C. § 3626(a)(3) (setting out procedural and substantive hurdles to obtaining a "prisoner release order"); *see also* *Brown v. Plata*, 131 S. Ct. 1910 (2011) (affirming imposition of such an order in California).

10. 18 U.S.C. § 3626(b) (allowing defendants in prison conditions cases to periodically seek "termination" of previously entered injunctions). *See infra* Part IV.A.

11. *See infra* Table 1.

12. *See infra* Table 2.

issues, and the claims, evidence, and requested relief plaintiffs' counsel submits. . . . [T]he identity, priorities, litigating strategies, and resources of plaintiffs' counsel have been of great importance to the shape and success of litigated prison reform.<sup>13</sup>

Judges in prison and jail cases, I argued, have "generally acted by following a path proposed by plaintiffs' counsel and by building on the foundation laid at trial."<sup>14</sup> In the years since passage of the PLRA, and faced with the kind of court-stripping Congress attempted with that statute,<sup>15</sup> judges need assistance from the parties more than ever. It is for this reason that this Article about the strategies the PLRA has prompted prisoners' lawyers to use in injunctive cases fits as part of this Symposium exploring federal district judges' roles. The strategies comply with the statute's limits and also allow U.S. district courts to remain a forum for the vindication of the constitutional rights of at least some of the nation's millions of prisoners. It is my hope that the examples presented below can help counsel and judges in prisoners' rights cases thread the needle that the PLRA presents.

## II. TRENDS IN PRISONER LITIGATION

The PLRA's sharp impact on the prevalence and outcomes in prison litigation is clear, but there are still many cases and situations in which courts continue to play a role. Two tables will make this point. Table 1 shows jail and prison populations from 1970 to the present, along with federal court filings categorized by the courts as dealing with "prisoner civil rights" or "prison conditions."<sup>16</sup> Figure A presents some of the same information in graphic form. Most of these cases seek dam-

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13. Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2015 (1999).

14. *Id.* at 2015–16.

15. See, e.g., Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445 (1998) (describing the PLRA and two other 1996 statutes, and observing that "[t]his spate of congressional jurisdiction-stripping imposes what may be the most significant limitations on federal jurisdiction since those enacted in connection with World War II price controls and draft legislation"); John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429 (2001); Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291 (2007).

16. Litigation figures are calculated using data released annually by the Administrative Office of the U.S. Courts, available in digital form from the Inter-university Consortium for Political and Social Research. See *Federal Court Cases: Integrated Database Series*, ICPSR, <http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/00072/studies> (last visited Aug. 30, 2014). Prisoner population figures come from a variety of publications by the Bureau of Justice Statistics, a component of the U.S. Department of Justice. Sources are set out comprehensively in the Appendix that follows this Article.

ages (although only a sliver succeed in obtaining them<sup>17</sup>). Table 2 shifts to injunctive litigation, showing the prevalence of court orders governing conditions of confinement reported in the Bureau of Justice Statistics jail and prison census of the given years.<sup>18</sup>

TABLE 1: PRISON AND JAIL POPULATION AND PRISONER CIVIL RIGHTS FILINGS IN FEDERAL DISTRICT COURT, FISCAL YEARS 1970–2012<sup>19</sup>

Fiscal year of filing	Incarcerated population				Prisoner civil rights filings in federal district court			
	Total	State prison	Federal prison	Jail	Total Filings	Non-federal defendants	Federal defendants	Filings per 1000 prisoners
1970	359,555	178,654	20,038	160,863	2,245	2,092	153	6.2
1971	358,061	177,113	20,948	160,000*	3,179	2,969	210	8.9*
1972	356,092	174,379	21,713	160,000*	3,635	3,393	242	10.2*
1973	364,211	181,396	22,815	160,000*	4,665	4,257	408	12.8*
1974	389,721	207,360	22,361	160,000*	5,573	5,185	388	14.3*
1975	413,816	229,685	24,131	160,000*	6,527	6,020	507	15.8*
1976	438,000	248,883	29,117	160,000*	7,096	6,702	394	16.2*
1977	449,563	258,643	30,920	160,000*	8,347	7,842	505	18.6*
1978	454,444	269,765	26,285	158,394	10,087	9,520	567	22.2
1979	474,589	281,233	23,356	170,000*	11,713	11,149	564	24.7*
1980	503,586	295,819	23,779	183,988	13,079	12,496	583	26.0
1981	556,814	333,251	26,778	196,785	16,328	15,539	789	29.3
1982	614,914	375,603	27,311	212,000	16,809	16,075	734	27.3
1983	651,439	394,953	28,945	227,541	17,512	16,788	724	26.9
1984	678,905	417,389	30,875	230,641	18,337	17,468	869	27.0
1985	752,603	451,812	35,781	265,010	18,485	17,658	827	24.6
1986	802,132	496,834	39,781	265,517	20,360	19,654	706	25.3
1987	853,114	520,336	42,478	290,300	22,067	21,410	657	25.9

17. See Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 4 U.C. IRVINE L. REV. (forthcoming 2015), available at <http://ssrn.com/abstract=2506378>.

18. Court order data is from the Bureau of Justice Statistics jail and prison censuses, which attempt a comprehensive census of the nation's jails and prisons approximately every five years. Comprehensive information on these sources is set out in the Appendix. The censuses tally responses from nearly every prison and jail, but those responses omit many known court orders. For example, there has been a court order involving mental health care at every California prison since 1997 and one involving medical care since 2002. (For information on the mental health orders, see *Case Profile: Coleman v. Brown, No. 2:90-cv-00520 (E.D. Cal.)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=573> (last visited Aug. 30, 2014). For information on the medical decree, see *Case Profile: Plata v. Brown, No. 3:01-cv-01351 (N.D. Cal.)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=589> (last visited Aug. 30, 2014); the Order Adopting Class Action Stipulation as Fair, Reasonable, and Adequate, *Plata v. Davis, No. 3:01-cv-01351 (N.D. Cal. June 20, 2002)*, available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0018-0001.pdf>; and the underlying Stipulation for Injunctive Relief, *Plata v. Davis, No. 3:01-cv-01351 (N.D. Cal. June 13, 2002)*, available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0018-0001.pdf>.) Yet no California prison reported any court order in the Census responses in 2005. So the data in Table 2 should be taken as indicative of trends rather than dispositive about any given state or facility.

19. Sources for all data include the Bureau of Justice Statistics, Administrative Office of the U.S. Courts. See *infra* Appendix for all sources and other details.

Fiscal year of filing	Incarcerated population				Prisoner civil rights filings in federal district court			
	Total	State prison	Federal prison	Jail	Total Filings	Non-federal defendants	Federal defendants	Filings per 1000 prisoners
1988	942,827	562,605	44,205	336,017	22,642	21,866	776	24.0
1989	1,070,227	629,995	53,387	386,845	23,737	22,804	933	22.2
1990	1,151,457	684,544	58,838	408,075	24,051	23,028	1,023	20.9
1991	1,215,144	728,605	63,930	422,609	24,352	23,567	785	20.0
1992	1,292,465	778,495	72,071	441,899	28,544	27,723	821	22.1
1993	1,375,536	828,566	80,815	466,155	31,693	30,842	851	23.0
1994	1,469,904	904,647	85,500	479,757	36,595	35,550	1,045	24.9
1995	1,588,370	989,004	89,538	509,828	39,053	38,022	1,031	24.6
1996	1,643,196	1,032,676	95,088	515,432	38,262	37,126	1,136	23.4
1997	1,733,150	1,074,809	101,755	556,586	26,095	25,226	869	15.1
1998	1,816,528	1,111,927	110,793	593,808	24,212	23,304	908	13.3
1999	1,889,538	1,155,878	125,682	607,978	23,512	22,645	867	12.4
2000	1,915,701	1,177,240	140,064	598,397	23,357	22,399	958	12.2
2001	1,969,747	1,179,954	149,852	639,941	22,131	21,224	907	11.2
2002	2,035,529	1,209,145	158,216	668,168	21,988	21,044	944	10.8
2003	2,082,145	1,225,971	168,144	688,030	22,061	20,914	1,147	10.6
2004	2,137,476	1,244,216	177,600	715,660	21,553	20,337	1,216	10.1
2005	2,189,696	1,261,071	186,364	742,261	22,484	21,317	1,167	10.3
2006	2,260,714	1,297,536	190,844	772,334	22,469	21,443	1,026	9.9
2007	2,295,982	1,316,105	197,285	782,592	21,978	20,825	1,153	9.6
2008	2,302,657	1,324,539	198,414	779,704	23,555	22,395	1,160	10.2
2009	2,274,099	1,319,563	205,087	749,449	22,698	21,552	1,146	10.0
2010	2,255,188	1,314,445	206,968	733,775	22,736	21,614	1,122	10.1
2011	2,227,723	1,290,212	214,774	722,737	23,362	22,067	1,295	10.5
2012	2,229,879	1,266,999	216,915	745,965	22,662	21,628	1,034	10.2

\* Indicates estimate because jail population unavailable.

FIGURE A: PRISONER POPULATION & CIVIL RIGHTS FILINGS PER 1000 PRISONERS, FISCAL YEARS 1970–2012

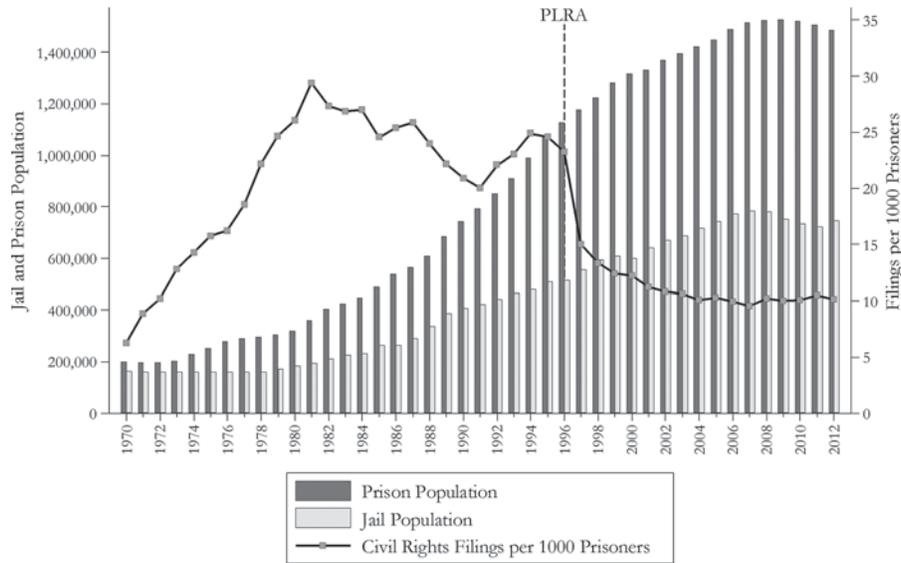


Table 1 and Figure A show four phases in the history of prisoner population and filings. Prison and jail populations went up, steeply at first and then at a slower rate, from 1970 to 2005. Since 2005, prison and jail population has plateaued. The prisoner filing rate has fluctuated more: it increased steeply from 1970 to 1981, declined from 1981 until 1991, increased for a few years, and then plunged as a result of the PLRA. It continued to shrink for some years after that. Since 2007, filing rates, prison population, and filings have all plateaued.

TABLE 2: CHANGING INCIDENCE OF COURT ORDERS GOVERNING STATE AND LOCAL FACILITIES<sup>20</sup>

	Year	(a) Total facilities	(b) % Facilities with orders	(c) Total population	(d) % Population housed in facilities with orders
Local Jails	1983	3,338	18%	227,541	51%
	1988	3,316	18%	336,017	50%
	1993	3,268	18%	466,155	46%
	1999	3,365	17%	607,978	32%
	2006	3,282	11%	756,839	20%
State Prisons	1984	694	27%	377,036	43%
	1990	957	28%	617,859	36%
	1995	1,084	32%	879,766	40%
	2000	1,042	28%	1,042,637	40%
	2005	1,067	18%	1,096,755	22%

Table 2's columns (a) and (c) show the total number of facilities and total incarcerated population, respectively, for jails and prisons in each census year. Columns (b) and (d) then show the proportion of those totals in which the census responses report court orders. For both jails and prisons, Table 2 evidences very substantial continuity in the years prior to the PLRA. From 1983 or 1984 to 1993 or 1995, respectively, about half of the nation's jail inmates, and about forty percent of the nation's state prisoners, were housed in facilities subject to court orders. (See column (d).) Because court orders tended to apply to larger jails and prisons, in terms of the number of facilities (rather than the number of prisoners), the coverage reached a bit under one-fifth of jail facilities and under one-third of prison facilities. (See column (b).) But then came the PLRA. The effect was muted in the first post-PLRA census for both jails and prisons, but, during the 2005 and 2006 censuses, only about twenty percent of state or jail inmates were housed in facilities that reported a court order, and the numbers were still lower if calculated by facility, rather than by population. The PLRA, that is, had a very signifi-

20. Sources for data include the Bureau of Justice Statistics. Data omits Federal prisons/jails and community corrections. See *infra* Appendix for all sources and other details.

cant impact of decreasing—but, importantly, not entirely erasing—the regulatory impact of litigation on jails and prisons.

In other work, I have explicated the many ways in which the PLRA made prisoners' rights cases harder both to bring and to win.<sup>21</sup> I focus next on just two provisions, the first governing entry of and the second governing termination of prospective relief. It is no surprise that, in the nearly two decades since passage of the PLRA, the prisoners' rights bar, along with the lawyers who represent corrections agencies and officials, have responded to the PLRA's requirements by developing new forms and strategies for settlements. In Parts III and IV, below, I set out the relevant provisions of the statute and then describe and analyze those responses.

### III. ENTRY OF RELIEF, INCLUDING SETTLEMENT

#### A. *What the PLRA Requires*

Under the PLRA, “prospective relief,” whether resulting from contested litigation or settlement, may “extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs.”<sup>22</sup> District judges asked to “grant or approve any prospective relief” may not do so “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.”<sup>23</sup> Prospective relief is broadly defined to include “all relief other than compensatory monetary damages . . . .”<sup>24</sup> This approach is consonant with the ordinary rules governing contested entry of injunctions in federal court,<sup>25</sup> but it diverges sharply from the

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21. See Schlanger, *Civil Rights Injunctions*, *supra* note 3, at 589–95; see also Schlanger, *Inmate Litigation*, *supra* note 3, at 1633–64.

22. 18 U.S.C. § 3626(a)(1)(A) (2012); see Elizabeth Alexander, *Isn't It Ironic? The "Particular Plaintiffs" Provision of the PLRA*, 24 FED. SENT'G REP. 229 (2012).

23. 18 U.S.C. § 3626(a)(1)(A). For an exploration of the caselaw on the intrusiveness requirement, see Kiira J. Johal, Note, *Judges Behind Bars: The Intrusiveness Requirement's Restriction on the Implementation of Relief Under the Prison Litigation Reform Act*, 114 COLUM. L. REV. 715 (2014).

24. 18 U.S.C. § 3626(g)(7).

25. For pre-PLRA summaries of federal court injunctive standards, see, for example, *Toussaint v. McCarthy*, 801 F.2d 1080, 1086–87 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987) (Litigated injunction “must be no broader than necessary to remedy the constitutional violation . . . [and] may order relief that the Constitution would not of its own force initially require if such relief is necessary to remedy a constitutional violation . . . [but in that event] must be narrowly tailored to prevent repetition of proved constitutional violations, and must not intrude unnecessarily on state functions.”). See also, *e.g.*, *Dean v. Coughlin*, 804 F.2d 207, 213 (2d Cir. 1986); *Duran v. Elrod*, 760 F.2d 756, 761–62 (7th Cir. 1985). Courts have therefore commented that the PLRA does not change these requirements for litigated relief. See, *e.g.*, *Gilmore v. California*, 220 F.3d 987, 1006 (9th Cir. 2000) (“[I]n the context of contested decrees, then, the

ordinary rules governing settlements. Were it not for the PLRA, courts could approve prisoners' rights settlements, like other settlements, much more freely, without any finding of a legal violation (indeed, avoiding such a finding is a primary settlement motive).<sup>26</sup> And the terms of those settlements would be limited only by the mild constraints that they "spring from and serve to resolve a dispute within the court's subject-matter jurisdiction . . . [,] 'com[e] within the general scope of the case made by the pleadings,' . . . further the objectives of the law upon which the complaint was based," and are not otherwise unlawful.<sup>27</sup> Thus, as the Supreme Court has explained, settlement terms could rise above the constitutional floor; "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial."<sup>28</sup> (In recent years, however, a number of commentators and legislators have argued that the constraints imposed by the PLRA should be made more broadly applicable.<sup>29</sup>)

The PLRA does, however, offer an exclusion from its settlement scope constraints. "[R]elief," the statute's definitional section specifies, "includes consent decrees but does not include private settlement agreements,"<sup>30</sup> which are defined as "agreement[s] entered into among the parties that [are] not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled."<sup>31</sup> The statute emphasizes that it does not "preclude parties from entering into a

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general standard for granting prospective relief differs little from the standard set forth [in the PLRA.]; Smith v. Arkansas Dep't. of Corr., 103 F.3d 637, 647 (8th Cir. 1996) ("[The PLRA] merely codifies existing law and does not change the standards for determining whether to grant an injunction.").

26. In class actions, of course, settlements must be "fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2). This requirement safeguards against settlements that are insufficiently plaintiff, not against settlements that intrude too deeply into defendants' affairs. *E.g.*, United States v. City of Miami, 614 F.2d 1322, 1331 (5th Cir. 1980) ("[C]areful scrutiny is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense of absent class members or shareholders.").

27. Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland, 478 U.S. 501, 525 (1986) (citations and internal quotation marks omitted).

28. *Id.*; see also *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 392 (1992) ("[S]tate and local officers in charge of institutional litigation may agree to do more than that which is minimally required by the Constitution to settle a case and avoid further litigation . . .").

29. For arguments that restrictions like this should apply more generally to consent decrees in government cases, see, for example, ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003); Ross Sandler & David Schoenbrod, *The Supreme Court, Democracy and Institutional Reform Litigation*, 49 N.Y. L. SCH. L. REV. 915 (2005); Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 U. PA. J. CONST. L. 637 (2014). See also Federal Consent Decree Fairness Act, H.R. 3041, 112th Cong. (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3041ih/pdf/BILLS-112hr3041ih.pdf>.

30. 18 U.S.C. § 3626(g)(9) (2012).

31. 18 U.S.C. § 3626(g)(6).

private settlement agreement that does not comply with the limitations on relief . . . if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.”<sup>32</sup> In addition, remedies for breach of a “private settlement agreement” may be sought in state court.<sup>33</sup>

### B. *How Parties Continue to Settle Cases*

Commentators on the PLRA prior to its passage thought the provisions limiting settlements might, in fact, doom all settlements in injunctive cases. For example, then-Senator Joe Biden criticized the PLRA’s “restrictions on the power of those governments from voluntarily negotiating their own agreements,” arguing that this “would place an even greater burden on the courts to litigate and relitigate these suits.”<sup>34</sup> But, in fact, the urge to settle is sufficiently powerful that settlements continue. Parties with abundant reasons to reach agreements have three strategies for getting those agreements approved: craft an acceptable stipulation, structure their settlement as a conditional dismissal, or anticipate state-court enforcement of the settlement.

#### 1. ACCEPTABLE STIPULATIONS

The first method for settling an injunctive case under the PLRA is to obtain the district court’s approval of the consent injunction, consistent with the Act’s requirements. That means obtaining a “find[ing] 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”—following a number of courts and commentators, I’ll call this a “need-narrowness-intrusiveness finding.”<sup>35</sup>

The obstacle this provision poses to settlement is not so much its insistence on narrow remedial scope—after all, a settlement agreeable to both the plaintiffs and the correctional agency they have sued is almost by definition less “intrusive” than a remedy imposed non-consensually. To quote one district court, “that the defendants chose to join the plaintiffs in selecting this remedy would seem to mean—and must be taken to mean—that they understood it to be precisely tailored to the needs of the occasion, that it is narrowly drawn and least intrusive—in fact not intru-

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32. 18 U.S.C. § 3626(c)(2)(A).

33. 18 U.S.C. § 3626(c)(2)(B).

34. 141 Cong. Rec. S14,611–28 (daily ed. Sept. 29, 1995).

35. *E.g.*, *Cason v. Seckinger*, 231 F.3d 777, 784 (11th Cir. 2000); *Benjamin v. Jacobson*, 172 F.3d 144, 150 (2d Cir. 1999); Boston, *supra* note 15, at 445.

sive at all.”<sup>36</sup> Prisoners’ rights lawyer John Boston’s comprehensive summary of the case law explains that even courts that give settlement less weight find “[a]greements between the parties” to be “‘strong evidence,’ if not dispositive, that provisions reflecting those agreements comply with the needs-narrowness-intrusiveness requirement . . . .”<sup>37</sup> The Eleventh Circuit stated the point more generally in an opinion remanding a longstanding Georgia prison case for the district court to decide if there remained a “current and ongoing violation” and whether the challenged relief satisfied the need-narrowness-intrusive standards, explaining that the PLRA does not undermine the ordinary role of stipulations in civil litigation: “[W]e do not mean to suggest that the district court must conduct an evidentiary hearing about or enter particularized findings concerning any facts or factors about which there is not dispute. The parties are free to make any concessions or enter into any stipulations they deem appropriate.”<sup>38</sup>

The problem for settlement is, rather, that the PLRA seems to require a finding of liability—a finding that there has been a “violation of [a] Federal right” for which correction is “necessary.”<sup>39</sup> Such a finding could, like any factual finding in court, rest on a stipulation. But while correctional agencies seeking approval of an injunctive settlement are happy to stipulate that that settlement’s scope is appropriate, they are rarely willing to stipulate in plain language that they have violated the Constitution or a federal statute. Such a stipulation carries significant political cost, after all, and could have adverse collateral effects prejudicing the agency in other lawsuits, including damage actions.

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36. *Morales Feliciano v. Calderon Serra*, 300 F. Supp. 2d 321, 334 (D.P.R. 2004) (footnote omitted), *aff’d*, 378 F.3d 42, 54–56 (1st Cir. 2004), *cert. denied*, 543 U.S. 1054 (2005). *See also, e.g.*, *Little v. Shelby Cnty., Tenn.*, No. 96-2520, 2003 WL 23849734, at \*1–2 (W.D. Tenn. Mar. 25, 2003) (“Where the parties in jail reform litigation agree on a proposed remedy, or modification of a proposed remedy, the Court will engage in limited review for the purpose of assuring continued compliance with existing orders and compliance with the Prison Litigation Reform Act. . . . Clearly, the least intrusive means in this case is that advocated by the parties themselves and determined by the parties and the court-appointed experts as being in the interest of both inmate and public safety.”).

37. JOHN BOSTON, THE LEGAL AID SOC’Y, THE PRISON LITIGATION REFORM ACT (Sept. 14, 2004), available at <http://www.wnyc.net/pb/docs/plra2cir04.pdf> (quoting *Benjamin v. Fraser*, 156 F. Supp. 2d 333, 344 (S.D.N.Y. 2001), *aff’d in part, vacated and remanded in part on other grounds*, 343 F.3d 35 (2d Cir. 2003)) (quoting *Cason*, 231 F.3d at 785 n.8 (noting that “particularized findings are not necessary concerning undisputed facts, and the parties may make concessions or stipulations as they deem appropriate”)); accord *Clark v. California*, 739 F. Supp. 2d 1168, 1229 (N.D. Cal. 2010) (citing parties’ agreement that the agreed to relief met the statutory requirements); *McBean v. City of New York*, No. 02-cv-05426, 2007 WL 2947448, at \*3 (S.D.N.Y. Oct. 5, 2007) (weighing parties’ agreement that detailed requirements meet need-narrowness-intrusiveness standard).

38. *Cason*, 231 F.3d at 785.

39. 18 U.S.C. § 3626(a)(1)(A) (2012).

Accordingly, parties that want settlements have come up with some opaque but—at least for many district courts—acceptable formulations for their stipulations.<sup>40</sup> A few of the negotiated provisions that have passed muster under the PLRA follow:

(a) *Stipulation by statutory citation:*

The court shall find that this Stipulation satisfies the requirements of 18 U.S.C.A. § 3626(a)(1)(A) and shall retain jurisdiction to enforce its terms. The court shall have the power to enforce the Stipulation through specific performance and all other remedies permitted by law. Neither the fact of this Stipulation nor any statements contained herein may be used in any other case or administrative proceeding, except that Defendants reserve the right to use this Stipulation and the language herein to assert issue preclusion and res judicata in other litigation seeking class or systemic relief. When these legal defenses are raised, Defendants will send copies of such complaints to Plaintiffs' counsel.<sup>41</sup>

(b) *Stipulation by statutory quotation:*

The parties stipulate, based upon the entire record, that the relief set forth in this Settlement Agreement is narrowly drawn, extends no further than necessary to correct violations of federal rights, and is the least intrusive means necessary to correct violations of federal rights.<sup>42</sup>

(c) *Stipulation to necessity to correct “the alleged violation”:*

The Court finds that the relief provided in the [Proposed Settlement Agreement] is narrowly drawn and extends no further than necessary to correct the alleged violation in conformance with the Prison Litigation Reform Act, 18 U.S.C. § [3626](a)(1).<sup>43</sup>

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40. For a similar discussion of some of these terms, see Elizabeth Alexander, *Getting to Yes in a PLRA World*, 30 PACE L. REV. 1672 (2010).

41. Stipulation for Injunctive Relief ¶ 149, *Fussell v. Wilkinson*, No. 1:03-cv-00704 (S.D. Ohio Nov. 22, 2005), available at <http://www.clearinghouse.net/chDocs/public/PC-OH-0020-0002.pdf>; see also, e.g., Amended Stipulation and Order, *Perez v. Tilton*, No. 3:05-cv-05241 (N.D. Cal. Aug. 21, 2006), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0033-0002.pdf>; Stipulated Agreement Between Plaintiffs and Defendants at 1, *McClendon v. City of Albuquerque*, No. 6:95-cv-00024 (D.N.M. June 30, 2005), available at <http://www.clearinghouse.net/chDocs/public/JC-NM-0002-0012.pdf>.

42. Settlement Agreement ¶¶ J–K, *Duffy v. Riveland*, No. 2:92-cv-01596 (W.D. Wash. June 3, 1998), available at <http://www.clearinghouse.net/chDocs/public/PC-WA-0003-0004.pdf>. See also, e.g., Consent Order ¶¶ 1–2, *Duvall v. Glendenning*, No. 1:94-cv-02541 (D. Md. Aug. 22, 2004), available at <http://www.clearinghouse.net/chDocs/public/PC-MD-0006-0003.pdf>.

43. Consent Decree, Order and Judgment Approving and Adopting Proposed Settlement Agreement ¶ 11, *Larna Chief Goes Out v. Missoula*, No. 9:12-cv-00155 (D. Mont. Oct. 31, 2013), available at <http://www.clearinghouse.net/chDocs/public/JC-MT-0002-0001.pdf>. See also, e.g., Consent Decree, Order and Judgment at 15, *Lozeau v. Lake Cnty., Mont.*, No. 95-cv-00082

*(d) Stipulation that expressly denies liability:*

The relief granted herein is narrowly drawn, extends no further than necessary to correct a violation of a federal right, and is the least intrusive means necessary to correct the violation of a federal right.

Nothing in this Order and Agreement, including, specifically, the stipulation . . . constitutes an admission of liability and undersigned Defendants . . . vigorously dispute that they have violated the federal rights of Plaintiff . . . or any other adult female inmate. The stipulation set forth . . . is included expressly to facilitate the parties' intent to enable the Court to: (a) retain jurisdiction for the desired term; (b) if necessary, entertain any future motion by North Carolina Prisoner Legal Services, Inc. [“NCPLS”)] . . . to enforce the terms of this Order and Agreement; and (c) serve as the exclusive forum for any such enforcement. The stipulation . . . , as well as all other representations, commitments, or stipulations in this Order and Agreement, shall have no precedential value and may not be relied on as precedent in any future claim, without prejudice or limitation, however, to the ability of NCPLS to enforce the terms of this Order and Agreement.

This Order and Agreement is entered into by the parties as part of an amicable settlement of disputed claims raised in this action. In entering into this settlement, Defendants . . . make no admissions of liability to Plaintiff and voluntarily assume the obligations set forth herein . . . .<sup>44</sup>

*(e) Stipulation that “conditions . . . necessitate” remedy:*

This Agreement is not intended to impair or expand the right of any

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(D. Mont. Oct. 23, 1996), available at <http://www.clearinghouse.net/chDocs/public/JC-MT-0001-0001.pdf>; Consent Judgment at 44, *Jones v. Gusman*, No. 2:12-cv-00859 (E.D. La. Dec. 11, 2012), available at <http://www.clearinghouse.net/chDocs/public/JC-LA-0028-0011.pdf> (referring to “the violations of federal rights as alleged by Plaintiffs in the Complaints” and providing “[a]ny admission made for purposes of this Agreement is not admissible if presented by third Parties in another proceeding”); Order Approving Settlement Agreement ¶ 4, *New Times, Inc. v. Ortiz*, No. 1:00-cv-00612 (D. Colo. Aug. 18, 2004), available at <http://www.clearinghouse.net/chDocs/public/PC-CO-0021-0001.pdf>.

44. Order and Agreement ¶¶ 2–4, *Etters v. Young*, No. 5:09-ct-3187 (E.D.N.C. May 21, 2012), available at <http://www.clearinghouse.net/chDocs/public/PC-NC-0013-0003.pdf>. For more information on the case, see *Case Profile: Etters v. Bennett*, No. 5:09-ct-03187 (E.D.N.C.), CIV. RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=13820>. See also *Etters v. Young*, No. 5:09-ct-3187, 2012 WL 1950415, at \*2 (E.D.N.C. May 30, 2012); see, e.g., Consent Decree, *Presley v. Epps*, No. 4:05-cv-00148 (N.D. Miss. Mar. 6, 2006), available at <http://www.clearinghouse.net/chDocs/public/PC-MS-0005-0001.pdf>; Stipulation and Order ¶ 1, *Duffy v. Riveland*, No. 2:92-cv-01596 (W.D. Wash. Aug. 31, 1998), available at <http://www.clearinghouse.net/chDocs/public/PC-WA-0003-0010.pdf>; Consent Decree, Order and Judgment, *Makinson v. Bonneville Cnty.*, No. 4:97-cv-00190 (D. Idaho Apr. 30, 1997), available at <http://www.clearinghouse.net/chDocs/public/JC-ID-0002-0001.pdf>; Settlement Agreement at 9, *New Times, Inc. v. Ortiz*, No. 1:00-cv-00612 (D. Colo. Apr. 24, 2008), available at <http://www.clearinghouse.net/chDocs/public/PC-CO-0021-0002.pdf>.

person or entity to seek relief against the County or its officials, employees, or agents, for their conduct. This Agreement is not intended to alter legal standards governing any such claims.

For the purposes of this lawsuit only and in order to settle this matter, Defendants stipulate, and this Court finds, that the conditions at the [Miami-Dade County Corrections and Rehabilitation Department] Jail facilities necessitate the remedial measures contained in this Agreement, including medical, mental health and suicide provisions. . . .

The Parties stipulate that this Agreement complies in all respects with the Prison Litigation Reform Act, 18 U.S.C. § 3626(a). The Parties further stipulate and the Court finds that the prospective relief in this Agreement is narrowly drawn, extends no further than necessary to correct the violations of federal rights as alleged by United States in its Complaint and Findings Letter . . . , is the least intrusive means necessary to correct these violations, and will not have an adverse impact on public safety or the operation of a criminal justice system. Accordingly, the Parties represent, and this Court finds, that the Agreement complies in all respects with 18 U.S.C. § 3626(a).<sup>45</sup>

(f) *Stipulation of violation in plain terms (with and without preclusion language):*

For purposes of this lawsuit only and in order to settle this matter, the Defendants stipulate that they have violated certain federal rights of inmates as alleged in the pleadings. The parties further stipulate and agree that the prospective relief in this Decree is narrowly drawn, extends no further than necessary to correct these certain violations of federal rights set forth in the Complaint, is the least intrusive means necessary to correct these violations, and will not have an adverse impact on public safety or the operation of a criminal justice system. Accordingly, the parties agree and represent to the Court that the Decree complies in all respects with the provisions of 18 U.S.C. § 3626(a), and may serve as the factual and legal basis for a court order issued pursuant to those provisions.

The issue of liability has not been litigated. The parties ask the Court to approve this Decree without a full hearing on the merits, on the basis of the United States' Complaint and the above stipulation.

This Decree is not intended to have any preclusive effect except between the parties. Should the issue of the preclusive effect of this

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45. Consent Decree ¶¶ 10–12, *United States v. Miami-Dade Cnty.*, No. 1:13-cv-21570 (S.D. Fla. May 1, 2013), available at <http://www.clearinghouse.net/chDocs/public/JC-FL-0021-0003.pdf>. For more information on the case, see *Case Profile: United States v. Miami-Dade Cnty., No. 1:13-cv-21570 (S.D. Fla.)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=12950> (last visited Oct. 12, 2014). See also Consent Order, *supra* note 42, ¶¶ 1–2.

Decree be raised in any proceedings other than this civil action, the parties agree to certify that this Decree was intended to have no such preclusive effect.<sup>46</sup>

(g) *Stipulation to court findings:*

Plaintiffs and Defendant jointly stipulate that the Court should make the findings required for prospective relief under 18 U.S.C. § 3626(a)(1)(A) and issue a permanent injunction . . . .<sup>47</sup>

My personal favorite of these quotations is (e), from the consent decree that settled the medical and mental health care case brought by the U.S. Department of Justice against the Miami-Dade County jail, under the Civil Rights of Institutionalized Persons Act.<sup>48</sup> The negotiated language has several attractive features. First, like all of the settlements except for (g), it avoids preclusive effect, making settlement more attractive to the defendant and therefore more available to the plaintiff. Second, the language of the need-narrowness-intrusiveness concession is carefully phrased. As a number of courts have commented: “Neither the PLRA nor caselaw requires a plainly worded concession of liability . . . .”<sup>49</sup> A very plain concession—like (f)’s explicit reference to “violat[ion]” of federal rights—draws attention and concomitant political costs. But the Miami-Dade consent decree avoids complete opacity, such as (a)’s stip-

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46. Consent Decree ¶¶ 58–60, *United States v. Clay Cnty.*, No. 4:97-cv-00151 (M.D. Ga. Aug. 20, 1997), available at <http://www.clearinghouse.net/chDocs/public/JC-GA-0010-0004.pdf>. For more information on the case, see *United States v. Clay Cnty.*, No. 4:97-cv-00151 (M.D. Ga. 1997), available at <http://www.clearinghouse.net/detail.php?id=69>. See also, e.g., Settlement Agreement and Order ¶ 15, *Clark v. California*, No. 3:96-cv-01486 (N.D. Cal. July 20, 1998), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0005-0010.pdf> (“Defendants [stipulate] that they have violated the federal rights of plaintiffs in a manner sufficient to warrant the relief contained herein . . . [and] that the relief set forth herein is narrowly drawn, extends no further than necessary to correct the violation of the federal rights and is the least intrusive means necessary to correct the violation of the federal rights.”); *Clark v. California*, 739 F. Supp. 2d 1168, 1229 (N.D. Cal. 2010) (noting parties’ agreement).

47. Joint Stipulations Supporting Resolution of Class Action ¶ 2, *Martinez v. Maketa*, No. 1:10-cv-02242 (D. Colo. Mar. 28, 2011), available at <http://www.clearinghouse.net/chDocs/public/JC-CO-0004-0009.pdf>. See *Martinez v. Maketa*, No. 10-cv-02242, 2011 WL 2222129, at \*1 (D. Colo. June 7, 2011) (noting parties’ stipulation that court should make PLRA-required findings and making such findings); see also Opinion and Order ¶ 5, *Jones’el v. Berge*, No. 3:00-cv-00421 (W.D. Wis. June 24, 2002), available at <http://www.clearinghouse.net/chDocs/public/PC-WI-0001-0007.pdf> (making required findings in order separate from order accepting the parties’ settlement agreement); Settlement Agreement ¶¶ 15.2–15.5, *Jones’el v. Berge*, No. 3:00-cv-00421 (W.D. Wis. Jan. 24, 2002), available at <http://www.clearinghouse.net/chDocs/public/PC-WI-0001-0003.pdf> (referring to “alleged” violations and containing both defendants’ denial of liability and a stipulation that the agreement was consistent with all PLRA requirements).

48. 42 U.S.C. §§ 1997–1997h (2012).

49. *Jones v. Gusman*, 296 F.R.D. 416, 463 (E.D. La. 2013).

ulation by statutory citation. It is fairly phrased, if not calculated for maximum public impact.

## 2. CONDITIONAL DISMISSAL

An alternative method for settling an injunctive case is to escape the limitations the PLRA imposes on “prospective relief” by using what the statute terms a “private settlement agreement”—defined as an “agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled.”<sup>50</sup> This kind of settlement is available using the ordinary processes for voluntary dismissals under Federal Rule of Civil Procedure 41(a); if the parties intend the district court to maintain jurisdiction over a case they have settled this way, they can so specify in the settlement, and that term may be approved by the court as one of such terms and conditions as the court deems proper.<sup>51</sup> (Such terms must be express.<sup>52</sup>) Settlements like this are routine in cases seeking damages, where compliance—payment—is an easily-monitored one-time event. Even in injunctive matters, private settlements were not unheard of prior to the PLRA’s enactment.<sup>53</sup> But foregoing the ordinary enforcement

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50. 18 U.S.C. § 3626(g)(6) (2012). *See* *Ghana v. N.J. State Parole Bd.*, No. 01-cv-01620, 2011 WL 3608633, at \*3 (D.N.J. Aug. 15, 2011) (explaining that absent a consent decree meeting PLRA prospective relief requirements, plaintiff’s only federal court remedy for breach of a settlement agreement was reinstatement of the underlying action).

51. FED. R. CIV. P. 41(a)(2). As the Supreme Court explained in *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 381–82 (1994):

When the dismissal is pursuant to Federal Rule of Civil Procedure 41(a)(2), which specifies that the action “shall not be dismissed at the plaintiff’s instance save upon order of the court and upon such terms and conditions as the court deems proper,” the parties’ compliance with the terms of the settlement contract (or the court’s “retention of jurisdiction” over the settlement contract) may, in the court’s discretion, be one of the terms set forth in the order. Even when . . . the dismissal is pursuant to Rule 41(a)(1)(ii) (which does not by its terms empower a district court to attach conditions to the parties’ stipulation of dismissal) we think the court is authorized to embody the settlement contract in its dismissal order (or, what has the same effect, retain jurisdiction over the settlement contract) if the parties agree. Absent such action, however, enforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction.

*See also* *Hazelton v. Wrenn*, No. 08-cv-00419, 2013 WL 1953354, at \*1–2 (D.N.H. Apr. 10, 2013) (taking this approach in a case subject to the PLRA), *report and recommendation approved*, 2013 WL 1953517 (D.N.H. May 9, 2013).

52. *See Kokkonen*, 511 U.S. at 381–82; *York v. Cnty. of El Dorado*, 119 F. Supp. 2d 1106, 1109 (E.D. Cal. 2000) (holding that the district court had no jurisdiction over the county’s motion to terminate because the agreement did not contain language specifying that the district court would retain jurisdiction, therefore the issue was a matter of contract to be decided by state courts).

53. *See, e.g., York*, 119 F. Supp. 2d at 1107 (“The undersigned clearly recalls, and the parties do not disagree, that the sine qua non for the County’s agreement to settle was the dismissal and the fact that the settlement was *not* to be construed as a consent decree.”). *Cf.* Judgment ¶ 6,

mechanisms (court process, modification of the order, public shaming facilitated by the attention often paid to court cases, and contempt) is generally very unappealing to plaintiffs. Only since 1996, when the PLRA diminished prisoner-plaintiffs' bargaining power, has this kind of settlement grown common in prisoners' injunctive cases.

The parties used a conditional dismissal, for example, in a case seeking to improve interpretive and other communication services for deaf prisoners in Virginia. The settlement agreement provided:

Pursuant to 18 U.S.C. § 3626(c)(2), during the term of the Agreement, plaintiffs may move the court for reinstatement of the lawsuit, or may elect to proceed in state court and seek specific performance or institute an action for breach subject to notification as set forth in paragraph 2 of this Subsection. An action to enforce this Agreement does not include any action for damages. A Deaf inmate seeking to enforce this Agreement in state court can only seek to have a court order [Virginia Department of Corrections] or [Virginia Department of Correctional Education] to comply with the terms of this Agreement. . . . This Agreement is a private settlement agreement within the meaning of 18 U.S.C. § 3626.<sup>54</sup>

The court accordingly “ORDERED that by consent of the parties and consistent with 18 U.S.C. § 3626(c)(2), the Court shall retain jurisdiction pursuant to *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994) through October 18, 2015 for the limited purpose of reinstating this lawsuit under the terms of the Agreement.”<sup>55</sup>

Rule 41(a) dismissals sometimes specify more comprehensively the conditions governing reinstatement of the action, requiring adjudication of non-compliance prior to continuation of the underlying litigation. For example, the settlement of a state-wide Native American religion case against New York's Department of Corrections provided:

[T]he parties will jointly move the Court for entry of an order dismissing this action, pursuant to Fed. R. Civ. P. 23(e) and 41(a)(2), and will attach a copy of this Stipulation to such motion. This dismissal shall be without prejudice to plaintiffs' right to move to reinstate

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Taylor v. Arizona, No. Civ. 72-21 PHX (D. Ariz. Oct. 19, 1973), available at <http://chadmin.clearinghouse.net/chDocs/public/PC-AZ-0007-0010.pdf> (“That all relief sought by plaintiff members of the class heretofore designated to which they are entitled is granted by this Judgment and that the class, collectively and individually, is entitled to no other relief under this action.”); Taylor v. United States, 181 F.3d 1017, 1018 (9th Cir. 1999) (quoting that provision and holding that the 1973 judgment therefore did not constitute prospective relief subject to termination under the PLRA).

54. Settlement Agreement at 21–22, *Minnis v. Johnson*, No. 1:10-cv-00096 (E.D. Va. Oct. 18, 2010), available at <http://chadmin.clearinghouse.net/chDocs/public/PC-VA-0019-0001.pdf>.

55. Order ¶ 2, *Minnis v. Johnson*, No. 1:10-cv-00096 (E.D. Va. Nov. 16, 2010); Docket Entry 109, *Minnis v. Johnson*, No. 1:10-cv-00096 (E.D. Va. Nov. 16, 2010), available at <http://chadmin.clearinghouse.net/chDocs/public/PC-VA-0019-9000.pdf>.

the action, . . . within three (3) years from the date the Stipulation is signed.

If, after sixty (60) days following any meeting [about compliance] . . . , plaintiffs' counsel believes that defendants are not in "substantial compliance" with the terms of this Stipulation (as defined herein), plaintiffs' counsel may request a conference with all parties before the Honorable Charles J. Siragusa, United States District Court, concerning the filing of a motion to reinstate this lawsuit . . . . Plaintiffs' counsel may request such a conference no earlier than five (5) months from the date this Stipulation is signed by the parties. Defendants shall be considered to be in "substantial compliance" with the terms of this Stipulation unless defendants' failures or omissions to meet the terms of the Stipulation were not minimal or isolated but were substantially and sufficiently frequent and widespread as to be systemic.

. . . .

The case shall not be reinstated unless the Court finds by clear and convincing evidence that defendants' failures or omissions to meet the terms of the Stipulation were not minimal or isolated but were substantially and sufficiently frequent and widespread as to be systemic.<sup>56</sup>

Under these provisions, if the plaintiffs sought to continue this litigation based on non-compliance with the settlement, they would first have to demonstrate that non-compliance to the district judge, and that showing would win merely the procedural right to continue to litigate, as if the settlement had never occurred.<sup>57</sup>

In a system-wide case dealing with solitary confinement of prison-

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56. Rule 41 Voluntary Stipulation of Dismissal Subject to Conditions at 17–18, *Hughes v. Goord*, No. 6:97-cv-06431 (W.D.N.Y. July 9, 1999), available at <http://www.clearinghouse.net/chDocs/public/PC-NY-0040-0001.pdf>; see also Decision and Order at 7, *Hughes v. Goord*, No. 6:97-cv-06431 (W.D.N.Y. Sept. 5, 2000), available at <http://www.clearinghouse.net/chDocs/public/PC-NY-0040-0003.pdf> ("It is hereby ordered that this action is dismissed as settled, upon the terms set forth in the stipulation of dismissal [#30], which is incorporated and made a part of this Decision and Order."). For more information on the case, see *Case Profile: Hughes v. Goord*, No. 6:97-cv-06431 (W.D.N.Y.), CIV. RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=887> (last visited Aug. 30, 2014).

57. For an example of a decree in which reinstatement required adjudication of non-compliance, see Order [Adopting Findings and Recommendations], *Rouser v. White*, No. 2:93-cv-00767 (E.D. Cal. Mar. 23, 2004), available at <http://chadmin.clearinghouse.net/chDocs/public/PC-CA-0066-0004.pdf> (adjudicating a motion "to enforce a settlement agreement by reinstating [the original] civil rights action," and remanding for "an evidentiary hearing, using applicable standards of contract law, to determine whether the settlement agreement was in fact violated"); Order [On Motion to Vacate Evidentiary Hearing Date], *Rouser v. White*, No. 2:93-cv-00767 (E.D. Cal. Aug. 4, 2004), available at <http://chadmin.clearinghouse.net/chDocs/public/PC-CA-0066-0008.pdf> (denying motion to vacate the hearing date); [Proposed] Order, *Rouser v. White*, No. 2:93-cv-00767 (E.D. Cal. Aug. 9, 2005), available at <http://chadmin.clearinghouse.net/chDocs/public/PC-CA-0066-0021.pdf> (proposing a stipulation to reinstate action). For more information on this case, see *Case Profile: Rouser v. White*, No. 2:93-cv-00767 (E.D. Cal.), CIV.

ers with mental illness, another court took a similar tack, although it framed the settlement as a stay, rather than a conditional dismissal. This framing has the advantage of ensuring that the settlement cannot be viewed as a final judgment, insulating it from appellate challenge. It may also facilitate ongoing informal supervision.<sup>58</sup> The agreement in that case provided:

If the Court finds that the [Massachusetts Department of Correction] is not in substantial compliance, i.e., is in substantial non-compliance, with a provision or provisions of this Settlement Agreement, it may enter an order consistent with equitable principles, but not an order of contempt, that is designed to achieve compliance.<sup>59</sup>

And then, escalation:

If [the Disability Law Center, Inc.] contends that the Department has not complied with an order entered under the preceding paragraph, it may, after reasonable notice to the Department, move for further relief from the Court to obtain compliance with the Court's prior order. In ruling on such a motion, the Court may apply equitable principles and may use any appropriate equitable or remedial power then available to it.<sup>60</sup>

Given this provision for enforcement, this agreement reads almost like a consent decree. But the district court explained in its order approving the agreement that "to obtain an order providing relief that is enforceable by contempt, plaintiff must prove not only that a provision of the Agreement has been violated but also that there has been a violation of a federal right, and that the relief ordered is limited only to what is necessary to remedy that violation as required by the PLRA, 18 U.S.C. § 3626(a)(1)(A)."<sup>61</sup>

Other settlements that define non-compliance as a prerequisite for reinstatement of the action assign the evaluation of non-compliance to experts, rather than the court. In a lawsuit under the Civil Rights of Institutionalized Persons Act,<sup>62</sup> brought by the United States against the state of Montana, the parties agreed:

Immediately upon execution of this Agreement, the parties shall jointly move the Court for entry of an Order conditionally dismissing

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RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=13836> (last visited Aug. 30, 2014).

58. These advantages were highlighted for me by John Boston.

59. Settlement Agreement at 17, *Disability Law Ctr. v. Mass. Dep't of Corr.*, No. 1:07-cv-10463 (D. Mass. Dec. 13, 2011), available at <http://www.clearinghouse.net/chDocs/public/PC-MA-0026-0004.pdf>.

60. *Id.*

61. *Disability Law Ctr. v. Mass. Dep't of Corr.*, 960 F. Supp. 2d 271, 277–78 (D. Mass. 2012).

62. 42 U.S.C. §§ 1997–1997h (2012).

this action, pursuant to Fed. R. Civ. P. 41(a)(2), conditional upon defendants' achieving compliance with its terms, and shall attach this Agreement to such motion. The motion shall request that the case be placed on the Court's inactive docket, though the Court shall retain jurisdiction over the case until a final dismissal with prejudice.

. . . .

If the experts conclude at the end of their fourth evaluation tour that there remain areas in which defendants have failed to reach substantial compliance, defendants will be in default of this agreement, and the case shall, upon plaintiff's motion, be restored to the Court's active docket as to those issues affected by defendants['] failure to comply.<sup>63</sup>

And still other agreements allow plaintiffs' counsel to determine when non-compliance justifies reinstatement of the action, without requiring any third-party or judicial agreement. For example, in another New York case, this one involving transportation of prisoners who use wheelchairs, the settlement provided:

Following any meeting with the Court as set forth in Paragraph 14 above, Plaintiff's counsel may file a motion with the Court for an Order reinstating the issues of this lawsuit which are the subject of this Voluntary Stipulation of Partial Dismissal. Plaintiff may not file such a motion without first requesting a pre-motion meeting with the Defendants and the Court as provided in Paragraphs 13 and 14 above and, if granted by the Court, participating in such meeting. Plaintiff shall make such a motion for reinstatement only upon Plaintiff's counsel's good faith belief that there is a failure on the part of Defendants to comply with the terms of this Voluntary Stipulation that is more substantial and pervasive than an isolated instance of a prisoner in a wheelchair being transported in a fashion which is not in accordance with this agreement.<sup>64</sup>

Finally, plaintiffs may expressly retain their complete discretion to reinstate the matter. This was the approach in a jail settlement with the City of Philadelphia, which provided, simply, "Plaintiffs reserve the right to reinstate these proceedings during the pendency of the Settlement Agreement."<sup>65</sup>

Whatever the language governing reinstatement, it seems that very

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63. Stipulated Agreement at 1–2, 13, *United States v. Montana*, No. 94-cv-90 (D. Mont. Jan. 27, 1997), available at <http://www.clearinghouse.net/chDocs/public/PC-MT-0003-0005.pdf>.

64. Rule 41 Voluntary Stipulation of Partial Dismissal Subject to Conditions at 6–7, *Shariff v. Goord*, No. 6:04-cv-06621 (W.D.N.Y. Oct. 20, 2011), available at <http://www.clearinghouse.net/chDocs/public/PC-NY-0057-0005.pdf>.

65. Settlement Agreement at 4, *Williams v. City of Philadelphia*, No. 2:08-cv-01979 (E.D. Pa. Apr. 29, 2011), available at <http://chadmin.clearinghouse.net/chDocs/public/JC-PA-0034-0010.pdf>.

few prisoner-plaintiffs have actually sought reinstatement for an allegedly breached settlement. In fact, I have been able to locate only two such cases,<sup>66</sup> after searching both Westlaw and the Civil Rights Litigation Clearinghouse<sup>67</sup> and after asking prisoners' lawyers on a well-populated listserv. I can only speculate about the causes of this scarcity. Given the demonstrably high prevalence of non-compliance with (de jure) fully enforceable settlements, documented in thousands of opinions over the decades, it seems most plausible that compliance with private settlement agreements is similarly spotty. But perhaps plaintiffs agree to private settlements more readily when they are very confident about prospects for compliance, so non-compliance is rarer than in the case of enforceable agreements. Alternatively, or in addition, perhaps reinstatements are few and far between because threats to *seek* reinstatement often succeed in eliciting compliance or something closer to it. Or perhaps reinstatements or efforts to obtain them are occurring, but are simply hard to locate. Clearly, though, reinstatement is not common; it's hard for plaintiffs' counsel to gear up again to pursue a litigation that was previously settled.

### 3. STATE-COURT ENFORCEMENT

Settlements can also qualify as PLRA-defined "private settlement agreements" if they are subject to state-court enforcement, rather than or in addition to reinstatement of the federal litigation.<sup>68</sup> Many settlements duly recite state court enforcement as a possible remedy for non-compliance. For example, the settlement in a lawsuit brought by mentally ill Indiana prisoners provided: "The parties recognize and acknowledge that this Private Settlement Agreement is intended to be a valid contract under the laws of the State of Indiana, enforceable in the courts of the State of Indiana."<sup>69</sup>

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66. See *Case Profile*: Rouser v. White, *supra* note 57; *Case Profile*: Williams v. City of Philadelphia, No. 2:08-cv-01979 (E.D. Pa.), CIV. RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=13838> (last visited Feb. 25, 2015).

67. CIV. RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net> (last visited Aug. 31, 2014). The Civil Rights Litigation Clearinghouse, which I founded and head, collects and displays documents and information relating to large-scale civil rights cases in many categories. Post-PLRA private settlement agreements in jail and prison injunctive cases are collected at *Special Collection: Post-PLRA Jail and Prison Private Settlement Agreements*, CIV. RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/results.php?searchSpecialCollection=29> (last visited Aug. 31, 2014).

68. 18 U.S.C. § 3626(c)(2) (2012).

69. Private Settlement Agreement Between Defendants and Plaintiffs at 2, Mast v. Donahue, No. 2:05-cv-00037 (S.D. Ind. Jan. 23, 2007), available at <http://www.clearinghouse.net/chDocs/public/PC-IN-0013-0002.pdf>. For more information on the case as a whole, see *Case Profile*: Mast v. Donahue, No. 2:05-cv-00037-LJM-WGH (S.D. Ind.), CIV. RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=5554> (last visited Aug. 30, 2014).

But typically such recitations are not, it seems, the prelude to actual ventures into state court to enforce federal settlements. State court is often an unattractive forum for plaintiffs. (After all, if they preferred state court, they could have sued there to begin with.<sup>70</sup>) It has been argued persuasively that state-court enforcement of a settlement-as-contract is even more unattractive, because of doctrines and inclinations toward governmental immunity and against specific performance of contracts, as well as state PLRA-analogues and more general deference to prison administrators.<sup>71</sup> Moreover, as the district court noted in a New York City jail case, the burden of starting over with a new judge, in a large-scale litigation, is far from small:

[I]t makes little sense that, if a perceived problem with compliance should arise, short of seeking reinstatement of this action, plaintiffs can seek relief only in state court under state law. In view of the time and effort I have spent on this case, including countless hours discussing not only the substantive terms of the Agreement but also its language, it would be a tremendous waste of resources for the parties to have to go to state court to seek relief from a state court judge wholly unfamiliar with the case.<sup>72</sup>

A 2008 study was unable to find a single example of state enforcement of a federal prisoners' rights settlement agreement. I, too, have found no such report, despite searches using Westlaw, the Civil Rights Litigation Clearinghouse, and word-of-mouth. (The closest near-exceptions I found were some early failed attempts by prisoners, who countered termination of pre-PLRA decrees by arguing that even if the PLRA rendered those decrees unenforceable in *federal* court after a termination motion, they remained enforceable in *state* court as private contracts. They lost: the federal courts found that the old decrees did not qualify as private settlement agreements and were fully terminable under 18 U.S.C. § 3626(b).<sup>73</sup>)

In fact, the prospect of reviving a settled federal litigation in state court, in front of a judge who is new to the dispute, is so daunting to

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70. Of course, defendants in a civil rights suit asserting federal rights can also remove that action to federal court if they so choose. See 28 U.S.C. § 1441(a) (2012) (authorizing defendants to remove from state court to federal court "any civil action brought in a State court of which the district courts of the United States have original jurisdiction").

71. Alison Brill, Note, *Rights Without Remedy: The Myth of State Court Accessibility After the Prison Litigation Reform Act*, 30 CARDOZO L. REV. 645 (2008).

72. *Ingles v. Toro*, 438 F. Supp. 2d 203, 215–16 (S.D.N.Y. 2006).

73. See *Benjamin v. Jacobson*, 172 F.3d 144, 156 (2d Cir. 1999) (en banc) ("We do not see any basis for inferring that Congress meant federal consent decrees that are not based on [the required PLRA findings] to remain in effect and amenable to enforcement in state courts."), *cert. denied*, 528 U.S. 824 (1999); *Hazen ex rel. LeGear v. Reagan*, 208 F.3d 697, 699 (8th Cir. 2000) ("We therefore hold that the PLRA prohibits the state-court enforcement, on a contract theory or otherwise, of federal consent decrees that do not meet the PLRA standards.").

litigants that the parties may dictate a requirement of mediation before the federal judge as a prerequisite to state-court enforcement. For example:

Plaintiff may . . . elect to proceed in State court and seek specific performance of the terms of this Agreement; provided, that plaintiff shall have first sought to resolve any compliance issue through the meet and confer and mediation procedures set forth in this Section, and such meet and confer procedures and mediation by [the federal judge] shall have failed to achieve a resolution.<sup>74</sup>

#### IV. TERMINATION OF PROSPECTIVE RELIEF

Once prospective relief that complies with the PLRA's constraints on entry *is* approved—whether based on consent (with the types of stipulations discussed in Part III.B) or after litigation—it becomes far more vulnerable to frequent challenge than other injunctions.

##### A. *What the PLRA Requires*

The PLRA provides:

In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener . . . [two] years after the date the court granted or approved the prospective relief; [or one] year after the date the court has entered an order denying termination of prospective relief under this paragraph . . . .<sup>75</sup>

A motion for termination should be granted unless “the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.”<sup>76</sup> Thus the same need-narrowness-intrusiveness requirements for entry of new relief apply to maintenance of existing relief, with the add-on requirements that the findings be written and based on a “current and ongoing” civil rights violation. In addition, a motion to terminate prospective relief leads to an automatic stay of that relief after 30 days, postponable to 90 days for good cause.<sup>77</sup>

These statutory rules governing termination of an injunction are substantially more defendant-friendly than the standards applicable to

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74. Private Settlement Agreement at 24, *Disability Advocates, Inc. v. N.Y. State Office Mental Health*, No. 02-cv-04002 (S.D.N.Y. Apr. 27, 2007), available at <http://www.clearinghouse.net/chDocs/public/PC-NY-0048-0002.pdf>.

75. 18 U.S.C. § 3626(b)(1) (2012).

76. 18 U.S.C. § 3626(b)(3).

77. 18 U.S.C. § 3626(a)(2)–(3).

other areas of law. For both litigated and consented injunctions, motions to modify or dissolve the injunction proceed under Federal Rule of Civil Procedure 60(b), which provides, in pertinent part:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.<sup>78</sup>

The Supreme Court has explained that dissolution of an injunction, whether contested or consented, is appropriate when the defendant has “complied in good faith with the . . . decree since it was entered,” and “eliminated to the extent practicable” the “vestiges” of past constitutional violations.<sup>79</sup> In addition, while Rule 60(b) requires the dissolution of a *litigated* decree if the law changes to make legal what the injunction forbids,<sup>80</sup> *consent* decrees are more stable. Modifications to consent decrees “should not strive to rewrite a consent decree so that it conforms to the constitutional floor.”<sup>81</sup> Instead, while consent decree modification may be “justified based on changes in either law or fact,” the Court has highlighted the importance of preserving “the finality of such agreements” and avoiding “disincentive[s] to negotiation of settlements in institutional reform litigation.”<sup>82</sup>

The point is that in areas outside the ambit of the PLRA, there is no prospect of annual relitigation of the necessity of consent decrees. Defendants who want an injunction lifted generally must establish that they have complied with that injunction, rather than arguing that, irrespective of their compliance, there is no extant violation of the constitutional rights of the plaintiffs. Frequent relitigation of the alleged violations underlying decrees can distract from efforts to solve the problems that prompted the decree in the first place, pull plaintiffs’ counsel from their monitoring tasks, and shrink the feasibility of solutions that take more than a year to implement.

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78. FED. R. CIV. P. 60(b).

79. *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 249–50 (1991); *see also Freeman v. Pitts*, 503 U.S. 467, 492 (1992).

80. *See, e.g., Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 431–32 (1855) (“If, in the mean time, since the decree, this right has been modified by the competent authority . . . it is quite plain the decree of the court cannot be enforced.”).

81. *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 391 (1992).

82. *Id.* at 389.

B. *How the Prisoners' Rights Bar Has Responded, and Should Respond*

Prior to the PLRA, I estimate that there were hundreds of “orphan decrees” applicable to jails and prisons around the country. These were decrees entered at some point, presumably mostly in the 1970s and 1980s, whose plaintiffs’ counsel was no longer actively monitoring or enforcing them.<sup>83</sup> I worked on one such jail conditions case, against Jefferson County, Alabama, which included jails in Birmingham and Bessemer, Alabama. The matter had been litigated in the 1980s by both private plaintiffs’ counsel and the United States, which sided with the plaintiffs. But by the time a motion to terminate was filed in 1997, it had been years since either class counsel or the Department of Justice had done any monitoring at all, much less sought to enforce the aging decree.<sup>84</sup>

This kind of neglect obviously undermines the prospects of compliance. Since passage of the PLRA, neglect can also render cases highly susceptible to termination. After all, the statute provides that defendants can seek an end of prospective relief at any point beginning two years after such relief is entered.<sup>85</sup> And when a termination motion is filed, the plaintiffs have an extremely limited amount of time to marshal evidence opposing it, or suffer, at least, the consequences of an automatic stay and potentially more permanent loss. If plaintiffs’ counsel are going to be able to fend off a motion to terminate, they need to prepare well before the motion is filed, and they need to remain prepared. In the Jefferson County jail case, it was a mad scramble to arrange a jail tour and review the documents needed to oppose the termination motion. If the jail authorities had offered even slight resistance to discovery, the time likely would have been insufficient.<sup>86</sup>

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83. I have written about such decrees in California jail litigation in particular. See Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 215 (2013).

84. The case was *Thomas v. Gloor*, No. 77-P-0066-S (N.D. Ala.) (injunction entered Aug. 28, 1978). For a summary of the litigation and a few of the 1997 documents, see *Case Profile: Thomas v. Gloor, No. 77-P-0066-S (N.D. Ala.)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=11308> (last visited Oct. 14, 2015).

85. Even if defendants agree not to seek termination, an intervenor might do so. See 18 U.S.C. § 3626(b)(1)(A) (2012) (“In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervenor . . .”). Ordinary intervention rules apply: the PLRA’s statutory grant of broad intervention rights to state and local officials governs only prisoner release orders. 18 U.S.C. § 3626(a)(3)(F).

86. Transcript of Proceedings at 17, *Thomas v. Gloor*, No. 77-P-0066-S (N.D. Ala. Aug. 6, 1997), available at <http://www.clearinghouse.net/chDocs/public/JC-AL-0022-0001.pdf>. The posture of this particular case was quirky: the county and state were both defendants, and the county benefitted from the decree’s requirement that the state promptly pick up sentenced

In the years since passage of the PLRA, the prisoners' rights bar has worked through enough of these scrambles to develop some coping strategies. Two types of preparation for a termination motion have emerged: First, the parties sometimes agree to stretch out the remediation period beyond the PLRA's default two years. Second, plaintiffs' counsel have worked to ensure that they are collecting sufficient information to inform their potentially hurried response to a termination motion.

### 1. LENGTHENING THE REMEDIAL PERIOD

Systemic litigation occurs when there are serious and systemic problems. Those problems take time to remedy, as settling defendants will often agree. Accordingly, prisoner-plaintiffs have sometimes succeeded in obtaining prison and jail officials' agreement to change the terms on which those officials may seek or obtain termination of a settlement. This kind of agreement may be beneficial for defendants, as well, because it frees them for a time from responding to plaintiffs' litigation-driven discovery requests. It's an open question whether an agreement that alters the PLRA's timing or another feature would be binding on the parties if challenged—perhaps by the defendant correctional system itself (maybe after an election brings to office a new sheriff or governor who disagrees with the negotiated deal), or perhaps by some interested third party with standing to object, if one exists. I think the best answer is yes, such agreements would be binding; there's insufficient reason to take the unusual approach of interpreting the PLRA's provisions as unwaivable.<sup>87</sup> In any event, such stipulations have rarely if ever been challenged.

Termination stipulations take a number of approaches. Sometimes, the parties opt out of the PLRA's termination provisions altogether, as in a settlement in the Albuquerque jail litigation:

The Defendants will not file any motion in the future asserting that this Stipulated Settlement should be terminated under the Prison Litigation Reform Act.<sup>88</sup>

In other agreements the parties lengthen the period of time prior to a

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prisoners and transfer them from jail to prison. Accordingly, it was in the county's interest to have the challenged decree remain operative. *Id.* at 33–36.

87. My thinking is that the situation is similar to that in *United States v. Mezzanatto*, 513 U.S. 196 (1995), in which the Supreme Court held that a criminal defendant could waive the statutory rule barring introduction at trial of statements made during plea negotiations. I thank David Rudovsky for proposing this comparison.

88. Stipulated Settlement Agreement Between Plaintiffs and Defendants at 7, *McClendon v. City of Albuquerque*, No. 6:95-cv-00024 (D.N.M. June 30, 2005), available at <http://chadadmin.clearinghouse.net/chDocs/public/JC-NM-0002-0012.pdf>.

termination motion. For example, in litigation by deaf or hard-of-hearing prisoners against the Washington State Department of Corrections:

In order to give the provisions contained herein an opportunity to be implemented and evaluated, both parties agree not to challenge this agreement for a period of four years.<sup>89</sup>

In still other decrees, the parties alter the terms on which termination can take place, agreeing to a prerequisite of decree compliance. So, for example, in a case brought by the Prison Legal News and joined by the U.S. Department of Justice against a South Carolina jail:

Defendants shall provide written notice to the Plaintiffs and the United States 30 days before filing any motion seeking to modify or terminate this Consent Injunction. Defendants shall not provide such notice or file such motion until they have achieved a minimum of one year of substantial compliance with the provisions of this Consent Injunction. If Plaintiffs and the United States determine that Defendants have achieved one year of substantial compliance with the provisions of this Consent Injunction, Plaintiffs and the United States will not oppose a motion filed by Defendants seeking to modify or terminate this Consent Injunction.<sup>90</sup>

Or, similarly, in California's system-wide prison case by prisoners with developmental disabilities:

Defendants may move to vacate this Settlement Agreement and dismiss the case on the ground that they have substantially complied with the plan set forth in Appendix A as modified for a period of three years. Plaintiffs may oppose the motion, and shall have the burden of proving that defendants are not in substantial compliance.<sup>91</sup>

By imposing a default sunset period on jail and prison decrees, the PLRA's termination provisions strengthen the bargaining power of cor-

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89. Settlement Agreement at 5, *Duffy v. Riveland*, No. C92-cv-1596R (W.D. Wash. June 3, 1998), available at <http://chadmin.clearinghouse.net/chDocs/public/PC-WA-0003-0004.pdf>; see also, e.g., Consent Order at 2, *Duvall v. Glendening*, No. 1:76-cv-01255 (D. Md. Aug. 22, 2002), available at <http://chadmin.clearinghouse.net/chDocs/public/PC-MD-0006-0003.pdf> ("Defendants have agreed that they will neither challenge nor otherwise seek to modify the terms of this Order, without Plaintiffs' consent, for a period of 14 months from date of entry.").

90. Consent Injunction ¶ 56, *Prison Legal News v. Berkeley Cnty. Sheriff*, No. 2:10-cv-02594 (D.S.C. Jan. 13, 2012), available at <http://chadmin.clearinghouse.net/chDocs/public/JC-SC-0003-0002.pdf>.

91. Interim Agreement and Stipulation at 7–8, *Clark v. California*, No. 3:96-cv-0186 (N.D. Cal. July 20, 1998), available at <http://chadmin.clearinghouse.net/chDocs/public/PC-CA-0005-0002.pdf>; see also, e.g., Stipulation for Injunctive Relief ¶ 261, *Fussell v. Wilkinson*, No. 1:03-cv-00704 (S.D. Ohio May 21, 2008), available at <http://chadmin.clearinghouse.net/chDocs/public/PC-OH-0020-0008.pdf> ("Oversight by the Monitor shall continue for five (5) years following the entry of this Stipulation unless sooner terminated on motion to the Court by the Defendants, and a finding is made by the Court following a determination on that issue by the Monitor, that substantial compliance has been achieved on all terms and been maintained for a period of two years in all areas.").

rections officials. But, as the above quotations demonstrate, there are still circumstances in which defendants agree to a different approach, whether because they think a longer remediation period is better for its own sake or because they are able to trade the lengthened remedial term for something they care about more.

## 2. GATHERING INFORMATION

Institutional reform remedies almost always include information collection provisions, which are crucial for monitoring compliance. But the PLRA makes fact-gathering even more important—useful not just to pressure defendants into compliance but to oppose an unwarranted motion to terminate. If information is sufficiently current and of the right provenance,<sup>92</sup> sometimes it can itself be introduced in court. But even if not, keeping up to date about what’s going on inside the jail or prison can help plaintiffs’ counsel prioritize post-motion discovery relating to issues in the challenged injunction that remain problematic. A number of methods are helpful, bringing together discovery leads, site inspections, document production, and client contact. It’s worth quoting at length some decrees that use these methods.<sup>93</sup>

One consent decree was negotiated after the district court entered a preliminary injunction based on plaintiffs’ proof of widespread constitutional violations at the Morgan County Jail, in Alabama.<sup>94</sup> The decree provided, in part:

38. To ensure compliance with this agreement, County Defendants shall provide to Plaintiffs’ counsel each month a complete and up-to-date census of the Jail population that lists inmates by location, status (awaiting trial, state convicted, or county convicted), all criminal charges, and length of confinement. County Defendants shall also provide to Plaintiffs’ counsel on a quarterly basis a complete and up-to-date security staffing report that includes staff names and assignments.

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92. The PLRA uses the word “current.” This means at the time the termination motion is made. An “instantaneous snapshot . . . is impossible,” but the record must be recent. *Lancaster v. Tilton*, No. 79-01630, 2007 WL 4570185, at \*5 (N.D. Cal. Dec. 21, 2007). Compare *id.* (record made over previous thirteen months is adequate), with *United States v. Territory of the Virgin Islands*, 884 F. Supp. 2d 399, 418–19 (D.V.I. 2012) (five-year-old findings “too dated,” although, “if properly updated by current findings, [they] could serve as an appropriate factual foundation”).

93. The Civil Rights Litigation Clearinghouse collects post-PLRA enforceable decrees, many of which have terms like the ones repeated here. See *Special Collection: Post PLRA Enforceable Consent Decrees*, CIV. RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/results.php?searchSpecialCollection=28> (last visited Sept. 2, 2014).

94. *Maynor v. Morgan Cnty., Ala.*, 147 F. Supp. 2d 1185 (N.D. Ala. 2001). For information on the case as a whole, see *Case Profile: Maynor v. Morgan Cnty., Ala., No. 5:01-cv-00851 (N.D. Ala.)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=10041> (last visited Oct. 15, 2014).

39. On a monthly basis for the first year after the effective date of this order, and on a quarterly basis thereafter, County Defendants shall provide to Plaintiffs' Counsel the physician sick call schedule for the previous month, including the name of each physician who worked, the actual days he or she was present at the Jail, the actual number of hours he or she spent at the Jail on each of these days, and how many patients he or she treated on each of these days. County Defendants shall provide this information with regard to on-site visits by the psychiatrist and psychiatric social worker and any other specialist who provides care on-site at the Jail, as well. The nursing schedule for the previous month, including the name of each nurse who worked, his or her qualifications (i.e., RN [registered nurse]), the days and hours he or she actually worked, and the number of patients he or she saw on each day worked.<sup>95</sup>

In both paragraphs, the requirement of lists of names and locations serves several functions: it reveals compliance problems where they exist; makes compliance reporting less impressionistic and more likely to be accurate, which itself pressures the defendants to more comprehensive compliance; and provides names of potential interviewees.

The decree continues:

40. Plaintiffs' counsel shall have reasonable access to Jail records, Jail inmates, and the Jail facility, including escorted, unannounced walk-through visits of the Jail on a quarterly basis during the first year following the entry of this Consent Decree, and twice a year thereafter. Paralegals working directly with Plaintiffs' counsel shall have reasonable access to Jail inmates and will be accompanied by an attorney during any walk-through of the Jail. Class counsel and their paralegals may bring experts at their own expense on such walk-through visits. Should class counsel or their paralegals bring a medical expert, the medical expert shall have access to all medical records and charts kept or created by the Jail. This Consent Decree does not prevent County Defendants from changing the medical providers who provide services at the Jail.<sup>96</sup>

This provision allows plaintiffs' counsel to maintain a good working knowledge of what is going on at the jail, and also to maintain relationships with their clients. This last is particularly useful because of an all-too-common feature of large-scale injunctive litigation, particularly litigation involving closed facilities like jails and prisons—the palpable separation between the plaintiff class and their lawyers. There are many methods to bridge this gap: frequent visits and consultations, plaintiffs'

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95. Consent Decree Applicable to the Plaintiff Class and the County Defendants ¶¶ 38–39, *Maynor v. Morgan Cnty., Ala.*, No. 5:01-cv-00851 (N.D. Ala. Sept. 25, 2001), available at <http://chadmin.clearinghouse.net/chDocs/public/JC-AL-0020-0002.pdf>.

96. *Id.* ¶ 40.

committees, and the like. And there are many reasons for plaintiffs' counsel to make the effort. Most relevant here is that even if prisoners' information about conditions at their prison is not wholly accurate, it is probably far more detailed than their lawyers can easily get by other methods. At least sometimes, prisoners can tell their lawyers whether non-compliance with a particular injunctive provision is common or rare and can identify particular incidents that might warrant further investigation.

A Georgia jail decree in a case brought by the United States took a different approach to compliance monitoring, requiring reporting not of the raw facts of compliance, but of the initiatives undertaken, although underlying documentation was also required to be maintained:

51. Defendants shall submit quarterly compliance reports to the United States and the Court, the first of which shall be submitted within sixty (60) days after the entry of this Decree. Thereafter, the reports shall be submitted fifteen (15) days after the termination of each quarter continuing until the Decree is terminated. The reports shall describe the actions the Defendants have taken during the reporting period to implement this Decree and shall make specific reference to the Decree provisions being implemented.

52. Defendants shall keep such records as will fully document that the requirements of this Decree are being properly implemented and shall make such records available at the Jail at all reasonable times for inspection and copying by the United States.

53. Defendants shall submit records or other documents to verify that they have taken such actions as described in their compliance reports and will also provide all documents reasonably requested by the United States. As part of this compliance process, documents submitted shall include a daily population count for the Jail, a separate count of the number of inmates in each cell or dorm, and staffing levels.

. . . .

55. During the period in which the Court maintains jurisdiction over this action, the United States and its attorneys, consultants, and agents shall have unrestricted access to the Jail, Jail inmates, Jail staff, and documents as necessary to address issues affected by this Decree. The United States' unrestricted access shall not conflict with the orderly operation of the Jail. Nothing in this Decree prohibits discovery pursuant to the Federal Rules of Civil Procedure.<sup>97</sup>

And for one of the (mammoth) system-wide California prison cases, plaintiffs' counsel essentially combined both approaches:

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97. Consent Decree ¶¶ 51–53, 55, *United States v. Clay Cnty., Ga.*, No. 4:97-cv-00151 (M.D. Ga. Aug. 20, 1997), *available at* <http://chadmin.clearinghouse.net/chDocs/public/JC-GA-0010-0004.pdf>.

15. Monitoring and Access to Information. Defendants shall provide plaintiffs' counsel with reasonable access to information sufficient to monitor defendants' compliance with their plan. Access to such information shall be provided in the ordinary course of business from the date this Settlement Agreement is approved by the Court. Such information shall include, but is not limited to, the following documents:

- a. A monthly report of the identity and location of all identified members of the plaintiff class;
- b. The complete medical, psychiatric and non-confidential central files of the plaintiff class;
- c. All internal reviews or audits of defendants' plan and programs;
- d. All budget change proposals to implement defendants' plan or programs;
- e. All evaluations of whether prisoners are developmentally disabled;
- f. All analyses and reports concerning the reliability of defendants' screening instruments; and
- g. Documents maintained at individual institutions that are relevant to assessing the state of defendants' compliance.

16. Plaintiffs shall be able to conduct 33 tours of institutions housing members of the plaintiff class per year (including multiple tours of the same institutions), with or without their expert consultants. Such tours shall include access to institutional programs and classification and disciplinary hearings, housing facilities, recreational yards, and all other areas of the institution normally used by inmates. Defendants shall make available for interview departmental, custodial, clinical and program staff that have responsibility for the care, treatment, safety, classification, housing, discipline and programming of class members. Plaintiffs' counsel shall be able to have brief discussions with inmates during the tours and shall be able to provide prison staff with counsel's name and address for distribution to specific inmates. Defendants also shall provide plaintiffs' counsel access to confidential interviews with inmates before or after the tours, as arranged among counsel, during regular business hours without regard to regular visiting hours and days. Plaintiffs reserve their right to seek to depose departmental, custodial, clinical, and program staff members.<sup>98</sup>

Yet another tack is to develop a procedure for independent or shared development of facts, which are then available for use in a termi-

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98. Interim Agreement and Stipulation ¶¶ 15–16, *Clark v. California*, No. 3:96-cv-01486 (N.D. Cal. July 20, 1998), available at <http://chadmin.clearinghouse.net/chDocs/public/PC-CA-0005-0002.pdf>.

nation proceeding. This might be done by a court-approved monitor, a panel of experts, or some other entity. For example, in an Idaho jail case:

114. The parties agree that an inspection of the existing Bonneville County Jail will be conducted by an independent inspector (preferably the Idaho Sheriffs' Association Inspection Team—if they will agree to conduct such inspection and provide a report of their findings) approximately three (3) and six (6) months after the effective date of this Consent Decree to verify compliance with the agreements set forth herein.

115. In the event that either of the parties desires verification of any information pertinent to this Decree during the term of this Decree, counsel for the parties agree to attempt to develop the necessary information, and if necessary, to select an expert, or other qualified individual, who shall be permitted to make the necessary inspections and provide the parties and the Court with information necessary to resolve any questions relevant to this Consent Decree, Order and Judgment.<sup>99</sup>

Of course monitoring has always been a feature of institutional reform litigation. My point here is that use of a monitor, expert panel, or other non-party inspector can give plaintiffs the ability to respond to a termination motion within the tight statutory time frame.

## V. CONCLUSION

Post-PLRA jail and prison litigation procedures tilt sharply in favor of defendants, the officials who run the nation's correctional facilities. The substantive law, too, is far from prisoner-friendly<sup>100</sup> (although this is well beyond the scope of this short paper). It remains possible, however, for courts to remain a forum in which some necessary prison reform can take place. The many consent decree provisions quoted in this paper or cited in its footnotes—and the hundreds more available at the Civil Rights Litigation Clearinghouse—offer a library of options to litigants in prison and jail cases affected by the PLRA. More theoretic-

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99. Consent Decree, Order and Judgment §§ 114–15, *Makinson v. Bonneville Cnty.*, No. 4:97-cv-00190 (D. Idaho Apr. 30, 1997), available at <http://chadmin.clearinghouse.net/chDocs/public/JC-ID-0002-0001.pdf>; see also Consent Decree, Order and Judgment §§ 65–66, *Davis v. Canyon Cnty.*, No. 1:09-cv-00107 (D. Idaho Nov. 12, 2009), available at <http://chadmin.clearinghouse.net/chDocs/public/JC-ID-0005-0004.pdf>.

100. Consider, for example, the holdings in *Wilson v. Seiter*, 501 U.S. 294 (1991), and *Whitley v. Albers*, 475 U.S. 312 (1986). In the first, the Court held that the Eighth Amendment's Cruel and Unusual Punishment Clause is violated by harmful prison conditions only if prison officials have a "culpable state of mind." *Wilson*, 501 U.S. at 296–302. Even egregious mistreatment or neglect can pass constitutional muster if it is merely negligent and not "deliberately indifferent." *Id.* at 302–04. And in the second case, the Court held that uses of force in prison constitutes cruel and unusual punishment only if "force was applied . . . maliciously and sadistically for the very purpose of causing harm." *Whitley*, 475 U.S. at 320–21.

cally, they demonstrate that litigation tactics and procedures are dynamic—that rule changes affect the parties' bargaining positions, but rarely eliminate bargaining altogether.

## APPENDIX

I have posted a compiled file containing state-by-state-by-year data for: jail population; federal and state prison population; and federal court prisoner filings (by type of federal/non-federal defendant). The full panel dataset, which I used to produce this Article's tables and figures, is available in a *Data Appendix*, accessible at <http://www.law.umich.edu/facultyhome/margoschlanger/Pages/Trends.aspx>. This published Appendix includes more information about the sources that underlie that posted dataset.

A. *Federal Court Filings (Table 1 & Figure A)*

All filing and outcome figures in this Article are derived from data by the Administrative Office of the U.S. Courts and cleaned up by the Federal Judicial Center, the research arm of the federal court system. These data include each and every case “terminated” (that is, ended, at least provisionally) by the federal district courts since 1970. The Federal Judicial Center also publishes periodic reports on the data. My figures are not from these written reports but are instead based on my compilation and manipulation of the raw data to eliminate duplicates, remands, etc. The Federal Judicial Center lodges this database for public access with the Inter-university Consortium for Political and Social Research, at <http://www.icpsr.umich.edu>. I used the datasets listed here, pulling the “civil terminations” data from each. By “prisoner civil rights” I mean cases with a “nature of suit” code equal to either 550 (prisoner civil rights) or 555 (prison conditions). I discern no clear distinction between these two codes. A consolidated codebook for the resulting consolidated database is posted in the online *Data Appendix*. Unfortunately, I am unable to post actual data because the Bureau of Justice Statistics has instructed the ICPSR that the data be available only for restricted use.<sup>101</sup>

1970 to 2000: FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 1970–2000, ICPSR STUDY No. 8429.

2001: FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2001, ICPSR STUDY No. 3415.

2002: FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2002, ICPSR STUDY No. 4059.

2003: FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2003, ICPSR STUDY No. 4026.

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101. *Restricted-Use Data Management*, ICPSR, <http://www.icpsr.umich.edu/icpsrweb/content/ICPSR/access/restricted/> (last visited Sept. 15, 2014).

2004: FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2004, ICPSR STUDY No. 4348.

2005: FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2005, ICPSR STUDY No. 4382.

2006: FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2006, ICPSR STUDY No. 4685.

2007: FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2007, ICPSR STUDY No. 22300.

2008: FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2008, ICPSR STUDY No. 25002.

2009: FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2009, ICPSR STUDY No. 29661.

2010: FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2010, ICPSR STUDY No. 30401.

2011: FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2011, ICPSR STUDY No. 33622.

2012 Terminations: FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2012, ICPSR STUDY No. 34881.

2012 Pendencies: FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE APPELLATE AND CIVIL PENDING DATA, 2012, ICPSR STUDY No. 29281.

#### B. *Prison Population (Table 1 & Figure A)*

Both federal and state prison populations are year-end counts and are available for all years for all states. Where available, the figure chosen is the average daily population (because that is the most consistently available data for state-by-state data). But for years when average daily population is not available, the mid-year count is used instead. Details are included in the data file itself.

1970: U.S. DEP'T OF JUSTICE, PRISONERS IN STATE AND FEDERAL INSTITUTIONS: 1968–1970, NAT'L PRISONER STATS. BULL., Apr. 1972, at 22 tbl.10c (sentenced prisoners).

1971 to 1973: U.S. DEP'T OF JUSTICE, PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DECEMBER 31, 1974, NAT'L PRISONER STATS. BULL., June 1976, at 14 tbl.1 (mostly sentenced prisoners).

1974: U.S. DEP'T OF JUSTICE, PRISONERS IN STATE AND FEDERAL INSTI-

TUTIONS ON DECEMBER 31, 1974, NAT'L PRISONER STATS. BULL., June 1976, at 36 tbl.1 (all prisoners).

1975: U.S. DEP'T OF JUSTICE, PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DECEMBER 31, 1975, NAT'L PRISONER STATS. BULL., app. II, at 36 tbl.1 (Feb. 1977) (all prisoners).

1976: U.S. DEP'T OF JUSTICE, PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DECEMBER 31, 1977, NAT'L PRISONER STATS. BULL., at 10 tbl.1 (Feb. 1979) (all prisoners).

1977: U.S. DEP'T OF JUSTICE, PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DECEMBER 31, 1978, NAT'L PRISONER STATS. BULL., at 42 special tbl. (May 1980) (all prisoners in custody).

1978 to 2012: *Corrections Statistical Analysis Tool (CSAT)—Prisoners*, BUREAU JUST. STATS., <http://www.bjs.gov/index.cfm?ty=NPs> (last visited Jan. 15, 2015) (tables available by following *Quick Tables*, then *Inmates in custody of state or federal correctional facilities, excluding private prison facilities, December 31, 1978–2013*, downloadable at [http://www.bjs.gov/nps/resources/documents/QT\\_custnopriv\\_tot.xlsx](http://www.bjs.gov/nps/resources/documents/QT_custnopriv_tot.xlsx); and *Inmates in custody of state or federal correctional facilities, including private prison facilities, December 31, 1999–2013*, downloadable at [http://www.bjs.gov/nps/resources/documents/QT\\_custwpriv\\_tot.xlsx](http://www.bjs.gov/nps/resources/documents/QT_custwpriv_tot.xlsx)).

### C. Jail Population (Table 1 & Figure A)

*Note:* Jail population is entirely unavailable for 1971–1977 and 1979, and only national data are available for 1980–1982, 1984–1987, 1991–1992, and 1994–1999. I assumed a jail population of 160,000 for 1971 to 1977, based on the figures in 1970 and 1978. I assumed a jail population of 170,000 in 1979, based on the figures in 1978. As with prison population, where available, the figure chosen is the average daily population, but for a few years when average daily population is not available, and the mid-year count is used instead. Details are included in the data file itself.

#### National population only

1980 to 2000: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES (2002), *previously available at* <http://www.ojp.usdoj.gov/bjs/glance/sheets/corr2.wk1> (on file with author) (June 30 count).

1980 to 1994: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1994, at 5 (June 1996, NCJ 160091), *available at* <http://www.bjs.gov/content/pub/pdf/>

cpius94a.pdf (*downloadable at* <http://www.bjs.gov/content/pub/sheets/cpi94a.zip>) (June 30 count).

1990 to 1996: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1996, at 20 (Apr. 1999, NCJ 170013), *available at* <http://www.bjs.gov/content/pub/pdf/cpius96.pdf> (June 30 count for all, and average daily population for 1990–1993).

1997 to 1999: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2000, at 6, *available at* <http://www.bjs.gov/content/pub/pdf/pjim00.pdf> (June 30 count).

2000 to 2013: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2013—STATISTICAL TABLES (May 2014, NCJ 245350), *available at* <http://www.bjs.gov/content/pub/pdf/jim13st.pdf> (June 30 count and average daily population).

#### State-by-state population

1970 Mid-year jail population: LAW ENFORCEMENT ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE, NATIONAL JAIL CENSUS 1970, at 10, tbl.2 (1971) (March count).

1978, 1983, 1988, and 1993: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAIL INMATES, BY SEX, HELD IN LOCAL JAILS (1997), *previously available at* <http://www.ojp.usdoj.gov/bjs/data/corpop09.wk1> (on file with author) (June 30 count). See also Jail Censuses for those years (June 30 count and average daily population). *See infra Appendix E: Jail Censuses (Table 2)*; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, THE 1983 JAIL CENSUS, at 2 (Nov. 1984, NCJ 95536).

1983: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1985, at 5 (Dec. 1987, NCJ-103957), *available at* <http://www.bjs.gov/content/pub/pdf/cpus85.pdf> (June 30 count).

1989: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1989, at 5, 8 (Oct. 1991, NCJ-130445), *available at* <http://www.bjs.gov/content/pub/pdf/cpus89.pdf> (June 30 count).

1990: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1990, at 5 (July 1992, NCJ-134946), *available at* <http://www.bjs.gov/content/pub/pdf/cpus90.pdf> (June 30 count).

1993: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORREC-

TIONAL POPULATIONS IN THE UNITED STATES, 1993, at 7 (Oct. 1995, NCJ-156241), *available at* <http://www.bjs.gov/content/pub/pdf/cpop93bk.pdf> (June 30 count).

2000 to 2012: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000–2012—STATISTICAL TABLES, at 15 tbl.11 (Oct. 2014, NCJ 247448), *available at* <http://www.bjs.gov/content/pub/pdf/mljsp0012st.pdf> (downloadable at <http://www.bjs.gov/content/pub/sheets/mljsp0012st.zip>) (average daily population). *Note:* The figures for Tennessee and Oklahoma are adjusted in 2010–2012, and for New York in 2012, because Davidson County, Oklahoma City, and Erie County were omitted from published data in those years. Thanks to Daniela Golinelli, Chief, Corrections Unit, Bureau of Justice Statistics, for providing appropriate corrections.

#### D. *Prison Censuses (Table 2)*

1984: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF STATE ADULT CORRECTIONAL FACILITIES, 1984, ICPSR STUDY No. 8444 (last updated Apr. 22, 1997); *see also* <http://www.bjs.gov/content/pub/pdf/csacf84.pdf>.

1990: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 1990, ICPSR STUDY No. 9908 (last updated Dec. 21, 2001); *see also* <http://www.bjs.gov/content/pub/pdf/csfcf90.pdf>.

1995: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 1995, ICPSR STUDY No. 6953 (last updated Apr. 20, 1998); *see also* <http://www.bjs.gov/content/pub/pdf/Csfcf95.pdf>.

2000: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 2000, ICPSR STUDY No. 4021 (last updated July 9, 2004); *see also* <http://www.bjs.gov/content/pub/pdf/csfcf00.pdf>.

2005: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 2005, ICPSR STUDY No. 24642 (last updated Oct. 5, 2010); *see also* <http://www.bjs.gov/content/pub/pdf/csfcf05.pdf>.

#### E. *Jail Censuses (Table 2)*

1983: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL JAIL CENSUS, 1983, ICPSR STUDY No. 8203 (last updated Feb. 13, 1997); *see also* <http://www.bjs.gov/content/pub/pdf/clj83->

vol1.pdf, <http://www.bjs.gov/content/pub/pdf/clj83-vol2.pdf>, <http://www.bjs.gov/content/pub/pdf/clj83-vol3.pdf>, <http://www.bjs.gov/content/pub/pdf/clj83-vol4.pdf>, <http://www.bjs.gov/content/pub/pdf/clj83-vol5.pdf>.

1988: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL JAIL CENSUS, 1988, ICPSR STUDY No. 9256 (last updated June 24, 1997); *see also* <http://www.bjs.gov/content/pub/pdf/clj88-vol1.pdf>, <http://www.bjs.gov/content/pub/pdf/clj88.pdf>.

1993: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL JAIL CENSUS, 1993, ICPSR STUDY No. 6648 (last updated July 13, 1996).

1999: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL JAIL CENSUS, 1999, ICPSR STUDY No. 3318 (last updated Aug. 16, 2002); *see also* <http://www.bjs.gov/content/pub/pdf/cj99.pdf>.

2006: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF JAIL FACILITIES, 2006, ICPSR STUDY No. 26602 (last updated Jan. 6, 2010); *see also* <http://www.bjs.gov/content/pub/pdf/cjf06.pdf>.

