April 4 (Class 9): Prison Litigation: Courts as a Source of Oversight & Reform

What is the role of courts in criminal justice reform? This class examines the relationships among courts, the administration of prisons, and prisoners' rights. We do so by considering the work of William Wayne Justice, the federal judge involved in the Texas prison litigation (*Ruiz v. Estelle*); the development of congressional efforts to limit courts' authority (the Prison Litigation Reform Act— PLRA); and the contemporary conflict over the most recent prison conditions case to reach the Supreme Court (*Plata v. Brown*). Our focus is on the various actors endowed with constitutional, legislative, administrative, political, and practical powers to oversee the administration of prisons. How did Judge Justice understand the role of judges in prison conditions cases? Is it different than in other kinds of cases? What were the concerns that animated the PLRA? How has the PLRA affected the balance of authority among judges, administrators, and legislatures? What are the metrics to assess the impact of litigation on conditions? The daily lives of inmates and administrators? The resources available to prisons?

Hon. William Wayne Justice, *The Origins of Ruiz v. Estelle*, 43 STANFORD L. REV. 1, 1-12 (1990)

Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons*, Cambridge Univ. Press, 1998

Statement of Senator Abraham, 143 CONG. REC. S14312 (daily ed. Sept. 26, 1995)

Prison Litigation Reform Act, 42 U.S.C. § 1997e et seq.

Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 558-69, 589-622 (2006)

Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOCIETY REV. 731, 731-37 (2010)

Brown v. Plata, 563 U.S. 493 (2011) (excerpts)

Marie Gottschalk, *Prison Overcrowding and Brown v. Plata*, New Republic (June 8, 2011)
http://www.newrepublic.com/article/politics/89575/prison-overcrowding-brown-plata-supreme-court-california

Joan Petersilia, *California Prison Downsizing and its Impact on Local Criminal Justice Systems*, 8 Harv. L. & Pol'y Rev. 327 (2014)

The Origins of *Ruiz v. Estelle*

William Wayne Justice*

On March 21, 1990, the Honorable William Wayne Justice, as Herman Phleger Visiting Professor of Law, delivered a speech to the Stanford community on the origins of Ruiz v. Estelle, *the case in which Judge Justice, after exercising unusual initiative in ordering consolidation of prisoner complaints into a class action, finding counsel for the plaintiff class, and ordering the U.S. Justice Department to appear as amicus curiae, held that state penitentiary treatment and conditions in Texas were unconstitutionally cruel. The* Stanford Law Review *is pleased to reprint the text of Judge Justice's remarks.*

* * *

I would like to take up two issues in my remarks today. The first may be termed historical. I will begin by briefly setting out the sequence of events that led to the initiation of the class action on behalf of prisoners incarcerated in Texas prisons in the case of *Ruiz v. Estelle*.[1] In most class action litigation, of course, the plaintiffs provide the impetus for maintaining the proceeding as a class action. In contrast, the decision in *Ruiz* to classify and consolidate the representative petitions that became the basis on which the case was litigated was my own.

The remainder of my remarks are an attempt to analyze and explain why it seemed necessary for the court to exercise its own initiative to bring about this consolidation. I wish to emphasize at the outset, however, that my desire to explain the court's conduct in *Ruiz* does not amount to an apology. I am much less interested in searching out precedents, in the traditional legal sense of that term, than I am in elaborating some broader analytical or theoretical scheme for making sense of the court's response to the hundreds of ill-drafted, handwritten prisoner's petitions that poured into the clerk's office in the Eastern District of Texas. I believe it is important to elaborate this broader means of understanding *Ruiz* because the problem the Texas prison case posed for our judicial system—specifically, how our courts can provide meaningful access to legal institutions for the most disadvantaged members of our society—is one of the most important and intractable issues that face judges, policymakers, and concerned lawyers of this generation. And there is no reason to expect the issue to become less important or less intractable during your careers in the law.

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* Judge, United States District Court, Eastern District of Texas.

1. 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part, vacated in part,* 679 F.2d 1115 (5th Cir. 1982), *cert. denied,* 460 U.S. 1042 (1982).

For me, the *Ruiz* litigation began before I went on the bench, when I was United States Attorney for the Eastern District of Texas. At that time, I would occasionally attend hearings on prisoner petitions held by my predecessor, the Honorable Joe W. Sheehy.

At this point, I should make clear that most units of the Texas Department of Corrections (TDC) are in the Southern District of Texas. The Beto, Coffield, and Eastham units, however, are situated within the Eastern District, in Anderson and Houston counties. For a good many years, prisoners in those units had been filing suits, primarily on individual bases, protesting the conditions of their confinement. Judge Sheehy had developed a rather summary form of hearing to deal with these cases.

The procedure, which I observed on several occasions, was as follows: The plaintiff would be sworn, and Judge Sheehy would ask him to tell his story. The prisoner would then give, to the best of his ability, a narrative account of the incident or incidents that had led him to file his complaint. Frequently this narrative would be difficult to follow, since most prisoners were, as prisoners are now, poorly educated, with only a rudimentary acquaintance with the English language.

The defendant state official would then have the opportunity to cross-examine the prisoner-plaintiff. Unlike the plaintiffs in these hearings, the defendants were always represented by counsel; as state officials, they would have the services of an assistant attorney general of the State of Texas.

Next, Judge Sheehy would ask the plaintiff if he had any evidence, other than his own testimony, to present to the court. Plaintiffs may have had such evidence from time to time, but I never saw any presented at the hearings I attended. Defendants, on the other hand, usually would produce both witnesses and documentary evidence to bolster their accounts.

After the witnesses for the defense were examined, the plaintiff typically would attempt some halting cross-examination. This was more likely to be "backchat" and denial, rather than recognizable cross-examination. At the conclusion of the defendant's presentation, Judge Sheehy would ask the plaintiff if he had any rebuttal evidence to present. Invariably, the plaintiff would not. Judge Sheehy would then dismiss the plaintiff's complaint from the bench.

I was struck at the time by the summary nature of these proceedings, but I want to emphasize that I did not then find anything in them to be a denial of due process. Nor, on the basis of what I heard in those hearings, did I have any sense of wrongdoing on the part of TDC. My attitude toward TDC at that time was probably similar to that of most Texans: I thought that the system was efficient, and while occasional problems common to all large organizations might exist, no grave, systemic difficulties existed.

Since, as I have said, I did not find any failure of due process in the procedure Judge Sheehy had worked out, I adopted his approach when I went on the bench. However, the process appeared quite different to me as participant than it had when I was merely an observer. The message was

brought home forcibly to me that prisoners who had no legal representation simply could not effectively present their grievances. *Pro se* prisoners, like other *pro se* litigants, had great difficulty in framing any kind of pleading, and knew nothing of the Federal Rules of Civil Procedure or the Federal Rules of Evidence. Their status as prisoners further exacerbated some of their difficulties. It would have been difficult, if not impossible, for them to engage in any discovery, had they even known how to do so.

Occasionally, I was tempted to try to get counsel for these prisoners, but to do so would have been very difficult. I could not order lawyers to represent them, and since at that time neither 42 U.S.C. § 1988[2] nor the Equal Access to Justice Act[3] was on the books, the prospect that an attorney would receive any fee for services rendered in such a case was extremely dim.

I noted that the procedural problems of these cases were likely to produce occasional substantive injustices as well. Despite their unartful expression, plaintiffs would occasionally say some things which had the ring of truth. Since my father had been a county district attorney and a criminal defense lawyer, and since I had been both a criminal defense lawyer and a prosecutor, I had been around jails since I was a boy. Having represented more than a few thieves, bootleggers, rapists, and murderers, I was not disposed to regard as the gospel truth everything a miscreant told me, even—and perhaps particularly— if he said it under oath. However, since my experience also encompassed any number of sheriffs, policemen, and jailers, I was not likely to be wholly credulous as to claims made by peace officers, either. I have been lied to and I have been told the truth, and I think that I can usually tell the difference. Therefore, I was greatly troubled when I found myself, as I sometimes did, dismissing prisoner suits that sounded credible. However, given the inept presentations and lack of documentary evidence in these cases, ruling in these prisoners' favor clearly would have been courting reversal.

I was more than troubled by this state of affairs; I was offended by it. Given the fact that TDC was always represented by counsel, while prisoners had to appear *pro se*, and given the consequences that inevitably followed, one side of a controversy was routinely going unheard. This, it seemed, and still seems, did not accord with the goals and aspirations of our adversarial system of justice.

I made some initial, and very minor, attempts to correct the balance in these proceedings by, in effect, cross-examining the state's witnesses myself. This had little effect on the outcome of the cases, but apparently a fairly large effect on my reputation among prisoners. As William Bennett Turner pointed out in an article on prisoner suits in the *Harvard Law Review*, "The 'liberal' decisions and reputations of individual judges appear to encourage

2. Pub. L. No. 96-481, tit. II, § 205(c), 94 Stat. 2330 (1980) (codified at 42 U.S.C. § 1988 (1982)).

3. Pub. L. No. 96-481, tit. II, §§ 201-208, 94 Stat. 2321, 2325-30 (1980) (codified as amended at 5 U.S.C. § 504 (1988), 15 U.S.C. § 634(b) (1988), 28 U.S.C. § 2412 (1988), and 42 U.S.C. § 1988 (1982)).

prisoner suits."[4] This was borne out in my case, for I began to receive what amounted to bushel baskets of letters from prisoners, detailing their complaints. (These letters were individually composed, and *not* the result of an organized letterwriting campaign. Having been the object of such campaigns launched from both within and without the prison walls, I have learned to recognize them.)

As I read through these baskets of correspondence, I developed a strong suspicion that vast wrongs were being systematically perpetrated on the prisoners, and I began to wonder whether such wrongs could be addressed in a judicial forum.

At about this time, I suppose as a result of the reputation for judicial activism I was acquiring, I was invited to address a seminar being conducted at Southern Methodist University (SMU) on prisons and prison reform. I made a brief speech outlining the problems I had encountered with habeas petitions and § 1983 complaints and recommending the development of some method for attorney appointment in these cases. One of the other speakers at the seminar was William Bennett Turner, whom I have already mentioned. Mr. Turner was already deeply involved in institutional reform litigation through his work for the NAACP Legal Defense Fund. Mr. Turner's presentation made an excellent impression on me.

After outlining my feelings about the inadequacy of the process available in these cases at the SMU seminar, I decided that I wanted to see at least one case where the plaintiffs were adequately represented. Accordingly, I directed my law clerks to inventory the complaints we had received, and to determine which type of complaints arose most frequently.

The complaints fell into four main areas. The first problem we could identify was brutality. Many of the petitions alleged harsh and violent behavior on the part of wardens, guards, staff, and convict overseers who were called "building tenders." The building tenders, who became one of the central issues in the *Ruiz* litigation, were convicts—frequently of the most brutal sort—whom the prison officials informally vested with all manner of supervisory and disciplinary powers, and who exercised that power through fear, physical assault, and the use of weapons tacitly or expressly approved.[5]

A second area about which many prisoners filed complaints was the lack of medical care available to TDC prisoners. TDC's medical care was woefully insufficient in both its staffing and its facilities. Ill-trained TDC and inmate staff had to deal with most routine medical problems, making judgments, prescribing treatments, and in extreme cases, even performing minor surgery that doctors ought to have done.[6]

The third major area of controversy was the grotesque overcrowding of many of the units, a condition that grew worse over time. In many cases,

4. William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts,* 92 HARV. L. REV. 610, 631 (1979).

5. *See* Ruiz v. Estelle, 503 F. Supp. at 1294-1303 (discussing staff and building tender brutality in Texas prisons).

6. *See id.* at 1307-28 (discussing Texas prison health care).

two or three—in extreme cases, even five—prisoners were being housed in cells designed for single occupancy. This overcrowding resulted in unsanitary conditions, great stress for the prisoners, tension, and many assaults.[7] The prisoners were being subjected to the same crowding experiment ethologists have performed on the common gray rat, *Rattus norwegicus*, and the experiment was having the same results.

The fourth topic of complaint was summary discipline. Prison officials allegedly were meting out various penalties to prisoners either without any disciplinary hearings or with hearings bereft of any semblance of due process.[8]

After my law clerks identified these four major categories in the prisoner complaints, I directed them to find a representative plaintiff for each kind of claim presented. One of the plaintiffs selected was David Ruiz. (It later developed that TDC had, in a manner of speaking, preselected David Ruiz as a plaintiff, when in November 1971, he was one of the writ-writers placed in what was called the "eight-hoe squad" at the Wynne Unit. Considering the fact that the creation of the eight-hoe squad concentrated in one place the most experienced jailhouse lawyers in the Texas prison system, it may be questioned how prudently the TDC officials who created it had acted.[9])

Once the cases were sorted out, they were ordered consolidated for trial. I then tried to get in touch with William Bennett Turner at his office at the Inc. Fund in San Francisco, but it developed that he was in Katmandu, Nepal, on a mountaineering holiday. When Mr. Turner returned from his Himalayan excursion, I was able to get hold of him; he agreed to represent the plaintiffs and thereupon filed an amended complaint in the consolidated civil action styled *Ruiz v. Estelle*.[10]

As a result of his preliminary investigation of the case, Mr. Turner determined that it ought to be maintained as a class action. Accordingly, he filed a motion for class certification, the class to consist of all present and prospective TDC prisoners. After an exceedingly short hearing, I granted the motion.[11]

Given Mr. Turner's experience and the resources on which he could draw, the prisoners in this action clearly would be far better represented than any I had heard heretofore. However, there was still a great disparity between the resources for discovery and investigation available to the plaintiff class and those available to the TDC.

I attended the Fifth Circuit Judicial Conference each year, where I al-

7. *See id.* at 1277-85 (discussing crowding in TDC facilities).

8. *See generally id.* at 1346-56 (discussing TDC disciplinary procedures).

9. The "eight-hoe squad" was a punitive work detail of prisoners who were assigned to labor in the prison unit's fields using implements such as hoes and shovels. For a discussion of the Wynne unit's squad, see STEVEN J. MARTIN & SHELDON EKLUND-OLSON, TEXAS PRISONS: THE WALLS CAME TUMBLING DOWN 50-58 (1987). *See also Ruiz*, 503 F. Supp. at 1367-70 (discussing official harassment of litigious prisoners).

10. No. H-78-987 (S.D. Tex. Dec. 12, 1974).

11. Ruiz v. Estelle, No. H-78-987 (S.D. Tex. Dec. 12, 1974) (Dk. No. 40) (order certifying that action may be maintained as class action).

ways met with my friend, Judge Frank M. Johnson, Jr. Judge Johnson had already spent several years dealing with the Alabama prison litigation, which also centered on the issue of overcrowding.[12] We began to compare our prison cases, and Judge Johnson told me that I would be well-advised to involve the United States in the litigation. I asked him how he had accomplished that in the Alabama case, and he told me that he had ordered the Department of Justice to appear as amicus curiae.

I asked Judge Johnson to provide me with a copy of the order he had entered, and using it as a model—or, as we call it in East Texas, a "go-by"—I issued the same kind of order in *Ruiz*.[13] The order gave the United States all the discovery powers of a party to the litigation. The Department lawyers were apparently astonished at what they found after investigation—sufficiently astonished that the United States filed a motion to intervene as a party plaintiff.[14]

The appearance of the United States as amicus had already so disturbed the balance of forces as to cause TDC some unease. But when the United States, with all the resources at its disposal, moved to intervene, it is fair to say that the State of Texas began to raise hell. The state petitioned the Fifth Circuit for a writ of mandamus to set aside my order granting the intervention. The writ was denied,[15] and the state thereupon petitioned the United States Supreme Court for certiorari. Certiorari was denied, with three justices dissenting.[16] In a somewhat unusual manner, the dissenting justices filed a rather blistering opinion written by then-Justice Rehnquist, questioning the authority of a district judge to do what I, and Judge Johnson before me, had done.[17] To obviate the concerns the Rehnquist dissent raised, Senator Edward Kennedy drafted a specific statute granting such authority to the district court.[18]

These, from my perspective, are the origins of the *Ruiz* litigation. I have no hesitation in accepting that what I did can properly be called judicial activism. I was surely not passive. No one told me to consolidate those cases. No one filed a motion for an attorney. I simply wanted to know what was going on. To borrow a phrase from my colleague on the Seventh Circuit, Judge Posner (who borrowed it from Colonel North's attorney, Brendan Sullivan), I was not a potted plant.[19]

Having made these historical observations, I will turn to the questions

12. *See* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978).

13. Ruiz v. Estelle, No. H-78-987 (S.D. Tex. Apr. 12, 1974) (Dk. No. 36) (ordering consolidation of cases and United States to appear as amicus curiae).

14. Motion of United States to Intervene, Ruiz v. Estelle, No. H-78-987 (S.D. Tex. Dec. 6, 1974).

15. *In re* Estelle, 516 F.2d 480 (5th Cir. 1975), *cert. denied sub nom.* Estelle v. Justice, 426 U.S. 925 (1976).

16. Estelle v. Justice, 426 U.S. 925 (1976).

17. *Id.*

18. Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified at 42 U.S.C. § 1997(c) (1988)).

19. Richard A. Posner, *What am I? A Potted Plant?,* NEW REPUBLIC, Sept. 28, 1987, at 23.

they raise. To be blunt, does a court have the authority to do the things I did? In a professedly adversarial court system, to what extent can a judge wield inquisitorial powers?

These questions derive their force in large measure from the traditional way in which we understand our legal system to operate. As Professor Owen Fiss has outlined that understanding, the typical lawsuit involves two antagonistic parties of roughly equal strength who become embroiled in a dispute and who then turn to a third party, a stranger to them and their dispute, asking the stranger to resolve the quarrel.[20] The impartiality of the judge is symbolized, as Professors Judith Resnik and Dennis Curtis have noted in their study of the iconography of justice, by the blindfold that the goddess of justice traditionally wears.[21] Our legal culture has instilled in us a very powerful conviction that the judge must act without fear or favor, showing no preference for either side.

Americans tend to assume that an impartial judge must be a passive judge, to whom the case is brought and before whom the case is constructed by the parties. The court—particularly a federal district court—has relatively little discretion in deciding whether to hear a case. If the court does not have either personal or subject matter jurisdiction, it may not hear the case. If it has both, the court has scant ability to refuse the case. Chief Justice Marshall put the point plainly in *Cohens v. Virginia*:

> The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given.[22]

Professor Abram Chayes adumbrates the duties of the judge in the traditional model. The judge is bound, according to Professor Chayes, "to decide only those issues identified by the parties, in accordance with the rules established by the appellate courts, or, . . . the legislature."[23] The judge, in the traditional model, is also not to assume the role of an investigator, but to remain passive. He or she is conceived to have "little or no responsibility for the factual aspects of the case or for shaping and organizing the litigation for trial."[24]

We live in a judicial world that the traditional model cannot always account for—a world of special masters and of bankrupting fines which would have seemed strange to Chief Justice Marshall (although both are judicial

20. Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice,* 93 HARV. L. REV. 1, 17 (1979).

21. Dennis E. Curtis & Judith Resnik, *Images of Justice,* 96 YALE L.J. 1727, 1727-28 (1987).

22. 19 U.S. (6 Wheat.) 264, 404 (1821).

23. Abram Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1286 (1976).

24. *Id.*

responses to Andrew Jackson's alleged reaction to *Worcester v. Georgia*[25]). Though the increasing prevalence of institutional reform litigation has eroded the hegemony of the model, it continues to inform most of our thinking about judges. For this reason, it is a very serious matter when political officials contend, as they frequently have done in the course of such institutional reform litigation, that the judiciary has stacked the deck against them. Such assertions, if credited, would deeply injure the reputation of the judges in the eyes of all serious persons.

However, the traditional conception of the lawsuit is deficient in several important respects. First, our legal culture is prone to conflate and confuse two independent issues—the issue of arriving at substantively correct decisions and the issue of adequate procedural structure. For this reason, the procedural structure that most assume is the ordinary way in which courts operate is inadequate as a means of making sense of the operation of a court in proceedings in which the parties are not in at least roughly equal positions, or in proceedings in which the remedy is complex and requires continual judicial superintendence long after the judgment is entered.

We can better analyze the conflation, and indeed the confusion, of procedural structure and the necessity of a fair hearing for all parties if we consider the difference between our insistence on a passive judiciary and the approaches of other Western judicial systems. Judicial neutrality is a goal of most, if not all, such systems. Judicial passivity is not. Within the American judicial system, the powers of a federal judge to examine witnesses and otherwise engage directly in the proceedings are broader than the powers of many state court trial judges. Moreover, an English trial judge, who also sits within the confines of the Anglo-American adversarial system, has powers to comment on evidence that are breathtaking in their expansiveness, at least if the highly entertaining "Rumpole" stories by John Mortimer, Q.C., are to be given any credence.[26] The *juge d'instruction* of the inquisitorial Continental systems has yet more authority to engage, and ordinarily does engage, in the investigation of matters which come before him. Nevertheless, in all these cases the judge is charged with a duty to be an impartial, neutral arbiter.

More important problems with the traditional model become visible, however, where the model's assumptions about the parties or the kinds of remedies necessary to fix things no longer hold. These are the types of problems with the traditional model that Professors Fiss[27] and Chayes[28] discuss. I want to distinguish here the procedural difficulties I encountered at the outset of the *Ruiz* litigation from those which developed later on in the course of the case. In the remedial phase of the case, I noted all the

25. 31 U.S. (6 Pet.) 315 (1832). In response to the Court's holding that Georgia had no legislative authority over Cherokee Nation lands, Jackson allegedly remarked: "John Marshall has made his decision. Now let him enforce it." GERALD GUNTHER, CONSTITUTIONAL LAW 25 (11th ed. 1985).

26. *See, e.g.*, JOHN MORTIMER, THE TRIALS OF RUMPOLE (1979).

27. *See* Fiss, *supra* note 20.

28. *See* Chayes, *supra* note 23.

problems with institutional reform litigation which Professors Fiss and Chayes have detailed. I know all too well the difficulties that a court encounters in enforcing orders that compel the reform of an entrenched bureaucracy, and the ways in which those encounters with official intransigence transform the functions of the judge. But those are not the problems I faced at the outset of the case. If I was an activist judge in the initial phases of the case, that activism really came from a straightforward commitment to the traditional goals of adjudication, in a situation in which the necessary balance of forces that underlies the traditional concept of adjudication did not exist.

Far more important than our commitment to the image of the passive judge is our commitment to the idea that the judge's job in the case before him is to get the right answer. Thus, in *Greenholtz v. Nebraska Penal Inmates*, the United States Supreme Court held that "[t]he function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions."[29] Another way of saying this, in Professor Herbert Wechsler's words, is that the duty of the judge is "to decide the litigated case and to decide it in accordance with the law . . . ."[30] Whether you call it avoiding the risk of erroneous decisions, deciding the litigated case, doing substantive justice to the parties, or simply getting to the truth, a judge has a duty to get right answers.

It was, however, difficult if not impossible for me—as it would have been for any judge—to reconcile my duty to decide cases on their merits and to get to the truth of the matters asserted in the courtroom, with the ordinary procedural strictures under which judges routinely operate. If I had continued with the routine I had adopted from Judge Sheehy, I would have spent the rest of my judicial career presiding over hearings that had the trappings of due process, but that were void of meaning.

That, I think, would not have fulfilled the requirements of due process. And I draw some consolation from the thought that such hearings would not have received much support from the leading process-oriented critic of institutional reform litigation, the late Professor Lon Fuller of Harvard. While I do not agree with all of Professor Fuller's analysis in his essay on "The Forms and Limits of Adjudication," I do agree with the "one simple proposition" from which he starts:

> [T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor. Whatever heightens the significance of this participation lifts adjudication toward its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself.[31]

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29. 442 U.S. 1, 13 (1979).

30. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6 (1959).

31. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363 (1978).

It seems clear, if we take Fuller's simple proposition seriously, that a minimal requirement for the judicial process to be legitimate is that both sides have an opportunity to be heard. Yet it would be ludicrous to contend that there was any real participation by the prisoners in the hearings Judge Sheehy and I held prior to the *Ruiz* case. The prisoners were not gagged, nor were they prevented from speaking. But the bare possibility of their presenting "proofs and reasoned arguments" did not afford them a means for doing so. The prisoners had, as I have said before, no earthly idea of how to present their contentions in a legally significant way. To allow them to present their grievances in a halting and semi-literate fashion may have offered them some formal right of participation, but that participation would have been, and indeed was, a nullity. Hence, as Professor Fuller puts it, untutored participation would have "destroy[ed] the integrity of adjudication itself."[32]

Because one of the parties was deprived of effective participation in such hearings, I was unable to perform the central duty of a judge. I could not have decided those cases on their merits. The facts might well have been as the petitioners alleged, and the law on their side. But absent a coherent presentation of the facts and the law, I could not have so found. This defect was not accidental or adventitious. The judicial process was systematically malfunctioning.

The central proposition of process-based theorists like Fuller and Wechsler is that the judicial process, when properly functioning and adhered to by judges, is a means to assure correct legal results. This suggests, contrariwise, that a process that ceaselessly generates results of dubious merit must itself have some serious internal defect. My fellow Texan, Professor Charles Black, made essentially this point in his celebrated response to Professor Wechsler's neutral principles argument. He asked how we would respond to a legal argument that tried to square the fourteenth amendment with the realities of segregation, and he then suggested that the only reasonable response was laughter.[33] There is, after all, a world which exists independently of the way courts see it. And if courts cannot see that world correctly, then the judges need new pairs of glasses.

Think of it this way. If systematic violations of the eighth amendment rights of prisoners were occurring, how could I remain passive and still become aware of those constitutional violations? When asked that way, the question refocuses the way you conceive of constitutional government. You cease to ask whether the passive role is being maintained or neutral principles adhered to. Instead, you begin to ask whether a system of government that might permit systematic violations of constitutionally guaranteed rights to go unnoticed and unaddressed is, in reality, constitutional. The answer to that question is plainly no. Hence, any judge who develops a strong suspi-

32. *Id.*

33. Charles Black, Jr., *The Lawfulness of the Segregation Decisions,* 69 YALE L.J. 421, 424 (1960).

cion, as I did, that the integrity of the judicial process—that is, its capacity for generating decisions that reflect the legal and factual merits of the cases before it—has been violated, is obliged to do something to move the process back onto track.

In *Ruiz*, I was faced with three choices. First, I could have continued to hear large numbers of prisoner petitions for the rest of my judicial career with full knowledge that such petitions were destined to fail. Second, I personally could have attempted to right the balance in the hearings I was conducting. Professor Fuller addresses the main problem with that alternative when he tries to imagine what an arbiter would have to do without lawyers as advocates:

> [T]he arbiter must put aside his neutrality and permit himself to be moved by a sympathetic identification sufficiently intense to draw from his mind all that it is capable of giving—in analysis, patience and creative power. When he resumes his neutral position, he must be able to view with distrust the fruits of this identification and be ready to reject the products of his own best mental efforts. The difficulties of this undertaking are obvious. If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once.[34]

Finally, I could find some means of classifying and consolidating the complaints and seeking out an attorney with the resources to present the prisoners' case adequately.

The first choice would have been wearisome, absurd, and a violation of my duty as I understood it. The second would have transformed me from judge to advocate, a transformation which would not only have been unseemly, but which also would have violated the integrity of the court.

It was not my business to be an advocate. But it was emphatically my business to find an advocate, because the truth could not have been ascertained without one. This concern with enabling the inarticulate to tell their stories is the central theme of what is called the "due process revolution," but the concern is older than the Warren Court. It can be found in the opinion of the court in *Powell v. Alabama,*[35] the Scottsboro Boys case, written by that redoubtable conservative, Justice Sutherland:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He requires the guiding hand of counsel at every step in the proceedings against him. . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[36]

The right to appointed counsel has, of course, progressed by fits and starts, from capital cases in *Powell* to felony cases in *Gideon v. Wainwright*[37]

34. Fuller, *supra* note 31, at 382-83.
35. 287 U.S. 45 (1932).
36. *Id.* at 68-69.
37. 372 U.S. 335 (1963).

to all criminal cases involving imprisonment in *Argersinger v. Hamlin*.[38] The contours of the right in civil cases are uncertain, thanks to the Supreme Court's ruling in *Lassiter v. Department of Social Services*.[39] But the general applicability, and indeed necessity, of the right to appointed counsel in *Ruiz* was clear.

Due process of law does not require that all those who feel aggrieved be able to get what they want from a court. But it does require that when such a person comes to court with a potentially cognizable claim, he be given a chance to say what he wants. Often enough, as any lawyer knows, the right to say what one wants, to get the ear of the court, is itself what a complainant most desires. The right to be heard, whether one's conditions be exalted or lowly, is a right the courts have a duty to vindicate. It was to vindicate that right, and to get at the truth about the conditions of some of the lowliest offscourings of our society, that I helped bring *Ruiz v. Estelle* to birth.

38. 407 U.S. 25 (1972).
39. 452 U.S. 18 (1980).

Judicial Policy Making and the Modern State

HOW THE COURTS REFORMED AMERICA'S PRISONS

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To Jacob, Miriam, Amir, and Rivka
and
Alexander, Gregory, Juliette, Timothy, and Ilene

Texas

The *Ruiz* Complaint and Trial (1972–1980)

The Arkansas litigation was the first and, in many ways, the most significant of all the prison cases, but the largest, longest, and most acrimonious involved the Texas prison system. The events that triggered it occurred in 1965, shortly after Frances Jalet decided to return to law practice after having raised a family. After spending a year at a University of Pennsylvania program to train legal services lawyers, she accepted a position in a federally funded legal services office in Austin, Texas. Almost immediately, she was drawn to some of the office's work involving the legal problems of state prisoners. A few months later, she filed a petition on behalf of a writ writer in the Texas prison system who claimed he was being denied access to legal services.

As if acting on a premonition, officials of the Texas Department of Corrections (TDC) fiercely resisted Jalet's efforts at every turn. They prevented her from visiting the prison on the grounds that she was not a criminal defense attorney representing inmates on appeal. They retaliated against the writ writers who tried to contact her. Eventually, they filed a rather unique suit against Jalet herself, seeking to bar her permanently from access to the prisoners on the grounds that she was "indoctrinating them with revolutionary ideas." As anyone with an even vaguely Cro-Magnon sensibility might have guessed, this bit of legal creativity by the TDC not only failed to intimidate Jalet, but spurred her, and others, to further action. By the time TDC's suit was finally and decisively rejected by the Fifth Circuit, Jalet had been joined by a number of colleagues who were busily filing dozens of petitions against the Texas prison system, challenging the lack of access to legal services and the harsh treatment of inmate writ writers. The writ writers, in turn, were beginning to file complaints about their conditions of confinement, the computation of good time, the prison disciplinary procedures, and a host of other issues.

These petitions were accumulating in disconcerting numbers by the early 1970s. Many of them were directed to Judge William Wayne Justice of the United States District Court for the Eastern District of Texas, who sat in Tyler, home of two state prison units.* Appointed to the district court by Lyndon Johnson in 1968, Judge Justice had quickly gained a reputation as an activist. By the time he began to address conditions in the state prisons, he had already handed down landmark rulings involving bilingual education, voter and employment discrimination, desegregation

* Texas, which has its own names for so many things, calls its prisons "units."

of schools and public housing, and conditions in custodial facilities for juveniles, the accused, and the mentally retarded.[55] Prison reform was thus a natural extension of his abiding concern with the rights of legally marginalized individuals.

In 1972, because of this interest and involvement, Judge Justice was invited to speak at a Practicing Law Institute Seminar on prisoners' rights at Dallas's Southern Methodist University. At the seminar, a young San Francisco lawyer named William Turner gave an impassioned speech on the same topic. Turner, a native Texan and a graduate of Harvard Law School, had litigated desegregation cases in the South for the NAACP Legal Defense Fund. Impressed, Judge Justice resolved to develop a prisoners' rights case of his own and to contact Turner to see if he would represent the complainants. As he later recalled, "I decided that I'd have a little test case to see what a first-class lawyer could do with the state's contentions and what he could develop in favor of the inmates, because I wanted to find out if there was any substance to what [the prisoners] were saying."[56] To develop the issues in the case, Judge Justice asked his clerks to locate "typical" petitions for each type of complaint.[57] Of the several such petitions they directed to him, one had been filed by David Ruiz on June 29, 1972. Ruiz, serving a twenty-five-year term for armed robbery, was known as a troublemaker by prison authorities because of his efforts in helping a number of other inmates file petitions in federal court. In his handwritten petition to Judge Justice, Ruiz alleged that he was being harassed by prison officials and was being denied his constitutional right to medical services and access to the courts. His petition was one of seven that Judge Justice ultimately selected for his "little test case."

Judge Justice's office tracked Turner down in Nepal, where, in true 1970s style, he was trekking, and invited him to handle the case. Upon his return Turner met with the judge, reviewed the petitions, and agreed. On April 12, 1974, he filed a revised version of Ruiz's complaint, now consolidated with the complaints of several other inmates and titled *Ruiz v. Estelle.* The resulting case quickly escalated into a class action suit on behalf of every Texas prisoner against every Texas prison. This was unique at the time, and remains unique to this day; no other system of this magnitude has been the subject of a comprehensive prison conditions suit.* Other prison cases have either involved much smaller systems, like Arkansas's or Rhode Island's; single institutions, like the Colorado Penitentiary and the Santa Clara County Jail; or particular practices in larger systems, like the California visitation rules. But Texas, which so often prides itself

* In 1974, Texas had the largest prison system in the nation in terms of inmate population. At present, California's growing enthusiasm for incarceration has dropped Texas into second place.

on having things that are large, was now embarked on a longhorn-sized litigation involving a host of conditions in all twenty-four of its "units."

Judge Justice quickly recognized the need for rather extensive investigatory resources, far beyond the limited capacities of a legal services office. Displaying a willingness to improvise that was to continue for the duration of the case, and determination that was born from prior experience in massive class action cases involving school desegregation, he took the unusual step of ordering the U.S. Department of Justice to appear as amicus curiae for the plaintiffs. He also ordered it to use its substantial investigatory powers and resources "to investigate fully the facts alleged in the prisoners' complaints, to participate in such civil action with the full rights of a party thereto, and to advise this court at all stages of the proceedings as to any action deemed appropriate."[58] The department's Office of Civil Rights was already involved in a suit challenging racial discrimination in the Texas prisons, and was thus familiar with the situation. Still staffed by lawyers recruited in the heyday of its civil rights activity, the Justice Department attorneys welcomed the request and enthusiastically joined the litigation. Attorney Gail Littlefield was named cocounsel along with Turner, and the department's resources were deployed to investigate conditions in the Texas prisons.[59] Like dozens of other innovative rulings that Judge Justice would make in *Ruiz*, the decision to draw the U.S. Department of Justice into the suit was appealed by the state to the Fifth Circuit Court of Appeals; like almost all the others, the decision was upheld.[60]

As the pretrial proceedings got under way, another distinctive aspect of the Texas litigation quickly became apparent. Arkansas prison officials had recognized that they were part of a backward, corrupt, mismanaged system in an impoverished little state, and were consequently apologetic about the practices revealed by the litigation against them. Other southern prison officials, while they varied in their levels of voluntary self-abnegation, generally displayed similar reactions. But Texas and the TDC were different. Texas was a large, wealthy, and rapidly growing state, located at the geographic juncture where the South became the Sunbelt. And Texas prisons were regarded by their own officials – and by many outsiders – as not only well managed, but as paragons of stern, effective punishment.

This belief in the exemplary nature of the Texas prison system had been carefully cultivated during the previous twenty-five years.[61] It began with the appointment of Oscar Ellis as the commissioner of the Texas Department of Corrections in 1947, a reaction to the usual southern-state scandals over corruption and abuse. Ellis began his adult life as a shoe salesman in Memphis and had backed into corrections. Elected to the Shelby County Board of Commissioners in the late 1930s, he was assigned responsibility for overseeing maintenance of the county roads. This required coordination with the county Department of Corrections, whose inmates worked on the road gangs. Ellis found that he had a gift for disciplining and controlling prisoners, and in short order was running the county corrections work program.[62] His model of a highly regimented, self-sufficient correctional system attracted general notice, and a few years later he was called to apply his approach in Texas. As the state's first systemwide prison manager, he was supposed to clean up the mess, and to a considerable extent he did. For the next fourteen years, until his death in 1961, Ellis reigned over the Texas prisons with an iron hand. He gained widespread respect within the state because he was an efficient administrator who ran orderly institutions and made few demands on the state budget. The prisoners were marched into the fields six days a week where they worked from "day clean to first dark"[63] growing cotton and a variety of other crops on the more than 100,000 acres of agricultural land owned by the TDC. They were guarded largely by "building tenders," armed inmate trusties who were compensated with a variety of costless goods such as special privileges and the opportunity to abuse the other inmates. If they failed to work, or failed to work hard, or sometimes failed to work ferociously hard, they were beaten with a rawhide strap. They were fed cheap food, housed in substandard facilities, and denied all but the most rudimentary medical care.[64] Between the late 1940s and 1958, the average daily cost of maintaining an inmate in the Texas prisons declined from $4 to less than $1.25, and in some years the system even returned funds to the state.[65] This was greatly appreciated by the state legislature, and was no doubt one of the reasons legislators were so willing to defer to Ellis and to abstain from "meddling" in TDC affairs.

Ellis's successor, George Beto, formerly president of a Lutheran college in Austin, not only maintained this tradition, but elevated it to near mythology. Fully six foot, seven inches tall, Beto was a man of tremendous charm and energy, known, with fearful admiration by staff and inmates alike, as "walking George" for his unannounced, personal inspections of the prisons under his command.[66] During his nearly twelve years in office, from 1961 until his retirement in 1972, the TDC came to be regarded as a model prison system: efficient, orderly, and inexpensive.[67] This view was widely held throughout the United States, as evidenced by Beto's election in 1970 as president of the American Correctional Association.[68] In 1972, just as the *Ruiz* case got under way, he was succeeded by James Estelle, his former assistant and handpicked successor.

Although the litigation ultimately revealed the Texas prisons as something of a Potemkin village, the initial reaction of TDC officials to the prisoner complaints must be understood in light of this twenty-five-year myth that had been painstakingly fostered by two powerful, charismatic, and morally self-assured commissioners. TDC officials were proud of their

traditions, viewed their authoritarian regime with its insistence upon cleanliness, order, and strict discipline as the epitome of penological success, and resented outside interference. The bizarre lawsuit under Beto's leadership against Frances Jalet, on the grounds that she was a "troublemaker" intent on "indoctrinating [prisoners] with revolutionary ideas," was not an aberration, but a product of this self-righteous mentality.

The TDC's position in the *Ruiz* litigation, therefore, was predictably one of fierce, no-holds-barred resistance. Because Estelle lacked the charisma and creativity of his predecessors, as Beto himself acknowledged to one of the authors,[69] he felt all the more determined to maintain the regime they had established. He categorically denied any wrongdoing by the TDC, denied that "building tenders" did anything other than janitorial work, and continued to resist and protest at each step of the case.[70] In fact, during the lengthy pretrial phase between 1975 and 1977, Judge Justice had to issue a number of orders to protect the safety of inmates who were cooperating with the plaintiff's attorneys.

The trial finally began in Houston on October 2, 1978, and its massive scale reveals the intensity of the conflict between the plaintiffs and the TDC. The trial lasted 159 days, as the court heard 349 witnesses and reviewed 1,565 exhibits. This mother of all prison trials concluded nearly a year later on September 20, 1979. Fourteen months later, on December 12, 1980,[71] Judge Justice issued a 118–page opinion that amounted to a wholesale condemnation of the Texas prison system. In his conclusion, he could hardly contain his anger at what he had found and his contempt for the officials who had categorically denied these facts:

> [I]t is impossible for a written opinion to convey the pernicious conditions and the pain and degradation which ordinary inmates suffer within the TDC units–the gruesome experiences of youthful first offenders forcibly raped; the cruel and justifiable fears of inmates, wondering when they will be called upon to defend the next violent assault; the sheer misery, the discomfort, the wholesale loss of privacy for prisoners housed with one, two or three others in a forty-five foot cell or suffocatingly packed together in a crowded dormitory; the physical suffering and wretched psychological stress which must be endured by those sick or injured who cannot obtain adequate medical care; the sense of abject helplessness felt by inmates arbitrarily sent to solitary confinement or administrative segregation without proper opportunity to defend themselves or to argue their causes; the bitter frustration of inmates prevented from petitioning the courts and other governmental authorities for relief from perceived injustices.[72]

Judge Justice held that TDC was in violation of the Constitution in six areas: space per inmate, security and supervision, health care, disciplinary procedures, access to legal services, and sanitation and safety conditions. He also indicated a strong preference for the parties to negotiate a settlement rather than relying on the court to formulate its own remedial order. The plaintiffs' attorneys were quite willing to do so, but the TDC officials were seething with rage. While they acknowledged that health services, disciplinary procedures, access to legal services, and sanitation conditions were less than optimal, they argued that these services met constitutional minimums. They thus felt that the judge was holding them to unreasonably high standards and did not fully appreciate the need for security and control. And throughout the trial TDC officials had steadfastly denied plaintiff's allegations that inmate building tenders – the TDC's own name for trusties – were used for security and supervision of other inmates. Nothing in Judge Justice's ruling caused them to change their stance. Although TDC and state officials were bitter that Judge Justice had given them virtually no credit for doing anything right, it was this condemnation of the building tender system that made them truly apoplectic.[73]

Nevertheless, the TDC officials finally did agree to negotiate, believing that they were probably better off participating in the formulation of a consent decree than relying on Judge Justice to formulate one on his own. For them, in other words, negotiations were simply the lesser of two evils. After three months of arm-twisting, Judge Justice finally got the parties to agree to a brief document outlining a procedure for correcting most of the violations found by the court. It contained a list of improvements that had been made since the trial in the areas of health care, provisions for special-needs prisoners (retarded, physically handicapped, developmentally disabled, or mentally ill), work safety and hygiene, the use of chemical agents, the terms and conditions of solitary confinement, and the terms and conditions in administrative segregation. It also specified that the TDC would prepare additional plans to address problems in these areas in light of "the relevant facts and conclusions contained in the court's Memorandum Opinion of December 12, 1980."[74] In all likelihood, this agreement could only have been reached because it was brief and couched in very general language, a tactic that, while successful in the short run, guaranteed that the intense conflict that had characterized the trial would subsequently reemerge.

The Consent Decree, the Special Master, and the Building Tenders (1981–1983)

The draft settlement agreement was submitted to Judge Justice in spring of 1981 and received his swift approval. Judge Justice also persuaded the parties to agree to the appointment of a special master to monitor the preparation and implementation of the plans. A few months later, on July 21, 1981, after reviewing nominations submitted by the parties, he selected Vincent Nathan.[75] Nathan had once taught contracts at the University of

Toledo School of Law. In 1974 District Judge Timothy Hogan had appointed Nathan, who then had had no experience or special interest in prisons, as the master in *Rhodes v. Chapman.*[76] Although the resulting decision was ultimately reversed by the Supreme Court, as noted in Chapter 2, Nathan's intelligence and natural courage had gained him respect from the attorneys for both sides in the case. After his work on *Rhodes,* he was appointed in several other cases, and by the end of the decade he was, along with Allen Breed, one of the two best known masters in the field. He was widely regarded as knowledgeable, businesslike, and well organized, but even his admirers described him as arrogant.

Justice's order gave Nathan sweeping powers and, rather unusually, granted him authority to appoint several assistants. Although the order emphasized that he could not "intervene in the administrative management of the Texas Department of Corrections," or "direct the defendants or any of their subordinates to take or to refrain from taking any specific action to achieve compliance," it provided that Nathan and his assistants could

> observe, monitor, find facts, report or testify as to his findings, and make recommendations to the court concerning steps which should be taken to achieve compliance. The special master may and should assist the defendants in every possible way, and to this end he may and should confer informally with the defendants and their subordinates on matters affecting compliance.[77]

The Court also granted the special master access to TDC files and the authority to conduct confidential interviews with staff and inmates, to attend all formal meetings of TDC officials, to require written reports from any TDC staff member, and to "order and conduct hearings with respect to the defendants' compliance with this court's orders."

Although TDC officials had been consulted regarding the idea of appointing a special master, and welcomed the appointment of Nathan because of his known expertise in corrections, the sweeping powers he received were viewed as one more gratuitous insult by Judge Justice. And almost immediately after Nathan commenced his work, TDC officials realized that they had made a mistake by not opposing his appointment.[78] To assess the adequacy of the TDC plans, Nathan and his associates held hearings and conducted their own investigations. In doing so they almost invariably found the TDC's plans to achieve compliance with the consent decree to be woefully deficient. TDC officials typically acknowledged minor violations, but Nathan's investigations revealed major ones. The TDC proposed modest, incremental reforms; Nathan saw the need for sweeping change. When such disagreements occurred, as regularly they did, the special master would ask the TDC to revise its plans in light of his findings

and offer "suggestions" about what would be required to make the new plans satisfactory. This pattern occurred so frequently that the sequence – submission of plans followed by the master's review and then revision and resubmission – became confused and perhaps even reversed. Nathan gradually came to be perceived as directing the scope and substance of the TDC's plans, rather than simply responding to them.

From Nathan's perspective it was the recalcitrance of the defendants that forced him and his staff to become increasingly involved in ferreting out issues and problems, and in determining the concrete steps needed to meet the requirements of the consent decree. From the defendants' perspective, Nathan was reveling in his power to "run the institution," and nothing they did could ever satisfy him. The final authority to resolve the ensuing disputes belonged to Judge Justice, and he almost always exercised it in favor of his special master. Throughout the process, TDC officials continued to challenge Nathan's findings and requests for more comprehensive planning, but Justice invariably supported Nathan and chastised the TDC for its recalcitrance. Indeed, as TDC resistance to the court continued, Justice's confidence in the special master seemed to grow, and the size and resolve of the master's office grew apace. At its apogee, the office had three monitors, a staff of thirteen, and an annual budget of well over one million dollars. It also had the collective determination to compel the TDC to abide by both the letter and the spirit of the consent decree, by persuasion if possible but by force if necessary.[79]

As a result, Nathan was able to pry out of the TDC a series of increasingly detailed plans which covered virtually every facet of prison life, including delivery of health services, inmate access to law libraries, vocational training programs, space requirements, diets, heating and ventilation, inmate classification systems, plans to deal with inmate gangs, correctional officer hiring, promotion policies, early release options, and architectural plans for new construction in the face of the mushrooming prison population. Each of the plans, together with the special master's reports on them, could run into the hundreds or even thousands of pages, and involve extraordinary levels of detail. Many of the recommended actions depended on vast funding increases for hiring and training new correctional officers, renovating large, old facilities, building still larger new ones, and expanding health, education, and other services. The court routinely approved these recommendations and ordered TDC officials to comply with them. The not-so-hidden audience for many of these recommendations and court orders was the governor and state legislature. The master's findings and recommendations emboldened plaintiffs' attorneys, who continued to expand their inquiry and to unearth new issues. For a period, it seemed, the more TDC acted to respond to these criti-

cisms, the more additional problems were revealed and the more the court's concerns expanded.

The most divisive issue in the entire process, and the one that best reveals the deep hostility between plaintiffs and defendants, involved the building tenders. At trial the plaintiffs' attorney Bill Turner had alleged that the building tender system, which placed prisoners under the discretionary control of other prisoners, had subjected them to a regime of "totalitarian brutality." The judge agreed, and the issue had been included in his consent decree, although the nature of the defendant's response had not been specified. Because the TDC continued to deny the very existence of the building tender system, one of the first things Vincent Nathan did after receiving his appointment was to assign his monitor, David Arnold, to conduct an investigation into the plaintiffs' allegations. Within short order, Arnold produced a lengthy report documenting the building tenders' role in guarding prisoners and maintaining general security. Even after this report, TDC officials continued to deny the findings, and successfully enlisted then Attorney General Mark White to their cause, who at the time was preparing an appeal of Judge Justice's rulings on behalf of the TDC. White had gubernatorial ambitions, which were shortly to be realized, and he and then Governor William Clements were seeking to outdo each other in their support for the TDC and their condemnation of Judge Justice's meddlesome orders.

At this juncture, however, a dramatic turning point occurred in the Texas prisons case. One of the TDC lawyers who was coordinating the appeal was Steve Martin. For many years prior to going to law school, Martin had worked as a guard in Texas prisons, and he was intimately familiar with their procedures, including the actual operation of the building tender system. As he recounts in his coauthored book about the case, he initiated his own quiet investigations in the wake of Arnold's report, the TDC's denials, and the attorney general's plans for the appeal. Drawing on his extensive contacts among both inmates and guards, Martin learned that the system was still intact and that, if anything, Arnold, as an outsider, had been unable to uncover many of its most egregious features. There followed a series of meetings with the attorney general's office, and with the Houston law firm of Fulbright and Jaworski, which had been retained to assist with the appeal, and later to assist the attorney general himself. Martin quietly informed them that Arnold's report was essentially accurate; if anything, it had understated the problem.[80] Attorney General White and his staff were incredulous at first and continued to rail against Judge Justice, but Martin's actions did sow the initial seeds of doubt. The first member of the defense team to seize upon Martin's evidence, however, was not one of the TDC's fancy lawyers, or the Texas attorney general, but Dick Whittington, a member of the Texas Board of Corrections.

Until *Ruiz* forced the TDC into the limelight, the board had been an inactive oversight body, rubber-stamping whatever actions the commissioners proposed. Now it was beginning to take an active role in trying to protect the TDC from the court's ever escalating attacks. As the only lawyer on the board, Whittington, a conservative Republican, had been charged with keeping abreast of the litigation, and thus learned about Martin's confirmation of Arnold's findings. At a meeting with Fulbright and Jaworski lawyers and TDC officials, he confronted Commissioner Estelle. Within a few days, Attorney General White was asking tough questions of Estelle and the TDC, angry that he had been lied to, and no doubt angrier still that he had embraced the lie in public. As time went on, the extent of the TDC's prevarications became increasingly apparent; with surprising rapidity, state officials began to place more credence in the court's findings and were motivated to conduct their own investigations, which in turn uncovered still other problems and abuses.[81]

As these events were transpiring, the TDC suffered another serious defeat – the loss of its appeal from Judge Justice's order. Even as the parties were hammering out the provisions of the settlement agreement and taking the first steps toward its implementation, state officials had been preparing to mount a full-scale appeal of the court's ruling, challenging the court's findings and the scope of the special master's authority. The appeal grew with the case, as the TDC added challenges to the detailed changes that the court demanded. In December 1982, the Circuit Court of Appeals for the Fifth Circuit handed down a unanimous opinion upholding Judge Justice's sweeping rulings, and the broad powers he had granted to the special master.[82] The TDC had drawn heavily on its vast reservoir of political support among Texas lawmakers in mounting this appeal and the concomitant effort to discredit Judge Justice, the special master, and the lead plaintiff's attorney. It had trifled with that support by lying about the building tender system, apparently hoping that Judge Justice would be reversed and the TDC could withdraw into its prior insularity and independence. Now the appeal was lost, the lie exposed, and their political support was crumbling.

Implementation of the Court Order (1983–1990)

By the mid-1980s, it seemed clear that the old order was passing, although battles continued to be fought and resistance remained fierce. The central features of the system under which it had flourished – income-producing prison labor, the building tenders, paternalistic discretionary control – had all been ground into the Texas dust. *Ruiz* had not found any of these features unconstitutional per se, but the joint implementation efforts of Judge Justice and Vincent Nathan created a regime in which they could

not survive. Instead of profit-making labor, Justice and Nathan demanded vocational programs and vastly increased expenditures on food and health care; instead of the inexpensive, sadistic convict building tenders, they demanded well-trained, salaried guards; instead of paternalism, they demanded due process and formally enacted legislation. These changes were each extensive by themselves; collectively, they produced a complete transformation of the methodology and style of the Texas prisons.

The collapse of the old order created a crisis within the TDC, as many of the most experienced managers were forced to resign or chose to do so. Those disillusioned few who remained were compelled to oversee the work of a rapidly growing cadre of inexperienced and hastily recruited guards who filled the role once occupied by the building tenders. With the court, its special master, and increasingly disgruntled state officials scrutinizing them, the TDC's leaders initiated a series of administrative shake-ups, which resulted in still more resignations, dismissals, and reassignments, plus a regime of micromanagement from the top down that further undermined staff effectiveness and morale. During 1983 and 1984, over two hundred disciplinary actions were brought against the remaining correctional officers. Citing frustration with the court and an inability to obtain funding from the state legislature, James Estelle resigned in 1983.[83]

He was replaced in May 1984 by Ray Procunier, the first TDC director who accepted the court orders as a given and was prepared to work within the framework established by them. Procunier had a solid record as a tough, reform-minded correctional administrator, whose strength was turning problems around quickly. He had held a series of important positions in California and, at the time of his appointment, was deputy director of corrections in New Mexico, specifically appointed there to bring order and discipline to that state's prison system in the wake of the 1980 rioting that had left thirty-three inmates dead. In Texas Procunier only served a little more than one year, but during that time he agreed to a second major settlement of outstanding issues that included crowding, visitation, staffing, construction, and classification. In reaching these agreements, Procunier alienated Attorney General White, who had continued to use the prison litigation as a campaign issue and had attacked any proposals, including his own earlier ones, to spend more funds on prisons. Rather than waiting to be fired by soon-to-be Governor White, Procunier resigned.

This administrative and political turmoil had its counterpart among the inmates. The problem had been anticipated by both Judge Justice and various state officials, but they were unable to prevent it. Guarded by an inexperienced and ill-prepared staff and freed from the brutal repression of the building tenders, inmates began to prey on each other with increasing frequency, while inmate gangs battled each other through every

section of the Texas prisons. These gangs were part of a nationwide development unrelated to events in Texas, or even prison reform generally, but in Texas they had clearly seized an opportunity presented by the lacuna in control. As Ben Crouch and James Marquart observe in their study of Texas prisons in the aftermath of *Ruiz*, to "protect themselves in an increasingly uncertain world, many inmates resorted to violent self-help, and in the process violence became a mechanism of social control."[84] The net result was that inmate-to-inmate violence escalated to an all-time high. The number of recorded fights among prisoners more than doubled, from thirty-eight per thousand prisoners in 1983 to eight-seven per thousand in 1986. Inmate deaths caused by other inmates skyrocketed, jumping from one or two per year throughout the 1970s to twenty-five in 1984 and twenty-seven in 1985.[85]

Following Procunier's resignation, state officials turned to another non-Texan to run the TDC: Lane McCotter. McCotter had been both a career soldier and a career corrections administrator, having spent his entire time in the Army – over twenty years – running military prisons. His last posting had been commander of the military barracks at Fort Leavenworth, Kansas, the toughest of the Army's several maximum security facilities. Among his colleagues McCotter was known as someone who was firm, fair, and ran a tight operation for both his staff and inmates. The significance of his selection could not have been lost on either the TDC administrators and correctional officers or the inmates – everyone knew that he had been selected to restore order and discipline to both these now unsettled groups. McCotter moved quickly, adopting the strict style that had characterized his administration at Leavenworth. He instituted frequent twenty-four-hour lockdowns and introduced massive numbers of new guards who had been subjected to an intense regimen of training. By 1986, the level of inmate violence began to decline. Indeed, Crouch and Marquart report that after McCotter's changes, long-term inmates felt safer than ever before, not only in comparison with the immediately previous period of heightened violence, but in comparison to life under the old order and the building tender system.[86]

This new regime was also harsh, however. Crouch and Marquart characterize it as "hyperlegalistic," by which they mean that the new director insisted that every detail in the prison's operations had to run "by the book," a book that he himself had written.[87] At times, some observers have commented, this meant that compliance with picayune, hastily conceived rules took precedence over common sense. But it did produce immediate results, and it eventually began to mature into a new order modeled along military lines rather than upon autocratic and personalistic rule.

Although everyone recognized the need to restore order, other features

of the court-ordered changes faced fierce resistance and daunting complications, as TDC officials continued to be truculent and uncooperative. Writing of his experience as a monitor for the special master, Samuel Brackel described the difficulties in implementing the seemingly straightforward task of providing prisoners access to legal materials:

> [T]he very introduction of the access [to legal materials] rules into the prison system generated – like any other new set of rights or rules would – considerable conflict and controversy. Inevitably, the availability of these new rights led to a spirited assertion of them by inmates and an explosion of charges that they were being violated by prison staff. The staff in turn reacted to these charges, often in a fashion that matched the unproductive and frivolous character of too many of the inmate complaints.[88]

This problem was complicated still further when the new library, with its relatively easy access, became a convenient rendezvous for homosexual liaisons, which at times crowded the limited space beyond capacity and initiated yet another round of conflict among inmates, staff, the prison system, and the Court.* Such spiraling problems were repeated hundreds of times, each time a new program or a new policy was put in place.

The situation was further complicated by the emergence of an additional problem that was clearly not attributable to either the TDC or the court order – the prison population explosion. Between 1972, when the case was first filed, and 1982, when the trial ended, Texas's prison population jumped from fifteen thousand to over twenty-six thousand. By the time the court terminated jurisdiction over *Ruiz*, in December 1992, it had risen to nearly fifty thousand. As in Arkansas, what began as a suit challenging practices and conditions eventually turned into a crowding suit, with the court, along with plaintiffs' attorneys and the defendants, scrambling to devise ways to accommodate the hundreds of new inmates who arrived each day at the doors of the state's already overcrowded prisons.

During the course of the litigation, this pressure grew even more acute as a result of separate federal court orders dealing with crowding in Texas county jails. For instance, in a suit against the Harris County (Houston) jail, a different federal judge ordered the TDC to stop its practice of refusing to accept newly sentenced offenders and leaving them to languish in the still more crowded county jails. Although this was a strategy devised by the TDC to meet its own court-ordered population caps, its compliance

* This pattern ultimately led Brackel to question the value of highly intrusive court orders. Repeatedly, he argues, such changes "led to a situation in which the level of mutual psychological harassment and the inclination to engage in other petty tests of power [were] raised to new heights."

was purchased at the price of keeping inmates in even worse conditions. The Harris County jail suit precipitated a crisis regarding this arrangement, but despite sustained litigation, the matter was never fully resolved and as of this writing TDC officials still try to delay acceptance of offenders sentenced to their custody.

The court's response to the crowding problem was to obtain the parties' agreement to a separate stipulation. In its original version, established in 1985, this stipulation provided for a system capacity of 40,134, but it was regularly amended as new facilities opened, and had reached 77,213 by 1995. The TDC's response to crowding took a variety of forms. Nudged by the court, it entered into a massive building campaign, greatly expanding its housing capacity throughout the 1980s. It turned to private contractors who quickly built and began to run facilities for low-security offenders. It developed a classification system that allowed it to house offenders more efficiently. It delayed acceptance of newly sentenced offenders, the court orders notwithstanding, thereby decreasing intake. It constructed tent cities within the walls of existing facilities to house inmates temporarily. Throughout all this, there was constant friction with the plaintiffs, the special master, and the court, as the population of various facilities approached the numbers provided for in a crowding stipulation.* [89] But there was also a sense that all parties were addressing the same problem, and that they perceived that problem in roughly equivalent ways.

In fact, by the late 1980s, there was a new attitude toward the court in evidence among TDC officials, largely because the officials themselves were new. These new officials grudgingly accepted the court's jurisdiction and embraced the views of modern correctional professionals. They no longer sought to defend the old order, or saw a need to lie about the discredited building tender system. It may have been this change in attitude, more than anything else, that led Judge Justice to begin winding down this elephantine case. On March 6, 1990, Justice ordered the parties to begin negotiations for a comprehensive final order. He required that the parties address "compliance problems, ensure that unconstitutional conditions do not recur, eliminate unnecessary detail, institutionalize reforms, improve defendant's internal monitoring mechanisms, and establish remedies and timetables for termination of the court's jurisdiction."

* Early in this process, after Judge Justice had released inmates on his own in order to relieve crowding, the legislature in Texas enacted the Texas Prison Management Act in order to permit the TDC to select the inmates to be released. This act, which provided a mechanism for early release whenever crowding reached a specified level (95 percent of capacity as defined in the act) was invoked twelve times in the first two years of its existence.

Needless to say, the path toward this final order was not always smooth, and the negotiations took over two years to complete. The proposed final judgment that emerged was divided into twenty-two sections, each covering an issue that had been central to the litigation. Rather than establish a timetable for the complete termination of the court's jurisdiction, the proposal included certain permanent injunctions that prescribed defendant's future actions with regard to crowding and to selected services.*

On December 11, 1992, Judge Justice signed the final order. In it he observed that "Deputy Director Scott . . . testified that the dramatic increases in staffing since the court entered its Amended Decree in 1981 have permitted the TDC to replace the building tender system with uniformed security staff, . . . and the record reflects that . . . officials effectively have dismantled the building tender system, and . . . that those officials intend to maintain their current policies in this area."[90] This was a dramatic turnabout from the first several years of the litigation, when TDC officials steadfastly denied the existence of the building tender system while trying to maintain it in actuality. Although the final judgment covered a host of issues, it may have been the significance of this acknowledgment and the changes that it implied that led Judge Justice to conclude his opinion with the following observation:

> Over twenty years ago, a handful of brave prisoners set in motion a process that even defendant's highest officials acknowledge has improved all aspects of the TDCJ-ID. TDCJ-ID has remade itself into a professionally operated agency whose goals are to achieve the highest standards of correctional excellence.
>
> Equally important, the measures taken by TDCJ-ID officials to meet their constitutional obligations have been memorialized and institutionalized in numerous internal rules and regulations that have replaced this court's orders as the agency's "road map" to success. The court is satisfied that the defendants not only will maintain and implement these rules and regulations, but also will continue to strive to improve on them and their implementation despite the absence in many areas of detailed court orders.[91]

But even as he took great satisfaction in the department's change of attitude and positive accomplishments, Judge Justice's opinion sounded two

* Sections of the final order addressed the following issues: staffing, support services, disciplinary procedures, health and safety, use of force, access to courts, maintenance of facilities, heating and ventilation, programmatic and recreational opportunities, crowding, bilingual staff, internal monitoring by defendants as to the conditions of the final agreement, programs for mentally retarded inmates, health services, psychiatric services, and conditions on death row.

themes he regarded as ominous. Noting that the department agreed to be permanently enjoined from exceeding population caps for those institutions identified in the plan, he nevertheless observed that the state appeared to have an "insatiable appetite" for incarcerating people. He also noted two recent, retrenchment-era cases, *Rufo v. Inmates of the Suffolk County Jail*[92] and *Freeman v. Pitts*,[93] which were handed down by the Supreme Court as the proposed settlement agreement was being negotiated. In *Rufo* the Supreme Court had substantially weakened the importance of consent decrees, establishing a "flexible" standard for the modification of such decrees in place of the more restrictive "grievous wrong" standard that had been in effect since 1932,[94] and that had applied to this case until its final months. Thus even as Judge Justice hailed the dramatic improvements in the state's prisons and the professionalism of its new administrators, he noted two developments that threatened to unravel the complex, painfully achieved agreement that had brought *Ruiz* to its conclusion.

In the twenty years since David Ruiz filed his petition and, more particularly, the twelve years that the Texas prisons had been placed under comprehensive judicial supervision, massive changes had occurred. The patriarchal regime, the building tenders, and the primitive living conditions were gone; professional guards, medical personnel, educational programs, and a federally trained superintendent had appeared in their place. Hundreds of millions of dollars, perhaps as much as a billion, had been spent as a result of the court's orders. In the largest, most bitterly contested prison case in American history, and almost certainly one of the largest and most bitterly contested legal cases in the history of Anglo-American law, the court had won a decisive, if potentially unstable victory.

3. TWO CLASSIC PRISON REFORM CASES: ARKANSAS AND TEX

1. The historical summary is based on: Arkansas Department of Correctio... *A Brief History of the Arkansas Department of Corrections,* (1985); James F... guson, *A History of the Arkansas Penitentiary* (1965).
2. Ferguson, *supra* note 1, at 9.
3. This description, like much of the information about the litigation's eff... on the Arkansas prisons, is based on interviews conducted by the auth... at Cummins Farm on January 2, 1992, with A.L. Lockhart, commissio... of the Arkansas Department of Corrections, and with other Arkan... prison officials. For a description of Mississippi's Parchman Farm... rather similar institution, see David Oshinsky, *Worse Than Slavery,* 135–... (1996).
4. See *Talley v. Stephens,* 247 F. Supp. 683 (E.D. Ark. 1965); *Jackson v. Bi...* 268 F. Supp. 804 (E.D. Ark. 1967); *Holt vs. Carver,* 300 F. Supp. 825 (E... Ark. 1969).
5. 247 F. Supp. 683 (E.D. Ark. 1965).
6. *Id.* at 684.
7. 268 F. Supp. 804, 806 (E.D. Ark. 1967); *vacated* 404 F.2d 571 (8th C... 1968).
8. *Jackson v. Bishop,* 404 F.2d 571, 580 (8th Cir. 1968).
9. *Id.*
10. 400 F.2d 1185 (8th Cir. 1969).
11. Authors' interview with Judge Eisele, Little Rock, Arkansas, Januar... 1992. (Judge Eisele was Rockefeller's campaign manager in his first r... for the governorship, and later his chief of staff.)
12. For a general description, see Mary Parker, "Judicial Intervention on C... rectional Institutions: The Arkansas Odyssey" (Ph.D. dissertation, S... Houston State University, 1983).
13. Eisele interview, *supra* note 11.
14. 300 F. Supp. 825 (E.D. Ark. 1969). This suit was probably encouraged... Sarver. Lockhart Interview, *supra* note 3.
15. See Parker, *supra* note 12; authors' interview with Mary Parker, Little Ro... January 3, 1992.
16. 300 F. Supp. at 832.
17. *Arkansas Gazette,* February 21, 1970, at 8, col. 4, cited in Parker, *supra* n... 12.
18. Parker, *supra* note 12, at 336.
19. 309 F. Supp. 362 (E.D. Ark. 1970).
20. Authors' interview with Jack Holt, Chief Justice, Arkansas Supreme Co... January 6, 1992.
21. *Arkansas Gazette,* February 20, 1970, p. 1, col. 1.
22. *Holt v. Sarver* (*Holt II*), 309 F. Supp. 362, 365 (E.D. Ark. 1970).
23. The figures in the footnote are found at *id.* at 373.
24. *Id.* at 381.

25. *Id.* at 381–82.
26. *Id.* at 382.
27. *Id.* at 385.
28. *Holt v. Sarver,* 442 F.2d 304 (8th Cir. 1971).
29. *Holt v. Hutto,* 363 F. Supp. 194 (E.D. Ark. 1973).
30. *Id.* at 198.
31. *Id.* at 216.
32. *Id.*
33. *Id.* at 217.
34. *Finney v. Arkansas Board of Corrections,* 505 F.2d 194, 215 (8th Cir. 1975).
35. *Id.* at 199.
36. *Id.* at 215.
37. *Finney v. Hutto,* 410 F. Supp. 257 (E.D. Ark. 1976).
38. Dudley Spiller & M. Kay Harris, *After Decision: Implementation of Judicial Decrees in Correctional Settings,* 64 (1977).
39. *Hutto v. Finney,* 437 U.S. 678 (1978).
40. Lockhart interview, *supra* note 3; Parker interview, *supra* note 15.
41. For an account of this process, see Parker, *supra* note 12.
42. Eisele interview, *supra* note 11.
43. *Finney v. Marbry,* 455 F. Supp. 756 (E.D. Ark. 1982).
44. *Id.* at 758.
45. *Id.* at 777.
46. Eisele interview, *supra* note 11.
47. Federal Rules of Civil Procedure, Rule 53 (b). David Kirp & Gary Babcock, "Judge and Company: Court-Appointed Masters, School Resegregation and Insitutional Reform," 72 Ala. L. Rev. 313 (1981); Theodore Eisenberg & Stephen Yeazell, "The Ordinary and Extraordinary in Institutional Litigation," 93 Harv. L. Rev. 465 (1980).
48. See Susan Sturm, "Mastering Intervention in Prisons," 88 Yale L. J. 1062 (1979).
49. Parker, *supra* note 12.
50. *Id.*
51. Eisele interview, *supra* note 11.
52. *Id.*
53. *Id.*
54. Lockhart interview, *supra* note 3.
55. Frank R. Kemerer, *William Wayne Justice: A Judicial Biography,* 358 (1991).
56. *Id.* at 358.
57. *Id.* at 359.
58. *Id.*
59. For an account of this process, see *id.* at 359–361.
60. *In re W. J. Estelle, Jr.,* 516 F.2d 480 (5th Cir. 1975).
61. There are several excellent descriptions of the prelitigation Texas prisons and the ensuing litigation: Ben Crouch & J. W. Marquart, *An Appeal to Justice: Litigated Reform of Texas Prisons* (1989); Steve Martin & Sheldon Ekland-Olson, *Texas Prisons: The Walls Came Tumbling Down* (1987). Another account, which has received widespread attention, is John Di-

Iulio, *Governing Prisons: A Comparative Study of Correctional Manage*
(1987). The authors' questions about DiIulio's interpretation appear
Malcolm Feeley & Edward Rubin, "Prison Litigation and Bureauc
Management," 17 L. & Soc. Inquiry 125, 137–43 (1992).
62. Martin & Ekland-Olson, *supra* note 61, at 19–20.
63. *Id.* at 15–23.
64. *Id.* at 9–25; Crouch & Marquart, *supra* note 61, at 13–46.
65. Crouch & Marquart, *supra* note 61, at 35.
66. *Id.* at 40.
67. *Id.* at 42–43.
68. *Id.* at 43.
69. Author's interview with George Beto, Huntsville, Texas, May 9, 1986
70. Martin and Ekland-Olson, *supra* note 61, at 175–77.
71. *Ruiz v. Estelle*, 503 F. Supp. 1265, 1378 (S.D. Tex. 1980).
72. *Id.* at 1381.
73. Martin and Ekland-Olson, *supra* note 61, at 176–77.
74. *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex 1980).
75. Crouch & Marquart, *supra* note 61, at 127; Martin & Ekland-Olson,
note 61, at 183.
76. 452 U.S. 337 (1981).
77. *Ruiz v. Estelle* (S.D. Tex. 1981) (Memorandum Opinion, July 24).
78. Author's interview with O. L. McCotter, Huntsville, Texas, May 9,
Beto interview, *supra* note 69.
79. Martin & Ekland-Olson, *supra* note 61, at 198.
80. *Id.* at 189 *Id.* at 196.
81. *Id.* at 196.
82. *Ruiz v. Estelle*, 688 F.2d 266 (1982).
83. Crouch & Marquart, *supra* note 61, at 235.
84. Crouch & Marquart, *supra* note 61, at 199.
85. *Id.* at 201.
86. *Id.* at 221.
87. Crouch & Marquart, *supra* note 61, at 149. See also McCotter intervie
supra note 78.
88. Samuel Jan Brackel, "Mastering Legal Access Rights of Prisoners," 12
Eng. J. of Crim. and Civ. Confine. 69 (1986).
89. The statute described in the footnote is Texas Prison Management A
General and Specialized Laws, 68th Legislature, Regular Session (19
codified as amended at Vernon's Texas Codes Ann. § 449 (West 19
Supp. 1997).
90. *Ruiz v. Estelle* (S.D. Tex. 1992) (Memorandum Opinion, Decembe
1992).
91. *Id.* at 33.
92. 502 U.S. 367 (1992).
93. 503 U.S. 467 (1992).
94. See *United States v. Swift & Co.*, 286 U.S. 106 (1932).

4. THREE VARIATIONS ON THE THEME: COLORADO STATE PENITENTIARY, THE SANTA CLARA COUNTY JAILS, AND MARION PENITENTIARY

1. Colo. Rev. Stat. §17-24-102(1) (a), (b), (c), (d) (1978).
2. Colo. Rev. Stat. §24-90-107 (1) (a) (1973).
3. *Ramos v. Lamm*, 485 F. Supp. 122, 137 (1979).
4. *Id.* at 142.
5. *Id.* at 142.
6. *Id.* at 137, 140.
7. *Id.* at 46.
8. *Id.* at 133.
9. *Id.* at 134.
10. *Id.* at 133.
11. *Id.*
12. *Id.*
13. Author's interview with Brad Rockwell, Legal Affairs Coordinator, Colorado Department of Corrections, Canon City, Colorado, June 6, 1989.
14. On the status of transitional workers, see *Ramos v. Lamm*, 485 F. Supp. at 138.
15. *Ramos v. Lamm*, 485 F. Supp. at 561.
16. 441 U.S. 520 (1979).
17. Cited in *Ramos v. Lamm* 485 F. Supp. at 129.
18. *Ramos v. Lamm* 485 F. Supp. at 133.
19. *Ramos v. Lamm*, *supra* note 3.
20. *Id.* at 140.
21. *Ramos v. Lamm*, 485 F. Supp. at 144.
22. *Id.* at 156.
23. *Id.* at 170.
24. *Id.* at 168.
25. *Ramos v. Lamm*, 713 F.2d 546 (1983).
26. The language quoted in the footnote from the dissenting opinion appears at *id.* at 560.
27. *Ramos v. Lamm*, Civil Action 77-K-1093 (N. D. Colo., August 7, 1985, at 3 (consent order).
28. *Ramos v. Lamm*, Civil Action 77-K-1093 (N. D. Colo., November 29, 1985) (Legal access plan).
29. *Ramos v. Lamm*, Civil Action 77-K-1093 (N. D. Colo., March 27, 1986) (Memorandum opinion and order).
30. *Ramos v. Lamm*, Civil Action 77-K-1093 (N. D. Colo. September 18, 1987) (Agreement and stipulation for order).
31. *Ramos v. Lamm*, Civil Action 77-K-1093, N. D. of Colo., December 8, 1987) (Order approving stipulation for closure of care).
32. For a history and analysis of jail litigation, see Wayne Welch, *Counties in Court: Jail Overcrowding and Court-Ordered Reform* (1995).

By Mr. ABRAHAM (for himself, Mr. HATCH, Mr. SPECTER, Mr. KYL, and Mrs. HUTCHISON):

S. 1275. A bill to provide for appropriate remedies for prison condition lawsuits, to discourage frivolous and abusive prison lawsuits, and for other purposes; to the Committee on the Judiciary.

THE PRISON CONDITIONS LITIGATION REFORM ACT

• Mr. ABRAHAM. Mr. President, I introduce legislation that I believe is essential if we are to restore public confidence in government's ability to protect the public safety. Moreover, it will accomplish this purpose not by spending more taxpayer money but by saving it.

This legislation removes enormous obstacles the Federal Government has placed in the path of States' and localities' ability to protect their residents. I would like to highlight three of these obstacles and explain what we are going to do to remove them.

First, in many jurisdictions including my own State of Michigan, judicial orders entered under Federal law raise the costs of running prisons far beyond what is necessary. These orders also thereby undermine the legitimacy and punitive and deterrent effect of prison sentences.

Second, in other jurisdictions, judicial orders entered under Federal law actually result in the release of dangerous criminals from prisons.

Third, these orders are complemented by a veritable torrent of prisoner lawsuits. Although these suits are found non-meritorious the vast majority of the time (over 99 percent, for example, in the ninth circuit), they occupy an enormous amount of State and local time and resources; time and resources that would be better spent incarcerating more dangerous offenders.

Let me start with the problems in my own State of Michigan.

Under a series of judicial decrees resulting from Justice Department suits against the Michigan Department of Corrections, the Federal courts now monitor our State prisons to determine:

1. How warm the food is.
2. How bright the lights are.
3. Whether there are electrical outlets in each cell.
4. Whether windows are inspected and up to code.
5. Whether prisoners' hair is cut only by licensed barbers.
6. And whether air and water temperatures are comfortable.

Elsewhere, American citizens are put at risk every day by court decrees. I have in mind particularly decrees that cure prison crowding by declaring that we must free dangerous criminals before they have served their time, or not incarcerate certain criminals at all because prisons are too crowded.

The most egregious example is the city of Philadelphia. For the past 8 years, a Federal judge has been overseeing what has become a program of wholesale releases of up to 600 criminal defendants per week to keep the prison population down to what she considers an appropriate level.

Under this order, there are no individualized bail hearings on a defendant's criminal history before deciding whether to release the defendant before trial. Instead, the only consideration is what the defendant is charged with the day of his or her arrest.

No matter what the defendant has done before, even, for example, if he or she was previously convicted of murder, if the charge giving rise to the arrest is a non-violent crime, the defendant may not be held pretrial. Moreover, the so-called non-violent crimes include stalking, carjacking, robbery with a baseball bat, burglary, drug dealing, vehicular homicide, manslaughter, terroristic threats, and gun charges.

As a result Philadelphia, which before the cap had about 18,000 outstanding bench warrants, now has almost 50,000. In reality, though, no one is out looking for these fugitives. Why look? If they were found, they would just be released back onto the streets under the prison cap.

In the meantime thousands of defendants who were out on the streets because of the cap have been rearrested for new crimes, including 79 murders, 959 robberies, 2,215 drug dealing charges, 701 burglaries, 2,748 thefts, 90 rapes, and 1113 assaults.

Looking at the same material from another vantage point: In 1993 and 1994, over 27,000 new bench warrants for misdemeanor and felony charges were issued for defendants released under the cap. That's 63 percent of all new bench warrants in 1993 and 74 percent of all new bench warrants for the first 6 months of 1994.

Failure to appear rates for crimes covered by the cap are all around 70 percent, as opposed to, for example, non-covered crimes like aggravated assault, where the rate is just 3 percent. The Philadelphia fugitive rate for defendants charged with drug dealing is 76 percent, three times the national rate.

Over 100 persons in Philadelphia have been killed by criminals set free under the prison cap. Moreover, the citizenry has understandably lost confidence in the criminal justice system's ability to protect them. And the criminals, on the other hand, have every reason to believe that the system can't do anything about them.

All of this would be bad enough if it were the result of a court order to correct serious constitutional violations committed by the Philadelphia corrections system. But it is not.

Indeed, a different Federal judge recently found that conditions in Philadelphia's oldest and most decrepit facility—Holmesburg Prison—met constitutional standards.

These murderous early releases are the result of a consent decree entered into by the prior mayoral administration from which the current administration has been unable to extricate itself.

Finally, in addition to massive judicial interventions in State prison systems, we also have frivolous inmate litigation brought under Federal law; this litigation also ties up enormous resources. Thirty-three States have estimated that Federal inmate suits cost them at least $54.5 million annually. The National Association of Attorneys General have extrapolated that number to conclude that nationwide the costs are at least $81.3 million. Since, according to their information, more than 95 percent of these suits are dismissed without the inmate receiving anything, the vast majority of the $81.3 million being spent is attributable to non-meritorious cases.

Mr. President, in my opinion this is all wrong. People deserve to keep their tax dollars or have them spent on projects they approve. They deserve better than to have their money spent, on keeping prisoners in conditions some Federal judge feels are desirable (although not required by any provision of the Constitution or any law). And they certainly don't need it spent on defending against frivolous prisoner lawsuits.

And convicted criminals, while they must be accorded their constitution rights, deserve to be punished. I think virtually everybody believes that while these people are in jail they should not be tortured, but they also should not have all the rights and privileges the rest of us enjoy, and that their lives should, on the whole, be describable by the old concept known as hard time.

The legislation I am introducing today will return sanity and State control to our prison systems. It will do so by limiting judicial remedies in prison cases and by limiting frivolous prisoner litigation.

First, we must curtail interference by the Federal courts themselves in the orderly administration of our prisons. This is not to say that we will have no court relief available for prisoner suits, only that we will try to retain it for cases where it is needed while curtailing its destructive use.

Most fundamentally, the proposed bill forbids courts from entering orders for prospective relief (such as regulating food temperatures) unless the order is necessary to correct violations of individual plaintiffs' Federal rights.

It also requires that the relief be narrowly drawn and be the least intrusive means of protecting the federal rights. And it directs courts to give substantial weight to any adverse impact on public safety or the operation of the criminal justice system caused by the relief.

No longer will prison administration be turned over to Federal judges for the slightest reason. Instead, the States will be able to run prisons as they see fit unless there is a constitutional violation, in which case a narrowly tailored order to correct the violation may be entered.

The bill also will make it more difficult for judges to release dangerous criminals back into the population, or to prevent the authorities from incarcerating them in the first place.

To accomplish this, the legislation forbids courts from entering release orders except under very limited circumstances. The court first must have entered an order for less intrusive relief, which must be shown to have failed to cure the violation of Federal rights. If a Federal court reaches this conclusion, it must refer the question of whether or not to issue a release order to a three judge district court.

This court must find by clear and convincing evidence that crowding is the primary cause of the violation of a Federal right and that no other relief will remedy the violation of the Federal right. Then the court must find, by a preponderance of the evidence, that the crowding had deprived particular plaintiffs of at least one essential, identifiable human need, and that prison officials have either deliberately subjected the plaintiffs to this deprivation or have been deliberately indifferent to it.

As important, this legislation provides that any prospective relief order may be terminated on the motion of either party 2 years after the later of the grant of relief or the enactment of the bill. The court shall grant the termination unless it finds that the original prerequisites for granting it are present at that time.

No longer, then, will we have consent decrees, such as those in Michigan under which judges control the prisons literally for decades.

Finally, the bill contains several measures to reduce frivolous inmate litigation. The bill limits attorney's fee awards. In addition, prisoners no longer will be reimbursed for attorney's fees unless they prove an actual statutory violation.

No longer will courts award attorney's fees simply because the prison has changed pre-existing conditions. Only if those conditions violated a prisoner's rights will fees be awarded.

Prisoners who succeed in proving a statutory violation will be reimbursed only for fees directly and reasonably incurred in proving that violation.

In addition, attorney's fees must be proportionally related to the court ordered relief. No longer will attorneys be allowed to charge massive amounts to the State for the service of correcting minimal violations.

And no longer will attorneys be allowed to charge very high fees for their time. The fee must be calculated at an hourly rate no higher than that set for court appointed counsel. And up to 25 percent of any monetary award the court orders the plaintiff wins will go toward payment of the prisoner's attorney's fees.

The bill also prohibits prisoners who have filed three frivolous or obviously nonmeritorious in forma pauperis civil actions from filing any more unless they are in imminent danger of severe bodily harm.

Also, to keep prisoners from using lawsuits as an excuse to get out of jail for a time, pretrial hearings generally will be conducted by telephone, so that the prisoner stays in prison.

Mr. President, these reforms will decrease the number of frivolous claims filed by prisoners. They will decrease prisoners' incentives to file suits over how bright their lights are. At the same time, they will discourage judges from seeking to take control over our prison systems, and to micromanage them, right down to the brightness of their lights.

This is a far-reaching bill, Mr. President. One aimed at solving a complex, costly, and dangerous problem. Its several provisions will discourage frivolous lawsuits and promote State control over State prison systems. At the same time, this legislation will help protect convicted criminals' constitutional rights without releasing them to prey on an innocent public or keeping them in conditions so comfortable that they lose their deterrent effect.

I urge my colleagues to support this legislation.

I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 1275

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Prison Conditions Litigation Reform Act''.

SEC. 2. APPROPRIATE REMEDIES FOR PRISON CONDITIONS.

(a) IN GENERAL.—Section 3626 of title 18, United States Code, is amended to read as follows:

''§ 3626. Appropriate remedies with respect to prison conditions

''(a) REQUIREMENTS FOR RELIEF.—

''(1) PROSPECTIVE RELIEF.—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. In determining the intrusiveness of the relief, the court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

''(2) PRELIMINARY INJUNCTIVE RELIEF.—In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the order final before the expiration of the 90-day period.

''(3) PRISONER RELEASE ORDER.—(A) In any civil action with respect to prison conditions, no prisoner release order shall be entered unless—

''(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

''(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

''(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

''(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

''(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

''(E) The court shall enter a prisoner release order only if the court finds—

''(i) by clear and convincing evidence—

''(I) that crowding is the primary cause of the violation of a Federal right; and

''(II) that no other relief will remedy the violation of the Federal right; and

''(ii) by a preponderance of the evidence—

''(I) that crowding has deprived a particular plaintiff or plaintiffs of at least one essential, identifiable human need; and

''(II) that prison officials have acted with obduracy and wantonness in depriving a particular plaintiff or plaintiffs of at least one essential, identifiable human need.

''(F) Any State or local official or unit of government whose jurisdiction or function includes the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief, and shall have the right to intervene in any proceeding relating to such relief.

''(b) TERMINATION OF RELIEF.—

''(1) TERMINATION OF PROSPECTIVE RELIEF.—(A) 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—

''(i) 2 years after the date the court granted or approved the prospective relief;

''(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

''(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

''(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A).

''(2) IMMEDIATE TERMINATION OF PROSPECTIVE RELIEF.—In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation.

''(3) LIMITATION.—Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct the violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is the least intrusive means to correct the violation.

''(4) TERMINATION OR MODIFICATION.—Nothing in this section shall prevent any party from seeking modification or termination before the relief is terminable under paragraph (1) or (2), to the extent that modification or termination would otherwise be legally permissible.

''(c) SETTLEMENTS.—

''(1) CONSENT DECREES.—In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).

''(2) PRIVATE SETTLEMENT AGREEMENTS.—(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

''(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy for breach of contract available under State law.

''(d) STATE LAW REMEDIES.—The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

''(e) PROCEDURE FOR MOTIONS AFFECTING PROSPECTIVE RELIEF.—

''(1) GENERALLY.—The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions.

''(2) AUTOMATIC STAY.—Any prospective relief subject to a pending motion shall be automatically stayed during the period—

''(A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or

''(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under subsection (b)(3); and

''(B) ending on the date the court enters a final order ruling on the motion.

''(f) DEFINITIONS.—As used in this section—

''(1) the term 'consent decree' means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties;

''(2) the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

''(3) the term 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

''(4) the term 'prisoner release order' includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

''(5) the term 'prison' means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

''(6) the term 'prospective relief' means all relief other than monetary damages; and

''(7) the term 'relief' means all relief in any form that may be granted or approved by the court, and includes consent decrees and settlement agreements (except a settlement agreement the breach of which is not subject to any court enforcement other than reinstatement of the civil proceeding that such agreement settled).''.

(b) APPLICATION OF AMENDMENT.—

(1) IN GENERAL.—Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all relief (as defined in such section) whether such relief was originally granted or approved before, on, or after the date of the enactment of this Act.

(2) TECHNICAL AMENDMENT.—Subsections (b) and (d) of section 20409 of the Violent Crime Control and Law Enforcement Act of 1994 are repealed.

(c) CLERICAL AMENDMENT.—The table of sections at the beginning of subchapter C of chapter 229 of title 18, United States Code, is amended to read as follows:

''3626. Appropriate remedies with respect to prison conditions.''.

SEC. 3. AMENDMENTS TO CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT.

Section 7 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e) is amended by adding at the end the following new subsections:

''(f) ATTORNEY'S FEES.—(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall be awarded only if—

''(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

''(B) the amount of the fee is proportionately related to the court ordered relief for the violation.

''(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is greater than 25 percent of the judgment, the excess shall be paid by the defendant.

''(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

''(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).

''(g) TELEPHONE HEARINGS.—To the extent practicable, in any action brought in Federal court pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by a prisoner crime confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone without removing the prisoner from the facility in which the prisoner is confined. Any State may adopt a similar requirement regarding hearings in such actions in that State's courts.

''(h) DEFINITION.—As used in this section, the term 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.''.

SEC. 4. SUCCESSIVE CLAIMS IN PROCEEDINGS IN FORMA PAUPERIS.

Section 1915 of title 28, United States Code, is amended by adding at the end the following new subsection:

''(f)(1) In no event shall a prisoner in any prison bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious bodily harm.

''(2) As used in this subsection, the term 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.''.●

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights (Refs & Annos)
Subchapter I-A. Institutionalized Persons

42 U.S.C.A. § 1997e

§ 1997e. Suits by prisoners

Effective: April 26, 1996
Currentness

(a) Applicability of administrative remedies

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.

(b) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.

(c) Dismissal

(1) The court shall on its own motion or on the motion of a party dismiss any action 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 if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 [1] of this title, such fees shall not be awarded, except to the extent that--

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 [1] of this title; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18 for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 [1] of this title.

(e) Limitation on recovery

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.

(f) Hearings

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

(g) Waiver of reply

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983 of this title or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) "Prisoner" defined

As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

Credits

(Pub.L. 96-247, § 7, May 23, 1980, 94 Stat. 352; Pub.L. 103-322, Title II, § 20416(a), Sept. 13, 1994, 108 Stat. 1833; Pub.L. 104-134, Title I, § 101[(a)][Title VIII, § 803(d)], Apr. 26, 1996, 110 Stat. 1321-71; renumbered Title I Pub.L. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327.)

Notes of Decisions (1095)

Footnotes

1 See Reference in Text note below.

42 U.S.C.A. § 1997e, 42 USCA § 1997e

Current through P.L. 113-9 (excluding P.L. 113-4) approved 5-1-13

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CIVIL RIGHTS INJUNCTIONS OVER TIME: A CASE STUDY OF JAIL AND PRISON COURT ORDERS

MARGO SCHLANGER*

Lawyers obtained the first federal court orders governing prison and jail conditions in the 1960s. This and other types of civil rights injunctive practice flourished in the 1970s and early 1980s. But a conventional wisdom has developed that such institutional reform litigation peaked long ago and is now moribund. This Article's longitudinal account of jail and prison court-order litigation establishes that, to the contrary, correctional court-order litigation did not decline in the late 1980s and early 1990s. Rather, there was essential continuity from the early 1980s until 1996, when enactment of the Prison Litigation Reform Act (PLRA) reduced both the stock of old court orders and the flow of new court orders. Even today, ten years after passage of the PLRA, the civil rights injunction is more alive in the prison and jail setting than the conventional wisdom recognizes. Yet while the volume of court-order litigation had, prior to 1996, remained stable, the nature of court-order practice changed from a "kitchen sink" model to something much more precise. Where in the 1970s litigation tended to be broad in scope, with loose standards of causation and sweeping remedies, through the 1980s and 1990s litigation grew ever more resource-intensive, and addressed increasingly narrow topics with more rigorous proof and causation requirements. This Article argues that this change was caused not only by the increasing conservativism of the federal bench, but more interestingly by a generalized skepticism about issues of causation in law, the increased presence of large pro bono firms accustomed to a resource-intensive mode of litigation, and the salience of several extraordinarily extensive litigations as models.

 Professor of Law, Washington University in St. Louis. Thanks for comments and ideas to participants in the 2004 Cornell Law School Junior Empirical Legal Scholars conference and in a Washington University in St. Louis faculty workshop, to Susan Appleton, Tomiko Brown-Nagin, Steve Burbank, Tracey George, Jim Jacobs, Laura Rosenbury, Peter Schuck, my colleagues of the Washington University Workshop on Empirical Research in Law (especially Andrew Martin and Kathie Barnes for statistics assistance), and, as always, to Sam Bagenstos.

I also want to thank the dozens of people who have shared their time and thoughts with me, some over several years, as I worked on the large project that includes this Article. The informants particularly helpful for this piece were: Elizabeth Alexander, Director, ACLU National Prison Project; John Boston, Director, Prisoners' Rights Project of the Legal Aid Society of New York; Alvin Bronstein, founder and former Director, ACLU National Prison Project; Donna Brorby, former plaintiffs' counsel, *Ruiz v. Estelle*; Steven Kelban, Director, Andrus Family Fund; Steve J. Martin, former general counsel, Texas Department of Corrections and frequent expert witness and court monitor in jail and prison cases; Vincent M. Nathan, frequent special master in jail and prison cases; and Don Specter, Director, Prison Law Office (San Quentin, Cal.). Many additional interviews, which have colored my views in significant ways, are listed in Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003).

All remaining errors are, of course, my responsibility.

I
HISTORY AND COMMENTARY

A. Early History

The first prison and jail orders, in the 1960s, had some obvious links to broader trends in civil rights litigation—in particular to the desegregation litigation project spearheaded by the NAACP Legal Defense Fund. Not only were the lawyers (and the judges) often identical,[22] the characteristic litigation techniques—complex party structure; relatively loose coupling of right and remedy; and forward looking and negotiated remedies, sometimes requiring an active and continuing role for the presiding judge—were the same.[23] There were substantive links as well; the first cases required correctional facilities to implement behind bars legal rights generally applicable on the outside—free exercise of religion, equal protection of the laws, and free speech—the most important of which related to African American prisoners' subordination.[24] The 1960s saw federal courts'

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[22] Schlanger, *Beyond the Hero Judge*, *supra* note 7, at 2016–17.

[23] For discussion of these features as the essential components of structural reform litigation, see, for example, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–84 (1976).

[24] The earliest court order of which I am aware was entered in *Fullwood v. Clemmer*, 206 F. Supp. 370, 374 (D.D.C. 1962), which required District of Columbia jail officials to allow Black Muslims to hold religious meetings. Desegregation orders followed almost immediately. *See* Bolden v. Pegelow, 329 F.2d 95, 96 (4th Cir. 1964) (requiring integration of District of Columbia's Lorton Prison barber shops); Washington v. Lee, 263 F. Supp. 327, 333 (M.D. Ala. 1966) (desegregating penal and detention facilities in Alabama), *aff'd*, 390 U.S. 333 (1968) (per curiam); *see also* Cooper v. Pate, 378 U.S. 546 (1964) (per curiam), *rev'g* 324 F.2d 165, 167 (7th Cir. 1963) (holding that Black Muslim prisoner failed to state cause of action when he alleged discriminatory isolation and restrictions on possession of Koran). For a discussion of the connections between injunctive prison litigation and desegregation litigation, see Schlanger, *Beyond the Hero Judge*, *supra* note 7, at 2002–03; *see also Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 95th Cong. 10 (1977) (statement of Assistant Att'y Gen. Drew S. Days, III) ("In the prison area the United States has participated in many cases in several States concerning conditions of confinement. This is partly as an outgrowth of litigation by the Attorney General under title III of the Civil Rights Act of 1964 to desegregate prison facilities."); Telephone Interview with Stephen A. Whinston, former attorney, U.S. Dep't of Justice (Jan. 20, 1999) (describing

newfound willingness to allow inmates the benefits of other rights, as well.[25] It did not take long before a set of cases established rights to due process protections prior to imposition of prison discipline[26] and to more humane conditions of in-prison punishment for disciplinary infractions.[27] Soon thereafter, perhaps sensitized by the Attica riot and its aftermath[28] to the deprivations that characterized prison life, courts began to grant ongoing relief in cases based on sometimes uncontested evidence of brutal and disgusting conditions not just in isolation cells but throughout facilities. The first case to require wholesale reform was in Arkansas in 1970.[29]

The cases in the 1970s made up the first phase of this new kind of litigation. In those early days, even quite radical inmates' advocates (who might have been expected to prefer more political, less legal,

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how Department of Justice used its Title III desegregation authority as statutory hook for jail and prison conditions investigations).

[25] *See, e.g.*, United States v. Muniz, 374 U.S. 150, 150 (1963) (holding that federal inmates could sue under Federal Tort Claims Act for personal injuries suffered while in federal custody); Eugene N. Barkin, *The Emergence of Correctional Law and the Awareness of the Rights of the Convicted*, 45 NEB. L. REV. 669, 686–88 (1966) (describing early impact of *Muniz*).

[26] *See* Sostre v. Rockefeller, 312 F. Supp. 863, 871–73 (S.D.N.Y. 1970) (requiring various procedural safeguards before inmate could be confined in disciplinary segregation), *aff'd in part, rev'd in part sub. nom.* Sostre v. McGinnis, 442 F.2d 178, 203 (2d Cir. 1971) ("We would not lightly condone the absence of such basic safeguards against arbitrariness as adequate notice, an opportunity for the prisoner to reply to charges lodged against him, and a reasonable investigation into the relevant facts—at least in cases of substantial discipline."); Nolan v. Scafati, 430 F.2d 548, 550 (1st Cir. 1970) (holding that inmate's description of basis for his disciplinary segregation might state claim for denial of due process); Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (holding that due process clause requires limited procedural protections prior to prison's imposition of major discipline).

[27] *See, e.g.*, Jordan v. Fitzharris, 257 F. Supp. 674, 680 (N.D. Cal. 1966) (finding that conditions in isolation constituted cruel and unusual punishment); Wright v. McMann, 257 F. Supp. 739 (N.D.N.Y. 1966) (denying relief on similar claim), *rev'd*, 387 F.2d 519, 527 (2d Cir. 1967), *on remand*, 321 F. Supp. 127 (N.D.N.Y. 1970), *aff'd in part, rev'd in part*, 460 F.2d 126 (2d Cir. 1972); Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968) (holding whipping of prisoners unconstitutional); *see also Fulwood*, 206 F. Supp. at 378–79 (holding confinement in "control cell" for prison rule violations unconstitutional because disproportionate to offense).

[28] On the Attica riot, see generally N.Y. STATE SPECIAL COMM'N ON ATTICA, ATTICA: THE OFFICIAL REPORT OF THE N.Y. STATE SPECIAL COMMISSION ON ATTICA (1972); TOM WICKER, A TIME TO DIE (1975). These sources describe how in 1971, inmates of the Attica Correctional Facility in upstate New York took fifty hostages. N.Y. STATE SPECIAL COMM'N ON ATTICA, *supra*, at 184–86. When authorities reclaimed control of the prison, four days later, they charged in with guns blazing and shot dead thirty-nine people, including ten of the hostages. *Id.* at xi, 373. Only four others were killed in the entire incident. *Id.* at xi. As was widely reported, it was the "bloodiest one-day encounter between Americans since the Civil War." *Id.*

[29] Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970). For subsequent cases, see *supra* note 4.

strategies) had extraordinarily high hopes for the cases. Litigation, and in particular overcrowding litigation,[30] would further a decarceration strategy, some of them reasoned, in two ways. First, litigation would discredit imprisonment as an institution by highlighting the disconnect between the ideals of penal practice and their realities.[31] Second, it would make incarceration both difficult and expensive. For example, David Rothman described some prison litigation proponents as "subscrib[ing] to a crisis strategy":

> They are convinced that implementing prisoners' rights will upset the balance of power within the institutions, making prisons as we know them inoperable .... Since terror and arbitrariness are at the heart of the system, granting rights to prisoners is the best way to empty the institutions. And emptying the institutions, decarcerating the inmates, they say, should be the ultimate goal of reform.[32]

Dr. Robert Cohen, a correctional physician who has been a court-appointed medical care monitor over many years, explained recently: "When all of us began our work, some of us felt that . . . by getting prisons to provide adequate care, forcing them to spend the amount of money that was required to do it right, that we would stop the growth of prisons because it would be too expensive."[33] In many of the states in which prison plaintiffs successfully pursued systemwide court orders, there was indeed a huge impact on prison budgets.[34] In fairly

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[30] *See* E-mail from John Boston, Dir., Prisoners' Rights Project, New York City Legal Aid Soc., to author (Oct. 22, 2005) (on file with the *New York University Law Review*).

[31] *See* Michael A. Millemann, *An Agenda for Prisoner Rights Litigation*, *in* 2 PRISONERS' RIGHTS SOURCEBOOK 153 (Ira P. Robbins ed., 1980) (edited version of speech originally given in 1974 presenting this view, but arguing that litigation "run[s] the risk of invigorating, rather than discrediting, today's prisons"). Millemann was one of the early staff attorneys at the ACLU National Prison Project.

[32] David J. Rothman, *Decarcerating Prisoners and Patients*, 1 C.L. REV. 8, 19–20 (1973).

[33] Dr. Robert Cohen, Testimony before the Commission on Safety and Abuse in America's Prisons 104 (July 20, 2005) (transcript available at http://www.prisoncommission.org/transcripts/public_hearing_2_day_2_panel_1_Quality_of_Medical_Care.pdf).

[34] *See* Malcolm M. Feeley, *The Significance of Prison Conditions Cases: Budgets and Regions*, 23 LAW & SOC'Y REV. 273, 274 (1989) (collecting and reporting estimates of budgetary impact in three major prison reform cases); John Fliter, *Another Look at the Judicial Power of the Purse: Courts, Corrections, and State Budgets in the 1980s*, 30 LAW & SOC'Y REV. 399, 404 tbl.1 (1996) (reporting estimates of court orders' effects on budgets in thirty states); Linda Harriman & Jeffrey D. Straussman, *Do Judges Determine Budget Decisions? Federal Court Decisions in Prison Reform and State Spending for Corrections*, 43 PUB. ADMIN. REV. 343, 345 tbl.1 (1983) (showing percentage increases of capital expenditures after court rulings on overcrowding); Jeffrey D. Straussman, *Courts and Public Purse Strings: Have Portraits of Budgeting Missed Something?*, 46 PUB. ADMIN. REV. 345, 345 (1986) (discussing budgeting theory); William A. Taggart, *Redefining the Power of the Federal Judiciary: The Impact of Court-Ordered Prison Reform on State Expenditures for Corrections*, 23 LAW & SOC'Y REV. 241, 259 tbl.2, 261 tbl.3 (1989) (reporting results of regression analysis examining impact of court-order reform on expenditures).

short order, however, it became apparent that polities were not responding to the increased cost of imprisonment by decarceration of any type in adult facilities[35] (juvenile decarceration was somewhat more prevalent[36]). Indeed, there seemed to be little limit to the public's willingness to spend on adult imprisonment. So, although the ACLU National Prison Project, for example, kept its mission statement's reference to "reducing reliance on incarceration,"[37] the goal of civilizing rather than emptying the nation's prisons and jails became the more realistic aim for even a very comprehensive litigation strategy. Advocates (joined more or less, depending on the case, by their inmate clients), administrators, and judges set to, forging a new kind of administrative order for penal and detention facilities.[38]

Although assessing the impact of the litigation is a complex topic well beyond the scope of this paper, it is clear that inmates gained much from the orders. For example, a case study of *Guthrie v. Evans*,[39] the Georgia State Prison case that ended in 1985, summarized its positive effects:

> The inhuman practices and conditions at [Georgia State Prison] that the special monitor described in 1979 no longer exist. The reign of terror against inmates has ended. Today, guards do not routinely beat, mace, and shoot inmates. Inmates and guards no longer die from a lack of safety and protection. Guards can walk the cells without having to carry illegal knives and pickax handles to protect themselves. The medical, mental, nutritional, educational, and rec-

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35 For data on adult incarceration, which began to accelerate in 1972, see Schlanger, *Inmate Litigation*, *supra* note 7, at 1583. *See also* Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980–1996*, 26 CRIME & JUST. 17, 19 fig.1 (1999).

36 For a description of the movement for juvenile decarceration, see generally Rodney J. Henningsen, *Deinstitutionalization Movement*, *in* ENCYCLOPEDIA OF JUVENILE JUSTICE 114 (Marilyn D. McShane & Frank P. Williams, III eds., 2003).

37 E-mail from Alvin J. Bronstein, founder and former Director, ACLU Nat'l Prison Project, to author (Oct. 24, 2005) (on file with the *New York University Law Review*).

38 For discussions of the bureaucratizing and other reforming force of inmate litigation, see generally JAMES B. JACOBS, STATEVILLE: THE PENITENTIARY IN MASS SOCIETY 106–07 (1977); Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications*, 24 PACE L. REV. 433 (2004); James B. Jacobs, *Judicial Impact on Prison Reform*, *in* PUNISHMENT AND SOCIAL CONTROL: ESSAYS IN HONOR OF SHELDON L. MESSINGER 63 (Thomas G. Blomberg & Stanley Cohen eds., 1999); James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts*, *in* New Perspectives on Prison and Imprisonment 33, 54 (1983) [hereinafter Jacobs, *Prisoners' Rights Movement*]; Vincent M. Nathan, *Have the Courts Made a Difference in the Quality of Prison Conditions? What Have We Accomplished to Date?*, 24 PACE L. REV. 419 (2004).

39 93 F.R.D. 390 (S.D. Ga. 1981).

> reational needs of inmates are now provided for. . . . Those changes were the result, in large part if not solely, of the *Guthrie* litigation.[40]

Inmate memoirs and writings confirm the point. For example, a 1979 article by Wilbert Rideau, then the (inmate) editor of the Louisiana State Penitentiary's *Angolite*, gave credit to court-order litigation for reducing sexual violence:

> While [rapes] used to be a regular feature of life here at the Louisiana State Penitentiary, they are now a rare occurrence. Homosexuality still thrives, but the violence and forced slavery that used to accompany it have been removed. In 1976, Federal District Court Judge E. Gordon West ordered a massive crackdown on overall violence at the prison, which paved the way for the allocation of money, manpower, and sophisticated electronic equipment to do the job. Since then, *any* kind of violence at all between inmates elicits swift administrative reprisal and certain prosecution. This, more than anything else, has made Angola safe for the average youngster coming into the prison today.[41]

Many—though by no means all—other sources concur.[42] Moreover, the effects of court orders are by no means limited to the systems in which they are entered. As I have suggested elsewhere, "orders also cast a marked general deterrent shadow on systems hoping to avoid them. And they have a mimetic impact, as other systems imitate them not out of fear but rather out of a more positive interest."[43]

Prison and jail officials were frequently collaborators in the litigation. If they did not precisely invite it, they often did not contest it. And as I and others have observed, the remedies in the cases, frequently designed at least in part by the defendants themselves, very

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[40] BRADLEY STEWART CHILTON, PRISONS UNDER THE GAVEL: THE FEDERAL COURT TAKEOVER OF GEORGIA PRISONS 108–09 (1991).

[41] Wilbert Rideau, *The Sexual Jungle* (1979), *in* WILBERT RIDEAU & RON WIKBERG, LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS 73, 94 (1992). The case mentioned was *Williams v. Edwards*, No. 71-98 (M.D. La.); the order in question was affirmed by the Court of Appeals, 547 F.2d 1206, 1213–14 (5th Cir. 1977).

[42] One example of this dispute can be found in the competing interpretations of *Ruiz v. Estelle*, No. Civ. H-78-987 (S.D. Tex.) (first complaint filed 1972), the Texas prison litigation (discussed *infra* Part III.B.3). For the position that *Ruiz* has benefited inmates, see generally Ben M. Crouch & James W. Marquart, Ruiz*: Intervention and Emergent Order in Texas Prisons*, *in* COURTS, CORRECTIONS, AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS (John J. DiIulio, Jr. ed., 1990) [hereinafter COURTS, CORRECTIONS, AND THE CONSTITUTION], and Sheldon Ekland-Olson & Steve J. Martin, Ruiz*: A Struggle over Legitimacy*, *in* COURTS, CORRECTIONS, AND THE CONSTITUTION, *supra* at 73. On the other side, see John J. DiIulio, Jr., *The Old Regime and the* Ruiz *Revolution: The Impact of Judicial Intervention on Texas Prisons*, *in* COURTS, CORRECTIONS, AND THE CONSTITUTION, *supra*, and CARROLL PICKETT WITH CARLTON STOWERS, WITHIN THESE WALLS: MEMOIRS OF A DEATH HOUSE CHAPLAIN 135–50 (2002).

[43] Schlanger, *Inmate Litigation*, *supra* note 7, at 1663.

much served what at least some of those defendants saw as their interests: increasing their budgets, controlling their inmate populations, and encouraging the professionalization of their workforces and the bureaucratization of their organizations.[44] As one jail administrator put it:

> To be sure, we used "court orders" and "consent decrees" for leverage. We ranted and raved for decades about getting federal judges "out of our business"; but we secretly smiled as we requested greater and greater budgets to build facilities, hire staff, and upgrade equipment. We "cussed" the federal courts all the way to the bank.[45]

Even when the litigation was not simply justification for a larger budget, it was useful to prison and jail administrators seeking to solidify their control over their organizations. A prison official in Kentucky, describing a major court-order case[46] about conditions at the Kentucky State Reformatory, explained that the consent decree in the case

> changed the whole system. It made the system unified. We had a cabinetwide policy and then institution policies clarified those. . . . That's the guideline by which you operate and function. . . . We have all this training. The training uses all the policies and procedures, explains the importance of the policies and procedures.[47]

The decrees professionalized and bureaucratized by the terms they imposed, but also by their impact on who was interested in becoming or qualified to become an administrator. As an inmate involved in the same Kentucky litigation observed:

> But you know what? Guys like those old-time wardens can never be warden at LaGrange any more. That's the beautiful thing about that consent decree. It made that system so damn sophisticated that you just can't walk out of the head of a holler in Hazard, out of the logging woods, an' walk right in and be the warden.[48]

In short, court orders had an enormous impact on the nation's jails and prisons by direct regulation, their indirect effects, and the shadow they cast. Among the areas affected were staffing, the amount of space per inmate, medical and mental health care, food,

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[44] *See, e.g.*, Schlanger, *Beyond the Hero Judge*, *supra* note 7, at 2012.

[45] Mark Kellar, *Responsible Jail Programming*, AM. JAILS, Jan.–Feb. 1999, at 78, 79.

[46] Thompson v. Bland, No. Civ. 79-0092 (W.D. Ky.), *consolidated with* Kendrick v. Bland, No. Civ. 76-0079 (W.D. Ky.). For the first decree in the case, see Kendrick v. Bland, 586 F. Supp. 1536 (W.D. Ky. 1984). Information about this litigation is available at http://clearinghouse.wustl.edu (see case PC-KY-007).

[47] LLOYD C. ANDERSON, VOICES FROM A SOUTHERN PRISON 202 (2000) (quoting lawyer Barbara Jones).

[48] *Id.* at 207 (quoting prisoner Wilgus).

hygiene, sanitation, disciplinary procedures, conditions in disciplinary segregation, exercise, fire safety, inmate classification, grievance policies, race discrimination, sex discrimination, religious discrimination and accommodations, and disability discrimination and accommodations—in short, nearly all aspects of prison and jail life, with the notable (if not quite universal) exceptions of education, custody level, and rehabilitative programming and employment.

B. The Purported Fading of the Structural Reform Injunction

As prison and jail court orders began to proliferate in the 1970s, scholars began to showcase these decrees, hailing or condemning the cases as the epitome of a new form of litigation—"public law litigation," or "structural reform litigation," Abe Chayes and Owen Fiss named it in their canonical treatments.[49] During the 1970s and 1980s, the jail and prison cases provided a field for sustained scholarly debate about the intertwined issues of legitimacy and capacity—that is, the appropriate role of courts in light of democratic theory and limited judicial competence.[50]

Through the 1990s, however, the volume of scholarly commentary diminished and a shared historical account, told by both the litigation's defenders and its detractors, emerged as conventional wisdom. This account explained that civil rights injunctive practice seeking to transform governmental institutions in a wide variety of settings and ways occurred because judges—misguided or heroic, depending on the ideology of the narrator—took it upon themselves in the 1970s and 1980s to impose their vision of humane policy on the nation. This moment of judicial imperialism (as right-leaning authors perceived it), or of appropriate judicial concern for the rights of unempowered Americans (as left-leaning authors argued), is largely gone now, the account continued,[51] mostly because it has been "throttled by the Supreme Court under Chief Justices Warren Burger and

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[49] Chayes, *supra* note 23, at 1284; Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

[50] For defenses of judicial legitimacy and capacity, see generally Fiss, *supra* note 49 and Ralph Cavanagh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371, 376 (1980); and against them, see generally DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977) and Nathan Glazer, *Towards an Imperial Judiciary?*, 41 PUB. INT. 104 (1975). PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983) is also extremely useful, although less easily categorized.

[51] *See, e.g.*, MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 145 (1998) (arguing that litigated reform of prisons had, by the late 1980s, "run its course"); Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM 647, 648 (1988) ("Chayes's focus on public law litigation seems ill-conceived because the inci-

William Rehnquist."[52] Ninth Circuit judge and former labor lawyer Marsha Berzon recently stated, a bit wistfully perhaps, that "'structural injunctions' have receded from the remedial scene";[53] those that remain, another account argues, "appear to be vestiges of a bygone era."[54] Accordingly, the conventional wisdom continues, the late 1980s and the 1990s were a time of fading ambition for would-be reformers: "[B]y the end of the twentieth century most of the planned litigation campaigns had petered out," replaced by "catch-as-catch-can" litigation against "targets of opportunity in an increasingly conservative judicial climate."[55] Malcolm Feeley and Edward Rubin's recent summary of the mid-1990s state of play in correctional court-order practice is consonant with this more general take on civil rights practice. By the 1980s, they explain, prison litigation was in its endgame: "No systemwide suits had been successful for years, and courts began terminating long-standing court orders and consent decrees."[56]

Different scholars have attributed the decline of the civil rights injunction to different forces. Probably the most common explanation is the increasing conservativism of the federal bench. As illustrated by the quotation above attributing structural reform litigation's demise to Burger/Rehnquist Court strangulation, some attribute the change to doctrinal shifts imposed on lower courts by the Supreme Court. Others pin the blame or praise not on particular doctrinal shifts but broader attitudinal ones. For example, Myriam Gilles suggests that "the structural reform injunction has disappeared from the contemporary sociolegal landscape because of the essentially political fear of judicial activism."[57] The anti-activist attitude, she argues, has moved courts to erect "procedural barriers" that have "all but denied litigants the ability to bring claims in federal court that challenge widespread

dence of the kind of lawsuits he had in mind—school desegregation and prison conditions cases—was waning even as he wrote.") (referring to Chayes, *supra* note 23).

52 SANDLER & SCHOENBROD, *supra* note 5, at 10 (summarizing but disputing conventional wisdom).

53 Marsha S. Berzon, *Rights and Remedies*, 64 LA. L. REV. 519, 525 (2004).

54 Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. MIAMI L. REV. 143, 144 (2003).

55 Mark Tushnet, *Some Legacies of* Brown v. Board of Education, 90 VA. L. REV. 1693, 1696 (2004).

56 Edward L. Rubin & Malcolm M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617, 661 (2003). See *infra* Table 1 & note 100 for a demonstration that Rubin and Feeley's precise claim is incorrect.

57 Gilles, *supra* note 54, at 161. What Gilles calls "anti-activism" might more accurately be described as "anti-plaintiffism"—a reluctance to accord judicially sanctioned relief to complainants. *Cf.* THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 2 (2004) (describing Rehnquist Court as activist because it so frequently struck down legislation).

and systemic practices that violate individual rights and constitutional guarantees."[58] Taking a less jurocentric approach, still others have attributed the fading of public law litigation to factors connected with plaintiffs' lawyers. In one interesting recent analysis, Mark Tushnet explores the fading of planned litigation campaigns, the source of some of the flashiest public law litigation. He explains that planned litigation is simply not sustainable in many arenas, first because lawyers lack the degree of control they need to act strategically, and second because of its vulnerability to legislative obstacles, including the defunding of plaintiffs' lawyers and outright legislative override.[59]

In any event, the generally accepted view has for some time been that civil rights injunctive practice has become essentially moribund. In the arena of prison and jail litigation, then, the Republican 100th Congress's 1996 intervention was essentially a move that could be expected finally to put the few lingering correctional court orders out of their misery, without having much broader impact. The Prison Litigation Reform Act, passed as part of Newt Gingrich's *Contract With America*[60] (albeit with quite a bit of Democratic support[61]), imposed numerous restrictions on entry of new jail and prison orders and continuation of old ones. Nonetheless, consistent with the story of decline just set out, observers in the late 1990s explained that "[i]t is not clear how much real effect" the PLRA would have, because "many of the mega-conditions cases that were initiated in the 1970s had already been terminated or were already winding down by 1994 or 1995, and there was general consensus that new suits attacking an array of conditions were not likely to emerge."[62] According to another commentary, the PLRA was essentially a "symbolic statute[ ]," because "the courts had already done most of what the Republican legislation sought to accomplish"—that is, courts had already limited the availability of relief to prison and jail plaintiffs and allowed institutional defendants various ways out of entered decrees.[63]

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58 Gilles, *supra* note 54, at 163.

59 Tushnet, *supra* note 55, at 1696–1705.

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

61 *See supra* note 19 and accompanying text.

62 FEELEY & RUBIN, *supra* note 51, at 383–84. By 2003, however, Feeley and Rubin had slightly shifted emphasis, explaining that the PLRA "has made it significantly more difficult for prisoners to bring claims in federal courts," and describing the statute as "important" in its effect. Rubin & Feeley, *supra* note 56, at 661–62.

63 Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 21 (1997).

plaintiffs' ability to obtain new orders[70] was not very consequential. The second, a revisionist story, is one of continuity in volume and perhaps in other important aspects of court-order practice.

I argue below that available systematic data and other more qualitative evidence demonstrate that both accounts are wrong. This error is unlikely to be confined to correctional court orders; it seems likely that the trends discussed here (at least those not caused by the PLRA) are relevant in other areas of civil rights injunctive practice as well. Thus, this case study of jail and prison court orders over time may shed some much needed light on civil rights injunctive practice more generally.

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the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

[70] *See* 18 U.S.C. § 3626(a)(1)(A) (2000) ("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."); 18 U.S.C. § 3626(c)(1) (2000) ("In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a)."); 42 U.S.C. § 1997e(d)(3) (2000) (limiting attorneys' fees); 42 U.S.C. § 1997e(a) (2000) (requiring exhaustion of administrative remedies prior to filing in "prison conditions" cases).

[71] The case studies include: ANDERSON, *supra* note 47 (Kentucky prison litigation); LEO CARROLL, LAWFUL ORDER: A CASE STUDY OF CORRECTIONAL CRISIS AND REFORM (1998) (Rhode Island prison litigation); CHILTON, *supra* note 40 (Georgia prison litigation); PHILLIP J. COOPER, HARD JUDICIAL CHOICES: FEDERAL DISTRICT COURT JUDGES AND STATE AND LOCAL OFFICIALS 233–70 (1988) (examining *Rhodes v. Chapman*, 434 F. Supp. 1007 (S.D. Ohio 1977) and Ohio prison reform); BEN M. CROUCH & JAMES W. MARQUART, AN APPEAL TO JUSTICE: LITIGATED REFORM OF TEXAS PRISONS (1989); M. KAY HARRIS & DUDLEY P. SPILLER, JR., AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS (1977) (study of implementation of court

D. *Explanations for the Mid- to Late-1990s Shift in the Volume of Court-Order Regulation*

The prior Sections have shown that there was stability in the volume of court-order regulation from the mid-1980s to the mid-1990s, followed by a major change. The census data have demonstrated as much, but they cannot explain *why* this contraction occurred. In this Section, I analyze potential explanations. The explanation I find most persuasive is ready at hand: The Prison Litigation Reform Act was enacted in 1996, after the 1993 and 1995 jail and prison censuses and before those in 1999 and 2000. There was a good deal of litigation over the PLRA's constitutionality in its first two years, but one would expect the statute's effects, if any, to begin to emerge by 1997 or 1998—perfect timing for their appearance in the 1999 and 2000 censuses.

Four provisions of the PLRA seem extremely relevant. The first allows defendants unhappy with a court order that is older than two years to seek "immediate termination," which is to be granted unless the order "remains necessary" to correct a "current and ongoing" violation of federal rights. The second provision grants defendants an "automatic stay of extant orders," thirty to ninety days after immediate termination proceedings are initiated. The third requires inmates to utilize administrative grievance channels prior to filing a suit in federal court. The fourth limits the availability of attorneys' fees for lawyers who successfully represent inmates in civil rights cases.

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120 In 1983, the census did not ask about order subject matter, so no analysis of changing subject matter is possible until 1993, the second time the census gathered the relevant data. See *infra* note 179 for a description of the order subject matter categories addressed in each census.

After discussing these four PLRA provisions, as well as another less important provision, I examine three competing explanations that do *not* involve the PLRA: increasing conservativism of the federal bench, doctrinal innovations of the mid-1990s restricting injunctive remedies, and declining funding for inmates' advocates. These are the lead explanations scholars have offered in support of the conventional wisdom of a 1980s–1990s decline in public law litigation. As already seen, the census data undermine that claimed decline, at least for jail and prison court orders. But can those same phenomena explain instead the decline that *does* appear in census data, in the mid- to late-1990s? As I discuss below, I do not think they are the major levers of change. Both because of its timing and content, the PLRA is a far more persuasive explanation.

1. The PLRA and the Declining Volume of Court-Order Regulation

The correctional censuses do not include information on litigation and therefore shed no light on the causes of the decline in court order incidence. But court opinion after opinion states that it is the PLRA that created the opportunity for defendants to seek an end to old court orders.[121] And many—though by no means all—participants report the PLRA as a dominant reason that orders have become not only shorter-lived but also harder for plaintiffs to obtain.[122] I consider in turn four provisions of the PLRA—those governing immediate termination, the automatic stay provision, administrative exhaustion, and attorneys' fees.

Immediate termination. Before the PLRA's enactment, the law on prospective relief in civil rights cases was that such relief would remain in effect until defendants fully complied with the judgment and somehow satisfied the court (or the plaintiffs, who could choose not to oppose the relevant motion) that they were unlikely to relapse.[123] The PLRA opened prison and jail orders to far more ready challenge. The statute entitles defendants to "immediate termination"

[121] There are dozens of opinions on the PLRA termination provisions that arose in a proceeding where defendants sought to terminate existing court orders. *See, e.g.*, Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 663 (1st Cir. 1997) (approving termination of decree governing Suffolk County Jail in Boston); Dougan v. Singletary, 129 F.3d 1424, 1427 (11th Cir. 1997) (remanding for termination of order concerning Florida death row conditions); Gavin v. Branstad, 122 F.3d 1081, 1083, 1092 (8th Cir. 1997) (remanding for consideration of termination motion relating to Iowa State Prison); Plyler v. Moore, 100 F.3d 365, 368, 375 (4th Cir. 1996) (affirming termination of order governing South Carolina prisons).

[122] *See* Telephone Interview with Elizabeth Alexander, Dir., ACLU Nat'l Prison Project (Mar. 29, 2001).

[123] *See* Louisiana v. United States, 380 U.S. 145, 154 (1965) (remarking that courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the [unlawful] effects of the past as well as bar like [illegality] in the future").

of any prospective relief two years after that relief is granted, unless the court finds "current and ongoing violation" of federal rights. And defendants can renew their request for termination yearly.[124] Because a very large majority of correctional court orders are more than two years old, the PLRA allows most counties, cities, or states unhappy with an order to simply move to terminate it. Sure enough, between 1996 and 2000, a large number of jurisdictions filed termination motions.[125] Plaintiffs' counsel were successful in defending some of the old orders, for a time by attacking the PLRA's constitutionality (until the Supreme Court effectively decided the issue[126]), and also by litigating the ongoing need for conditions remedies.[127] Inevitably, however, plaintiffs lost some of those contests, and the victories they achieved came at the cost of new projects. Thus, by forcing inmates' advocates into rear-guard actions that were only partly successful and that took the place of assaults on additional targets, the PLRA's immediate termination provision both shrank the stock of old orders and slowed the flow of new ones.

Automatic stay. Not only does the PLRA empower defendants to control the litigation agenda, it simultaneously accelerates the termination litigation in a way that sharply disadvantages plaintiffs. Between one and three months after a defendant moves to terminate relief, the order is automatically "stayed" until the court reaches its termination decision.[128] This has two important effects. First, the speed of the decision clock gives the defendant an important advantage: Defendants get to decide when the race will begin, and they can pick the start date with an eye to their own convenience, or perhaps the inconvenience of opposing counsel.[129] The second advantage

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124 18 U.S.C. § 3626(b)(1) (2000).

125 *See, e.g.*, *supra* note 121.

126 The constitutionality of the immediate termination provision followed *a fortiori* from the Court's decision in *Miller v. French*, 530 U.S. 327, 350 (2000), which upheld the constitutionality of the automatic stay provision in 18 U.S.C. § 3626(e)(2) (2000).

127 In *Ruiz*, for example, the plaintiffs simultaneously defended on both law and facts; they first won on both. Ruiz v. Johnson, 37 F. Supp. 2d 855, 939 (S.D. Tex. 1999) (finding constitutional violations in conditions of confinement in Texas prison system, and holding PLRA unconstitutional). After the statutory challenge failed on appeal, Ruiz v. United States, 243 F.3d 941, 945 (5th Cir. 2001), the plaintiffs litigated conditions for three more years. *See* Ruiz v. Estelle, No. 4:78-cv-00987 (S.D. Tex. June 17, 2002) (docket entry 9015, granting termination motion) (docket available via PACER and as document PC-TX-003-000 at http://clearinghouse.wustl.edu).

128 18 U.S.C. § 3626(e) (2000).

129 When I was a lawyer for the Department of Justice, for example, I recall that one state filed a dozen such motions—one in each of its corrections cases—on July 3, and served them by mail. The lead lawyer on the case in which I was involved did not open the motion until after a long weekend and several days vacation, about a week later. On a thirty-day timeline, that lost week was very precious. (Not until later in 1997 were district

defendants gained by enactment of the automatic stay is more substantive. A termination motion effectively puts plaintiffs to their proof on the ongoing necessity of court-order regulation. Assembling that proof in just thirty days can be extremely difficult, as it requires both knowledge of specific harmful events at a set of closed facilities and expert testimony about the connection between those events and claimed operational failures.

Administrative exhaustion. Prior to the PLRA, inmates seeking to file lawsuits generally were not required to first run their complaints through whatever grievance system their incarcerating authority had implemented.[130] The PLRA changed that rule: Now, prior to bringing their lawsuits, inmates must make their complaints to prison or jail authorities using available administrative grievance procedures.[131] Plaintiffs' failure to exhaust can lead to dismissal of their cases.[132] The exhaustion rule establishes an extremely difficult hurdle for many of the inmates who bring damage actions, usually without

courts granted authority to suspend operation of the automatic stay for an additional 60 days. *See* Prison Litigation Reform Act, Pub. L. No. 104-134, § 802, 110 Stat. 1321-66, 1321-68 to 1321-69 (1996), *amended by* Pub. L. No. 105-119, § 123, 111 Stat. 2470 (1997) (codified as amended at 18 U.S.C. § 3626(e)(3) (2000)).)

[130] *See* McCarthy v. Madigan, 503 U.S. 140, 149–50 (1992) (exhaustion of federal Bureau of Prisons grievance processes not required for filing civil rights action); Patsy v. Bd. of Regents, 457 U.S. 496, 502 (1982) (exhaustion of state administrative processes not required prior to initiation of action under section 1983). Under the Civil Rights of Institutionalized Persons Act (CRIPA), if district courts deemed exhaustion "appropriate and in the interests of justice," incarcerating authorities who had obtained federal certification of their grievance system as "plain, speedy, and effective" could insist that civil rights actions brought by inmates be stayed pending exhaustion. 42 U.S.C. § 1997e(a)(1) (1988) (superseded by PLRA, Pub. L. No. 104-134, § 803(d), 110 Stat. 1321, 1321–71); *see also* Donald P. Lay, *Exhaustion of Grievance Procedures for State Prisoners Under § 1997e of the Civil Rights Act*, 71 IOWA L. REV. 935, 937–42 (1986) (discussing CRIPA exhaustion rules). With so small a prize (and because they objected to the statutory certification requirements), few correctional jurisdictions bothered to seek certification. *See* JUDICIAL CONFERENCE OF THE U. S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 49 (1990) (explaining that "few states have sought and obtained certification under this statute"); Note, *Resolving Prisoners' Grievances Out of Court: 42 U.S.C. § 1997e*, 104 HARV. L. REV. 1309, 1310–11 (1991) (discussing certification procedure and Federal Courts Study Committee's recommendations for revision).

[131] 42 U.S.C. § 1997e(a) (2000).

[132] It is by no means clear that dismissal is what ought to follow flawed attempts to exhaust. Exhaustion can equally be a requirement governing the *timing* of judicial review, not its ultimate availability. Some courts have, indeed, applied this general approach to the PLRA. *See* Ngo v. Woodford, 403 F.3d 620, 631 (9th Cir. 2005) (holding judicial review of inmates' claim available notwithstanding even untimely administrative appeal); Thomas v. Woolum, 337 F.3d 720, 723 (6th Cir. 2003) (same). *But see, e.g.*, Johnson v. Meadows, 418 F.3d 1152, 1154, 1157 (11th Cir. 2005) (holding PLRA's exhaustion requirement akin to procedural default rule, and cataloging cases similarly resolved by other circuits). The Supreme Court will resolve this issue soon. *See* Woodford v. Ngo, 403 F.3d 620 (9th Cir. 2005), *cert. granted*, 126 S.Ct. 647 (2005) (No. 05-416).

counsel, because they are frequently unable to navigate cumbersome and confusing grievance procedures.[133] This problem applies in injunctive litigation with somewhat diminished force, because injunctive cases have lawyers. Nonetheless, advocates complain that the exhaustion rule poses extremely difficult challenges, because it takes time for lawyers to get involved and grievance systems can set very tight deadlines for inmates. In Kentucky's system, for example, a grievance is timely only if filed within five working days of the grieved incident.[134]

Attorneys' fees limitations. The PLRA's limitations on attorneys' fees have also been at least somewhat important. As in many sections of the civil rights bar, inmates' advocates financed a good deal of their activity prior to the PLRA by the fee-shifting that accompanied successful litigation.[135] The PLRA drastically limited the rates that advocates could obtain, setting the maximum rate at 150% of the rate "established"[136] for payment of criminal defense lawyers. At the time of the statute's passage, this meant a maximum hourly rate of $112.50, as opposed to the several hundred dollars per hour experienced lawyers had previously been paid.[137] Those higher fees had typically been

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133 *See* Schlanger, *Inmate Litigation*, *supra* note 7, at 1649–54 (discussing difficulties exhaustion requirement presents to inmate litigants).

134 *See* Kentucky Corrections Policies & Procedures No. 14.6, Sept. 15, 2004, at 8. This and other state grievance policies have been posted by Yale Law School's Jerome N. Frank Legal Services Organization at http://www.law.yale.edu/outside/html/Legal_Services/lso-Woodford-v-Ngo.htm (last visited Mar. 28, 2006). They are described in Brief of the Jerome N. Frank Legal Services Organization of the Yale Law School as Amicus Curiae in Support of Respondent, Appendix, Woodford v. Ngo, No. 05-416, 2006 WL 304573 (9th Cir. Feb. 2, 2006), *available at* http://www.law.yale.edu/outside/pdf/centers/woodford_ngo/Woodford_Amicus_brief.pdf.

135 *See* 42 U.S.C. § 1988(b) (2000).

136 42 U.S.C. § 1997e(d)(3) (2000) (authorizing payment of successful plaintiffs' counsel at "the hourly rate established under section 3006A of title 18, for payment of court-appointed [criminal defense] counsel"). There are currently two competing interpretations of the "established" rate—the rate authorized for criminal defense lawyers by the federal Judicial Conference, and the (sometimes lower) rate actually paid in districts with budgetary shortfalls. *Compare* Webb v. Ada County, 285 F.3d 829, 838–39 (9th Cir. 2002) (holding that authorized rate is "established"), *cert. denied*, 537 U.S. 948 (2002), *with* Hernandez v. Kalinowski, 146 F.3d 196, 201 (3d Cir. 1998) (holding that rate authorized but not "implemented" because of budgetary constraints was not "established" rate).

137 *See, e.g.*, Madrid v. Gomez, 190 F.3d 990, 993 n.2 (9th Cir. 1999). The court stated:

> Thus, when the PLRA applies, the maximum allowable rate is $112.50 per hour, as compared to the rates authorized by the district court, which ranged from $155 per hour to $305 per hour. The two attorneys most involved in the remedial phase of this case charged $305 per hour and $290 per hour, respectively.

used to finance litigation outlays, and their cutback has caused advocacy organizations some financial strain.[138]

Red herring: The PLRA's limitation on entry of prospective relief. Finally, the PLRA has a provision that might *seem* important in causing the decline in reported court-order coverage. I suspect, however, that it is not. The statute's prospective relief limitations dictate that federal courts, and state courts hearing federal claims, may neither grant nor approve any relief other than money damages, "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."[139] Application of these limits to litigated relief was not a major change from prior law.[140] But, of course, most cases settle, and application to settlements, by contrast, was a quite startling innovation.[141] Indeed, it might have been expected that few defendants would settle a case on such terms (particularly if the findings were to be given preclusive effect in subsequent damage action litigation). It turns out, however, that the institution of settlement is extremely resilient. The statute expressly allows parties two methods to avoid application of the provision. They may negotiate "private settlement agreement[s]," enforceable in state court as contracts.[142] Or they may agree to a conditional dismissal of a federal lawsuit, upon satisfaction of some negotiated terms; if the defendant fails to comply, the court reinstates the case, though it cannot enforce the agreement.[143] Probably even more prevalent, however, is a magic words strategy: Participants report that "[i]n practice, parties who wish to

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138 E-mail from Elizabeth Alexander, Dir., ACLU Nat'l Prison Project, to author (Oct. 22, 2005) (on file with the *New York University Law Review*).

139 18 U.S.C. § 3626(a) (2000).

140 *See* Lewis v. Casey, 518 U.S. 343, 357 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."); Milliken v. Bradley, 433 U.S. 267, 280 (1977) ("The remedy must therefore be related to the *condition* alleged to offend the constitution . . . .") (internal quotation marks and citation omitted); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) ("[T]he nature of the violation determines the scope of the remedy."); *see also* H.R. Rep. 104-21, at 24 n.2 (1995) (commenting, on bill provision that ultimately became 18 U.S.C. 3626(a), that "dictates of the provision are not a departure from current jurisprudence concerning injunctive relief").

141 *See* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 389 (1992) (explaining that injunctive settlements may extend well past what might permissibly be entered in litigated decrees).

142 18 U.S.C. § 3626(c)(2)(B) (2000).

143 18 U.S.C. § 3626(c)(2)(A) (2000); *see also* FED. R. CIV. P. 41(a) (governing voluntary dismissals, including conditional dismissals).

settle agree to these findings and the court approves them."[144] The PLRA's prospective relief limit may be undermining the *effectiveness* of court-order regulation, but it is unlikely that it is severely undermining the very existence of court orders.

Next, I canvass non-PLRA explanations for the decline in court orders reported in the last census.

2. *Increasing Conservativism of the Federal Bench*

It stands to reason that the more conservative a judge, the less inclined that judge would be to enter or continue a pro-inmate injunctive order over the objection of defendant prison or jail officials. After all, more conservative judges are less inclined to grant relief in civil rights cases in general, and less inclined to find for criminal defendants;[145] prison and jail litigation combine the two. So an increasingly conservative federal bench could help to explain the decline in the volume of correctional court-order regulation. And indeed, the federal judiciary did grow increasingly conservative during the Reagan and Bush I years, as more and more Republicans were appointed. By the close of the first Bush presidency at the end of 1992, 76% of active district judges and 72% of active court of appeals judges had been appointed by Republicans.[146] Using active judges' "nominate scores" (a measure of ideological predisposition[147] that is

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144 John Boston, *The Prison Litigation Reform Act*, *in* LITIGATION, at 686, 703 (PLI Litig. & Admin. Practice, Course Handbook Series No. 640, 2000); *see also* John Boston, *The Prison Litigation Reform Act: The New Face Of Court Stripping*, 67 BROOK. L. REV. 429, 447 n.69 (citing, as examples of settlements where defendants waived right to move to terminate, Stipulation and Judgment at 6, Prison Legal News v. Crawford, No. CV-N-00-0373-HDM-RAM (D. Nev. Sept. 27, 2000) (agreeing not to seek to terminate for five years) (available as document PC-NV-007-001 at http://clearinghouse.wustl.edu); Stipulation and Order at 2–3, Duffy v. Riveland, Nos. C92-1596R & C93-637R (W.D. Wash. Aug. 31, 1998) (agreeing not to challenge settlement for four years) (available as document PC-WA-003-010 at http://clearinghouse.wustl.edu)).

145 *Cf.* C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 37 tbls.2, 3, 4, 5 & 6 (identifying persistent voting differences from 1969 to 1985 between district court judges nominated by Republican and Democratic Presidents in civil rights and liberties cases, and in criminal justice cases). Although the party of the appointing President has been criticized recently as an insufficiently nuanced proxy for judicial ideology, voting behavior studies confirm that since the Johnson presidency, district court appointees of each Republican president have rendered fewer liberal decisions than nominees of any Democratic president. *See, e.g.*, *id.* at 47 tbls.2, 3, 4, 5, 6, 7 & 8; Ronald Stidham, Robert A. Carp & Donald R. Songer, *The Voting Behavior of President Clinton's Judicial Appointees*, 80 JUDICATURE 16, 19 tbls.1 & 2 (1996).

146 Derived from Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 295 tbl.6 (1993).

147 The "nominate scores," sometimes referred to as "common space" measures, are based on the voting behavior of judges' home-state U.S. senators, where those senators are of the same party as the nominating president. Micheal W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*,

more sensitive than the party of the appointing president), the results are similar: A new study shows the increasingly conservative median point for federal courts of appeals leading up to 1992.[148] Studies of district court voting behavior confirm the predicted rightward shift in reported opinions.[149]

What undermines this potential explanation of the late 1990s contraction in court-order regulation is the timing of the ideological shift. The proportion of Republican-appointed judges declined steadily from 1992 through 2000, bottoming out at 45% at the end of the Clinton presidency.[150] True, given Clinton's avowed interest in appointing moderate judges, along with the demonstrable rightward movement by Senate Democrats (who have a great deal to say about who gets appointed to the federal courts of appeals and even more about the district courts[151]), the Clinton appointees promised to be

54 POL. RES. Q. 623, 630–37 (2001) (using "common space" measures described in KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997), to assess judges' ideological predispositions).

148 Lee Epstein, Andrew D. Martin, Jeffrey A. Segal & Chad Westerland, *The Judicial Common Space*, J.L. ECON. & ORG. (forthcoming 2006) (manuscript at 11 fig.4, on file with the *New York University Law Review*), *available at* http://epstein.wustl.edu/research/JCS.pdf (presenting sharp shift rightward, circuit by circuit, among federal court of appeals appointees in 1980s).

149 *See* Kenneth L. Manning & Robert A. Carp, Declarations of Independence? Federal District Court Judges and the Congruence of their Decision-Making with Public Opinion 15 tbl.2 (unpublished manuscript on file with the *New York University Law Review*) (paper prepared for 2003 Sw. Pol. Sci. Ass'n). The relevant table is reprinted with permission in this Article's Technical Appendix, *supra* note 68. No study of unreported district court dispositions is available. *Cf.* Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1494–97, 1503–07 (2004) (describing evidence of systematic differences in outcomes of reported and unreported adjudication in federal courts of appeals).

150 Derived from Goldman, *supra* note 146, at 295 tbl.6; Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Evaluation*, 78 JUDICATURE 276, 291 tbl.6 (1995); Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254, 272 tbl.8 (1997) [hereinafter Goldman & Slotnick, *Clinton's First Term Judiciary*]; Sheldon Goldman & Elliot Slotnick, *Clinton's Judges: Summing up the Legacy*, 84 JUDICATURE 228, 253 tbl.8 (2001); Sheldon Goldman & Elliot Slotnick, *Picking Judges Under Fire*, 82 JUDICATURE 265, 283 tbl.8 (1999) [hereinafter Goldman & Slotnick, *Picking Judges Under Fire*]; Sheldon Goldman, Elliot Slotnick, Gerard Gryski, Gary Zuk, & Sara Schiavoni, *W. Bush Remaking the Judiciary: Like Father Like Son?*, 86 JUDICATURE 282, 298 tbl.1 (2003).

151 *See* SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 358–59 (1997) (describing district court judges' appointments as "primarily . . . the products of senatorial patronage"); Stephen B. Burbank, *Politics, Privilege & Power: The Senate's Role in the Appointment of Federal Judges*, 86 JUDICATURE 24, 25–26 (2002) (explaining that Senate role with respect to lower-court nominations is "dominated by patronage" and that senator from president's party of nominee's state has "veto power"); Goldman & Slotnick, *Picking Judges Under Fire*, *supra* note 150, at 267 (same); Goldman & Slotnick, *Clinton's First Term Judiciary*, *supra* note 150, at 254–57 ("Candidates for the district bench came from recommendations by

moderates rather than liberals.[152] This has been borne out by voting patterns; the Clinton appointees have proven less liberal than their predecessors appointed by Presidents Johnson and Carter. Still, as one would have expected,[153] the Clinton appointees' voting seems nonetheless to be less conservative than that of their immediate Republican predecessors.[154] So the direction of the resulting mid-1990s ideological shift in the federal bench makes it an equally poor candidate as a cause of the change in the correctional census data between the mid-1990s and 1999/2000. I argue below[155] that the increasing conservativism of the federal bench that characterized the 1980s has had an important impact on the *nature* of correctional court-order litigation—but the late-1990s decrease in *volume* of regulation must have had other causes.

3. *The Changing Law of Injunctions*

In the early 1990s the Supreme Court increasingly tried to rein in civil rights court orders. Two school desegregation opinions, *Board of Education of Oklahoma v. Dowell*[156] and *Freeman v. Pitts*,[157] began the trend in 1991 and 1992: In each, the Court made it a bit easier for civil rights defendant governments to end court-order regulation. But the current phase of public law litigation doctrine really started a bit later, with the Kansas City school desegregation decision, *Missouri v. Jenkins* (*Jenkins III*),[158] and an Arizona inmate access-to-courts deci-

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Democratic senators, or in the absence of a Democratic senator, from the Democratic members of the House of Representatives or other high-ranking Democratic Party politicians.").

[152] *See* Epstein et al., *supra* note 148, at 11 fig.4 (presenting shift left in median nominate scores among federal court of appeals judges beginning in mid-1990s, but one that was generally shallower than rightward shift of 1980s).

[153] *See* Goldman, *supra* note 150, at 291 (describing Clinton administration's moderate appointment strategy); Stidham, Carp & Songer, *supra* note 145, at 19 tbl.2 (showing percentage of liberal decisions in areas of criminal justice, civil rights and liberties, and labor and economic regulation).

[154] *See* Stidham, Carp & Songer, *supra* note 145, at 19 tbl.2 (showing percentage of liberal decisions in areas of criminal justice, civil rights and liberties, and labor and economic regulation).

[155] *Infra* Part III.B.

[156] 498 U.S. 237, 249–50 (1991) (requiring dissolution of school desegregation order if defendants "had complied in good faith with the desegregation decree since it was entered, and . . . the vestiges of past discrimination had been eliminated to the extent practicable").

[157] 503 U.S. 467, 471 (1992) (holding, because of policy in favor of relinquishing judicial authority over local governmental entities, that district court "is permitted to withdraw judicial supervision with respect to discrete categories in which the school district has achieved compliance with a court-ordered desegregation plan," and "need not retain active control over every aspect of school administration until a school district has demonstrated unitary status in all facets of its system").

[158] 515 U.S. 70 (1995).

sion, *Lewis v. Casey*,[159] in 1995 and 1996, respectively. These cases emphasized three preeminent values in public law litigation: the importance of defendant governments' institutional autonomy, the need to formulate remedies of limited and foreseeable duration, and the necessity of a tight fit between right and remedy. In *Jenkins III*, Chief Justice Rehnquist's majority opinion emphasized the requirement that the substance of any litigated remedy be limited by the scope of the constitutional violation.[160] *Jenkins III* held illegitimately broad a district court order aimed at increasing the attractiveness of a school district to families who lived outside of district boundaries, because the proven violation occurred entirely within the district. In his opinion for the *Lewis* Court, Justice Scalia similarly insisted that litigated class action remedies could extend no farther than proven injury, setting aside a systemwide order in a case in which the proof was not similarly systemwide.

The timing of these doctrinal shifts is exactly right for them to explain the mid-1990s shift in volume of court-order regulation. Read most aggressively, *Lewis* in particular seems extremely important as a constraint on the entry of new relief. After all, the Federal Bureau of Prisons has 166 prison facilities; Texas has 108; California has 90.[161] If, for example, plaintiffs could obtain relief only with respect to individual institutions about which they presented evidence, that would make systemwide relief all but unobtainable in large prison systems. But this explanation of our observed contraction in correctional court-order regulation fails because *Lewis*, a case about prison systems' obligation to provide limited legal assistance (usually access to a law library) to inmates seeking to challenge their conviction, sentence, or conditions of confinement, has not, in fact, appeared terribly influential outside of that narrow doctrinal home. In cases since *Lewis* in which courts have entered litigated orders, most opinions do not spend much (or indeed any) time dealing with *Lewis*. To test this

159 518 U.S. 343 (1996).

160 In the most general way, this was a principle previously articulated in 1974, in the Detroit school desegregation case, *Milliken v. Bradley* (*Milliken I*), 418 U.S. 717 (1974). But *Milliken I* stands more for the limited proposition that misconduct by one government entity does not authorize injunctive remedies that coerce a politically separate government entity. *Id.* at 750, 752.

161 Fed. Bureau of Prisons, U.S. Dep't of Justice, Federal Prison Facility Locator, http://www.bop.gov/DataSource/execute/dsFacilityLoc (last visited Mar. 3, 2006) (listing federal facilities); Tex. Dep't of Criminal Justice, Unit Directory, http://www.tdcj.state.tx.us/stat/unitdirectory/all.htm (last visited Mar. 5, 2006) (listing Texas's facilities); Cal. Dep't of Corrections and Rehabilitation, *Fourth Quarter 2005 Facts and Figures*, http://www.corr.ca.gov/DivisionsBoards/AOAP/FactsFigures.html (last visited Mar. 9, 2006) (describing California's facilities).

general impression (which is shared by inmates' advocates[162]), I ran a Westlaw search of federal court of appeals[163] cases citing *Lewis*,[164] which pulled up over 740 opinions. Nearly all the prison and jail cases are about law libraries and other access-to-courts issues. Only *twelve* of the 740 opinions were prison or jail cases in which appellate judges treated *Lewis* as raising a general issue about standing or the permissible scope of injunctive relief.[165] Apparently, in what is perhaps a sign of the resilience of group adjudicatory techniques, lower courts have essentially confined *Lewis*'s remedial holding to its original setting. Similarly, they do not generally take the time even to distinguish *Jenkins III*. A similar search of court of appeals cases citing *Jenkins* and using the word "jail" or "prison,"[166] came up with just forty-three opinions, only *two* of which deal with *Jenkins* even glancingly as precedent relevant to the scope of injunctive relief.[167] Moreover, both *Lewis* and *Jenkins III* set the terms for litigated decrees, but in fact most cases settle. In sum, while the evidence is not conclusive, both opinions and participants suggest that neither *Lewis* nor *Jenkins III* has had impact on general injunctive practice in the prison or jail setting, and they therefore cannot explain the late 1990s decline in court-order incidence.

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162 E-mail from Elizabeth Alexander, *supra* note 138; E-mail from John Boston, *supra* note 30; E-mail from Don Specter, Dir., Prison Law Office, to author (Oct. 24, 2005) (on file with the *New York University Law Review*).

163 I limited this search to courts of appeals because in nearly all of the circuits, even "unpublished" opinions in the federal courts of appeals are available via Westlaw, whereas the problem of non-publication creates a bias of unknown direction and strength in district court opinion analysis. Note, however, that for several of the courts of appeals, there remains some group of historical opinions that are unavailable on Westlaw. *See* TIM REAGAN ET AL., FED. JUDICIAL CTR., CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS (2005), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/Citatio2.pdf/$File/Citatio2.pdf (discussing court of appeals publication policies and statistics); William R. Mills, *The Shape of the Universe: The Impact of Unpublished Opinions on the Process of Legal Research*, 46 N.Y.L. SCH. L. REV. 429, 429–36 (2003) (outlining history and policies of no-publish rules).

164 The search, which I ran during the summer of 2005, was "Lewis v. Casey" in Westlaw's "CTA" database.

165 For a list of the cases and relevant quotations, see Technical Appendix, *supra* note 68.

166 More precisely, my Westlaw search, in the "CTA" database in the fall of 2005, was "'Missouri /2 Jenkins' & jail prison & da(aft 1994)."

167 *See* Glover v. Johnson, 138 F.3d 229, 242 (6th Cir. 1998) ("The challenge, it appears, is to remember that terminating judicial oversight is an objective to be affirmatively strived for, not simply an event that we welcome if it happens to occur. *Cf.* Missouri v. Jenkins, 515 U.S. 70, 88–89 (1995)."); Lucien v. Johnson, 61 F.3d 573, 576 (7th Cir. 1995) (denying requested remedy that would "place the federal courts in a relation of superintendence to the state court of claims—a well-nigh intolerable interference with a core function of state government . . . . *cf. Missouri v. Jenkins* . . . (concurring opinion)") (citations omitted).

4. *Declining Funding for Inmates' Advocates*

When correctional court-order litigation started, the plaintiffs' side of the litigation was funded in three ways.[168] First, some organizations that brought the cases received federal funding via the Legal Services Corporation. Second, other organizations received foundation funding. The third funding source, important since the cases' beginning, was free labor by private lawyers. These plaintiffs' attorneys became involved in different ways: Some were appointed by judges; others were brought in as "cooperating attorneys" by organizations with insufficient staffing to handle cases in-house; still others got involved because of some commitment to a particular inmate client or other connection to a given facility. Finally, in 1976, when Congress enacted the fee-shifting Civil Rights Attorney's Fees Awards Act, it added to the mix a fourth method—the funding of successful plaintiffs' attorneys by defendants.[169]

This last source was constrained by the PLRA, which limits attorneys' fees. The other funding sources, however, were not similarly contracting. Just like the rightward tack on the federal bench, the other restrictions on funding happened too early to provide satisfactory explanations for the mid- to late-1990s change. Federally funded legal services offices were major players in jail litigation in particular in the 1970s, but all the evidence indicates that the Reagan budget cuts of 1981 greatly reduced their involvement, which became sporadic except in a few offices.[170] So by the time Congress banned both class actions and representation of inmates by recipients of legal services funding in 1996 (in the same appropriations bill that included the PLRA),[171] there was not much federally-funded correctional court-

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168 As government entities, defendants are funded according to their ordinary budget process.

169 Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988(b) (2000)); Maher v. Gagne, 448 U.S. 122, 132–33 (1980) (holding that Act authorizes attorneys' fees awards to compensate attorneys who successfully negotiate consent decrees in civil rights cases). Until 1991, successful plaintiffs' advocates were sometimes able to win an order shifting experts' fees as well. *See* W. Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 85–86 (1991) (limiting expert fees to $30 per day). Susan Sturm identifies *Casey* as putting some financial stress on national corrections litigation, *see* Sturm, *supra* note 79, at 33 & n.125, and even now plaintiff-side participants point to it as a crucial loss, *see* Telephone Interview with Vincent M. Nathan, frequent special master in jail and prison cases (Aug. 2, 2005).

170 *See* Schlanger, *Beyond the Hero Judge*, *supra* note 7, at 2019; Sturm, *supra* note 79, at 53–67.

171 *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(15), 110 Stat. 1321, 1321–55; *see also* 45 C.F.R. §§ 1632.1–1632.5 (2005) (governing Legal Service Corporation's representation of prisoners).

order activity left to stifle.[172] This change cannot have caused the late-1990s decline in volume of court-order litigation.

Some foundation sources had also shrunk or disappeared by 1996. The National Prison Project of the ACLU, for example, was once the Edna McConnell Clark Foundation's largest grantee, until Clark turned off the spigot.[173] But that change took place in the early 1990s—a bit too early to explain the data above. Moreover, new foundation sources have emerged.[174] Some make the traditional types of grants, directly to an organization to pay for its lawyers, experts, or other expenses. Others follow a newly prevalent model of legal public interest funding; rather than grants to organizations, a number of newer funders provide salary-support fellowships to young lawyers who go work for public interest law groups, including inmates' advocacy groups.[175] It would require further research to understand the net impact of these competing trends.[176]

As for the third initial source of support for correctional injunctive litigation, subsidization by private lawyers, there is no convincing evidence that as of the late 1990s it had shrunk or was shrinking. In fact, recent years have seen an increase in the pro bono commitments of large law firms.[177]

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[172] *See supra* note 170.

[173] Telephone Interview with Alvin J. Bronstein, founder and former Dir., ACLU Nat'l Prison Project (Dec. 21, 1998) (describing early foundation support for National Prison Project); Sturm, *supra* note 79, at 32 & n.122 (describing Clark support for National Prison project in 1990–1991, and its subsequent decision to "gradually phase out unrestricted, general support for corrections litigation").

[174] Among the most prominent new foundation sources of support for correctional court-order litigation are George Soros's Open Society Institute, the Jeht Foundation, and the Impact Fund. Telephone Interview with Steve Kelban, Executive Dir., Andrus Family Fund (Oct. 27, 2004); Foundation Directory Online, http://fconline.fdncenter.org (last visited Mar. 3, 2006) (subscription required); The Impact Fund, Grants Awarded, http://www.impactfund.org/pages/grants/grntspst.htm#04-05CivilRights (last visited Mar. 23, 2006) (describing grants awarded in particular cases) Open Society Institute, U.S. Justice Fund, The After Prison Initiative, http://www.soros.org/initiatives/justice/focus_areas/after_prison/grantees/bazelon_2004 (last visited Mar. 9, 2006) (describing one grant).

[175] Telephone Interview with Elizabeth Alexander, *supra* note 122; E-mail from Don Specter, *supra* note 162.

[176] Lawyers from some advocacy organizations report that external funding has grown somewhat sparser since the 1980s, with the effect of constraining the volume of their activities. But at least some of them rank tightening funding far below the non-monetary provisions of the PLRA as an explanation for the mid- to late-1990s contraction in correctional court orders. *See* E-mail from Elizabeth Alexander, *supra* note 138. Don Specter of the Prison Law Office reports that the PLRA has not had much effect on his office's California prison docket. E-mail from Don Specter, *supra* note 162.

[177] Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 40–41 (2004). Large firms with pro bono programs have been quite involved in corrections litigation. Sturm, *supra* note 79, at 71–72.

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What we have at the end of the day, then, is a quite different story from the one prior scholars have told. Far from an early 1980s heyday, it looks like correctional court-order incidence essentially plateaued from the 1980s to the 1990s, for both jails and prisons.[178] The 1996 Prison Litigation Reform Act is the most plausible explanation for what happened next. By drastically widening the escape route for correctional jurisdictions seeking to terminate court orders, interposing a difficult administrative exhaustion hurdle for maintenance of a court-order lawsuit, and squeezing the funding for the advocates who seek court orders, the PLRA has contributed to a major decline in the regulation of prisons and jails by court order. Nonetheless, even after the PLRA, court-order incidence remains quite high in the final correctional censuses. There is increasing variation among states, and in a few states, jails and prisons continue to experience a great deal of injunctive regulation.

III
THE CHANGING NATURE OF COURT-ORDERED RELIEF

Even though the 1980s and early 1990s did not see a decline of the *incidence* of court orders governing jails and prisons around the country, that does not mean that court-order practice continued unchanged. In fact, major changes in the nature of the litigation took place. The correctional census data along with other sources reveal that over the 1980s and 1990s there was a marked shift in what might be called the *depth* of court-order regulation, as the paradigm intervention shifted from an omnibus model to something more fine-grained.

A. Number of Topics

In a perfect world one would use a combination of metrics to assess court-order depth: number or proportion of inmates affected, number or proportion of staff affected, money spent on compliance, staff hours spent on compliance, perceived burden and benefit, and so on. Unfortunately, such metrics are unavailable. Nevertheless, the correctional census data do allow valuable, if blunter, inquiry. Figure

[178] It is possible, of course, that there was a pre-1984 peak that is not detectable by examination of the census data, which start in 1984. I think this is unlikely, however, based on other sources, such as the National Prison Projects' "status reports" which used to describe annually the most significant prison cases past and present, and therefore allowed some assessment of pre-1984 trends. Those status reports are reprinted in 3 PRISONERS AND THE LAW app. B (Ira P. Robbins ed., 2005).

5 begins that inquiry, describing the number of specific topics reported by jails and prisons subject to court order, over time.[179] The number of topics is interesting both because it tells us something about the nature of court-order cases and also because it may correlate with their budgetary impact.[180]

Figure 5 is, once again, a set of histograms, in two panels. In the first, each regulated facility receives equal weight; in the second, the figures are weighted by the population held in each regulated facility. Both panels show that among prisons, but not jails, the early 1990s saw a substantial decrease in the number of regulated subject areas. That decrease continued between 1995 and 2000. The trend is stronger in the second, population-weighted panel, but it is present in

[179] This table presents the questionnaires' included topics, by census administration:

	Jail 1983	Prison 1984	Jail 1988	Prison 1990	Jail 1993	Prison 1995	Jail 1999	Prison 2000
Population cap	•	•	•	•	•	•	•	•
Totality of conditions			•	•	•	•		•
Crowding		•	•	•	•	•	•	•
Medical care		•	•	•	•	•	•	•
Administrative segregation		•	•	•	•	•	•	•
Staffing		•	•	•	•	•	•	•
Food/sanitation		•	•	•	•	•	•	•
Education/training		•	•	•	•	•	•	•
Discipline			•	•	•	•	•	•
Discipline/grievance		•						
Grievance policies			•	•	•	•	•	•
Recreation/exercise		•	•	•	•	•	•	•
Visiting			•		•			
Visiting/mail		•		•				
Visiting/mail/phone						•	•	•
Fire safety		•	•	•	•	•	•	•
Counseling		•	•	•	•	•	•	•
Inmate classification			•	•	•	•	•	•
Library services			•	•	•	•	•	•
Search policies			•		•	•	•	•
Discrimination		•						
Protective custody					•			
Religious practices						•	•	•
Accommodation of disability								•

Not all the topics are listed in the published reports, but they are all listed in the ICPSR's codebooks for the raw census data, *see supra* note 81, as well as in the census questionnaires themselves (on file with the *New York University Law Review*). *See supra* notes 83–86 The two most recent census questionnaires, for 1999 and 2000 are BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CJ-3, 1999 CENSUS OF JAILS (1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cj-3.pdf and BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CJ-43, 2000 CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cj43.pdf.

[180] Two studies examining what their authors believed to be the single most significant prison court orders in each state found that the number of issues in these cases correlates with greater budgetary increases for corrections departments following their entry. Fliter, *supra* note 34, at 409 tbl.2, 409–10; Taggart, *supra* note 34, 265 tbl.7, 265–66 (1989). It is not clear, however, how generalizable these findings are.

both. Jails under court order followed a very different pattern; they saw much less change over time. What change did occur was an *increase* in the number of topics between 1988 and 1993, and then a slight decrease in the next period, from 1993 to 1999.

FIGURE 5A: NUMBER OF REGULATED TOPICS AMONG CORRECTIONAL ENTITIES WITH COURT ORDERS

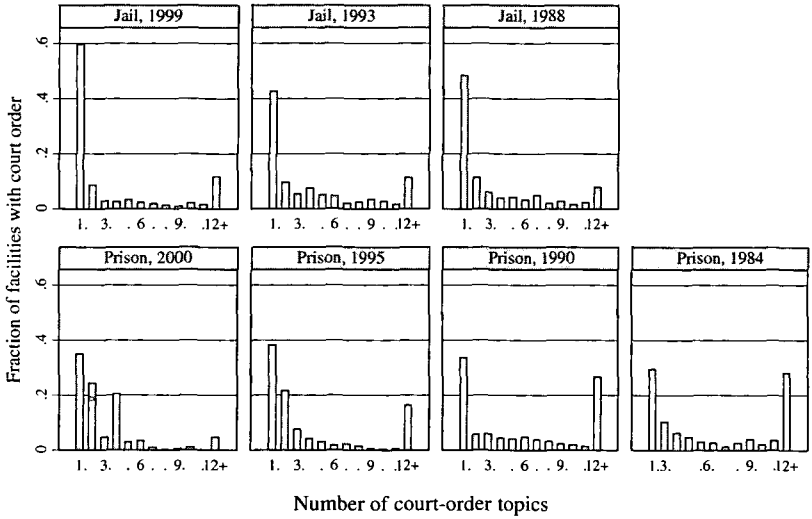
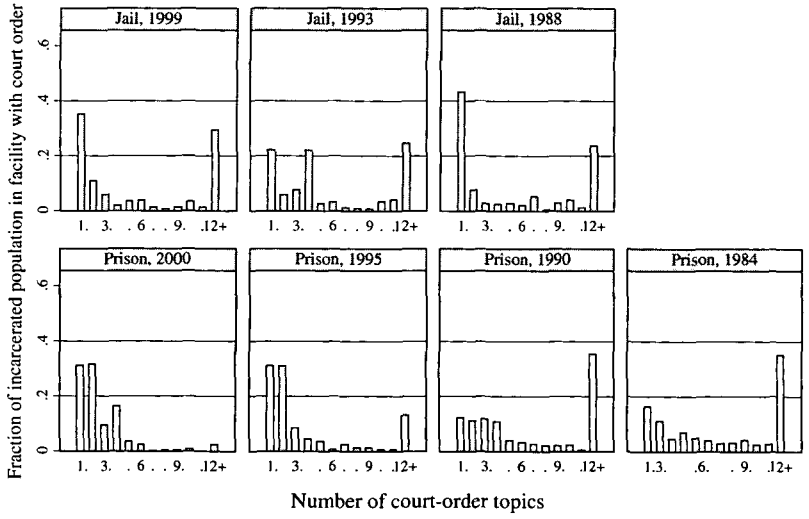


FIGURE 5B: NUMBER OF REGULATED TOPICS AMONG CORRECTIONAL ENTITIES WITH COURT ORDERS (WEIGHTED BY INCARCERATED POPULATION)



Source: Derived from Bureau of Justices Statistics Prison and Jail Censuses, *supra* note 81.

B. *Explaining the Changes*

What this change signals and why it occurred are questions that the census data cannot answer. But other sources—court opinions, law review articles, case studies, and interviews—shed some light. My reading of these sources suggests that the decrease in the number of topics in prison court orders that began in the mid-1980s stems from two factors, one within litigation and the other within corrections. The first factor was the increasing rigor of injunctive litigation over the relevant time period. Prior work, for example by Susan Sturm, has identified this trend and attributed it primarily to top-down doctrinal shifts.[181] I argue that this trend has other bottom-up sources as well—in particular, a general hardening of attitudes about causation, and (counterintuitively) the increasing resource base and sophistication of plaintiffs' counsel. The second factor contributing to declining numbers of regulated topics is more speculative: It may well be that improving conditions (or at least conditions that improved in constitutionally regulated areas) made fewer topics attractive to either plaintiffs' counsel or courts for court-order regulation. For jails, more than for prisons, this second factor would be less applicable; jail conditions have long been worse than prison conditions, and that continues to be the case in many facilities. In addition, for jails, *both* factors have been countered by the orders' particularly large benefits to jail defendants. This Section examines how the practice of court-order litigation has metamorphosized over time. I argue that the 1970s "kitchen sink" model—characterized by a litigation with broad scope, loose standards of causation, and sweeping remedies, often based on "totality of conditions" reasoning—gave way to more focused, resource-intensive litigation that addressed increasingly narrow topics with more rigorous proof on harm and causation. I conclude that the changes were primarily caused by a conservative shift in the federal bench, increasingly skeptical attitudes towards causation generally, the legacy of the examples cast by *Ruiz* in the 1980s and *Madrid v. Gomez* in the 1990s, and the involvement of lawyers practicing in the "big-firm" model of litigation.

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[181] *See* Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 719–23 (1993).

cooperating attorneys.[182] Perhaps for this reason, by all accounts the cases tended to follow a similar script, at least before the mid-1980s. A paradigm prison case was the Alabama litigation, *Pugh v. Locke*.[183] *Pugh* was very typical of the first generation of prison cases in that its substantive scope, its method of litigation, and its remedial approach[184] were extremely broad. It was largely this wave of cases that produced the results in the 1984 census—widespread orders reaching many subjects.

Described in detail in several important case studies,[185] *Pugh v. Locke* started when District Judge Frank Johnson received several serious complaints from inmates in the Alabama system and responded by bringing in not only private counsel but also the ACLU National Prison Project, the U.S. Attorney's Office (led by Nixon appointee Ira DeMent, later named to the federal bench by the first President Bush), and the Department of Justice's Civil Rights Division. It was the Prison Project and the Justice Department that funded the litigation.[186] Having heard the results of their investigation, including expert testimony, Judge Johnson agreed to impose a quite comprehensive order governing prison policies and procedures statewide.[187]

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[182] As one early prison litigator describes, the network predated the formal establishment of the Prison Project:

> There were only a few of us in the prisoners' rights movement at this time: William Hellerstein of the New York City Legal Aid Society, Stanley Bass of the NAACP Legal Defense & Education Fund, Inc. and a handful of others scattered around the country. Hellerstein, Bass and I decided we would coordinate our efforts.

Herman Schwartz, *Prisoners' Rights Lawyers in VA and NY Merge to Form NPP*, NAT'L PRISON PROJECT J., Fall 1987, at 5.

[183] *Pugh* and an earlier case, *Newman v. Alabama*, were merged, for some purposes, early in their litigation. *See* Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976); Newman v. Alabama, 466 F. Supp. 628 (M.D. Ala. 1979); Newman v. Alabama, 503 F.2d 1320 (5th Cir. 1974); Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977); Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam); Newman v. Alabama, 578 F.2d 565 (5th Cir. 1978); Newman v. Alabama, 683 F.2d 1312 (11th Cir. 1982); Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983); Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984); Graddick v. Newman, 453 U.S. 928 (1981) (Powell, J.) (denying application for stay); *id.* at 937 (Rehnquist, J.) (respecting Court's denial of stay).

[184] Telephone Interview with Elizabeth Alexander, *supra* note 122. Susan Sturm makes a similar, though more limited point. She quotes several prison litigators—the same ones I have interviewed—describing this early litigation as "anecdotal." Sturm, *supra* note 181, at 719–21.

[185] BASS, *supra* note 71, at 329–46; YACKLE, *supra* note 71, at 79–107; YARBROUGH, *supra* note 71, at 187–217; *see also* Frank M. Johnson, Jr., *The Alabama Punting Syndrome*, 18 JUDGES' J. 4 (1979).

[186] YACKLE, *supra* note 71, at 69.

[187] *Pugh*, 406 F. Supp. at 331–35.

Liability in the *Pugh* litigation was predicated on a "totality of conditions" theory: The idea was that various aspects of incarceration for Alabama's inmates combined to make the entirety of their lives intolerable and therefore unconstitutional. This approach was litigated and followed in quite a large number of cases resolved in the 1970s.[188] But the comprehensiveness of both the liability theory and the resulting findings and remedy did not mean endless discovery and trials. Rather, the plaintiffs' counsel in the Alabama system litigation, as in other cases of the era, proceeded with a broad-brush approach: In this era, summary testimony by experts and judicial tours rather than statistics were the preferred methods of proof.[189] Judge Johnson was (somewhat unusually) disinclined to tour, so plaintiffs' counsel substituted photographs to illustrate their testimony.[190] The first order was issued after a trial that lasted just seven days.[191] Indeed, Judge Johnson directed plaintiffs' counsel away from longer presentation, for example when they began to ask an expert witness who had testified about conditions at one facility whether conditions at the others were similar.[192] Notwithstanding that limited foundation, the order governed prison population, the size of cells, the conditions of isolation and the procedures to be followed to impose it, development of a new inmate classification system, mental health care, protection of inmates from other inmates, sanitation and hygiene, environmental sanitation, nutrition, correspondence, visitation, educational and vocational training, recreation, and staffing levels. The *Pugh* order was not terribly specific: It filled fewer than four pages in its Federal

188 For a review listing cases, see Michael S. Feldberg, Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367, 369–70 & n.12 (1977). *See also* L. Lee Boatright, Note, *Federal Courts and State Prison Reform: A Formula for Large Scale Federal Intervention into State Affairs*, 14 SUFFOLK U. L. REV. 545, 547 (1980) ("By aggregating conditions, however, inmate petitioners have convinced a number of courts that the cumulative effect of these elements amount to a constitutional violation."); *id.* at 547 n.10 (citing cases).

189 For a description of repeat judicial tours, see ANDERSON, *supra* note 47, at 107–14, 151 (case study of litigation over conditions at Kentucky State Reformatory):

> In one of the dorms, Shorty said, "Look here, Judge." Inmates lifted up some floorboards. The judge peered down and saw raw sewage, including human waste, floating beneath the floor. One inmate pulled back his mattress and pointed to the underside, and Johnstone saw swarms of cockroaches crawling on the mattress. . . . In another dorm, inmates politely asked the guard to open the fire emergency escape door. The guard fumbled with his key chain and tried key after key in the lock, but nothing worked: it was obvious that the guard could not open the door in case of fire and that he was unaware of that fact.

Id. at 151. For information on the underlying litigation, see *supra* note 46.

190 YACKLE, *supra* note 71, at 72.

191 *Pugh*, 406 F. Supp. at 322.

192 YACKLE, *supra* note 71, at 88.

Supplement publication. But it incorporated by reference several quite detailed sets of standards issued by various government authorities, and academics, as well as several Supreme Court cases.[193]

One of the reasons the Alabama trial was so short was that the defendants put on almost no defense.[194] In part, as clearly has happened many times since, the defendants were hopeful that a federal court order would help them pry resources out of the state legislature. "This is what happens," the state's lead attorney told newspaper reporters, "when you have a legislature that abdicates its duties."[195] If this was the plan it was quite effective: Estimates of the budgetary consequences of the *Pugh* orders vary, but they were certainly extremely large.[196] Or perhaps—as prior commentators have also suggested—Alabama's prison conditions were so bad that defense would have been useless, even counterproductive, for defendants seeking to avoid alienating Judge Johnson, whose remedial authority they would have to live with.[197] But even if this latter point is correct, that simply underscores the looseness of the evidentiary showing required. Doctrinally, evidence of ill will or subjective culpability (what current doctrine labels "deliberate indifference"[198]) was not yet required. More important, the necessary causal showing connecting demonstrated variations from accepted penal practice on the part of administrators to evidenced widespread harm was quite minimal. If plaintiffs could demonstrate, first, a set of problematic practices and, second, widespread harm, neither courts nor defendants tended to

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193 *See Pugh*, 406 F. Supp. at 332–35 (referring to standards set out in *Wolff v. McDonnell*, 418 U.S. 539 (1974), Minimum Mental Health Standards for the Alabama Correctional System (Center for Correctional Psychology, University of Alabama, December 1972), *Procunier v. Martinez*, 416 U.S. 396 (1973), and United States Public Health Service).

194 YARBROUGH, *supra* note 71, at 193–96.

195 *Id.* at 196 (quoting Robert Lamar in *Montgomery Advertiser*, August 29, 1975); *see also* YACKLE, *supra* note 71, at 92 (suggesting defense strategy of blaming legislature for inadequate funding).

196 Yackle reports that an early estimate predicted compliance costs for the physical plant alone would be over $79 million. YACKLE, *supra* note 71, at 108. Taggart estimates (based on multivariate regression) that the order triggered a more than one-third increase in total annual expenditures for two years. Taggart, *supra* note 34, at 261 tbl.3, 263 tbl.5. Harriman and Straussman describe an increase in expenditures per prisoner of 81%. Harriman & Straussman, *supra* note 34, at 345 tbl.1. Note that it is difficult to separate the effect of the *Pugh* orders from that of orders in *Newman v. Alabama*, a case about medical care begun earlier, also before Judge Johnson.

197 *See* YACKLE, *supra* note 71, at 92–93 (describing strategic reasons for not putting on strong defense).

198 *See* Farmer v. Brennan, 511 U.S. 825, 829 (1994); Estelle v. Gamble, 429 U.S. 97, 104 (1976).

press for precise proof about either the mechanics of the connection or its strength.

Not all the prison cases in the 1970s and early 1980s looked just like *Pugh v. Locke*. Many, for example, governed only one or a few of a state's facilities.[199] Some were more thoroughly settled; others more thoroughly litigated. Some concerned only a limited issue or two.[200] But *Pugh* can fairly be described as a paradigmatic first generation prison case. Over the years, however, the loose approach to causation grew less and less prevalent. The trend had both top-down and bottom-up origins—by which I mean, simply, that its causes can be found both in developing Supreme Court precedent and in less doctrinal, more widespread factors.

2. Bell v. Wolfish, Rhodes v. Chapman, *and the Supreme Court's General Reining in of Public Law Litigation*

The crucial Supreme Court precedents were issued in 1979 and 1981, in *Bell v. Wolfish*,[201] a jail conditions case involving a federal facility in New York City, and *Rhodes v. Chapman*,[202] a double-celling case from Ohio. Both decisions pushed lower courts towards a higher evidentiary standard in prison and jail cases. These cases were part and parcel of the Supreme Court's retrenchment in public law litigation more generally. The Court began in the 1970s and continued into the 1980s to promulgate rules favoring defendants in civil rights litigation. It issued cases holding, for example, that civil rights remedies must be closely tied to the demonstrated wrongs or their effects;[203] that availability of relief is limited where it infringes on the rights of actors who have done no wrong;[204] and that the rights to be enforced

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[199] *See, e.g.*, Wright v. Enomoto, 462 F. Supp. 397, 398 (N.D. Cal. 1976) (governing four California maximum security prisons), *summarily aff'd*, 434 U.S. 1052 (1978); Bradberry v. Phend, No. IP 76-459-C (S.D. Ind. Mar. 21, 1977) (consent decree and judgment governing one Indiana prison) (described in Kindred v. Duckworth, 9 F.3d 638, 639–40 (7th Cir. 1993)); Ramos v. Lamm, 639 F.2d 559, 562 (10th Cir. 1980) (governing one Colorado prison).

[200] *See, e.g.*, Lamar v. Coffield, 951 F. Supp. 629, 630 (S.D. Tex. 1996) (describing order entered in 1977 requiring desegregation in inmate housing in Texas prison system); Muhammad v. Keve, 479 F. Supp. 1311, 1314, 1328 (D. Del. 1979) (accommodation of Muslim diet and use of Muslim names in Delaware Correctional Center).

[201] 441 U.S. 520 (1979).

[202] 452 U.S. 337 (1981).

[203] Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 435–36 (1976) (vacating judgment for failure to show racial mix of schools was caused by segregative actions of school board); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 419–20 (1977) (vacating judgment for disparity between evidence of constitutional violation and scope of district court remedy).

[204] Milliken v. Bradley, 418 U.S. 717, 752–53 (1974) (vacating judgment of interdistrict remedy where constitutional violations were limited to one district).

are federal, not state.[205] At the time, the limits of this second set of cases were seen by pro-reform commentators to be anachronisms,[206] but they have proved to be permanent features of the remedial landscape.

Bell v. Wolfish and *Rhodes v. Chapman* fit comfortably in this broader group of decisions making civil rights remedies harder for plaintiffs to sustain. In *Wolfish*, the Court held double bunking of pretrial jail inmates permissible under the Fourteenth Amendment. In an often-quoted passage in his majority opinion, then-Justice Rehnquist cautioned lower courts against too-ready interference with correctional authorities' prerogatives:

> The deplorable conditions and Draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems. But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute. The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.[207]

In *Rhodes*, the Court reversed an order barring double celling at a maximum security facility in Ohio as banned by the Eighth Amendment, explaining that prior cases favorable to inmates were not to be read too loosely. The test was whether conditions "alone or in combination" could be shown to "deprive inmates of the minimal civilized measure of life's necessities."[208] Although Justice Brennan, joined by

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[205] Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) (holding that federal courts lack jurisdiction to enter injunction compelling state officials' compliance with state law).

[206] *E.g.*, Abram Chayes, *The Supreme Court, 1981 Term, Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 7–8 (1982).

[207] Bell v. Wolfish, 441 U.S. 520, 562 (1979).

[208] Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

Justices Blackmun and Stevens, concurred in the judgment in order to "emphasize that today's decision should in no way be construed as a retreat from careful judicial scrutiny of prison conditions,"[209] even that concurrence insisted that plaintiffs seeking constitutional regulation of prison conditions demonstrate the causal link between the challenged practices and specific harm—problems with, for example, food, ventilation, sanitation, or violence.[210] Justice Brennan agreed with the outcome because "the [district] court's findings of fact suggest that crowding at the prison has not reached the point of causing serious injury."[211] (I do not mean to overstate this last point, however; Brennan held an extremely expansive view of what harms were constitutionally cognizable.)

Bell v. Wolfish and *Rhodes v. Chapman* did not forbid "totality of conditions" reasoning—the Supreme Court did not take that step until ten years later, in *Wilson v. Seiter*[212]—but they went a step or two down that path. Indeed, several courts of appeals anticipated *Wilson*'s holding, citing the earlier Supreme Court precedents. For example, in 1981 in a case about inmates in administrative segregation in four California state prisons, the Ninth Circuit vacated an injunction entered by the district court, and explained that the lower court's totality of conditions reasoning was dispositively overbroad: "[T]he court's principal focus must be on specific conditions of confinement. It may not use the totality of all conditions to justify federal intervention requiring remedies more extensive than are required to correct Eighth Amendment violations."[213] Rather, the Ninth Circuit held, litigation had to be a good deal more precise:

> In analyzing a challenge to prison conditions based on the Eighth Amendment, a court should examine each challenged condition of confinement, such as the adequacy of the quarters, food, medical

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209 *Id.* at 353 (Brennan, J., concurring in judgment).

210 *Id.* at 364. Justice Brennan explained:

> The court must examine the effect upon inmates of the condition of the physical plant (lighting, heat, plumbing, ventilation, living space, noise levels, recreation space); sanitation (control of vermin and insects, food preparation, medical facilities, lavatories and showers, clean places for eating, sleeping, and working); safety (protection from violent, deranged, or diseased inmates, fire protection, emergency evacuation); inmate needs and services (clothing, nutrition, bedding, medical, dental, and mental health care, visitation time, exercise and recreation, educational and rehabilitative programming); and staffing (trained and adequate guards and other staff, avoidance of placing inmates in positions of authority over other inmates).

211 *Id.* at 368.

212 501 U.S. 294 (1991).

213 Wright v. Rushen, 642 F.2d 1129, 1133 (9th Cir. 1981); *see, e.g.*, Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982) (similarly rejecting totality of conditions analysis); Walker v. Mintzes, 771 F.2d 920, 925 (6th Cir. 1985) (same).

> care, etc., and determine whether that condition is compatible with "the evolving standards of decency that mark the progress of a maturing society." . . . Of course, each condition of confinement does not exist in isolation; the court must consider the effect of each condition in the context of the prison environment, especially when the ill-effects of particular conditions are exacerbated by other related conditions.[214]

This approach was encouraged if not required by *Bell v. Wolfish* and *Rhodes v. Chapman*.

3. *1980s Factors: The Rightward Shift Among Federal Judges; Increasing Causal Skepticism;* Ruiz v. Estelle

Prior literature offers an account similar to mine of once-loose and then tighter evidentiary approaches to prison reform litigation; that literature has, like the Section just concluded, found the causes of the trend in *Bell v. Wolfish* and *Rhodes v. Chapman*. As Susan Sturm summarized in a 1994 law review article:

> The Supreme Court's decisions over the last fifteen years, particularly in *Bell v. Wolfish* and *Rhodes v. Chapman*, toughened the evidentiary standards for demonstrating that overcrowding and other conditions are depriving inmates of basic human needs. Proving that an institution's population significantly exceeds design capacity or violates minimum professional standards is not enough. Plaintiffs must demonstrate the connection between the prison conditions and a particular harm to inmates.[215]

Although this seems correct, I believe that these Supreme Court cases were not sufficient (or even, for that matter, necessary) to explain the changes in litigation practice that indubitably occurred. Rather, the simultaneous influences discussed in this Section—the increasing conservativism of the federal bench, increased causal stringency, and the example set by the district court Texas prison litigation, *Ruiz*—better account for the shift.

The rightward shift among federal judges. Beginning in 1981, increasingly conservative doctrine was coupled with increasingly conservative judges, as President Reagan's appointees joined the federal bench. The point that this change affected the nature of civil rights litigation is obvious to any civil rights lawyer, and also finds support in the limited scholarly resources relating to district courts.[216] One

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[214] *Wright*, 642 F.2d at 1133.

[215] Sturm, *supra* note 181, at 719 (footnotes omitted).

[216] Although it is perilous to rely too heavily on reported opinions, see Pether, *supra* note 149, at 1494–97, 1503–07 (describing evidence of systematic differences in outcomes of reported and unreported adjudication in federal courts of appeals), in a database of reported district court opinions coded by Kenneth Manning, Robert Carp, and C.K.

would expect more conservative judges to be less interested in kitchen-sink prison and jail injunctive litigation, and harder to persuade even in focused cases.

Causal skepticism. Another, less banal, point seems to me extremely important as well. When corrections litigation was in its infancy, causation seemed obvious, and belaboring the topic seemed correspondingly hypertechnical. But over time, it came instead to seem appropriate to require plaintiffs seeking court-enforced relief to make a fairly rigorous showing of the precise nature of their causal claims. This is not simply a top-down, Supreme-Court-driven change; the point is more attitudinal than doctrinal. The resulting shift towards greater causal stringency is one that has occurred in many areas of law—for example in antitrust,[217] administrative law,[218] and the constitutional law governing policing[219]—as well as in prison conditions cases. Indeed, the trend towards increasingly piecemeal analysis of plaintiffs' claims probably extends even farther. Steve Burbank, for example, describes modern summary judgment practice as warped by what he calls factual and legal "carving"—the first "a process that does not require more of the whole but sees less in the parts by subjecting the nonmovant's 'evidence' to piece-by-piece analysis," and the second a tendency "whereby the law is subdivided into smaller, more objective units, thus ramifying the issues as to which an adequate factual showing (however defined) must be made."[220] Because increased causal stringency will tend, in most arenas, to favor defendants over plaintiffs (who bear the burden of proof), this point

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Rowland, "liberal" (pro-plaintiff) civil rights and civil liberties results peaked at nearly 52% in 1980, and then declined fairly consistently over the next twelve years, to 35%. Manning & Carp, *supra* note 149, at 15 tbl.2.

217 Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with* Brunswick v. Pueblo Bowl-O-Mat, 66 ANTITRUST L.J. 273, 273 (1998); M. Sean Royall, *Disaggregation of Antitrust Damages*, 65 ANTITRUST L.J. 311, 311 (1997) (describing antitrust's "disaggregation rule," under which plaintiff who "challenges multiple discrete acts or practices as unlawful" must prove damages caused by each separate violation).

218 *See* Gene R. Nichol, Jr., *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L.J. 185, 186–87 (1980) (describing development of stricter causation doctrine to govern injury-in-fact test).

219 Rizzo v. Goode, 423 U.S. 362, 375 (1976) (reversing grant of comprehensive injunctive relief against police department where "sole causal connection . . . between petitioners and the individual respondents was that in the absence of a change in police disciplinary procedures, the [allegedly unlawful] incidents were likely to continue to occur, not with respect to them, but as to the members of the classes they represented").

220 Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 624–25 (2004).

may well be related to the rightward shift in judicial personnel described above.

Ruiz. A third non-doctrinal factor pushing prison litigation towards increasing rigor was the example set by the avatar of the new generation of cases, the Texas prison litigation, *Ruiz v. Estelle*.[221] National Prison Project Director Elizabeth Alexander calls the impact of *Ruiz* an example of a "reverse Gresham's law"—its more rigorous approach drove the less rigorous out of the system.[222] That is, *Ruiz* itself served as a bottom-up cause of the increasing complexity of prison litigation, which was an important factor behind the correctional census data on declining topic numbers in the resulting court orders.

None of the factors already described applied to *Ruiz*. The opinions in *Bell v. Wolfish* and *Rhodes v. Chapman* post-dated its trial. It was tried before a liberal Johnson appointee, during the Carter administration, before the Fifth Circuit Court of Appeals began to shift right. Its judge demonstrated no particular skepticism about plaintiffs' causal claims. Yet *Ruiz* was litigation of an entirely different form than *Pugh*—a mold that would grow familiar in the ensuing years.

Like *Pugh v. Locke*, *Ruiz* began with a number of pro se filings by inmates in the early 1970s. Similarly, it first took off when its district judge, William Wayne Justice, consolidated several of those individual complaints, appointed private counsel, and (on the advice of Judge Frank Johnson[223]) summoned the U.S. Department of Justice to appear in the case. Alabama had, at the time of the *Pugh* trial, held 5000 inmates, the bulk of them in four large facilities.[224] Because Texas (which then had the largest prison system in the country) held over 24,000 inmates in seventeen major facilities,[225] *Ruiz* posed a far

221 The chronicles of *Ruiz v. Estelle*, No. Civ. H-78-987 (S.D. Tex.) (first complaint filed in June 1972), include CROUCH & MARQUART, *supra* note 71, at 117–50; DiIulio, *supra* note 42, at 51–72; and MARTIN & EKLAND-OLSEN, *supra* note 71, at 83–168. That case is also quite accessible via published and otherwise available court opinions; it made its first appearance in the federal reporters as *Ruiz v. Estelle*, 550 F.2d 238 (5th Cir. 1977), was the subject of its first major published opinion in 1980, *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), and its last as *Ruiz v. Johnson*, 154 F. Supp. 2d 975 (S.D. Tex. 2001), with numerous stops along the way in the Fifth Circuit and one in the Supreme Court, *Ruiz v. Estelle*, 460 U.S. 1042 (1983) (denying certiorari). It was finally dismissed on June 17, 2002. *See* Ruiz v. Estelle, No. Civ. H-78-987, (docket entry 9015) (docket available via PACER and as document PC-TX-003-000 at http://clearinghouse.wustl.edu).

222 Telephone Interview with Elizabeth Alexander, *supra* note 122. Gresham's law, which describes flows of currency, is usually stated as "bad money drives out good."

223 William Wayne Justice, *The Origins of* Ruiz v. Estelle, 43 STAN. L. REV. 1, 6 (1990).

224 Pugh v. Locke, 406 F. Supp. 318, 322 (M.D. Ala. 1976).

225 *See* Ruiz v. Estelle, 503 F. Supp. 1265, 1274 n.1 (S.D. Tex. 1980) (listing Texas prisons and number of inmates held in them).

greater litigation challenge. The Justice Department funded and conducted an investigation unlike any that had previously occurred in a prison case, with discovery that lasted several years and took untold hours by lawyers, investigators, and experts, all funded by the U.S government. For example, the Justice Department spent tens of thousands of dollars constructing a life-size model of a forty-five square foot cell; the model sat on the courtroom floor for the entire trial, used periodically to illustrate testimony.[226] The Texas Department of Corrections, far from acquiescing in an order, opposed its entry tooth and nail. The trial began in October 1978, occupied 159 trial days, and ran until September 1979. Over 300 witnesses testified; there were over 1500 exhibits. The opinion, issued in 1980, ran 127 pages in the Federal Supplement reporter, all those pages justifying the entry of the comprehensive court order governing the entire Texas prison system.[227]

Ruiz seems to have followed its path—rigor in discovery, litigation, justification, and regulation—for reasons unrelated to either doctrine or ideology. Rather, the reasons for its dissimilarity to *Pugh* were more idiosyncratic: the size of the Texas prison system, the vehement opposition by the defendants, and the ready availability of litigation resources to the Department of Justice and the Texas Department of Corrections.[228] It was not doctrine but these factors that combined to make *Ruiz* an example of a new kind of civil rights litigation. *Ruiz*, in sum, continued the wholesale kind of order, but taken seriously as a precedent—as it was by courts and litigants—it served as an inadvertent rate-buster, setting the bar for getting such an order very high.

Over the 1980s, then, both doctrinal changes and attitudinal changes, along with the high expectations set by the litigation history of cases like *Ruiz*, created hurdles for public law litigation. But those hurdles were not, I should emphasize, insurmountable. Even if district judges scrupulously followed *Wolfish* and *Rhodes*, and even if they were influenced both by the attitudinal shift I have identified and by the example of *Ruiz*, the result was a higher bar for plaintiffs, not inevitable defendants' outcomes. The point is that by the end of the 1980s, to the extent that cases were contested, litigation grew more rigorous and it began to be harder for plaintiffs to win wholesale

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226 Telephone Interview with Donna Brorby, former plaintiffs' counsel, *Ruiz v. Estelle* (Aug. 4, 2005).

227 Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980).

228 Interview with Vincent M. Nathan, *supra* note 169; E-mails from Donna Brorby, former plaintiffs' counsel, *Ruiz v. Estelle*, to author (Oct. 24 & 25, 2005) (on file with the *New York University Law Review*).

orders. Unless defendants had their own strong reasons for settling, plaintiffs almost certainly needed to offer a theory not only about exactly how the claimed unconstitutional practice contributed to serious harm experienced by plaintiffs, but about how much of that harm was demonstrably attributable to the bad practice. This was easier to do in cases about single issues than in the kind of kitchen-sink litigation represented by *Pugh*.

4. *1990s Factors:* Wilson v. Seiter, *Expenses, and Pro Bono Practice*

Except that the Clinton appointees tilted the federal judiciary a little bit left,[229] the 1990s saw even more of the same in what one inmates' attorney calls a litigation "arms race."[230] The Supreme Court continued to raise evidentiary obstacles for injunctive remedies in prison cases and the cases grew ever more complex and expensive to litigate. This, in turn, fostered the staffing of major prison and jail cases by pro bono large-firm attorneys. That personnel shift, I argue below, has itself fed the arms race, as large-firm attorneys have followed their ordinary large-firm "playbook" to make the cases even more expensive, more thoroughly litigated, and more complex.

In 1991, the Supreme Court continued farther down the path marked in *Bell v. Wolfish* and *Rhodes v. Chapman*. In *Wilson v. Seiter*,[231] the Court opined:

> *Some* conditions of confinement may establish an Eighth Amendment violation "in combination" when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets. . . . To say that some prison conditions may interact in this fashion is a far cry from saying that all prison conditions are a seamless web for Eighth Amendment purposes. Nothing so amorphous as "overall conditions" can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.[232]

Wilson also instituted a new requirement: evidence of a culpable mental state labeled "deliberate indifference."[233] The result in litiga-

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229 *See supra* notes 149–54 and accompanying text.

230 *See infra* note 234.

231 501 U.S. 294 (1991).

232 *Id.* at 323–24 (internal citations omitted).

233 *Id.* at 303. The Court imported this standard from *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), which held that, in order for a prisoner to make an Eighth Amendment claim for inadequate medical treatment, the prisoner must prove a defendant's "deliberate indifference" to serious medical need.

tion was to require proof not only of conditions but of specific administrators' *knowledge* of conditions and the threats to inmate health and safety they posed. Again, this was hardly insurmountable but it complicated litigation substantially.

Interviews conducted by Susan Sturm in 1994 give a flavor of what the post-1970s changes meant for plaintiffs' counsel: Litigators talked about an "arms race" in the "degree of sophistication" required by these cases.[234] John Boston, director of the New York City Legal Aid Society's Prisoners' Rights Project, explained: "A great deal of what we do now is put together evidentiary [presentations] of [a] scope unthinkable 10–15 years ago."[235] Plaintiffs' counsel began to litigate cases differently—about fewer facilities and fewer issues at a time. Even so, "cheap victories are now nonexistent," Elizabeth Alexander, of the National Prison Project reported.[236] Especially after *West Virginia University Hospitals, Inc. v. Casey* limited the availability of shifted expert fees,[237] the non-profits began to look for deep-pocket law firms to pay the very substantial—and in part unrecoverable—litigation outlays. As I discuss below, this in turn contributed to a still more rigorous kind of litigation.

If *Pugh* was the paradigm prison case of the 1970s, and *Ruiz* of the 1980s, *Shumate v. Wilson,* can serve as a 1990s exemplar. Filed in 1995 and settled two-and-a-half years later,[238] *Shumate* concerned medical care in two women's prisons in California. It was litigated and negotiated by a large group of plaintiffs' lawyers from the ACLU, Legal Services for Prisoners with Children, California Rural Legal Assistance, two major California law firms (Heller Ehrman and Bingham McCutchen), and a private public interest prisoners' counsel. The Department of Justice did not appear. Where the earlier cases had covered classes of all present and future inmates in the relevant state systems, *Shumate*'s class was more narrowly defined: all present and future inmates at the relevant two facilities "who suffer from, or who are at risk of developing, serious illness or injury, excluding mental disorders," with a separately represented subclass of

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234 Sturm, *supra* note 181, at 720 n.381 (quoting from 1991 interview with John Boston, Legal Director, Prisoners' Rights Project, Legal Aid Society of New York).

235 *Id.* at 719 n.377 (quoting from 1991 interview with John Boston) (alterations in original).

236 *Id.* at 710 n.332 (quoting 1990 and 1991 interviews with Elizabeth Alexander, Associate Director for Litigation, ACLU National Prison Project).

237 499 U.S. 83, 102 (1991).

238 Shumate v. Wilson, No. 2:95-cv-00619-WBS-JFM (E.D. Cal. filed Apr. 4, 1995, settled Dec. 22, 1997) (docket entries 1 and 392, complaint and order) (docket available via PACER and as document PC-CA-011-000 at http://clearinghouse.wustl.edu).

those class members "who have been diagnosed as HIV-positive."[239] In preparation for trial, the plaintiffs identified forty-six inmate witnesses; over fifty-six deposition transcripts were entered into evidence. The case was finally settled just before the trial was scheduled to begin, when defendants agreed to a set of standards governing health care. In many of these details, *Shumate* looked extremely different from its predecessors in the 1970s and 1980s. As we know from the census data, its topical narrowness was not new, but was newly characteristic. Equally important was the changing mix of lawyer-types representing the plaintiffs, and the level of effort required for plaintiffs to obtain their relief notwithstanding the substantive narrowness and local reach of the order.

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[239] Shumate v. Wilson, No. 2:95-cv-00619-WBS-JFM (E.D. Cal. Jan. 12, 1996) (docket entry 57, order certifying class action) (docket available via PACER and as document PC-CA-011-000 at http://clearinghouse.wustl.edu).

[240] *Madrid v. Gomez*, No. 90-3094 (N.D. Cal. filed Oct. 26, 1990), appears in the federal reporters at: *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995), *mandamus denied*, *Wilson v. U.S. Dist. Court for the E. Dist. of Cal.*, 103 F.3d 828 (9th Cir. 1996); *Madrid v. Gomez*, 940 F. Supp. 247 (N.D. Cal. 1996) (attorneys' fees), *aff'd in part, rev'd in part*, 190 F.3d 990 (9th Cir. 1999) (en banc), *superseding* 150 F.3d 1030 (9th Cir. 1998).

[241] Wilson Sonsini won $3.5 million in attorneys' fees, so its work was not, strictly speaking, pro bono after all. Amy Stevens, *The 'Pro Bono' Payoff*, S.F. EXAMINER, Dec. 3, 1995, at A-12. The firm told a reporter that it planned to give $2.4 million to charity and keep the rest for costs. *Id.*

[242] *Madrid*, 889 F. Supp. at 1155.

[243] The trial ran from September 17, 1993 to December 1, 1993, with closing argument given December 15, 1993. *See* Madrid v. Gomez, No. C90-3094 (N.D. Cal.) (docket entries

In its 139-page liability opinion, the court found that prison staff habitually used excessive force against inmates in a variety of situations; that the medical and mental health care at Pelican Bay were constitutionally inadequate; and that conditions in the Secure Housing Unit constituted cruel and unusual punishment for prisoners with mental illness, brain damage, mental retardation, or borderline personality disorders.[244] The court's order was incredibly careful: It described the problem, explained its causes, discussed the evidence in support of each step of the causal chain, and connected that evidence to the culpable state of mind of named defendants. Judge Henderson's opinion in *Madrid* followed every rule laid down by the Supreme Court. But *Madrid* the *case*, rather than *Madrid* the *opinion* did more. As in *Ruiz*, fifteen years earlier, *Madrid*'s plaintiffs' lawyers raised to a whole new level the quantum of evidence offered in corrections litigation. And like *Ruiz*, *Madrid* now sits in the collective consciousness of those bringing, defending, and judging correctional litigation, demonstrating what kind of showing is required for a sustainable liability finding.

Why did plaintiffs' counsel work so hard at *Madrid*? It seems unlikely that winning the case in the district court required the degree of preparation, proof, argument, and evidence produced. After all, just like *Ruiz*'s Judge Justice and *Pugh*'s Judge Johnson, Judge Henderson is well known as one of the most progressive members of the federal bench.[245] Rather, plaintiffs'-side participants agree that in part the idea was to create a record for appeal, and in part—and this is the point I am particularly interested in—it was just because "that's the way partners at big firms practice."[246] A story about the case's beginning makes the point. When Susan Creighton, the Wilson Sonsini partner who led the litigation, was just getting started, she hired Steve Martin as a litigation consultant. Martin, an experienced expert-witness penologist, recalls that over two days of meetings, the

342–475, 479) (docket available as document PC-CA-017-000 at http://clearinghouse.wustl.edu) (length of trial); *Madrid*, 889 F. Supp. at 1156–57 (reporting other statistics).

244 *Madrid*, 889 F. Supp. at 1254, 1260, 1267.

245 *See, e.g.*, SOUL OF JUSTICE: THELTON HENDERSON'S AMERICAN JOURNEY (Abby Ginzburg, producer, 2005).

246 Telephone Interview with Vincent M. Nathan, *supra* note 169. It is clear that who the lawyer is in a case can matter a great deal for how it is litigated. *See, e.g.*, Howard M. Erichson, *Private Lawyers, Public Lawsuits: Plaintiffs' Attorneys in Municipal Gun Litigation*, *in* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 129, 136–40 (Timothy D. Lytton ed., 2005) (describing different approaches taken in gun litigation by lawyers of different backgrounds); Thomas M. Hilbink, *You Know the Type. . .: Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657, 662–90 (2004) (describing types of "cause lawyers" and difference their type makes).

firm lawyers discussed prison litigation with him—what kinds of records prisons kept, what kinds of discovery were useful, who the best experts were, how much those experts charged, how long they could be expected to take to do their work, the conditions for an effective site visit, and so on. On some issues, however, it was the firm lawyers who explained how things were going to work. Martin remembers, "Susan said, 'We are going to litigate this case like we do any other case. We're going to hire the best experts, [and then] give them what they need.'"[247] At one point, Martin was asked how many use-of-force incident reports he would need to review. He began by saying, "Well, ideally, all of them—but that's not doable, so . . . ." Creighton interrupted him, he recalls, and said, "No, it is doable." He was paid for the time it took to review each and every one.[248] Vince Nathan, special master in *Ruiz* as well as many other cases, was another expert hired by the plaintiffs in *Madrid*. He remembers very similar conversations: "Susan Creighton was so focused, so sophisticated; there was never enough proof for her."[249]

Both Nathan and Martin explain that this kind of thorough, resource-intensive litigation is not unusual in injunctive class actions litigated by large firms since the 1990s. Only rarely, Nathan says, has he seen large firms leave correctional class action cases to wither, staffed only by overworked associates and underlitigated in a variety of ways. Much more typically, "when litigation begins, it's like there's a playbook, the same one for big commercial litigation and for pro bono cases. If you sue someone, this is how you do it."[250] Another lawyer who frequently represents inmates in damage actions explains in all seriousness that big law firms "don't know how to *not* spend money."[251]

It makes sense that, having committed to a particular litigation, pro bono counsel would litigate hard. Several studies have described how in the 1990s, large law firms' pro bono practice norms became increasingly assimilated with their paid-practice norms.[252] The change

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247 Telephone Interview with Steve J. Martin, former General Counsel, Texas Dep't of Corrections, and frequent expert witness and court monitor in jail and prison cases (Aug. 2, 2005).

248 *Id.*

249 Telephone Interview with Vincent M. Nathan, *supra* note 169.

250 *Id.*

251 Telephone Interview with Catherine Campbell, prisoners' attorney (May 7, 2001).

252 Cummings, *supra* note 177, at 33–41 (documenting institutionalization of pro bono work in big firms in 1990s); Stephen Daniels & Joanne Martin, Legal Services For The Poor: Supply, Self-Interest, and Institutionalizing Pro Bono 17–24 (June 2005), (unpublished manuscript, on file with the *New York University Law Review*) (reporting how large firms in Chicago structure pro bono work).

is likely to be self-reinforcing. If it takes Wilson Sonsini's resources to litigate a prison case successfully, there is ever more reason for inmate advocacy groups to find law firms to take cases on.[253]

It is not the case, I should emphasize, that every single correctional court-order litigation now follows what Vince Nathan calls the big firm "playbook." Leanly staffed litigation cases continue to be brought, sometimes to dispositions favorable to the plaintiffs.[254] However, like *Ruiz*, the example of *Madrid* casts its shadow upon corrections litigation, and thus serves as a bottom-up cause of the increased complexity of contemporary injunctive correctional practice.

* * * *

At the end of the day, then, I have argued that over the past twenty years, the increasing rigor of injunctive practice has been of great importance in correctional injunctive cases. It has induced plaintiffs' counsel to tackle fewer issues in fewer facilities at a time. It has, along with declining attorneys' fees reimbursement, the end of expert fees reimbursement, and the other factors described, pushed inmates' rights organizations into partnerships with big firm lawyers who can commit substantial economic resources to the increasingly complex and expensive litigation. In turn, the big firm approach to the litigation has itself furthered the very same trend.

C. Changing Conditions?

In addition to litigation reasons, there could be corrections reasons for the decline in the number of topics in prison court-order cases. Perhaps there were fewer topics for orders because prison conditions have gotten better, maybe even because of prior orders. Even though the incarcerated population exploded in the 1980s and 1990s,

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[253] *Cf.* Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225, 1253–54 (2004) (explaining how increased expenses and procedural hurdles in malpractice litigation have made it more attractive to specialists, whose comparative advantage has grown).

[254] For example, the death row litigation in Mississippi, litigated by counsel from the National Prison Project and the law firm Holland and Knight, took just seven months to get from complaint (filed July 12, 2002) to trial (started Feb. 15, 2003), just three days of trial time, and just four experts. *See* Complaint, Russell v. Johnson, No. 1:02-cv-00261 (N.D. Miss. Jul. 18 2002) (docket entry 1 and Transcript (Mar. 3, 2003)) (docket available via PACER and as document PC-MS-003-000 at http://clearinghouse.wustl.edu.); Rebuttal Declaration of Stephen F. Hanlon Regarding Plaintiffs' Motion for Attorneys' Fees and Expenses at 5, Russell v. Johnson, No. 1:02-cv-261 (N.D. Miss. Dec. 3, 2004) (available via PACER and as document PC-MS-003-004 at http://clearinghouse.wustl.edu) (only four experts).

there are fewer American prisons with the kinds of conditions described in Judge Johnson's liability ruling in *Pugh v. Locke* now than there were in the 1970s. In some ways our prisons are worse today—more idle, more dehumanizing—but Eighth Amendment law is extremely limited: It exempts from constitutional analysis many of the issues that matter most to prisoners, such as educational programming, work and other activities, and the custody level. So even though today's paradigmatic prison failings are deeply troubling, they do not violate our current understanding of the Constitution. While today's inmates do more time and there are more of them (which magnifies the importance of whatever failings our prisons have), there is little question that most American prisons stay more comfortably above the low constitutional floor today than they did in the past. One might predict, then, the fall-off in number of topics that has in fact occurred.

But while the litigation-related reasons for Figure 5's prison results seem to me quite certain, these corrections-related reasons seem somewhat less so. The reason for my skepticism is that improvements in the conditions of *most* prisons are somewhat beside the point, because in recent years, court orders are regulating ever fewer facilities. There is every reason to think that facilities with new court orders are among the worst ones out there. And those facilities are certainly bad enough to justify multiple-topic regulation.

Law & Society REVIEW

Mass Incarceration and the Paradox of Prison Conditions Litigation

Heather Schoenfeld

In this article I examine how prison conditions litigation in the 1970s, as an outgrowth of the civil rights movement, inadvertently contributed to the rise of mass incarceration in the United States. Using Florida as a case study, I detail how prison conditions litigation that aimed to *reduce* incarceration was translated in the political arena as a court order to *build prisons*. Drawing on insights from historical institutionalist scholarship, I argue that this paradox can be explained by considering the different historical and political contexts of the initial legal framing and the final compliance with the court order. In addition, I demonstrate how the choices made by policy makers around court compliance created policy feedback effects that further expanded the coercive capacity of the state and transformed political calculations around crime control. The findings suggest how "successful" court challenges for institutional change can have long-term outcomes that are contrary to social justice goals. The paradox of prison litigation is especially compelling because inmates' lawyers were specifically concerned about racial injustice, yet mass incarceration is arguably the greatest obstacle to racial equality in the twenty-first century.

In the late 1960s, prison inmates in the United States drew inspiration and resources from the movement for black civil rights in order to challenge prison conditions and practices through the federal courts (Cummins 1994; Jacobs 1980; Strum 1993). The civil rights lawyers who represented them not only sought to extend hard-fought "rights" to prisoners, but they also "had extraordinary high hopes that . . . [prison conditions] litigation, and in particular overcrowding litigation" would reduce states' reliance on incarceration (Schlanger 2006:560). Prisoners and their lawyers throughout the 1970s and 1980s were largely successful: By 1993, 40 states were under court order to reduce overcrowding and/or eliminate

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unconstitutional conditions of confinement (Sturm 1993). Yet despite the noted "success" of prison litigation, the decarceration goals of lawyers were never realized.[1] In fact, just the opposite occurred: Since 1973, the incarceration rate in the United States has grown by 700 percent (Western 2006:13).

In this article I ask how prison conditions litigation intended to reduce the state's reliance on incarceration eventually contributed to unprecedented prison growth. This question is important because despite recent restrictions on litigation by inmates, "the civil rights injunction is more alive in the prison and jail setting than the conventional wisdom recognizes" (Schlanger 2006:555). In addition, this question complicates explanations of the new "culture of control" or "law-and-order" politics that foreground the *backlash to* the civil rights movement (Beckett 1997; Garland 2001; Weaver 2007) by suggesting that mass incarceration is also a result of policies that *complied with* civil rights litigation. Finally, the paradox of prison litigation in the United States is especially compelling because inmates' lawyers were motivated by concerns for racial justice: Particularly in the South, prison reform litigation targeted historical racial inequities in the prison system (Feeley & Rubin 1998; Yackle 1989). Yet the growth of incarceration over the last 30 years has been disproportionately concentrated on poor black communities and has arguably reinscribed second-class citizenship on black Americans since the civil rights movement (Wacquant 2002; Western 2006).[2]

Although some existing scholarship characterizes prison litigation as a "double-edged sword," it has not systematically examined how specific prison litigation contributed to the rise of mass incarceration at the state level (Feeley & Swearingen 2004:466; Schlanger 1999). Using Florida as a case study, I demonstrate how the legal challenge to the grossly inadequate condition of state prisons, *Costello v. Wainwright* (1975) (hereinafter "*Costello*"), was a product of developments in civil rights law and legal activists' concerns for racial justice. Given the liberalization of racial politics in Florida, the national consensus on rehabilitation (and less secure confinement for offenders), and the state's widespread efforts at reform, inmates' lawyers hoped that the litigation would force Florida state policy makers to rethink their conservative penal policy. Yet between the negotiation of the court order in the late 1970s and its enforcement in the late 1980s, the political context had changed

[1] On the success of prison litigation see Feeley and Rubin (1998) and Feeley and Swearingen (2004). See Crouch and Marquart (1989), Filter (1996), and Taggart (1989) for a more circumspect take on the impact of prison litigation.

[2] In the United States, 1 in 15 adult black men versus 1 in 106 white men are in prison (Pew Center on the States 2008:34).

from reform to retrenchment (Pierson 1994). Increasingly, the dominant political discourse depicted black citizens as drains on the state rather than rightful claimants of equal opportunity (MacLean 2006), and criminal offenders as objects of "risk" rather than rehabilitation (Feeley & Simon 1992). In this new context, policy makers began to understand the problem as not too many people in prison but the risk of too many people being released from prison. Thus, state policy makers *translated* the court order on overcrowding as an order to *build prisons*. In the long run, compliance with the court order increased the state's capacity and willingness to incarcerate, leading to the further expansion of incarceration throughout the 1990s in ways that continued to disproportionately impact black Americans (see Figure 1).

To explain how policy makers translated compliance with prison litigation as an order to build prisons, I present a chronological "strategic narrative" of *Costello* (Pedriana & Stryker 2004; Stryker 1996). The narrative details the translation of *Costello* across a changing political and social context between its origins in 1973 and final compliance with the court order in 1993.[3] To do this I draw on a variety of primary data, including state records, court documents, newspaper articles, and 54 formal interviews with key actors (see Methods Appendix for details). Throughout the narrative I highlight the key decisions that directed the course of the litigation and its implementation in social policy in ways that put the state on the path toward mass incarceration.

Note that my findings highlight a previously unconsidered explanatory factor in the rise of mass incarceration: the role of prison conditions litigation. Specifically, I find that prison conditions litigation was a mediating factor in the politicization of punishment. Politicians' interpretation of the litigation created a platform by which they could draw on cultural distrust of the state (Zimring et al. 2001; see also Lynch 2010) and racialized fears of criminals (Russell-Brown 2008) for their political advantage. Consequently, the translation of prison litigation in the political arena can help explain some of the contemporary features of "governing through crime," such as its bipartisan support, the zero-sum game between criminals and victims (Garland 2001), and the value of prison "capacity" regardless of prisons' ability to lower the crime rate (Simon 2007).

More broadly, my findings point to new reasons that positive legal outcomes for the disadvantaged may not be sufficient for reducing inequality in the long term. Beyond those detailed in other scholarship, such as the "myth of rights," the need for

[3] *Costello* covered medical care, overcrowding, and food service in the Florida prisons. My narrative does not cover the medical care or food services portion of the litigation.

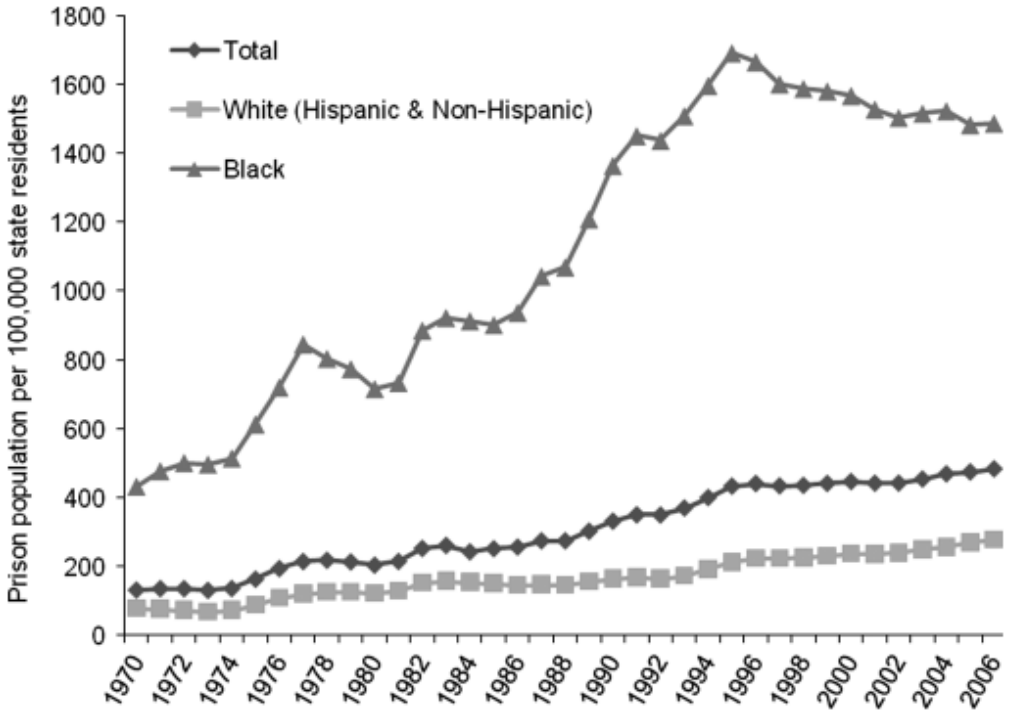

Figure 1. Incarceration Rates by Race, Florida, 1970–2006.
Source: Compiled by author from Florida Department of Corrections Annual Reports and Bureau of the Census.

congruent political mobilization, the presence of symbolic victories, and the limits of court enforcement, I argue that research should examine how "progressive" court orders are "translated" into social policy by lawmakers. Specifically, I find that the contingencies of timing and the broader political and social context over which litigation unfolds can cause unintentional and unfavorable terms of compliance. In addition, I argue that researchers need to consider how the translation process can produce "feedback effects" that ultimately bring about consequences that are quite opposed to the spirit of the initial legal mobilization.

Timing and the Translation of Compliance

This article builds on understandings of "legal translation" (White 1990, 1996), or how narrative and rhetoric underpin legal claims. I conceive legal translation as happening on both the front end and back end of litigation. On the front end, legal translation is "how reformers translate their moral values and political goals into . . . plausible legal claims and arguments" (i.e., legal framing) (Paris 2001:640). On the back end, it is how the language and content of court decisions is understood for the purposes of implementation. Research on legal translation is important because on the front end, legal framing shapes court opinions that, on the

back end, can "powerfully shape the language of politics" and the current and future "agenda of contention" (Paris 2006:1028; citing ideas in Brigham 1987). In particular, this article considers the ways in which *timing* influences how legal framing impacts the translation of compliance. This insight about timing, gleaned from historical institutionalist scholarship on social policy and institutional change, helps explain how legal "successes" in court can have detrimental impacts over the long run.

Contemporary scholarship in sociolegal studies examines not only the success or failure of court decisions, but also the contingencies and conditions that affect courts' ability to bring about social change (McCann 2006; Stryker 2007). Important for the case of institutional reform litigation, this scholarship finds that court procedure, which requires lawyers to choose one particular legal argument, can lead to a narrow reframing of disputes and narrow definitions of social problems (Bumiller 1988; Coglianese 2001; McCann 1992). In the case of civil rights litigation, the focus on liberal notions of freedom, i.e., "negative rights" or freedom from coercion, gives way to a remedy that "merely neutralizes the inappropriate conduct of the perpetrator," rather than positively affirming the self-determination of the victim (Freeman 1995:29; Frymer 2005; Roberts 1995). The construction of prisoners' rights fell squarely into this negative rights tradition, as the courts ruled that Florida inmates had a right to be free from immediate physical violence brought about by overcrowding and inadequate medical attention. This framing precluded consideration of whether those in prison should have been there in the first place—even though this was part of the larger critique waged by the prisoners' movement (see Jackson 1972).

In a recent article, Paris (2006) imagines new realms of research analyzing change agents' conscious or unconscious choices about how to frame their claims in the legal arena. While this research agenda is important, it neglects an essential part of the processes by which law brings about social change. Instead, this article focuses on legal translation on the back end—the conscious or unconscious choices by those responsible for implementing court decisions. The contention that "law is a language into which other languages must be continuously translated" holds true in reverse: implementation requires the translation of the language of law into other languages, including the language of compliance, social policy, and politics (White 1996:55, cited by Paris 2006:1026). This is not to say that prison reformers' early choices for framing legal claims did not matter—they certainly did. But researchers need to better understand how the language of the court is ultimately understood in the political arena by those responsible for compliance.

Scholarship on legal framing has also recognized that the convergence of social movement strategy and legal discourse can help account for the "success" of some reform litigation (McCann 2006; Paris 2001). Numerous empirical case studies have demonstrated that court decisions are more likely to lead to change in policy (on the books and on the ground) when complemented by active political pressure from below (McCann 1994; Melnick 1994; Paris 2006; Pedriana 2006; Pedriana & Stryker 2004; Ziv 2001). However, the effect of timing on the convergence between legal framing and political strategy has often been overlooked. In addition, legal scholarship has not sufficiently considered the impact of timing on the convergence between political context, policy implementation, and court enforcement—generally thought to be the weakness of courts (McCann 2006:32). Yet historical institutionalist scholars have created multiple theoretical models that elucidate how the timing of policy initiatives influences future practices and institutional development (Pierson 2004; Thelen 1999). This work can be applied to legal initiatives in ways that demonstrate how the lasting impact of court decisions depends on the timing of legal translation.

For example, advocates of "path-dependent" explanations hypothesize that timing and the substance of decisions have independent causal effects on social outcomes:

> Specific patterns of timing and sequence matter; starting from similar conditions, a wide range of social outcomes may be possible; large consequences may result from relatively "small" or contingent events; particular courses of action, once introduced, can be virtually impossible to reverse (Pierson 2000:251).

In law, path dependency occurs when the "ideational constraints of liberal legal doctrine" (Paris 2001:637) restrict the content of judicial decisions, which in turn "block one path of development while encouraging another" (Stone Sweet 2002:119); or when the system of legal precedent creates a branching quality to the law as "each step in one direction increases the likelihood of additional steps in the same direction" (Hathaway 2001:628; see also Cunningham 2006; Gillette 1998; Posner 2000).

In explaining policy outcomes historical institutionalist scholarship points out that the *when* of policy innovation can be as important as the *what* of policy ideas (Weir 1992). Or in the case of legal outcomes, the timing of litigation with historical and political context can be more important than the legal arguments themselves. Similar to scholarship that recognizes courts' inability to control the temporal order of cases that come before them (Stone Sweet 2002), the case of prison litigation in Florida demonstrates that plaintiffs do not control the speed of the court process. As a

result, while the initial framing by legal activists may be congruent with their goals in one political context, the actual period of compliance can take place in a different historical and political context that undermines litigators' original goals.

The contingencies of legal translation can have long-term "policy feedback" effects. Policy feedback is the idea that past policy shapes politics or the language and capacity of interest groups to frame and enact subsequent policy (Orloff 1993). Policy decisions will have significant feedback effects when they create large institutions, organize beneficiary groups, or are embedded into economic and social structures (Hacker 2002). The same can be said for legal decisions that become embedded in social policy. In the case of prison litigation in Florida, the framework of the consent order became institutionalized in state law in ways that structured political contention and limited the options for court compliance. In turn, the translation of compliance created new resources, incentives, and opportunities that changed political and policy calculations around crime control.

Legal Translation on the Front End

The Foundations of Prison Litigation in Florida

Similar to other prison litigation across the country in the 1970s, the prison conditions litigation in Florida was a product of the personal biographies of civil rights lawyers, specific developments in civil rights law itself, and newly available resources for legal challenges to civil rights violations (Smith 1974; see generally Greenberg 2004; Thomas 1988). The case study of Florida supports Schlanger's (1999) contention that the source of prison litigation is best described not just by the actions of activist judges (Feeley & Rubin 1998), but by "looking, instead, at the interaction between sympathetic judges and a set of advocates who saw a potential for urging change by lawsuit and had both resources to bring case after case and expertise to work effectively within the legal frameworks governing both contested and settled orders" (Schlanger 1999:2030).

The plaintiffs in *Costello* were represented by Tobias Simon, a local veteran civil rights attorney who had defended Dr. Martin Luther King Jr. and supporters in St. Augustine, Florida, during one of the more violent clashes of the civil rights movement (Associated Press 1964). In the late 1960s, Simon, motivated by the racial disparities in death sentences, turned his attention to death penalty cases in Florida (Greenberg [1985]2004:479). Simon's trips to death row exposed him to the brutal conditions at Florida State

Prison, where cells designed for two housed 10, and inmate "medics" provided medical "treatment" to other inmates. Looking for an opportunity to address overcrowding, in 1972 Simon agreed to represent two inmates who had filed a complaint in the United States District Court for the Middle District of Florida about inadequate medical care at Florida State Prison.[4] District Judge Charles R. Scott, one of the active pro–civil rights judges in the South, knew Simon well and had previously signaled his respect for the "advantages of the class device" in Simon's work on the death penalty (*Adderly v. Wainwright* 1972:400). Within a few months, Simon had added overcrowding to the complaint, and Judge Scott certified it as a class action on February 22, 1973. Extending the successful framework from death penalty lawsuits, the amended complaint sued Louie Wainwright, the director of the Florida Division of Corrections (later renamed the Florida Department of Corrections [hereafter "FDOC"]), for relief from overcrowding and inadequate medical care that caused "substantial harm to inmates in violation of the Eighth Amendment prohibition against cruel and unusual punishment." Specifically, Simon asked the court to compel state officials to "re-distribute" or "reduce" the prison population in one of three ways: "either stem the influx of inmates . . .; accelerate the discharge of qualified inmates . . .; or allocate adequate funds and facilities to care for the ever-expanding inmate population" (Amended complaint, 2 Jan. 1973).[5]

While the lawsuit did not specifically challenge racial injustice—as deplorable prison conditions equally impacted black and white inmates—it addressed racial inequality in at least three regards. First, as mentioned above, the key actors initiating the case—Simon and Judge Scott—were themselves motivated by concerns about racial inequality. And in directing the course of *Costello*, they drew on their civil rights litigation experience and doctrinal and procedural precedents established in desegregation and other civil rights cases.[6] Second, at the time racial inequality pervaded all state

[4] Earlier, as a staff attorney for the ACLU, Simon had volunteered to represent Clarence Earl Gideon, whose petition to the Supreme Court became the basis of the right to counsel (*Gideon v. Wainwright* 1963). Although Gideon eventually refused the ACLU's help, Simon later wrote of that experience in terms that pointed to the logic of his commitment to protecting the rights of prisoners: "It has become almost axiomatic that the great rights which are secured for all of us by the Bill of Rights are constantly tested and retested in the courts by the people who live in the bottom of society's barrel. . . . Upon the shoulders of such persons are our great rights carried" (quoted in Lewis 1964:239).

[5] Legal documents referred to in the text are on file with the author.

[6] For example, citing *Carter v. West Feliciana School Board* (1970), Judge Scott ordered the defendants to cooperate with a comprehensive survey of FDOC medical care by a Special Master (*Costello v. Wainwright* 1973). In addition, he assigned the United States as amicus curiae in order to tap the resources of the Civil Rights Division of the Department of Justice (see also Yackle 1989). Judge Scott also gave the U.S. Department of Justice rights of a party, which allowed it to participate actively in discovery, cross-examination, and oral

institutions in Florida, including the penal system (V. Miller n.d.). In their court filings, the plaintiffs repeatedly blamed the overcrowding on "governmental neglect," which was due to the legacy of racialized penal servitude in Florida (DuBois 1901; Mancini 1996) and the dominance of Northern rural segregationist legislators, who opposed spending money on black prisoners (Schoenfeld 2009). In a nod to the legacy of slavery, in his first order Judge Scott reproached the defendants that "a free democratic society cannot . . . stack [inmates] like chattels in a warehouse" (*Costello v. Wainwright* 1975:38). Finally, this same legacy contributed to Florida's "highly conservative criminal justice policy," which relied on "excessive use of imprisonment by the courts" (Ohmart & Bradley 1972:A-1). As Simon's statements later indicated, he hoped that the lawsuit would force state legislators to amend Florida's penal culture, beginning by releasing nonviolent offenders and reforming sentencing in order to divert offenders from prison (Interview, Elisabeth DuFresne, inmate lawyer, 21 Sept. 2009). And similar to the eradication of the death penalty and the provision of social services for the poor (Davis 1995; Greenberg 2004), these measures stood to disproportionately benefit black offenders, who at the time made up more than 55 percent of the prison population in Florida (compared to the less than 15 percent black population of the state; Florida Division of Corrections 1973:54; U.S. Bureau of the Census 1970: Table 24).

At the time, Simon's hope that the state would reduce the prison population was understandable. First, there was a national move *away* from secure confinement. The National Advisory Commission on Criminal Justice Standards and Goals (1973) recommended halting prison construction and using community sanctions instead of prison sentences for all but the worst offenders. Second, Floridians had recently elected a "reform" governor, Reubin Askew, and court-ordered legislative reapportionment had brought a new cohort of more progressive policy makers to the state capitol, many of whom realized that recent federal court decisions on prison conditions meant they "would have to do something different" (Interview, Jim Tillman, former Florida State House Representative, 10 May 2007).[7] In addition, the Attica prison riot in 1971 and subsequent riots across the country's

arguments on behalf of the plaintiffs (*Costello v. Wainwright* 1972). Simon drew on his relationship with and the resources of the Legal Defense Fund and the ACLU's National Prison Project.

[7] In 1971, the Eighth Circuit Court of Appeals affirmed the decision in *Holt v. Sarver* (1970) that the whole prison system in Arkansas constituted cruel and unusual punishment. Other early prison litigation cases include *Taylor v. Perini* (1972) (entering a consent decree for the Ohio prison system) and *Battle v. Anderson* (1974) (finding that several conditions in the Oklahoma prison system violated the Constitution).

prisons, including in Florida, sparked legislators' concern about prison violence:

> We had three and four people staying in a cell made for one person at the main prison. So overcrowded conditions and the fact that correctional officers were terribly underpaid and qualifications were if you had a broad back and a weak mind and could hit somebody over the head with a baton, you qualified to be a prison guard . . . our correctional system was just a boiling pot ready to explode (Interview, Jim Tillman, former Florida State House Representative, 10 May 2007).

Finally, administrators at the FDOC *embraced* the lawsuit. As overcrowding threatened to jeopardize the progress Wainwright had made "modernizing" the prison system, he welcomed the chance to use the court as leverage with state legislators (Interview, Louie Wainwright, 17 April 2007; Florida Division of Corrections 1973:45). In fact, in spring 1973, when Simon asked the court to restrict the FDOC from accepting more inmates into the system, Wainwright took it upon himself to do so. In addition, he signed a pretrial stipulation agreeing to "gross systemic deficiencies in the delivery of adequate medical care to inmates" and "severe overcrowding" in the prison system (Pretrial stipulation, 6 Dec. 1974).

The *Costello* Injunction

By 1975, the legislature had still not appropriated adequate resources for the prison system, and Governor Askew, facing a tough re-election campaign, had strictly forbade more system closures, so Simon refiled the application for preliminary injunction. Granted by Judge Scott, the injunction became both the legal and political cornerstone of the events that unfolded around *Costello*. As it met with the political reality on the ground, it guided both sides' interpretation of the case and the resulting consent decree. In particular, three aspects of the injunctive order were important, including the definition of the problem, the substantive framework of the order, and the assumption of responsibility for relief.

First, the language of the injunction defined the problem as the immediate possibility of violence in overcrowded prisons. In his published decision, Judge Scott cited several medical experts and Wainwright, who all testified that the overcrowding created unsanitary, unhealthy, and dangerous living conditions for the inmates. In addition, a fair amount of attention during the testimony, and in the reasoning for the court, involved the mental health of inmates, including the suggestion that crowded conditions put black and white inmates too close to each other and that this could lead to physical violence (*Costello v. Wainwright* 1975:12–14). By

interpreting the problem as such, Judge Scott's decision precluded a discussion of the underlying purpose and use of the prison system.

Second, in establishing the framework for relief, Judge Scott selectively relied on a report by the American Justice Institute (the "AJI report") submitted in Simon's application for injunction. He chose to use its concept of "prison capacity"—ordering the defendants to "reduce the overall inmate population" in five stages over one year to "emergency capacity," defined as "the population beyond which the institution must be considered critically, and quite probably, dangerously overcrowded," and in 18 months to "normal capacity," defined as "that population which an institution can properly accommodate on an average daily basis" (*Costello v. Wainwright* 1975:34).[8] Judge Scott specifically stated that the order was based on the nebulous concept of "capacity" rather than a fixed number, in order to motivate the "Division of Corrections to maintain its pertinacious program of developing further innovations to increase the capacity of the Florida penal system" (*Costello v. Wainwright* 1975:35).

It is important to note that Judge Scott chose *not* to point to some very specific remedies suggested by the AJI report that would have *reduced admissions* to the prison system, including increasing the age of youth that could be sent to prison, developing short-term incarceration options for minor offenders, or establishing a pre-commitment diagnostic service to the courts that had been shown to "divert a significant number away from the prison system" (Ohmart & Bradley 1972:B12–14). Thus by focusing the relief on "capacity" rather than a reduction of the prison population as originally asked for by the plaintiffs, Judge Scott's order left open the possibility of compliance by prison growth.

Third, the decision placed the primary responsibility for reducing the population to "normal capacity" on the FDOC.

[8] As fully defined by the American Justice Institute:

> "Normal capacity" [is] that population which an institution can properly accommodate on an average daily basis. It represents that population which best utilizes the resources currently available. It should include some vacant beds, to accommodate population surges, and to allow for different classifications of inmates within institutional totals.
>
> "Maximal capacity" [is] the fullest possible use of the plant, given virtually unlimited program and staff resources.
>
> "Emergency capacity" [is] the population beyond which the institution must be considered *critically, and quite probably, dangerously overcrowded*. It includes every bed in the institution which it is judged can safely be occupied at times of peak populations either due to intermittent and unpredictable population surges or to emergency and temporary circumstances (Ohmart & Bradley 1972:C-6; emphasis added).

However, in elucidating the ways to reduce overcrowding, Judge Scott touched on a number of means that required the cooperation of other institutional actors. For example, he suggested that the Florida Parole and Probation Commission could accelerate granting of parole, that courts could increase their use of pretrial intervention programs, or that the State of Florida could "simply construct or lease additional facilities" (*Costello v. Wainwright* 1975:39). However, by himself, Wainwright only had the authority to find ways to house inmates temporarily, or to award inmates between five and 15 days per month of "gain-time" (reductions to original prison sentences for good behavior, participation in programming, or other positive activity).[9] Consequently, by placing responsibility for compliance on Wainwright, rather than the governor or legislature, Judge Scott's order empowered the FDOC to direct the translation of compliance in ways that did not divert people from prison.

The Initial Reaction by Lawmakers: Delay and Limited Reform

The injunction hit state lawmakers like a "bombshell" (Interview, William Sherrill, former attorney for the Florida Department of Legal Affairs, 4 Feb. 2008). However, because of the legacy of *Brown v. Board of Education* (1954), instead of prompting legislators to "do something," it prompted invectives against federal court interference. As one House Representative wrote to the Florida Sheriffs Association:

> I want you to know that I am in complete agreement with your position. . . . The Federal Courts have stepped in to legislate conditions in our jails and once again the rights of criminals are vastly superior to those of honest, hardworking, taxpaying, law obeying citizens . . . we might as well sign a contract with the Hilton Hotel to come in and build and operate our penal system (if you can call it one) (Letter to Rayman Hamlin, President, Florida Sheriffs Association, 5 Feb. 1975).

Yet the state could not appeal the case on factual grounds because the FDOC had repeatedly conceded to the basic facts. Therefore, state attorneys appealed on the procedural grounds that because the injunction required Wainwright to violate the state law (by

[9] At the time, it was common practice by state corrections agencies to award "gain-time," or "good time." Florida had a history of controlling the prison population via gain-time. The first gain-time laws came about as part of the large overhaul of the Division of Corrections in 1957 (Fla. Laws 1957, ch. 57–121, sec. 25). At the time, gain-time credits were given to inmates at the discretion of the individual warden or prison supervisor. In 1963, the legislature spelled out a more generous, but uniform, schedule of gain-time credits, awarding each inmate a certain number of days' credit for each month served depending on the length of the original sentence (Fla. Laws 1963, ch. 63–243).

closing the prison system to new entrants), the case needed to be heard by a three-judge panel (Interview, William Sherrill, former attorney for the Florida Department of Legal Affairs, 4 Feb. 2008). The delay tactic worked, and over the next two years the case went all the way to the Supreme Court.[10]

When the injunction was reinstated in May 1977, legislators responded ambiguously with lofty mandates, small reforms, and relatively little in the way of funding. As a result, FDOC administrators spent most of their time trying to figure out where to put newly arriving inmates:

> In those days . . . much of our time and energy went to finding bed space for the people who were being sent in. They [the legislature] hadn't yet figured out that when you send someone to prison you have to have a bed and a place for them to stay. In the early days, it was our problem. I mean I heard legislators say in open meetings, ''What are you going to do with your prisoners?'' Those are actually the words [they used]. I told them, ''These are the state of Florida's prisoners'' (Interview, Dave Bachman, former deputy director, FDOC, 28 March 2007).

Given the historical underfunding of the Florida penal system by the state legislature and the realization that the FDOC had no ability to stem the flow of inmates but would be held responsible anyway, FDOC administrators advocated changes to the gain-time laws for more leeway in releasing inmates (Fla. Laws 1978, ch. 78–304). Despite this new discretion, the FDOC still estimated that it would need 7,000 new prison beds because commitments to prison continued to increase (see Figure 2). In response, the state conducted a survey that relied on the same concepts of ''capacity'' as the injunctive order but labeled them ''design capacity'' and ''maximum capacity'' in order to arrive at different numbers—reducing the FDOC's estimated need to 3,400 beds (Florida Department of Offender Rehabilitation, Bureau of Planning Research and Staff Development, 8 July 1976). The concepts of design and maximum capacity then became the framework for a settlement agreement reached almost two years later.

[10] *Costello v. Wainwright*, 525 F 2d. 1239 (Crt. of App. 5th Cir. 1976, affirmed), 539 F 2d. 547 (en banc), reversed and remanded, 430 U.S. 325 (1977). Relying almost completely on the lack of challenge to the constitutionality of the law in question, the Court clarified that the ''temporary suspension of an otherwise valid state statute'' in order to comply with court-ordered relief is *not* ''equivalent to finding that statute unconstitutional'' (*Costello v. Wainwright* 1977:328).

Figure 2. Increase in Annual Commitments to Florida Prisons, 1960–1980.
Source: Florida Department of Corrections Annual Reports; additional information available from the author.

Legal Translation on the Back End

Sensing that the federal courts were turning against broad intervention in prison conditions cases, Simon worked with state lawyers on a compromise between his demand for a prison system based on "design capacity" and the state's desire to maintain prisons at "maximum capacity" (Interview, Elisabeth DuFresne, inmate lawyer, 21 Sept. 2009).[11] The result, the Overcrowding Settlement Agreement (OSA), approved in February 1980, stipulated that no individual prison could exceed maximum capacity (and could only be at maximum capacity for five days) and, most important, that the inmate population of the entire system could not exceed "design capacity" plus one-third. It defined "design capacity" as 40 to 90 square feet for inmates in individual cells and no less than 55 square feet per inmate in dorms; and "maximum capacity" as approximately 33 percent less space per inmate (40 to 60 square feet for cells and 37.5 square feet for dormitories), with double bunking allowed along outer walls (*Costello v. Wainwright* 1980). In addition, the FDOC agreed to no longer use three deteriorating buildings

[11] In May 1979, the Supreme Court held that lower courts should defer to the expertise of correction officials and that double-celling was not a violation of the Eighth Amendment (*Bell v. Wollfish* 1979). The Court's subsequent rulings trended away from a broad interpretation of prisoners' rights and comprehensive federal court intervention (Schlanger 2006).

for housing inmates. In exchange, the plaintiffs agreed to drop any liability claims and gave the FDOC five and a half years to comply with the consent decree.

Unlike the injunctive order, the Court emphasized the responsibility of not only Wainwright, but the governor and the legislature as well. In fact, although the U.S. Department of Justice and some national reformers felt that a settlement agreement was "premature," Simon may have been more optimistic about state compliance because of the election of Bob Graham as governor (Personal communication, former law partner of Toby Simon, 20 March 2007). Having pledged to "exercise" his "authority and leadership" to implement the terms of the OSA, Governor Bob Graham appointed Simon and the state's legal representative to a Governor's Advisory Committee on Corrections charged with developing legislative mechanisms for compliance (Press release, governor's office, 12 Nov. 1980).

The Institutionalization of the *Costello* Consent Decree in State Law

Notwithstanding the work of the Governor's Advisory Committee, the OSA was only incorporated into state law after the state experienced a "prison overcrowding crisis" in spring 1982. In 1980, Wainwright had lobbied the governor for more prison beds, insisting that the FDOC had "no control over the growth of the system and the cost of providing care and supervision for the increasing number of inmates" (Letter to Governor Graham, 13 Jan. 1981). However, Governor Graham and the legislature, wanting to direct state funds elsewhere, were not forthcoming with additional resources (Florida House of Representatives 1996). Responding to ongoing revelations of brutality in the prisons, Judge Scott ordered an immediate status report, which revealed that 19 of the FDOC's 25 institutions were operating above maximum capacity and that the FDOC had built temporary wooden housing in order to count 1,640 additional bed spaces (Report to the Court Pursuant to the Order of May 12, 1982).[12] William Sheppard, who took over as lead counsel for the plaintiffs after Simon died of cancer, argued that the "plywood tents" were potential fire hazards and as such were an immediate threat to the inmates (Hearing on violation of settlement agreement, 6 July 1982). Although Judge Scott allowed them, he warned that "further recalcitrance in building adequate permanent facilities to house state prisoners will breed further woes for the defendants" (Order, 14 July 1982, pp. 8–9).

[12] According to Richard Dugger, the warden of Florida State Prison at the time, the temporary structures were not used to house inmates but were constructed in order to count the space when determining "maximum capacity" (Interview, Richard Dugger, former secretary of the FDOC, 22 March 2007).

The legislature responded by appropriating money for 2,000 more prison beds and convening a bipartisan task force to recommend solutions to the overcrowding crisis. Although the task force recognized public concern over crime, it also noted the fiscal consequences of a crime policy that relied too heavily on confinement (Corrections Overcrowding Task Force 1983). A similar sentiment was expressed by some members of the public:

> Florida simply cannot afford to build more and more prisons. . . . . But Florida, as many other states, is under a federal court order to reduce its prison population or provide more space. This pressure is valid because the courts have recognized the rights of inmates not to be treated as animals (*The Evening Independent*, 17 March 1983, Editorial, n.p.).

And indeed, the task force's recommendations, codified in the Corrections Reform Act of 1983, included the implementation of sentencing guidelines and policies to stem the flow of offenders into prison through alternative court dispositions (including drug treatment and a stricter form of probation). The task force hoped that guidelines would "regulate the type of offenders who require incarceration . . . reduce their average length of stay . . . [and] foster greater public and professional confidence due to the honesty of the new system" (Corrections Overcrowding Task Force 1983:iii). The law even included an official goal to lower the state's incarceration rate (Fla. Laws 1983, ch. 83–131).

Yet lawmakers also understood that guidelines and goals, in and of themselves, would not necessarily keep the prison population under maximum capacity—making additional statutory release mechanisms necessary. Thus, the 1983 reforms included new retroactive gain-time rules that shortened sentences by up to 50 percent and an emergency release gain-time mechanism to deal with "crisis overcrowding." The latter, developed by the *Costello* lawyers in their earlier capacity as members of the Governor's Advisory Commission on Corrections, required the FDOC to reward additional gain-time of up to 30 days, in five-day increments, to *all* inmates eligible to receive gain-time when the prison population reached within two percentage points of "system maximum capacity" (Fla. Laws 1983, ch. 83–131).

The decision to institutionalize the *Costello* consent decree through gain-time laws had significant feedback effects on the translation of compliance. While FDOC administrators could not compel prosecutors and judges to use the sentencing alternatives in the 1983 reforms, they could use the gain-time laws to compel legislators to fund more prisons. An FDOC administrator explained,

> [The Overcrowding Agreement] helped us tremendously, because we finally had some standards. We wanted that. . . . So

> we developed through that, housing standards—"maximum capacity" beyond which we wouldn't be able to go without violating the *Costello* Agreement. That then gave us the hammer we needed to go to the legislature and say "look, we are within two percentage points of being in contempt of court, we have got to build more beds, or we are going to have to trigger this release mechanism"—and nobody wanted to do that, so they said, "We'll give you money for more beds" (Interview, Dave Bachman, former deputy director, FDOC, 28 March 2007).

The Timing of Final Compliance

Despite a temporary reduction in the prison population in 1984 (Dykstra 1986), by 1985 the prison system was still overcrowded and the FDOC was scheduled to lose an additional 1,367 beds when it closed two units under the terms of the consent decree. In anticipation of noncompliance, and concerned about the safety of the FDOC's temporary wooden housing, lead counsel Sheppard began filing notices of violation (e.g., Notice of Violation of Overcrowding Settlement Agreement and Motion for Order to Show Cause, 27 March 1985). Judge Scott's successor, Judge Susan H. Black, reacting to the state's slow response, appointed a Special Master and Monitor in order to significantly increase the court's day-to-day monitoring of the prison system (Opinion and Order Preamble, 22 Aug. 1985). When coupled with the advent of the crack cocaine epidemic and a conservative shift in state politics, the timing of this pressure from the court marked a critical juncture that led to state officials' decision to comply by building more prison beds.

Although President Ronald Reagan had declared a "war on drugs" in 1982, arrests for drug offenses in Florida grew only slightly before 1985. But in summer 1986, the media discovered crack cocaine, and Florida law enforcement and politicians committed new resources to the "fight" against drugs (Drummond 1988; Petchel 1987; Ritchie & Gallagher 1988). In the second half of 1986, arrests for sale and possession of cocaine in Florida jumped by 30 percent. The increased prosecution of cocaine offenses led to a spike in prison admissions: Between fiscal year 1986 and 1987, prison admissions increased by 7,400 offenders (or 33 percent). Forty-six percent of this increase was due to the increase in admissions for drug crimes (see Figure 3; FDOC 1987:38; 1988:28, 41). As others have noted, the increase in drug offender admissions had a disproportionate impact on black offenders (Mauer 1999; Tonry 1995): Between 1986 and 1990, the number of black offenders admitted to prison for drug crimes increased by 850 percent, while admissions for white drug offenders increased by 210 percent (statistical information from FDOC annual reports 1986–1990; available upon request).

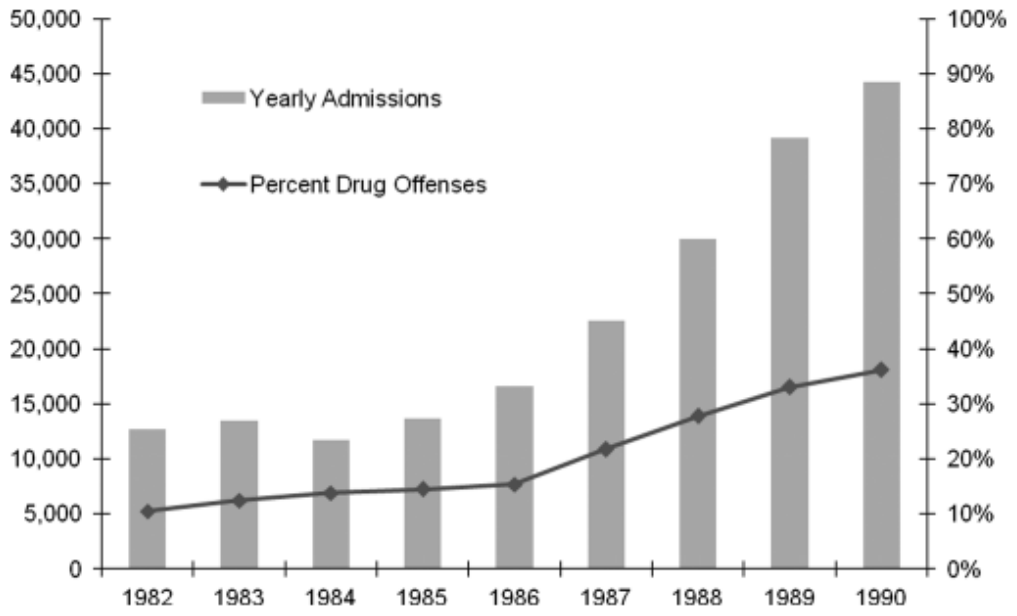

Figure 3. Prison Admissions for Drugs as a Percentage of Total, 1980–1990.
Source: Florida Department of Corrections Annual Reports; additional information available from the author.

The unprecedented number of prison admissions led to another overcrowding crisis that perfectly coincided with the arrival of a new Republican governor and a more conservative legislature. In January 1987, the new Secretary of Corrections, Richard Dugger, warned Governor Bob Martinez that the prison population was about to exceed 99 percent of design capacity. Realizing that Judge Black was "rapidly losing patience," Governor Martinez quickly called a special legislative session to enact measures that could immediately reduce the emergency overcrowding, including new gain-time rules that gave additional discretion to the FDOC (State of Florida, Journal of the House: First Special Session "A", 1987). However, the crack cocaine scare also prompted legislators to restrict gain-time for drug and habitual offenders.[13] The legislature funded contracted jail beds, tent beds, and beds in converted industry buildings (Fla. Laws 1987, ch. 87–1). However, the court's increased monitoring had made clear that "temporary" housing was an "unacceptable" long-term solution (Dahl 1987a), forcing the Martinez administration to develop a permanent solution to overcrowding and the *Costello* lawsuit.

[13] When the prison population reached 98 percent of capacity, instead of *requiring* the FDOC to credit *all* inmates with five-day increments of gain-time, the new administrative gain-time mechanism *allowed* the FDOC to grant up to 60 days of administrative gain-time to all inmates with positive work evaluations, program participation, and/or behavior adjustment, except those serving mandatory minimum terms for drug crimes, firearm possession, and capital offenses. Sex offenders who had not received "treatment" and those sentenced as "habitual offenders" were also ineligible (Fla. Laws 1987, ch. 87–2).

As Governor Martinez had campaigned in the mold of President Reagan, he was predisposed to support aggressive policing and the use of prison (Nordheimer 1986). Former Governors Askew's and Graham's previous decisions to accelerate the release of inmates further guided Governor Martinez's understanding of the state's options under *Costello*. Consequently, the Martinez administration believed that "under the terms of the federal court order, inmates must be released early when a population cap is reached" (*St. Petersburg Times*, 19 Dec. 1986, Editorial, n.p.). Eager to reverse the "mistakes" of his predecessors, and under pressure from district attorneys and county sheriffs strongly opposed to "releasing inmates through the back door" (Interview, Ed Austin, former president, Florida Prosecuting Attorney's Association, 21 Sept. 2008), Governor Martinez and Dugger began to advocate a new large-scale prison construction program. As Lieutenant Governor Bobby Brantley, who headed the initiative for Governor Martinez, explained,

> It is a hard thing [funding prisons] because . . . you've got educational needs and [the public] don't want to . . . spend all this money on prisoners, because the public, they'll tell you real quick [*sic*], "Oh yeah do what Governor Graham did, put 'em in tents." I mean they'd bury 'em all if it was up to the public. But *yeah we had to do it* . . . there's just not a whole lot more that anybody's been able to come up with . . . other than lock 'em up (Interview, former Lieutenant Governor Bobby Brantley, 12 April 2007; emphasis added).[14]

In order to overcome the public's and legislators' resistance to prison construction, the Martinez administration used the threat of "early releases." For example, the governor's office sent state legislators (and local officials) lists of offenders from their districts who would be released if the state did not build more prisons: "I mean we actually did this, 'Here's a list of the people that are . . . going to be appearing in the neighborhood near you'" (Interview, former Lieutenant Governor Bobby Brantley, 12 April 2007). While some Democrats argued that Florida relied too heavily on incarceration and that the state budget lacked resources for drug treatment programs, they were also concerned that the new release mechanism would overwhelm their urban districts with prison releasees (Dahl & Nickens 1987). Thus, according to Jon Mills, the former

[14] Brantley's recollection of his perception that the public opposed spending money on prisons was probably accurate for the time period. A poll commissioned by one of Governor Martinez's political opponents found that only 15 percent of respondents favored the construction of new prisons (*St. Petersburg Times*, 20 May 1988, 6B). This perception changed by the mid-1990s when legislators repeatedly stated that the public wanted to lock up offenders "whatever it cost."

Democratic Speaker of the House from relatively liberal Gainesville, Democrats also felt the urgency of the moment:

> I think there was some looking ahead, but it was more viewed as this is what we have to do and *there really are no other options* and trying to work with the Department and work with the Governor and others to meet what was a situation that had backed up (Interview, Jon Mills, former Florida State House Representative, 26 April 2007; emphasis added).

Of course, the legislature did have other options, but none were as guaranteed to end the overcrowding. Lawyers from the Florida Justice Institute, for example, argued that the state should redouble its 1983 reform efforts and expand alternatives such as probation, restitution, community control, community service, and work release (Berg 1987). This argument, however, did not "hold water" with many legislators because "if somebody gets killed because you don't have a [prison] bed . . . [or] the Federal Court tells you to release [a criminal offender] and they kill someone the next night, that's not very good" (Interview, Robert Trammell, former Florida State House Representative, 1 May 2007).

This interpretation of the lack of options was compounded by the media's coverage of the release program: Newspaper articles quoted judges, prosecutors, and defense attorneys worried about offenders returning to the community faster than expected (Dahl 1987b). Rightly or wrongly, the media blamed the early release mechanisms on the legislature, which then blamed the federal courts: "I don't like letting them out on administrative gain time at all, but we've got to go by the federal guidelines until we build enough prisons to hold them" (former State Senator Wayne Hollingsworth (D) Lake City, quoted in Dahl 1987b). Despite new restrictions on potential releasees, in winter 1988 a repeat offender named Charlie Street, who had served only half of his prison sentence, killed two Miami police officers. Calling the incident "Florida's Willie Horton," the *Miami Herald* reported the crime in a tone meant to capitalize on racial fears:

> NUMBNESS is the first reaction to the murders of Metro Police Officers Richard Boles and David Strzalkowski. Then, as the story unfolds, the shock gives way to rage. Screaming rage. Rage that cracks the veneer of civilization from one end of urban South Florida to the other. How could these two fine, dedicated police officers be dead, allegedly at the hands of a career criminal, an attempted murderer just 10 days out of state prison . . . ("Florida's 'Willie Horton,'" *Miami Herald*, 30 Nov. 1988, p. 24A).

Although it is not uncommon for released inmates to re-offend, because of the media attention and the national politicization of

prisoner releases, legislators felt the need to express their outrage by vowing to "build more prisons to make room for more criminals" (Dahl 1989:D1).

As a consequence of this series of decisions, legislators approved what would later be called "an aggressive prison construction program" (Florida House of Representatives 1996:13). Between 1987 and 1991, the legislature appropriated 27,087 "prison bedspaces" (or 20 major correctional institutions)—six times what had been appropriated in the previous five years (Florida House of Representatives 1996:13). Yet despite these new measures, because of increasing prison admissions and gain-time restrictions on drug offenders, the FDOC had to continue granting early release to inmates. In fact, by the end of the decade Florida prisons had gained national attention, with the *New York Times* reporting that for every prisoner the FDOC accepted, it had to release one (Malcolm 1989).

The Final Settlement

The prison building program and the accelerated releases finally brought the state into compliance 21 years after Michael Costello's original complaint. In May 1991, the parties to *Costello* entered into an agreement with the governor and the state legislature that stipulated four points. The first three concerned the stability, independence, and power of a newly created medical oversight agency (the Correctional Medical Authority [CMA]), and the fourth required that the legislature enact a law to maintain the prison system population at or below design capacity plus one-third.[15] Although Sheppard "didn't have faith in the system," he had successfully forced the FDOC to stop using tents and wooden facilities and was "satisfied that we had done everything that we could."

> When they said, we will put it in the statute, I said, fine, put it in the statute and when you get it done come back and talk to me, and they did that. I guess I was more hopeful that it would last (Interview, William Sheppard, 21 Feb. 2008).[16]

[15] In 1986, at the urging of the Special Master, the legislature created the Correctional Medical Authority (CMA) to replace the monitoring functions of the court (Fla. Laws 1986, ch. 86–183). Funded by the state but politically independent, the CMA was staffed by professionals who had the authority to compel the FDOC to fix deficiencies. The CMA also indirectly monitored overcrowding through its oversight of FDOC's Office of Health Services, which was tasked with certifying housing occupancy.

[16] The prison capacity requirement was codified in state law in 1992 (Fla. Stat. §944.023, 1993).

The Special Master's final report agreed that Dugger's actions as secretary of the FDOC supported a "conclusion of a good faith effort to comply":

> These actions include not only removal from bed inventory of questionable actual housing units and of certain jail and other beds which did not exist but also the promulgation . . . of criteria by which the Department will determine bed capacity (Special Master's Report and Recommendation on Case Closure, 9 Oct. 1992, p. 7).

The report further cited that compliance had been "maintained long enough" that future noncompliance was unlikely (p. 49).

On March 30, 1993, after hearing direct assurances of the state's commitment from Lieutenant Governor Kenneth "Buddy" MacKay and the new Secretary of Corrections, Harry Singletary, Judge Black issued her opinion and order granting final judgment (*Costello v. Wainwright* 1993). Expressing confidence that the CMA would faithfully monitor health care delivery and act as a "check on unconstitutional levels of overcrowding" (1993:15), Judge Black found it an adequate mechanism to "assure continued compliance with the orders entered" (1993:18). As the future would confirm, however, Sheppard's reluctance was justified: In 1995, the state legislature modified the prison capacity law to allow for design capacity plus one-half (Fla. Laws 1995, ch. 95–251). Yet his reservation that the state would not maintain safe and adequate housing and medical care for inmates did not foresee the long-term effects of the prison litigation—which were only just becoming clear.

The Path of *Costello*: Policy Feedback and Future Prison Growth

By 1993, when *Costello* was finally settled, 50,000 people were incarcerated in Florida's state prisons—up from just below 20,000 in 1980. In the next 15 years, the state prison population grew by another 50,000 (see Figure 4; FDOC 1981, 1994, 2008). Although unintended and unanticipated, the ways in which *Costello* was understood in the political arena and translated into social policy had feedback effects that increased the state's capacity and willingness to build prisons. In turn, this new capacity and willingness paved the way for the "tough justice" laws of the 1990s, which guaranteed increasing incarceration rates for years to come and the persistence of racial inequality.

First, the decisions that brought the FDOC into compliance in the crucial period from 1987 to 1991 increased the state's capacity to build going forward. In order to comply with the court order, Dugger took responsibility for "building prisons in the quickest,

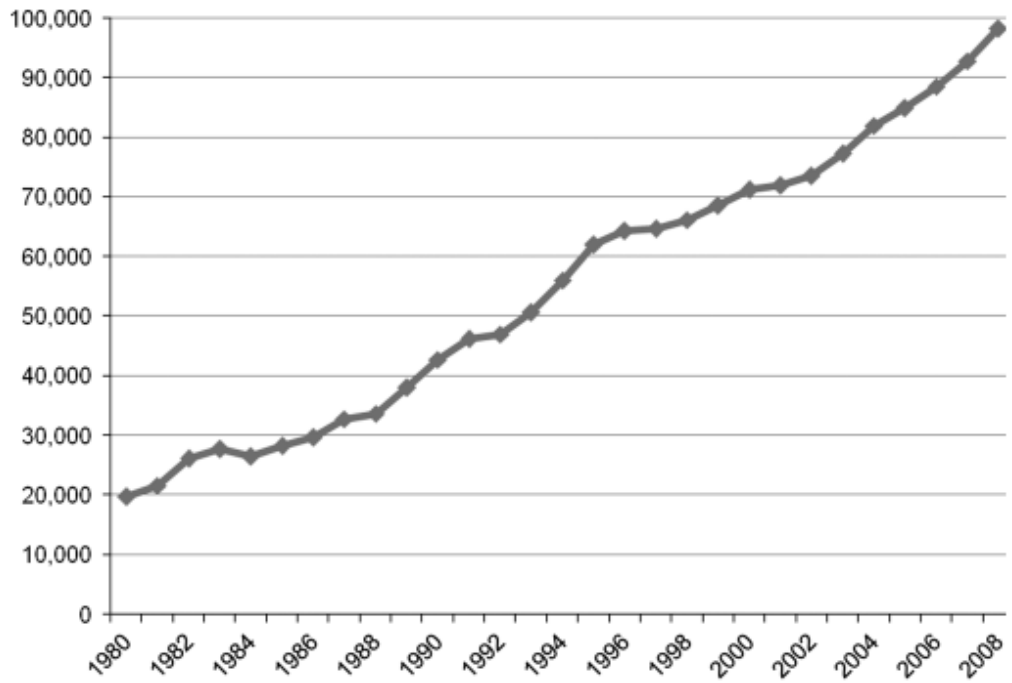

Figure 4. Prison Population Growth in Florida, 1980–2008.
Source: Florida Department of Corrections Annual Reports; additional information available from the author.

least expensive way possible" (Interview, Richard Dugger, former secretary of the FDOC, 22 March 2007). To find the cheapest land on which to build prisons, the FDOC abandoned efforts to put prisons in the southern half of the state, close to the homes of most inmates (FDOC 1990). Instead it ran advertisements in North Florida local newspapers and developed glossy brochures on the economic benefit of prisons for rural communities (Florida Department of Corrections brochure: "Siting of New Correctional Facilities," 1990). The FDOC then built prisons in the counties that provided free land and ready-made infrastructure. This policy created new incentives for state lawmakers to support prisons. As one North Florida state legislator stated,

> Well, [the state] needed a prison and I figured if it was going to be somewhere we ought to get some advantage out of it. . . . [It] was always recognized [as] a good clean industry, no smokestacks, employed a lot of people. [Later] the Chamber [of Commerce] saw it as economic development (Interview, Samuel Bell, former Florida State House Representative, 30 May 2007).

Of the 20 new prisons built between 1987 and 1993, 13 were located in North Florida, five in Central Florida, and only two in South Florida.

In order to build cheaply, the FDOC also abandoned ongoing efforts to expand smaller "community-based" institutions and

instead used in-house architects and engineers to develop a "quick construction," dormitory-style institution that could be built almost entirely with inmate and staff labor (FDOC 1988). In the early 1990s, the FDOC improved its inmate-built prison prototype, making it even faster to build, and more secure (Rhine 1998). The litigation and dynamic release policies also forced the FDOC and the state to create internal mechanisms that strengthened policy makers' capacity to enhance criminal sentences in the future, including a nonpartisan statutory system to predict prison populations and an in-house corrections data processing system to calculate inmate release dates.

Second, the decision to comply with *Costello* through early releases and prison growth had feedback effects that reduced the perceived costs and increased the political benefits of incarceration as a crime control strategy—resulting in a new willingness to build prisons. In the 1970s and early 1980s, legislators were loath to build prisons for a variety of reasons: some ideological (the state should treat, rather than warehouse), some fiscal (state budget dollars should be spent elsewhere), some political (voters would punish politicians who spent state money on prisoners). But in the late 1980s, these concerns were tempered by the conservative shift in state politics, the perceived financial benefit of prisons for rural communities, and the absence of a negative public response to the building program into the early 1990s. These developments reinforced state legislators' calculation that they could spend money on prisons (as a trade-off with transportation, education, or health care) without any political cost (Klas 1991). Furthermore, organized interests that could have highlighted the costs of prison growth did not appear. Traditional civil rights organizations, black legislators, and urban Democrats who were concerned about over-incarceration and racial disparities did not enter into the debate because they served constituents who were the most impacted by crime (Burgos 1988; Marques 1988). Thus even in more liberal districts, as long as prisons stayed out of the news (i.e., no more egregious brutality or conditions scandals), legislators did not lose voters' support by funding prison expansion (Interview, Jon Mills, former Florida State House Representative, 26 April 2007).

The events of the late 1980s also marked the ascent of the political use of crime in Florida. When new sensational crimes occurred, as in the case of Charlie Street, legislators felt compelled to enhance criminal penalties and place further restrictions on who was eligible for gain-time (Fla. Laws 1988, ch. 88–131).[17] However, because they did this while the state was still under court order, they had to continue the early-release program. With fewer people

[17] Similar to the Willie Horton episode and the defeat of Michael Dukakis, Florida state lawmakers still remember the name "Charlie Street" and the lesson that releasing offenders can have negative political consequences.

eligible for early release, the time served by eligible offenders decreased even further, such that by the early 1990s, average time served was less than 35 percent of court-imposed sentences (Task Force for the Review of the Criminal Justice and Corrections Systems 1994:14).[18] The liberal gain-time policies galvanized the law enforcement community, who used the opposition to early release policies to lobby legislators, organize victims' groups, and provide the media with juicy sound bites (Schoenfeld 2009). In the early 1990s, the perceived public backlash to the release policies created new incentives for lawmakers to expand prison capacity.[19] Thus in 1994, legislators funded another 14,000 prison beds in order to end the early release program (including beds in three private prison facilities). And in 1995, they passed one of the first "truth-in-sentencing" laws in the country, which required all future inmates to serve 85 percent of their court-imposed sentence (Fla. Laws 1995, ch. 95–294).

Since then, having realized both the physical capacity and the political willingness to build prisons, state lawmakers have continually used crime and prison resources to enhance their political capital (Garland 2001; Simon 2007; Wacquant 2009). For example, in 1995, Florida emblematically "reintroduced" chain gangs due to the initiative of State Senator Charlie Crist, who came to be known as "Chain Gang Charlie" and is now the current governor of Florida (Fla. Laws 1995, ch. 95–283). In 1999, Governor Jeb Bush campaigned on the slogan "10-20-LIFE," promising mandatory sentences for those who carried guns during the commission of a crime (Fla. Laws 1999, ch. 99–12). His initiative passed despite the fact that the violent crime rate in Florida had been decreasing an average of 4 percent per year since 1990 (Florida Department of Law Enforcement 2008: n.p.). Most recently, in response to "the horrendous murders of children like Adam Walsh, Carlie Brucia, Jessica Lunsford, [and] Sarah Lunde," Governor Crist passed the Anti-Murder Act, which stipulates zero tolerance for probation violators (Florida Governor's Office 2007: n.p.). Passed

[18] In 1988, the legislature replaced administrative gain-time with "provisional credits," which allowed for up to 90 days to be subtracted from the sentence of eligible inmates when the prison population reached 97.5 percent of capacity. It became so common it was referred to as "computer release" (Interview, Assistant Bureau Chief of Sentence Structure, FDOC, 30 March 2007).

[19] The backlash to early releases even impacted national politicians in Florida (Nurse 1993). Congressmen Charles Canady (12th District) and Bill McCollum (8th District), with the support of their respective county sheriffs, introduced the Prison Litigation Relief Act in summer 1993. The Act aimed to "limit judicial interference in the management of the nation's prisons and jails" (H. R. 2354, introduced in the 103rd Cong.). Their proposed bill was eventually incorporated into the Prison Litigation Reform Act of 1995, which has drastically reduced the number of federal claims filed by prisoners and has conceivably prevented legitimate claims from being heard (Schlanger & Shay 2007).

unanimously by the legislature, the large potential fiscal impact of the law (estimated at more than $20 million per year) was hardly considered by legislators during the committee hearings before its passage.

To accommodate the growth in the prison population that accompanied tough justice laws, the FDOC built an additional 32 institutions between 1995 and 2007 at an average cost per bed of $12,000 to $30,000 (FDOC 1996:13, 2007b). In 2007, Florida spent one in every 11 budget dollars on corrections, a total of $2.7 billion (Pew Center on the States 2008:30). Similar to many other states with oversized prison populations, in 2009 Florida faced a deficit of $2.4 billion and began cutting back on state services (Cave 2009). In addition, if the prison population continues to grow at this pace, the FDOC will need to add another 16,500 beds over the next five years (Pew Center on the States 2008:10).

It is important to note that this growth in incarceration continues to disproportionately impact black Americans and contribute to racial inequality. New crime initiatives, like those passed in the late 1980s, have disparate consequences: For example, of the almost 4,000 inmates currently imprisoned under "10-20-LIFE," more than 63 percent are black (non-Hispanic) (FDOC 2007a:6). As when the *Costello* litigation began, the percentage of black inmates in the FDOC is still more than 50 percent, and the ratio of black to white incarceration is approximately 5.5 to 1 (FDOC 2007b:38).

Conclusion and Discussion

The story of prison litigation in the United States presents a paradox: How could legal mobilization aimed at decreasing incarceration and improving prison conditions have been successful, yet contribute to unprecedented levels of incarceration in the long run? This paradox is exemplified in a statement by Simon, the original lawyer for the inmates in *Costello*, during the hearings for the OSA in 1979:

> My own hope is that once the Federal Court enters a non-appealable order we will see the last of the new prisons built in this state. The system will begin to look at other remedies . . . because we know that if the prisons get overcrowded again . . . they will have to begin spending considerable sums of dollars for the construction of prisons. *And the legislature for the first time will be forced to make that choice*. For that reason, your honor . . . we have signed it (Transcript, hearing on OSA, 23 Oct. 1979; emphasis added).

Yet less than 10 years later, the legislature chose to comply with the order through a massive prison building initiative. As Mills, the

Speaker of the Florida House of Representatives in 1987, later recalled, legislators did not feel like they had a choice:

> The corrections situation was unchangeable and immutable and you had to deal with it. *It really . . . wasn't a discretionary issue;* not dealing with it had . . . public safety consequences. So it wasn't a matter of joyfully pushing for more funding for corrections. It was a fact of life and a fact of the circumstances of that period of time (Interview, Jon Mills, former Florida State House Representative, 26 April 2007; emphasis added).

The case study of Florida prison litigation suggests that the discrepancy between Simon's and Mills's understanding of the state's options can be explained by considering the congruence and timing of legal translation on both the front and back end *and* how decisions around legal translation constrained or enabled future possibilities for compliance.

Prisoners' rights lawyers and activists in the early 1970s were concerned about the overreliance on confinement, the overrepresentation of black Americans in the criminal justice system, and negligible treatment of inmates. Given the historical context, litigating these issues meant translating them into a problem of constitutional "rights" (Scheingold 2004). While reformers' decarceration goals seem profoundly misplaced in today's political climate, at that time they were in sync with national criminal justice experts who were promoting the ideal of rehabilitation and a future with fewer prisons (American Friends Service Committee 1971; Blumstein & Cohen 1973). However, the "rights" framing of prison litigation limited the ideation of the problem to the "immediate dangerous conditions" instead of, for example, the overuse of incarceration for low-level offenses.

Had the framework of the initial preliminary injunction required the state to *reduce* the prison population using specific measures designed to permanently decrease commitments to prison, the idea of regulating "prison capacity" may not have taken on such central importance. As it was, the capacity framework guided negotiations over a consent decree. Similarly, the injunction left space for FDOC administrators, as the "target population," to interpret the court's decision based on their own needs and understandings (Horowitz 1977). In their view, the court order was an opportunity to finally extract sufficient resources from the state. Yet during the first part of the 1980s legislators opposed spending more money on corrections, so instead they attempted to reduce the prison population through sentencing reform. In addition, legislators opted to regulate immediate overcrowding crises, as defined by *Costello*, by releasing inmates before the end of their sentences.

Together, the 1983 reforms offered the best chance for compliance along the terms envisioned by Simon and other prisoners'

rights attorneys. However, the reforms were stymied because legislators did not create new infrastructure or incentives to force district attorneys and judges to utilize alternatives to state prison. In addition, because of the timing of court intervention, the reforms were given less than two years to work. As a consequence, the prison system remained overcrowded and the FDOC was forced to create temporary housing. The attorney for the inmates used the potential danger of temporary housing to uncover the state's unwillingness to enact permanent remedies, prompting the court to increase its monitoring of the prison system.

Having already "experimented" with reform, state officials were left with two options that could *guarantee* a long-term solution to overcrowding: release offenders, or build more prisons. Timed with the beginning of the first Republican administration in 20 years and the crack cocaine scare, releasing offenders became politically untenable—thus legislators' belief that building prisons was their *only* option. Yet increased drug offense enforcement forced the FDOC to continue to grant accelerated gain-time to inmates in order to stabilize the prison population. The governor, law enforcement, and the media all used the "early releases" for strategic advantage, conflating the legislative release mechanism with the court order to end overcrowding and reinforcing the notion that *Costello* required the state to build new prisons.

As historical institutionalist scholarship suggests, the case study of Florida prison litigation highlights how the contingencies of timing can affect the court's ability to bring about social change. The temporal separation between the translation of a problem into a lawsuit on the front end and the translation of the court order into public policy on the back end creates the possibility that legal outcomes will diverge from legal activists' original intentions. Even when a court order favors the aggrieved party and aims to reduce inequality or remedy injustice, the process by which it is translated over time, with all its contingencies, can produce "compliance" that is unintended or unfavorable.[20] Thus scholars of law and social change should consider the ongoing political and historical contexts "in which courts do their work" (Paris 2001), from the initial interpretation of the legal issues at stake, to the legal remedy, to compliance efforts by responsible parties.

The case of Florida prison litigation also points to limits of traditional grassroots mobilization in expanding the progressive possibilities of court decisions. Although a grassroots prison reform

[20] Others have made the argument that civil rights litigation, and in particular *Brown v. Board of Education* (1954), did not ultimately bring about the racial equality that plaintiffs envisioned (Bell 2004). One can argue that in *Brown*, the meaning of "compliance" was formally rewritten by the Court as the political context changed, rendering "compliance" insufficient to achieve educational equality.

movement did not exist in Florida during the *Costello* litigation, it seems unlikely that it could have focused the translation of compliance toward reducing incarceration in the long run. Traditional civil rights organizations did not see it in their interest to advocate on behalf of criminal offenders. And even if they had, in the 1970s civil rights organizations were marginalized in Florida state politics. Most important, inmates' lawyers could not have predicted the mobilization of law enforcement, and victims' groups in support of incarceration. With the advantage of hindsight and unlimited resources, inmates' lawyers could have countered this mobilization by organizing educators and public welfare activists to maintain political support for the 1983 reforms.

In addition, the case of prison litigation in Florida highlights the role of policy feedback in the long-term evaluation of social change efforts through the courts. In Florida, the choices made by policy makers around court compliance, including where and how to build prisons, created policy feedback effects that further expanded the coercive capacity of the state and transformed political calculations around crime control. Thus scholarship on law and social change needs to look beyond one-dimensional "measures" of court success (Stryker 2007:74) (such as the implementation of law "on the books" and "on the ground") and instead follow how legal translation generates new constituencies, molds new languages of contention, and constrains and enables the definition of new "problems."

The framework of policy feedback can also help researchers better understand some features of the "law-and-order" politics of the 1990s. By translating the court order into a statutory release mechanism, legislators effectively increased the discrepancy between nominal and actual prison sentence lengths. In turn, this discrepancy created a potent symbol for politicians and interest groups looking to capitalize on the public's distrust of the state (Zimring et al. 2001). While there may have been valid reasons to shorten prison sentences, politicians in the early 1990s could claim that the "forced release" of offenders before the end of their "true" sentences was a substantial harm to public safety and a "risk" not worth taking. This claim then reinforced the racialized "fear that government authorities [would] serve the interests of criminals" over law-abiding citizens (Zimring et al. 2001:231). In this sense, while unintentional, the prison conditions litigation created a means by which state legislators and district attorneys could attack judicial discretion, expand mandatory minimums, and abolish sentencing guidelines. The political backlash to "early releases" thus allowed politicians to strengthen their own political authority by building new prisons and enacting new policy meant to keep more criminals behind bars for longer periods of time (Simon 2007).

The finding that prison litigation contributed to mass incarceration in Florida supports the "double-edged" sword scholarship about prison conditions litigation (Feeley & Swearingen 2004:466) and substantiates the concern that "by promoting the comforting idea of the 'lawful prison,' the litigation movement may have smoothed the way for ever-harsher sentences and criminal policies" (Schlanger 1999:2036, commenting on Feeley & Rubin 1998: note 19). Yet the findings run counter to the idea that prisoner rights litigation engendered a backlash *within* prisons that drew corrections administrators toward a "custody orientation" (Gottschalk 2006; Irwin 1980; Lynch 2010). To the contrary, Florida prison officials embraced prison conditions litigation, using it as a chance to pry needed resources from the state legislature (see also Carroll 1998). The story of prison litigation in Florida also extends new scholarship that finds counterintuitive explanations for mass incarceration. As Gottschalk (2006) has carefully detailed, we should consider how "not the usual suspects," but rather women's rights groups and other "liberal" organizations, contributed to policies of mass incarceration. In this case, concerns about racial justice ultimately helped create incentives to expand the penal state, which now ensnares 1 in 11 black adults (in prison or jail or under probation or parole supervision) (Pew Center on the States 2009:1).

Finally, the story of Florida demonstrates how detailed, in-depth accounts of prison growth in one particular state can offer new theoretical insights to explanations of mass incarceration. As most scholarship on the growth in incarceration has focused on the national level (Beckett 1997; Garland 2001; Murakawa 2005; Simon 2007), scholars of punishment have only begun to examine the unique paths to mass incarceration at the state level (Campbell 2009; Lynch 2010; L. Miller 2008; Page n.d.). I believe that more scholarship in this vein will demonstrate that prison litigation had similarly non-intuitive effects in other states. Future scholarship, therefore, should examine other states' growth in prison capacity, the state-level politics of punishment, and the specific ways in which race has shaped the penal States of America.

Methods Appendix

The data for this article are drawn from a larger case study of prison growth in Florida between 1950 and 2000 (Schoenfeld 2009). The case study incorporated the analysis of a variety of primary data, including archival records, court records, and formal interviews. These sources are supplemented by secondary accounts of Florida's political history, newspaper articles, and crime and law enforcement data. In addition, my understanding of Florida's

politics and its prison system was also informed by numerous informal conversations and field visits to a representative sample of Florida's correctional institutions.

I created a historical record of key decisions concerning Florida's system of punishment between 1950 and 2000 with archival data from the Florida State Archives and Library, the Florida Legislative Library, the Florida Supreme Court Library, and the FDOC. I reconstructed the *Costello* case using publicly available court decisions and filings and hearing transcripts, pleadings, correspondence, and monitoring and other reports from the private files of William Sheppard, Esq., in Jacksonville, Florida. Documents referred to in the text are on file with the author.

From the documentary evidence I identified key actors involved in promoting or opposing key legislation and/or administrative changes from a variety of perspectives, including elected state officials, bureaucrats, legal and other activists, and representatives of special interest groups. I reached out to 75 potential interviewees, being careful to include people from each time period, both Republicans and Democrats and people who were less formally involved in the policy process. I was able to conduct 54 formal interviews between March 2007 and September 2009. Where I could not speak directly to key people, I relied on the archival data and newspaper accounts of their positions, statements, and actions. For the most part I was able to conduct interviews in person and digitally record and transcribe them (I asked permission to record interviews and only three people declined). Interviews lasted anywhere from 45 minutes to 2 1/2 hours. Since interviewees are elected or appointed public officials, or lawyers asked about their professional decisions and duties, I was granted an exemption by the IRB to receive oral consent. Where relevant I use interviewees' real names. The following table lists the number of interviewees by perspective and time period:

Perspective	1970–1986	1987–2000	Total Number of People Interviewed
FDOC Personnel	12	8	12
State Legislators (Democrats)	6	3	7
State Legislators (Republicans)	4	4	7
Gubernatorial/Legislative Staff	4	7	7
Lawyers (Prisoners)	6	4	6
Lawyers (State)	1	1	2
Other Legal	1	0	1
Special Interests/Other	6	12	12

I generated separate interview schedules for each of the 54 interviewees depending on the time period, the decisions made during the time period, and his or her involvement. In general, I asked interviewees about their role in the decisionmaking process, their goals, their choices, what information they used to guide their decisions, who supported their decisions and opposed their decisions, and their understandings of the consequences of their decisions. I asked interviewees who did not directly make policy decisions about the process by which decisions were made, the information available to decision makers, or other administrative processes. As interviewees were often speaking of events that happened years in the past, my detailed questions helped jog their memories. When their answers conflicted or were circumspect, I triangulated the information with available documentary evidence or newspaper articles from the time.

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131 S.Ct. 1910
Supreme Court of the United States

Edmund G. BROWN, Jr., Governor of California, et al., Appellants,
v.
Marciano PLATA et al.

No. 09–1233. | Argued Nov. 30, 2010. | Decided May 23, 2011.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C.J., joined.

Opinion

Justice KENNEDY delivered the opinion of the Court.

This case arises from serious constitutional violations in California's prison system. The violations have persisted for years. They remain uncorrected. The appeal comes to this Court from a three-judge District Court order directing California to remedy two ongoing violations of the Cruel and Unusual Punishments Clause, a guarantee binding on the States by the Due Process Clause of the Fourteenth Amendment. The violations are the subject of two class actions in two Federal District Courts. The first involves the class of prisoners with serious mental disorders. That case is *Coleman v. Brown*. The second involves prisoners with serious medical conditions. That case is *Plata v. Brown*. The order of the three-judge District Court is applicable to both cases.

After years of litigation, it became apparent that a remedy for the constitutional violations would not be effective absent a reduction in the prison system population. The authority to order release of prisoners as a remedy to cure a systemic violation of the Eighth Amendment is a power reserved to a three-judge district court, not a single-judge district court. In accordance with that rule, the *Coleman* and *Plata* District Judges independently requested that a three-judge court be convened. The Chief Judge of the Court of Appeals for the Ninth Circuit convened a three-judge court composed of the *Coleman* and *Plata* District Judges and a third, Ninth Circuit Judge. Because the two cases are interrelated, their limited consolidation for this purpose has a certain utility in avoiding conflicting decrees and aiding judicial consideration and enforcement. The State in this Court has not objected to consolidation, although the State does argue that the three-judge court was prematurely convened. The State also objects to the substance of the three-judge court order, which requires the State to reduce overcrowding in its prisons.

The appeal presents the question whether the remedial order issued by the three-judge court is consistent with requirements and procedures set forth in a congressional statute, the Prison Litigation Reform Act

of 1995 (PLRA). The order leaves the choice of means to reduce overcrowding to the discretion of state officials. But absent compliance through new construction, out-of-state transfers, or other means—or modification of the order upon a further showing by the State—the State will be required to release some number of prisoners before their full sentences have been served. High recidivism rates must serve as a warning that mistaken or premature release of even one prisoner can cause injury and harm. The release of prisoners in large numbers—assuming the State finds no other way to comply with the order—is a matter of undoubted, grave concern.

At the time of trial, California's correctional facilities held some 156,000 persons. This is nearly double the number that California's prisons were designed to hold, and California has been ordered to reduce its prison population to 137.5% of design capacity. By the three-judge court's own estimate, the required population reduction could be as high as 46,000 persons. Although the State has reduced the population by at least 9,000 persons during the pendency of this appeal, this means a further reduction of 37,000 persons could be required. As will be noted, the reduction need not be accomplished in an indiscriminate manner or in these substantial numbers if satisfactory, alternate remedies or means for compliance are devised. The State may employ measures, including good-time credits and diversion of low-risk offenders and technical parole violators to community-based programs, that will mitigate the order's impact. The population reduction potentially required is nevertheless of unprecedented sweep and extent.

Yet so too is the continuing injury and harm resulting from these serious constitutional violations. For years the medical and mental health care provided by California's prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners' basic health needs. Needless suffering and death have been the well-documented result. Over the whole course of years during which this litigation has been pending, no other remedies have been found to be sufficient. Efforts to remedy the violation have been frustrated by severe overcrowding in California's prison system. Short term gains in the provision of care have been eroded by the long-term effects of severe and pervasive overcrowding.

Overcrowding has overtaken the limited resources of prison staff; imposed demands well beyond the capacity of medical and mental health facilities; and created unsanitary and unsafe conditions that make progress in the provision of care difficult or impossible to achieve. The overcrowding is the "primary cause of the violation of a Federal right," specifically the severe and unlawful mistreatment of prisoners through grossly inadequate provision of medical and mental health care.

This Court now holds that the PLRA does authorize the relief afforded in this case and that the court-mandated population limit is necessary to remedy the violation of prisoners' constitutional rights. The order of the three-judge court, subject to the right of the State to seek its modification in appropriate circumstances, must be affirmed.

I

A

The degree of overcrowding in California's prisons is exceptional. California's prisons are designed to house a population just under 80,000, but at the time of the three-judge court's decision the population was almost double that. The State's prisons had operated at around 200% of design capacity for at least 11 years. Prisoners are crammed into spaces neither designed nor intended to house inmates. As many as 200 prisoners may live in a gymnasium, monitored by as few as two or three correctional officersAs many as 54 prisoners may share a single toilet.

The Corrections Independent Review Panel, a body appointed by the Governor and composed of correctional consultants and representatives from state agencies, concluded that California's prisons are " 'severely overcrowded, imperiling the safety of both correctional employees and inmates.' " In 2006, then-Governor Schwarzenegger declared a state of emergency in the prisons, as " 'immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding.' " The consequences of overcrowding identified by the Governor include " 'increased, substantial risk for transmission of infectious illness' " and a suicide rate " 'approaching an average of one per week.' "

Prisoners in California with serious mental illness do not receive minimal, adequate care. Because of a shortage of treatment beds, suicidal inmates may be held for prolonged periods in telephone-booth sized cages without toilets. A psychiatric expert reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic. Prison officials explained they had " 'no place to put him.' " Other inmates awaiting care may be held for months in administrative segregation, where they endure harsh and isolated conditions and receive only limited mental health services. Wait times for mental health care range as high as 12 months. In 2006, the suicide rate in California's prisons was nearly 80% higher than the national average for prison populations; and a court-appointed Special Master found that 72.1% of suicides involved "some measure of inadequate assessment, treatment, or intervention, and were therefore most probably foreseeable and/or preventable."

Prisoners suffering from physical illness also receive severely deficient care. California's prisons were designed to meet the medical needs of a population at 100% of design capacity and so have only half the clinical space needed to treat the current population. A correctional officer testified that, in one prison, up to 50 sick inmates may be held together in a 12–by 20–foot cage for up to five hours awaiting treatment. The number of staff is inadequate, and prisoners face significant delays in access to care. A prisoner with severe abdominal pain died after a 5–week delay in referral to a specialist; a prisoner with "constant and extreme" chest pain died after an 8–hour delay in evaluation by a doctor; and a prisoner died of testicular cancer after a "failure of MDs to work up for cancer in a young man with 17 months of testicular pain." Doctor Ronald Shansky, former medical director of the Illinois state prison system, surveyed death reviews for California prisoners. He concluded that extreme departures from the standard of care were "widespread," and that the proportion of "possibly preventable or preventable" deaths was "extremely high." Many more prisoners, suffering from severe but not life-threatening conditions, experience prolonged illness and unnecessary pain.

B

These conditions are the subject of two federal cases. The first to commence, *Coleman v. Brown,* was filed in 1990. *Coleman* involves the class of seriously mentally ill persons in California prisons. Over 15 years ago, in 1995, after a 39–day trial, the *Coleman* District Court found "overwhelming evidence of the systematic failure to deliver necessary care to mentally ill inmates" in California prisons. The prisons were "seriously and chronically understaffed," and had "no effective method for ensuring ... the competence of their staff," The prisons had failed to implement necessary suicide-prevention procedures, "due in large measure to the severe understaffing." Mentally ill inmates "languished for months, or even years, without access to necessary care." "They suffer from severe hallucinations, [and] they decompensate into catatonic states." The court appointed a Special Master to oversee development and implementation of a remedial plan of action.

In 2007, 12 years after his appointment, the Special Master in *Coleman* filed a report stating that, after years of slow improvement, the state of mental health care in California's prisons was deteriorating. The Special Master ascribed this change to increased overcrowding. The rise in population had led to greater demand for care, and existing programming space and staffing levels were inadequate to keep pace. Prisons had retained more mental health staff, but the "growth of the resource [had] not matched the rise in demand." At the very time the need for space was rising, the need to house the expanding population had also caused a "reduction of programming space now occupied by inmate bunks." The State was "facing a four to five-year gap in the availability of sufficient beds to meet the treatment needs of many inmates/patients." "[I]ncreasing numbers of truly psychotic inmate/patients are trapped in [lower levels of treatment] that cannot meet their needs."The Special Master concluded that many early "achievements have succumbed to the inexorably rising tide of population, leaving behind growing frustration and despair."

C

The second action, *Plata v. Brown,* involves the class of state prisoners with serious medical conditions. After this action commenced in 2001, the State conceded that deficiencies in prison medical care violated prisoners' Eighth Amendment rights. The State stipulated to a remedial injunction. The State failed to comply with that injunction, and in 2005 the court appointed a Receiver to oversee remedial efforts. The court found that "the California prison medical care system is broken beyond repair," resulting in an "unconscionable degree of suffering and death." The court found: "[I]t is an uncontested fact that, on average, an inmate in one of California's prisons needlessly dies every six to seven days due to constitutional deficiencies in the [California prisons'] medical delivery system." And the court made findings regarding specific instances of neglect, including the following:

> "[A] San Quentin prisoner with hypertension, diabetes and renal failure was prescribed two different medications that actually served to exacerbate his renal failure. An optometrist noted the patient's

> retinal bleeding due to very high blood pressure and referred him for immediate evaluation, but this evaluation never took place. It was not until a year later that the patient's renal failure was recognized, at which point he was referred to a nephrologist on an urgent basis; he should have been seen by the specialist within 14 days but the consultation never happened and the patient died three months later."

Prisons were unable to retain sufficient numbers of competent medical staff, and would "hire any doctor who had 'a license, a pulse and a pair of shoes.'" Medical facilities lacked "necessary medical equipment" and did "not meet basic sanitation standards." "Exam tables and counter tops, where prisoners with ... communicable diseases are treated, [were] not routinely disinfected."

In 2008, three years after the District Court's decision, the Receiver described continuing deficiencies in the health care provided by California prisons:

> "Timely access is not assured. The number of medical personnel has been inadequate, and competence has not been assured .... Adequate housing for the disabled and aged does not exist. The medical facilities, when they exist at all, are in an abysmal state of disrepair. Basic medical equipment is often not available or used. Medications and other treatment options are too often not available when needed .... Indeed, it is a misnomer to call the existing chaos a 'medical delivery system'—it is more an act of desperation than a system."

A report by the Receiver detailed the impact of overcrowding on efforts to remedy the violation. The Receiver explained that "overcrowding, combined with staffing shortages, has created a culture of cynicism, fear, and despair which makes hiring and retaining competent clinicians extremely difficult." "[O]vercrowding, and the resulting day to day operational chaos of the [prison system], creates regular 'crisis' situations which ... take time [and] energy ... away from important remedial programs." Overcrowding had increased the incidence of infectious disease, and had led to rising prison violence and greater reliance by custodial staff on lockdowns, which "inhibit the delivery of medical care and increase the staffing necessary for such care." "Every day," the Receiver reported, "California prison wardens and health care managers make the difficult decision as to which of the class actions, *Coleman* ... or *Plata* they will fail to comply with because of staff shortages and patient loads."

D

The *Coleman* and *Plata* plaintiffs, believing that a remedy for unconstitutional medical and mental health care could not be achieved without reducing overcrowding, moved their respective District Courts to convene a three-judge court empowered under the PLRA to order reductions in the prison population. The judges in both actions granted the request, and the cases were consolidated before a single three-judge court. The State has not challenged the validity of the consolidation in proceedings before this Court, so its propriety is not presented by this appeal.

The three-judge court heard 14 days of testimony and issued a 184–page opinion, making extensive findings of fact. The court ordered California to reduce its prison population to 137.5% of the prisons'

design capacity within two years. Assuming the State does not increase capacity through new construction, the order requires a population reduction of 38,000 to 46,000 persons. Because it appears all but certain that the State cannot complete sufficient construction to comply fully with the order, the prison population will have to be reduced to at least some extent. The court did not order the State to achieve this reduction in any particular manner. Instead, the court ordered the State to formulate a plan for compliance and submit its plan for approval by the court.

The State appealed to this Court pursuant to 28 U.S.C. § 1253, and the Court postponed consideration of the question of jurisdiction to the hearing on the merits.

II

As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. " 'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.' "

To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison's failure to provide sustenance for inmates "may actually produce physical 'torture or a lingering death.' " Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.

If government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation. Courts must be sensitive to the State's interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals. Courts nevertheless must not shrink from their obligation to "enforce the constitutional rights of all 'persons,' including prisoners." Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.

Courts faced with the sensitive task of remedying unconstitutional prison conditions must consider a range of available options, including appointment of special masters or receivers and the possibility of consent decrees. When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison's population. By its terms, the PLRA restricts the circumstances in which a court may enter an order "that has the purpose or effect of reducing or limiting the prison population." The order in this case does not necessarily require the State to release any prisoners. The State may comply by raising the design capacity of its prisons or by transferring prisoners to county facilities or facilities in other States. Because the order limits the prison population as a percentage of

design capacity, it nonetheless has the "effect of reducing or limiting the prison population."

Under the PLRA, only a three-judge court may enter an order limiting a prison population. Before a three-judge court may be convened, a district court first must have entered an order for less intrusive relief that failed to remedy the constitutional violation and must have given the defendant a reasonable time to comply with its prior orders. The party requesting a three-judge court must then submit "materials sufficient to demonstrate that [these requirements] have been met." If the district court concludes that the materials are, in fact, sufficient, a three-judge court may be convened.

The three-judge court must then find by clear and convincing evidence that "crowding is the primary cause of the violation of a Federal right" and that "no other relief will remedy the violation of the Federal right." As with any award of prospective relief under the PLRA, the relief "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." The three-judge court must therefore find that the relief is "narrowly drawn, extends no further than necessary ..., and is the least intrusive means necessary to correct the violation of the Federal right." In making this determination, the three-judge court must give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." Applying these standards, the three-judge court found a population limit appropriate, necessary, and authorized in this case.

This Court's review of the three-judge court's legal determinations is *de novo,* but factual findings are reviewed for clear error. . . . The three-judge court oversaw two weeks of trial and heard at considerable length from California prison officials, as well as experts in the field of correctional administration. . . .

A

The State contends that it was error to convene the three-judge court without affording it more time to comply with the prior orders in *Coleman* and *Plata*.

. . . .

2

Before a three-judge court may be convened to consider whether to enter a population limit, the PLRA requires that the court have "previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied." This provision refers to "an order." It is satisfied if the court has entered one order, and this single order has "failed to remedy" the constitutional violation. The defendant must also have had "a reasonable amount of time to comply with the previous court orders." This provision refers to the court's "orders." It requires that the defendant have been given a reasonable time to comply with all of the court's orders. Together, these requirements ensure that the " 'last resort remedy' " of a population limit is not imposed " 'as a first step.' "

The first of these conditions, the previous order requirement of § 3626(a)(3)(A)(i), was satisfied in *Coleman* by appointment of a Special Master in 1995, and it was satisfied in *Plata* by approval of a consent decree and stipulated injunction in 2002. Both orders were intended to remedy the constitutional violations. Both were given ample time to succeed. When the three-judge court was convened, 12 years had passed since the appointment of the *Coleman* Special Master, and 5 years had passed since the approval of the *Plata* consent decree. The State does not claim that either order achieved a remedy. Although the PLRA entitles a State to terminate remedial orders such as these after two years unless the district court finds that the relief "remains necessary to correct a current and ongoing violation of the Federal right," California has not attempted to obtain relief on this basis.

The State claims instead that the second condition, the reasonable time requirement of § 3626(a)(3)(A)(ii), was not met because other, later remedial efforts should have been given more time to succeed. In 2006, the *Coleman* District Judge approved a revised plan of action calling for construction of new facilities, hiring of new staff, and implementation of new procedures. That same year, the *Plata* District Judge selected and appointed a Receiver to oversee the State's ongoing remedial efforts. When the three-judge court was convened, the Receiver had filed a preliminary plan of action calling for new construction, hiring of additional staff, and other procedural reforms.

Although both the revised plan of action in *Coleman* and the appointment of the Receiver in *Plata* were new developments in the courts' remedial efforts, the basic plan to solve the crisis through construction, hiring, and procedural reforms remained unchanged. These efforts had been ongoing for years; the failed consent decree in *Plata* had called for implementation of new procedures and hiring of additional staff; and the *Coleman* Special Master had issued over 70 orders directed at achieving a remedy through construction, hiring, and procedural reforms. The *Coleman* Special Master and *Plata* Receiver were unable to provide assurance that further, substantially similar efforts would yield success absent a population reduction. Instead, the *Coleman* Special Master explained that "many of the clinical advances ... painfully accomplished over the past decade are slip-sliding away" as a result of overcrowding. And the *Plata* Receiver indicated that, absent a reduction in overcrowding, a successful remedial effort could "all but bankrupt" the State of California.

Having engaged in remedial efforts for 5 years in *Plata* and 12 in *Coleman,* the District Courts were not required to wait to see whether their more recent efforts would yield equal disappointment. When a court attempts to remedy an entrenched constitutional violation through reform of a complex institution, such as this statewide prison system, it may be necessary in the ordinary course to issue multiple orders directing and adjusting ongoing remedial efforts. Each new order must be given a reasonable time to succeed, but reasonableness must be assessed in light of the entire history of the court's remedial efforts. A contrary reading of the reasonable time requirement would in effect require district courts to impose a moratorium on new remedial orders before issuing a population limit. This unnecessary period of inaction would delay an eventual remedy and would prolong the courts' involvement, serving neither the State nor the prisoners. Congress did not require this unreasonable result when it used the term "reasonable."

The *Coleman* and *Plata* courts had a solid basis to doubt that additional efforts to build new facilities and hire new staff would achieve a remedy. Indeed, although 5 years have now passed since the appointment of the *Plata* Receiver and approval of the revised plan of action in *Coleman,* there is no indication that the constitutional violations have been cured. A report filed by the *Coleman* Special Master in July 2009 describes ongoing violations, including an "absence of timely access to appropriate levels of care at every point in the system." A report filed by the *Plata* Receiver in October 2010 likewise describes ongoing deficiencies in the provision of medical care and concludes that there are simply "too many prisoners for the healthcare infrastructure." The *Coleman* and *Plata* courts acted reasonably when they convened a three-judge court without further delay.

B

Once a three-judge court has been convened, the court must find additional requirements satisfied before it may impose a population limit. The first of these requirements is that "crowding is the primary cause of the violation of a Federal right."

1

The three-judge court found the primary cause requirement satisfied by the evidence at trial. The court found that overcrowding strains inadequate medical and mental health facilities; overburdens limited clinical and custodial staff; and creates violent, unsanitary, and chaotic conditions that contribute to the constitutional violations and frustrate efforts to fashion a remedy. The three-judge court also found that "until the problem of overcrowding is overcome it will be impossible to provide constitutionally compliant care to California's prison population."

. . . .

The record documents the severe impact of burgeoning demand on the provision of care. At the time of trial, vacancy rates for medical and mental health staff ranged as high as 20% for surgeons, 25% for physicians, 39% for nurse practitioners, and 54.1% for psychiatrists. These percentages are based on the number of positions budgeted by the State. Dr. Ronald Shansky, former medical director of the Illinois prison system, concluded that these numbers understate the severity of the crisis because the State has not budgeted sufficient staff to meet demand. According to Dr. Shansky, "even if the prisons were able to fill all of their vacant health care positions, which they have not been able to do to date, ... the prisons would still be unable to handle the level of need given the current overcrowding." Dr. Craig Haney, a professor of psychology, reported that mental health staff are "managing far larger caseloads than is appropriate or effective." A prison psychiatrist told Dr. Haney that " 'we are doing about 50% of what we should be doing.' " In the context of physical care Dr. Shansky agreed that "demand for care, particularly for the high priority cases, continues to overwhelm the resources available."

Even on the assumption that vacant positions could be filled, the evidence suggested there would be insufficient space for the necessary additional staff to perform their jobs. The *Plata* Receiver, in his report on overcrowding, concluded that even the "newest and most modern prisons" had been "designed with clinic space which is only one-half that necessary for the real-life capacity of the prisons." Dr. Haney reported that "[e]ach one of the facilities I toured was short of significant amounts of space needed to perform otherwise critical tasks and responsibilities." In one facility, staff cared for 7,525 prisoners in space designed for one-third as many. Staff operate out of converted storage rooms, closets, bathrooms, shower rooms, and visiting centers. These makeshift facilities impede the effective delivery of care and place the safety of medical professionals in jeopardy, compounding the difficulty of hiring additional staff.

This shortfall of resources relative to demand contributes to significant delays in treatment. Mentally ill prisoners are housed in administrative segregation while awaiting transfer to scarce mental health treatment beds for appropriate care. One correctional officer indicated that he had kept mentally ill prisoners in segregation for " '6 months or more.' " Other prisoners awaiting care are held in tiny, phone-booth sized cages. The record documents instances of prisoners committing suicide while awaiting treatment.

Delays are no less severe in the context of physical care. Prisons have backlogs of up to 700 prisoners waiting to see a doctor. A review of referrals for urgent specialty care at one prison revealed that only 105 of 316 pending referrals had a scheduled appointment, and only 2 had an appointment scheduled to occur within 14 days. Urgent specialty referrals at one prison had been pending for six months to a year.

Crowding also creates unsafe and unsanitary living conditions that hamper effective delivery of medical and mental health care. A medical expert described living quarters in converted gymnasiums or dayrooms, where large numbers of prisoners may share just a few toilets and showers, as " 'breeding grounds for disease.' "[7] Cramped conditions promote unrest and violence, making it difficult for prison officials to monitor and control the prison population. On any given day, prisoners in the general prison population may become ill, thus entering the plaintiff class; and overcrowding may prevent immediate medical attention necessary to avoid suffering, death, or spread of disease. After one prisoner was assaulted in a crowded gymnasium, prison staff did not even learn of the injury until the prisoner had been dead for several hours. Living in crowded, unsafe, and unsanitary conditions can cause prisoners with latent mental illnesses to worsen and develop overt symptoms. Crowding may also impede efforts to improve delivery of care. Two prisoners committed suicide by hanging after being placed in cells that had been identified as requiring a simple fix to remove attachment points that could support a noose. The repair was not made because doing so would involve removing prisoners from the cells, and there was no place to put them. More generally, Jeanne Woodford, the former acting secretary of California's prisons, testified that there " 'are simply too many issues that arise from such a large number of prisoners,' " and that, as a result, " 'management spends virtually all of its time fighting fires instead of engaging in thoughtful decision-making and planning' " of the sort needed to fashion an effective remedy for these constitutional violations.

Increased violence also requires increased reliance on lockdowns to keep order, and lockdowns further impede the effective delivery of care. In 2006, prison officials instituted 449 lockdowns. The average lockdown lasted 12 days, and 20 lockdowns lasted 60 days or longer. During lockdowns, staff must either escort prisoners to medical facilities or bring medical staff to the prisoners. Either procedure puts additional strain on already overburdened medical and custodial staff. Some programming for the mentally ill even may be canceled altogether during lockdowns, and staff may be unable to supervise the delivery of psychotropic medications.

The effects of overcrowding are particularly acute in the prisons' reception centers, intake areas that process 140,000 new or returning prisoners every year. Crowding in these areas runs as high as 300% of design capacity. Living conditions are " 'toxic,' " and a lack of treatment space impedes efforts to identify inmate medical or mental health needs and provide even rudimentary care. The former warden of San Quentin reported that doctors in that prison's reception center " 'were unable to keep up with physicals or provid[e] any kind of chronic care follow-up.' Inmates spend long periods of time in these areas awaiting transfer to the general population. Some prisoners are held in the reception centers for their entire period of incarceration.

Numerous experts testified that crowding is the primary cause of the constitutional violations. The former warden of San Quentin and former acting secretary of the California prisons concluded that crowding "makes it 'virtually impossible for the organization to develop, much less implement, a plan to provide prisoners with adequate care.' " The former executive director of the Texas Department of Criminal Justice testified that " '[e]verything revolves around overcrowding' " and that " 'overcrowding is the primary cause of the medical and mental health care violations.' " The former head of corrections in Pennsylvania, Washington, and Maine testified that overcrowding is " 'overwhelming the system both in terms of sheer numbers, in terms of the space available, in terms of providing healthcare.' " And the current secretary of the Pennsylvania Department of Corrections testified that " 'the biggest inhibiting factor right now in California being able to deliver appropriate mental health and medical care is the severe overcrowding.' "

The State attempts to undermine the substantial evidence presented at trial, and the three-judge court's findings of fact, by complaining that the three-judge court did not allow it to present evidence of current prison conditions. This suggestion lacks a factual basis.

The three-judge court properly admitted evidence of current conditions as relevant to the issues before it. The three-judge court allowed discovery until a few months before trial; expert witnesses based their conclusions on recent observations of prison conditions; the court admitted recent reports on prison conditions by the *Plata* Receiver and *Coleman* Special Master; and both parties presented testimony related to current conditions, including understaffing, inadequate facilities, and unsanitary and unsafe

living conditions. . . . .

The State does not point to any significant evidence that it was unable to present and that would have changed the outcome of the proceedings. To the contrary, the record and opinion make clear that the decision of the three-judge court was based on current evidence pertaining to ongoing constitutional violations.

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C

The three-judge court was also required to find by clear and convincing evidence that "no other relief will remedy the violation of the Federal right." § 3626(a)(3)(E)(ii).

The State argues that the violation could have been remedied through a combination of new construction, transfers of prisoners out of State, hiring of medical personnel, and continued efforts by the *Plata* Receiver and *Coleman* Special Master. The order in fact permits the State to comply with the population limit by transferring prisoners to county facilities or facilities in other States, or by constructing new facilities to raise the prisons' design capacity. And the three-judge court's order does not bar the State from undertaking any other remedial efforts. If the State does find an adequate remedy other than a population limit, it may seek modification or termination of the three-judge court's order on that basis. The evidence at trial, however, supports the three-judge court's conclusion that an order limited to other remedies would not provide effective relief.

The State's argument that out-of-state transfers provide a less restrictive alternative to a population limit must fail because requiring out-of-state transfers itself qualifies as a population limit under the PLRA. Such an order "has the purpose or effect of reducing or limiting the prison population, or ... directs the release from or nonadmission of prisoners to a prison." The same is true of transfers to county facilities. Transfers provide a means to reduce the prison population in compliance with the three-judge court's order. They are not a less restrictive alternative to that order.

Even if out-of-state transfers could be regarded as a less restrictive alternative, the three-judge court found no evidence of plans for transfers in numbers sufficient to relieve overcrowding. The State complains that the *Coleman* District Court slowed the rate of transfer by requiring inspections to assure that the receiving institutions were in compliance with the Eighth Amendment, but the State has made no effort to show that it has the resources and the capacity to transfer significantly larger numbers of prisoners absent that condition.

Construction of new facilities, in theory, could alleviate overcrowding, but the three-judge court found no realistic possibility that California would be able to build itself out of this crisis. At the time of the court's decision the State had plans to build new medical and housing facilities, but funding for some plans had not been secured and funding for other plans had been delayed by the legislature for years.

Particularly in light of California's ongoing fiscal crisis, the three-judge court deemed "chimerical" any "remedy that requires significant additional spending by the state." Events subsequent to the three-judge court's decision have confirmed this conclusion. In October 2010, the State notified the *Coleman* District Court that a substantial component of its construction plans had been delayed indefinitely by the legislature. And even if planned construction were to be completed, the *Plata* Receiver found that many so-called "expansion" plans called for cramming more prisoners into existing prisons without expanding administrative and support facilities. The former acting secretary of the California prisons explained that these plans would " 'compound the burdens imposed on prison administrators and line staff' ' " by adding to the already overwhelming prison population, creating new barriers to achievement of a remedy.

The three-judge court also rejected additional hiring as a realistic means to achieve a remedy. The State for years had been unable to fill positions necessary for the adequate provision of medical and mental health care, and the three-judge court found no reason to expect a change. Although the State points to limited gains in staffing between 2007 and 2008, the record shows that the prison system remained chronically understaffed through trial in 2008. The three-judge court found that violence and other negative conditions caused by crowding made it difficult to hire and retain needed staff. The court also concluded that there would be insufficient space for additional staff to work even if adequate personnel could somehow be retained. Additional staff cannot help to remedy the violation if they have no space in which to see and treat patients.

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The State claims that, even if each of these measures were unlikely to remedy the violation, they would succeed in doing so if combined together. Aside from asserting this proposition, the State offers no reason to believe it is so. Attempts to remedy the violations in *Plata* have been ongoing for 9 years. In *Coleman,* remedial efforts have been ongoing for 16. At one time, it may have been possible to hope that these violations would be cured without a reduction in overcrowding. A long history of failed remedial orders, together with substantial evidence of overcrowding's deleterious effects on the provision of care, compels a different conclusion today.

The common thread connecting the State's proposed remedial efforts is that they would require the State to expend large amounts of money absent a reduction in overcrowding. The Court cannot ignore the political and fiscal reality behind this case. California's Legislature has not been willing or able to allocate the resources necessary to meet this crisis absent a reduction in overcrowding. There is no reason to believe it will begin to do so now, when the State of California is facing an unprecedented budgetary shortfall. As noted above, the legislature recently failed to allocate funds for planned new construction. Without a reduction in overcrowding, there will be no efficacious remedy for the unconstitutional care of the sick and mentally ill in California's prisons.

D

The PLRA states that no prospective relief shall issue with respect to prison conditions unless it is narrowly drawn, extends no further than necessary to correct the violation of a federal right, and is the least intrusive means necessary to correct the violation. When determining whether these requirements are met, courts must "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system."

1

The three-judge court acknowledged that its order "is likely to affect inmates without medical conditions or serious mental illness." This is because reducing California's prison population will require reducing the number of prisoners outside the class through steps such as parole reform, sentencing reform, use of good-time credits, or other means to be determined by the State. Reducing overcrowding will also have positive effects beyond facilitating timely and adequate access to medical care, including reducing the incidence of prison violence and ameliorating unsafe living conditions. According to the State, these collateral consequences are evidence that the order sweeps more broadly than necessary.

The population limit imposed by the three-judge court does not fail narrow tailoring simply because it will have positive effects beyond the plaintiff class. Narrow tailoring requires a " ' "fit" between the [remedy's] ends and the means chosen to accomplish those ends.' " The scope of the remedy must be proportional to the scope of the violation, and the order must extend no further than necessary to remedy the violation. This Court has rejected remedial orders that unnecessarily reach out to improve prison conditions other than those that violate the Constitution. But the precedents do not suggest that a narrow and otherwise proper remedy for a constitutional violation is invalid simply because it will have collateral effects.

Nor does anything in the text of the PLRA require that result. The PLRA states that a remedy shall extend no further than necessary to remedy the violation of the rights of a "particular plaintiff or plaintiffs." This means only that the scope of the order must be determined with reference to the constitutional violations established by the specific plaintiffs before the court.

This case is unlike cases where courts have impermissibly reached out to control the treatment of persons or institutions beyond the scope of the violation. Even prisoners with no present physical or mental illness may become afflicted, and all prisoners in California are at risk so long as the State continues to provide inadequate care. Prisoners in the general population will become sick, and will become members of the plaintiff classes, with routine frequency; and overcrowding may prevent the timely diagnosis and care necessary to provide effective treatment and to prevent further spread of disease. Relief targeted only at present members of the plaintiff classes may therefore fail to adequately protect future class members who will develop serious physical or mental illness. Prisoners who are not sick or mentally ill do not yet have a claim that they have been subjected to care that violates the Eighth

Amendment, but in no sense are they remote bystanders in California's medical care system. They are that system's next potential victims.

A release order limited to prisoners within the plaintiff classes would, if anything, unduly limit the ability of State officials to determine which prisoners should be released. . . .The order of the three-judge court gives the State substantial flexibility to determine who should be released. If the State truly believes that a release order limited to sick and mentally ill inmates would be preferable to the order entered by the three-judge court, the State can move the three-judge court for modification of the order on that basis. The State has not requested this relief from this Court.

The order also is not overbroad because it encompasses the entire prison system, rather than separately assessing the need for a population limit at every institution. . . .

Although the three-judge court's order addresses the entire California prison system, it affords the State flexibility to accommodate differences between institutions. There is no requirement that every facility comply with the 137.5% limit. Assuming no constitutional violation results, some facilities may retain populations in excess of the limit provided other facilities fall sufficiently below it so the system as a whole remains in compliance with the order. This will allow prison officials to shift prisoners to facilities that are better able to accommodate overcrowding, or out of facilities where retaining sufficient medical staff has been difficult. The alternative—a series of institution-specific population limits—would require federal judges to make these choices. Leaving this discretion to state officials does not make the order overbroad.

Nor is the order overbroad because it limits the State's authority to run its prisons, as the State urges in its brief. While the order does in some respects shape or control the State's authority in the realm of prison administration, it does so in a manner that leaves much to the State's discretion. The State may choose how to allocate prisoners between institutions; it may choose whether to increase the prisons' capacity through construction or reduce the population; and, if it does reduce the population, it may decide what steps to take to achieve the necessary reduction. The order's limited scope is necessary to remedy a constitutional violation.

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2

In reaching its decision, the three-judge court gave "substantial weight" to any potential adverse impact on public safety from its order. The court devoted nearly 10 days of trial to the issue of public safety, and it gave the question extensive attention in its opinion. Ultimately, the court concluded that it would be possible to reduce the prison population "in a manner that preserves public safety and the operation of the criminal justice system."

The PLRA's requirement that a court give "substantial weight" to public safety does not require the court

to certify that its order has no possible adverse impact on the public. A contrary reading would depart from the statute's text by replacing the word "substantial" with "conclusive." Whenever a court issues an order requiring the State to adjust its incarceration and criminal justice policy, there is a risk that the order will have some adverse impact on public safety in some sectors. This is particularly true when the order requires release of prisoners before their sentence has been served. Persons incarcerated for even one offense may have committed many other crimes prior to arrest and conviction, and some number can be expected to commit further crimes upon release. Yet the PLRA contemplates that courts will retain authority to issue orders necessary to remedy constitutional violations, including authority to issue population limits when necessary. A court is required to consider the public safety consequences of its order and to structure, and monitor, its ruling in a way that mitigates those consequences while still achieving an effective remedy of the constitutional violation.

This inquiry necessarily involves difficult predictive judgments regarding the likely effects of court orders. Although these judgments are normally made by state officials, they necessarily must be made by courts when those courts fashion injunctive relief to remedy serious constitutional violations in the prisons. These questions are difficult and sensitive, but they are factual questions and should be treated as such. Courts can, and should, rely on relevant and informed expert testimony when making factual findings. It was proper for the three-judge court to rely on the testimony of prison officials from California and other States. Those experts testified on the basis of empirical evidence and extensive experience in the field of prison administration.

. . . .

The court found that various available methods of reducing overcrowding would have little or no impact on public safety. Expansion of good-time credits would allow the State to give early release to only those prisoners who pose the least risk of reoffending. Diverting low-risk offenders to community programs such as drug treatment, day reporting centers, and electronic monitoring would likewise lower the prison population without releasing violent convicts. The State now sends large numbers of persons to prison for violating a technical term or condition of their parole, and it could reduce the prison population by punishing technical parole violations through community-based programs. This last measure would be particularly beneficial as it would reduce crowding in the reception centers, which are especially hard hit by overcrowding. The court's order took account of public safety concerns by giving the State substantial flexibility to select among these and other means of reducing overcrowding.

The State submitted a plan to reduce its prison population in accordance with the three-judge court's order, and it complains that the three-judge court approved that plan without considering whether the specific measures contained within it would substantially threaten public safety. The three-judge court, however, left the choice of how best to comply with its population limit to state prison officials. The court was not required to second-guess the exercise of that discretion. Courts should presume that state officials are in a better position to gauge how best to preserve public safety and balance competing correctional and law enforcement concerns. The decision to leave details of implementation to the State's discretion protected public safety by leaving sensitive policy decisions to responsible and competent state officials.

. . . .

III

Establishing the population at which the State could begin to provide constitutionally adequate medical and mental health care, and the appropriate time frame within which to achieve the necessary reduction, requires a degree of judgment. The inquiry involves uncertain predictions regarding the effects of population reductions, as well as difficult determinations regarding the capacity of prison officials to provide adequate care at various population levels. Courts have substantial flexibility when making these judgments. " 'Once invoked, "the scope of a district court's equitable powers ... is broad, for breadth and flexibility are inherent in equitable remedies." ' "

Nevertheless, the PLRA requires a court to adopt a remedy that is "narrowly tailored" to the constitutional violation and that gives "substantial weight" to public safety. When a court is imposing a population limit, this means the court must set the limit at the highest population consistent with an efficacious remedy. The court must also order the population reduction achieved in the shortest period of time reasonably consistent with public safety.

A

The three-judge court concluded that the population of California's prisons should be capped at 137.5% of design capacity. This conclusion is supported by the record. Indeed, some evidence supported a limit as low as 100% of design capacity. The chief deputy secretary of Correctional Healthcare Services for the California prisons testified that California's prisons " 'were not designed and made no provision for any expansion of medical care space beyond the initial 100% of capacity.' " Other evidence supported a limit as low as 130%. The head of the State's Facilities Strike Team recommended reducing the population to 130% of design capacity as a long-term goal. A former head of correctional systems in Washington State, Maine, and Pennsylvania testified that a 130% limit would " 'give prison officials and staff the ability to provide the necessary programs and services for California's prisoners.' " A former executive director of the Texas prisons testified that a limit of 130% was " 'realistic and appropriate' " and would " 'ensure that [California's] prisons are safe and provide legally required services.' " And a former acting secretary of the California prisons agreed with a 130% limit with the caveat that a 130% limit might prove inadequate in some older facilities.

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The Federal Bureau of Prisons (BOP) has set 130% as a long-term goal for population levels in the federal prison system. The State suggests the expert witnesses impermissibly adopted this professional standard in their testimony. But courts are not required to disregard expert opinion solely because it

adopts or accords with professional standards. Professional standards may be "helpful and relevant with respect to some questions." The witnesses testified that a limit of 130% was necessary to remedy the constitutional violations, not that it should be adopted because it is a BOP standard. If anything, the fact that the BOP views 130% as a manageable population density bolsters the three-judge court's conclusion that a population limit of 130% would alleviate the pressures associated with overcrowding and allow the State to begin to provide constitutionally adequate care.

Although the three-judge court concluded that the "evidence in support of a 130% limit is strong," it found that some upward adjustment was warranted in light of "the caution and restraint required by the PLRA." The three-judge court noted evidence supporting a higher limit. In particular, the State's Corrections Independent Review Panel had found that 145% was the maximum "operable capacity" of California's prisons at although the relevance of that determination was undermined by the fact that the panel had not considered the need to provide constitutionally adequate medical and mental health care, as the State itself concedes. After considering, but discounting, this evidence, the three-judge court concluded that the evidence supported a limit lower than 145%, but higher than 130%. It therefore imposed a limit of 137.5%.

This weighing of the evidence was not clearly erroneous. The adversary system afforded the court an opportunity to weigh and evaluate evidence presented by the parties. The plaintiffs' evidentiary showing was intended to justify a limit of 130%, and the State made no attempt to show that any other number would allow for a remedy. There are also no scientific tools available to determine the precise population reduction necessary to remedy a constitutional violation of this sort. The three-judge court made the most precise determination it could in light of the record before it. The PLRA's narrow tailoring requirement is satisfied so long as these equitable, remedial judgments are made with the objective of releasing the fewest possible prisoners consistent with an efficacious remedy. In light of substantial evidence supporting an even more drastic remedy, the three-judge court complied with the requirement of the PLRA in this case.

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The medical and mental health care provided by California's prisons falls below the standard of decency that inheres in the Eighth Amendment. This extensive and ongoing constitutional violation requires a remedy, and a remedy will not be achieved without a reduction in overcrowding. The relief ordered by the three-judge court is required by the Constitution and was authorized by Congress in the PLRA. The State shall implement the order without further delay.

The judgment of the three-judge court is affirmed.

It is so ordered.

APPENDIXES

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

Today the Court affirms what is perhaps the most radical injunction issued by a court in our Nation's history: an order requiring California to release the staggering number of 46,000 convicted criminals.

There comes before us, now and then, a case whose proper outcome is so clearly indicated by tradition and common sense, that its decision ought to shape the law, rather than vice versa. One would think that, before allowing the decree of a federal district court to release 46,000 convicted felons, this Court would bend every effort to read the law in such a way as to avoid that outrageous result. Today, quite to the contrary, the Court disregards stringently drawn provisions of the governing statute, and traditional constitutional limitations upon the power of a federal judge, in order to uphold the absurd.

The proceedings that led to this result were a judicial travesty. I dissent because the institutional reform the District Court has undertaken violates the terms of the governing statute, ignores bedrock limitations on the power of Article III judges, and takes federal courts wildly beyond their institutional capacity.

I

A

The Prison Litigation Reform Act (PLRA) states that "[p]rospective 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"; that such relief must be "narrowly drawn, [and] exten[d] no further than necessary to correct the violation of the Federal right"; and that it must be "the least intrusive means necessary to correct the violation of the Federal right." In deciding whether these multiple limitations have been complied with, it is necessary to identify with precision what is the "violation of the Federal right of a particular plaintiff or plaintiffs" that has been alleged. What has been alleged here, and what the injunction issued by the Court is tailored (narrowly or not) to remedy is the running of a prison system with inadequate medical facilities. That may result in the denial of needed medical treatment to "a particular [prisoner] or [prisoners]," thereby violating (according to our cases) his or their Eighth Amendment rights. But the mere existence of the inadequate system does not subject to cruel and unusual punishment the entire prison population in need of medical care, including those who receive it.

The Court acknowledges that the plaintiffs "do not base their case on deficiencies in care provided on any one occasion"; rather, "[p]laintiffs rely on systemwide deficiencies in the provision of medical and mental health care that, taken as a whole, subject sick and mentally ill prisoners in California to 'substantial risk of serious harm' and cause the delivery of care in the prisons to fall below the evolving standards of decency that mark the progress of a maturing society." But our judge-empowering "evolving standards of decency" jurisprudence (with which, by the way, I heartily disagree does not prescribe (or at least has not until today prescribed) rules for the "decent" running of schools, prisons, and other government institutions. It forbids "indecent" treatment of individuals—in the context of this case, the *denial of medical care* to those who need it. And the persons who have a constitutional claim for denial of medical care are those who are denied medical care—not all who face a "substantial risk" (whatever that is) of being denied medical care.

The *Coleman* litigation involves "the class of seriously mentally ill persons in California prisons," and the *Plata* litigation involves "the class of state prisoners with serious medical conditions." The plaintiffs do not appear to claim—and it would absurd to suggest—that every single one of those prisoners has personally experienced "torture or a lingering death," as a consequence of that bad medical system. Indeed, it is inconceivable that anything more than a small proportion of prisoners in the plaintiff classes have personally received sufficiently atrocious treatment that their Eighth Amendment right was violated —which, as the Court recognizes, is why the plaintiffs do not premise their claim on "deficiencies in care provided on any one occasion." Rather, the plaintiffs' claim is that they are all part of a medical system so defective that some number of prisoners will inevitably be injured by incompetent medical care, and that this number is sufficiently high so as to render the system, as a whole, unconstitutional.

But what procedural principle justifies certifying a class of plaintiffs so they may assert a claim of systemic unconstitutionality? I can think of two possibilities, both of which are untenable. The first is that although some or most plaintiffs in the class do not *individually* have viable Eighth Amendment claims, the class as a whole has collectively suffered an Eighth Amendment violation. That theory is contrary to the bedrock rule that the sole purpose of classwide adjudication is to aggregate claims that are individually viable. "A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged."

The second possibility is that every member of the plaintiff class *has* suffered an Eighth Amendment violation merely by virtue of being a patient in a poorly-run prison system, and the purpose of the class is merely to aggregate all those individually viable claims. This theory has the virtue of being consistent with procedural principles, but at the cost of a gross substantive departure from our case law. Under this theory, each and every prisoner who happens to be a patient in a system that has systemic weaknesses—such as "hir [ing] any doctor who had a license, a pulse and a pair of shoes,"—has suffered cruel or unusual punishment, even if that person cannot make an individualized showing of mistreatment. Such a theory of the Eighth Amendment is preposterous. And we have said as much in the past: "If ... a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his

constitutional right to medical care ... simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared: it would have become the function of the courts to assure adequate medical care in prisons." *Lewis v. Casey,* 518 U.S. 343, 350, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996).

Whether procedurally wrong or substantively wrong, the notion that the plaintiff class can allege an Eighth Amendment violation based on "systemwide deficiencies" is assuredly wrong. It follows that the remedy decreed here is also contrary to law, since the theory of systemic unconstitutionality is central to the plaintiffs' case. The PLRA requires plaintiffs to establish that the systemwide injunction entered by the District Court was "narrowly drawn" and "extends no further than necessary" to correct "the violation of the Federal right of a particular plaintiff or plaintiffs." If (as is the case) the only viable constitutional claims consist of individual instances of mistreatment, then a remedy reforming the system as a whole goes far beyond what the statute allows.

It is also worth noting the peculiarity that the vast majority of inmates most generously rewarded by the re-lease order—the 46,000 whose incarceration will be ended—do not form part of any aggrieved class even under the Court's expansive notion of constitutional violation. Most of them will not be prisoners with medical conditions or severe mental illness; and many will undoubtedly be fine physical specimens who have developed intimidating muscles pumping iron in the prison gym.

B

Even if I accepted the implausible premise that the plaintiffs have established a systemwide violation of the Eighth Amendment, I would dissent from the Court's endorsement of a decrowding order. That order is an example of what has become known as a "structural injunction." As I have previously explained, structural injunctions are radically different from the injunctions traditionally issued by courts of equity, and presumably part of "the judicial Power" conferred on federal courts by Article III:

> "The mandatory injunctions issued upon termination of litigation usually required 'a single simple act.'. Indeed, there was a 'historical prejudice of the court of chancery against rendering decrees which called for more than a single affirmative act.' And where specific performance of contracts was sought, it was the categorical rule that no decree would issue that required ongoing supervision.... Compliance with these 'single act' mandates could, in addition to being simple, be quick; and once it was achieved the contemnor's relationship with the court came to an end, at least insofar as the subject of the order was concerned. Once the document was turned over or the land conveyed, the litigant's obligation to the court, and the court's coercive power over the litigant, ceased .... The court did not engage in any ongoing supervision of the litigant's conduct, nor did its order continue to regulate its behavior."

Structural injunctions depart from that historical practice, turning judges into long-term administrators of complex social institutions such as schools, prisons, and police departments. Indeed, they require

judges to play a role essentially indistinguishable from the role ordinarily played by executive officials. Today's decision not only affirms the structural injunction but vastly expands its use, by holding that an entire system is unconstitutional because it *may produce* constitutional violations.

The drawbacks of structural injunctions have been described at great length elsewhere. This case illustrates one of their most pernicious aspects: that they force judges to engage in a form of factfinding-as-policymaking that is outside the traditional judicial role. The factfinding judges traditionally engage in involves the determination of past or present facts based (except for a limited set of materials of which courts may take "judicial notice") exclusively upon a closed trial record. That is one reason why a district judge's factual findings are entitled to plain-error review: because having viewed the trial first hand he is in a better position to evaluate the evidence than a judge reviewing a cold record. In a very limited category of cases, judges have also traditionally been called upon to make some predictive judgments: which custody will best serve the interests of the child, for example, or whether a particular one-shot injunction will remedy the plaintiff's grievance. When a judge manages a structural injunction, however, he will inevitably be required to make very broad empirical predictions necessarily based in large part upon policy views—the sort of predictions regularly made by legislators and executive officials, but inappropriate for the Third Branch.

This feature of structural injunctions is superbly illustrated by the District Court's proceeding concerning the decrowding order's effect on public safety. The PLRA requires that, before granting "[p]rospective relief in [a] civil action with respect to prison conditions," a court must "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." Here, the District Court discharged that requirement by making the "factual finding" that "the state has available methods by which it could readily reduce the prison population to 137.5% design capacity or less without an adverse impact on public safety or the operation of the criminal justice system." It found the evidence "clear" that prison overcrowding would "perpetuate a criminogenic prison system that itself threatens public safety," and volunteered its opinion that "[t]he population could be reduced even further with the reform of California's antiquated sentencing policies and other related changes to the laws." It "reject[ed] the testimony that inmates released early from prison would commit additional new crimes," finding that "shortening the length of stay through earned credits would give inmates incentives to participate in programming designed to lower recidivism," and that "slowing the flow of technical parole violators to prison, thereby substantially reducing the churning of parolees, would by itself improve both the prison and parole systems, and public safety." It found that "the diversion of offenders to community correctional programs has significant beneficial effects on public safety," and that "additional rehabilitative programming would result in a significant population reduction while improving public safety."

The District Court cast these predictions (and the Court today accepts them) as "factual findings," made in reliance on the procession of expert witnesses that testified at trial. Because these "findings" have support in the record, it is difficult to reverse them under a plain-error standard of review. And given that the District Court devoted nearly 10 days of trial and 70 pages of its opinion to this issue, it is difficult to dispute that the District Court has discharged its statutory obligation to give "substantial weight to any adverse impact on public safety."

But the idea that the three District Judges in this case relied solely on the credibility of the testifying expert witnesses is fanciful. *Of course* they were relying largely on their own beliefs about penology and recidivism. And *of course* different district judges, of different policy views, would have "found" that rehabilitation would not work and that releasing prisoners would increase the crime rate. I am not saying that the District Judges rendered their factual findings in bad faith. I am saying that it is impossible for judges to make "factual findings" without inserting their own policy judgments, when the factual findings *are* policy judgments. What occurred here is no more judicial factfinding in the ordinary sense than would be the factual findings that deficit spending will not lower the unemployment rate, or that the continued occupation of Iraq will decrease the risk of terrorism. Yet, because they have been branded "factual findings" entitled to deferential review, the policy preferences of three District Judges now govern the operation of California's penal system.

It is important to recognize that the dressing-up of policy judgments as factual findings is not an error peculiar to this case. It is an unavoidable concomitant of institutional-reform litigation. . . .

But structural injunctions do not simply invite judges to indulge policy preferences. They invite judges to indulge *incompetent* policy preferences. Three years of law school and familiarity with pertinent Supreme Court precedents give no insight whatsoever into the management of social institutions. Thus, in the proceeding below the District Court determined that constitutionally adequate medical services could be provided if the prison population was 137.5% of design capacity. This was an empirical finding it was utterly unqualified to make. Admittedly, the court did not generate that number entirely on its own; it heard the numbers 130% and 145% bandied about by various witnesses and decided to split the difference. But the ability of judges to spit back or even average-out numbers spoon-fed to them by expert witnesses does not render them competent decisionmakers in areas in which they are otherwise unqualified.

. . . .

C

My general concerns associated with judges' running social institutions are magnified when they run prison systems, and doubly magnified when they force prison officials to release convicted criminals. As we have previously recognized:

> "[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.... [T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree.... Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison is, moreover, a task that has been committed to the responsibility of those branches, and separation of

powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have ... additional reason to accord deference to the appropriate prison authorities."

These principles apply doubly to a prisoner-release order. As the author of today's opinion explained earlier this Term, granting a writ of habeas corpus " 'disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.' " Recognizing that habeas relief must be granted sparingly, we have reversed the Ninth Circuit's erroneous grant of habeas relief to individual California prisoners four times this Term alone. And yet here, the Court affirms an order granting the functional equivalent of 46,000 writs of habeas corpus, based on its paean to courts' "substantial flexibility when making these judgments." It seems that the Court's respect for state sovereignty has vanished in the case where it most matters.

. . . .

III

In view of the incoherence of the Eighth Amendment claim at the core of this case, the nonjudicial features of institutional reform litigation that this case exemplifies, and the unique concerns associated with mass prisoner releases, I do not believe this Court can affirm this injunction. I will state my approach briefly: In my view, a court may not order a prisoner's release unless it determines that the prisoner is suffering from a violation of his constitutional rights, and that his release, and no other relief, will remedy that violation. Thus, if the court determines that a particular prisoner is being denied constitutionally required medical treatment, and the release of that prisoner (and no other remedy) would enable him to obtain medical treatment, then the court can order his release; but a court may not order the release of prisoners who have suffered no violations of their constitutional rights, merely to make it less likely that that will happen to them in the future.

This view follows from the PLRA's text that I discussed at the outset, 18 U.S.C. § 3626(a)(1)(A). "[N]arrowly drawn" means that the relief applies only to the "particular [prisoner] or [prisoners]" whose constitutional rights are violated; "extends no further than necessary" means that prisoners whose rights are not violated will not obtain relief; and "least intrusive means necessary to correct the violation of the Federal right" means that no other relief is available.*

I acknowledge that this reading of the PLRA would severely limit the circumstances under which a court could issue structural injunctions to remedy allegedly unconstitutional prison conditions, although it would not eliminate them entirely. If, for instance, a class representing all prisoners in a particular institution alleged that the temperature in their cells was so cold as to violate the Eighth Amendment, or that they were deprived of all exercise time, a court could enter a prisonwide injunction ordering that the temperature be raised or exercise time be provided. Still, my approach may invite the objection that the PLRA appears to contemplate structural injunctions in general and mass prisoner-release orders in

particular. The statute requires courts to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief" and authorizes them to appoint Special Masters, provisions that seem to presuppose the possibility of a structural remedy. It also sets forth criteria under which courts may issue orders that have "the purpose or effect of reducing or limiting the prisoner population,"

I do not believe that objection carries the day. In addition to imposing numerous limitations on the ability of district courts to order injunctive relief with respect to prison conditions, the PLRA states that "[n]othing in this section shall be construed to ... repeal or detract from otherwise applicable limitations on the remedial powers of the courts." The PLRA is therefore best understood as an attempt to constrain the discretion of courts issuing structural injunctions—not as a mandate for their use. For the reasons I have outlined, structural injunctions, especially prisoner-release orders, raise grave separation-of-powers concerns and veer significantly from the historical role and institutional capability of courts. It is appropriate to construe the PLRA so as to constrain courts from entering injunctive relief that would exceed that role and capability.

* * *

The District Court's order that California release 46,000 prisoners extends "further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs" who have been denied needed medical care. 18 U.S.C. § 3626(a)(1)(A). It is accordingly forbidden by the PLRA—besides defying all sound conception of the proper role of judges.

Justice ALITO, with whom THE CHIEF JUSTICE joins, dissenting.

The decree in this case is a perfect example of what the Prison Litigation Reform Act of 1995 (PLRA), was enacted to prevent.

The Constitution does not give federal judges the authority to run state penal systems. Decisions regarding state prisons have profound public safety and financial implications, and the States are generally free to make these decisions as they choose.

. . . .

The approach taken by the three-judge court flies in the face of the PLRA. Contrary to the PLRA, the court's remedy is not narrowly tailored to address proven and ongoing constitutional violations. And the three-judge court violated the PLRA's critical command that any court contemplating a prisoner release order must give "substantial weight to any adverse impact on public safety." The three-judge court would have us believe that the early release of 46,000 inmates will not imperil—and will actually

improve—public safety. Common sense and experience counsel greater caution.

I would reverse the decision below for three interrelated reasons. First, the three-judge court improperly refused to consider evidence concerning present conditions in the California prison system. Second, the court erred in holding that no remedy short of a massive prisoner release can bring the California system into compliance with the Eighth Amendment. Third, the court gave inadequate weight to the impact of its decree on public safety.

* * *

The prisoner release ordered in this case is unprecedented, improvident, and contrary to the PLRA. In largely sustaining the decision below, the majority is gambling with the safety of the people of California. Before putting public safety at risk, every reasonable precaution should be taken. The decision below should be reversed, and the case should be remanded for this to be done.

I fear that today's decision, like prior prisoner release orders, will lead to a grim roster of victims. I hope that I am wrong.

In a few years, we will see.

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Prison Overcrowding and Brown v. Plata

By Marie Gottschalk

Today the United States is the world's warden, incarcerating more people than any other country. With just 5 percent of the world's population, it has 25 percent of its prisoners. Since the 1970s, the United States has built the largest penal system in the world to accommodate a sixfold increase in its inmate population. But what happens behind its prison walls generally remains far removed from public consciousness. In this context, the Supreme Court's landmark decision in Brown v. Plata last month, which declared that the degrading and inhumane conditions in

California's grossly overcrowded prisons are unconstitutional, was an exceptional moment when the prison wall was briefly breached.

Of course, Brown v. Plata does not mark the beginning of the end of mass incarceration in the United States, nor of the abusive conditions that proliferate in U.S. prisons and jails. Unlike the landmark prisoners' rights cases of the 1960s and 1970s, this decision is unlikely to spur many successful copycat lawsuits to impose prison population caps and revitalize the courts as a major forum to challenge abusive prison conditions. The Prison Litigation Reform Act (PLRA), enacted by Congress in 1996 to greatly constrict prisoners' access to the courts and to reduce the judiciary's role in monitoring the penal system, continues to present formidable obstacles for inmates seeking to challenge their conditions of confinement. For those few cases that successfully navigate the PLRA and make it into the courts, the legal process is long and protracted. Remarkably, the U.S. prison and jail population has more than doubled since 1990, the year that one of the two lawsuits eventually consolidated in Brown v. Plata was initially filed.

Moreover, Brown v. Plata is not even likely to spur major reductions in California's inmate population any time soon. This is because the Supreme Court conceded great latitude to the Golden State in how to reduce overcrowding in its prisons and by when. State officials could choose to release some prisoners early. But they could also address the population cap affirmed by the Supreme Court by sending more prisoners to out-of state penal facilities or to county jails in California. Or California could simply build more prisons.

So why, then, is this a landmark decision with enormous implications for the future course of penal policy reform in the United States? More so than many other Supreme Court decisions, Brown v. Plata was as much a political statement as a legal one. It did not render the PLRA restrictions on challenging the conditions of confinement through the courts any less arduous. But it did pry open some important political space that could help incubate political solutions to the problem of mass incarceration in the United States.

The first way in which the Court opened up some political space for prison reform was by making the abhorrent conditions in California's prisons strikingly visible. In the nineteenth century, prisons opened their doors to the public and were popular destinations for gawking domestic and foreign tourists. In the 1960s and early 1970s, prison memoirs and accounts of life behind bars regularly turned up on best-seller lists. Today, however, the U.S. penal system is distinctive not only because of its huge size, but also because of its relative invisibility—leaving aside television shows like Oz, which contribute to a grossly distorted view of what is at stake in mass incarceration. The hundreds of prisons and jails that dot rural America and the desolate outskirts of cities, the 2.4 million men and women currently locked up, the 750,000 former offenders released from prison each year with stunted life chances, and the struggles of the millions of children with an incarcerated mother or father tend to leave little trace on the wider public consciousness.

Justice Anthony M. Kennedy, writing for the majority in this acrimonious 5-4 decision, graphically catalogued the appalling conditions in California's penal system, which operates at about 200 percent of capacity: as many as 50 sick inmates at a time held in 12 by 20 foot cages for up to five hours as they await medical treatment; as many as 54 prisoners sharing a single toilet; year-long waits for mental health treatment; a suicide rate nearly twice the national average for prisoners; a needless death every six to seven days because of delayed or inadequate medical care; and the "dry cages," where suicidal prisoners are kept in telephone booth-sized enclosures without toilets. In case words were not enough, Kennedy appended to his decision photos of the "dry cages" and of a gymnasium-style room crammed with dozens of prisoners and their bunk beds. This was a rare instance where the Court turned to visual evidence to bolster a decision.

The second way in which the Court's decision may prove important is its assiduous efforts to bring wider perceptions of the public safety effects of incarceration into better alignment with the latest social science research. In the decades-long prison

build-up, penal expertise has been sidelined for the most part in public debates over crime and punishment. In an important departure, Kennedy showcased key findings of leading experts on crime and punishment about the association between mass incarceration and public safety. Kennedy noted that several states have successfully cut their prison populations without seeing their crime rates escalate. He also highlighted other important research findings, including that prisons might actually be criminogenic. As many experts on crime have noted, mass incarceration may actually increase the crime rate because imprisonment severs inmates' ties to their jobs, families, and communities, expands opportunities for criminal networking, and subjects inmates to overcrowded and abusive conditions.

But if Brown v. Plata gives politicians in California some political cover to begin charting a new course for penal reform in the Golden State, what is still lacking in California and elsewhere is a political movement that can transcend the current political climate, which remains deeply and reflexively punitive. As Kennedy made clear in his decision, absent a political push for reform neither this ruling nor others by the courts are likely to be the major catalyst to reverse the prison boom or ameliorate abusive prison conditions. The "constitutional violations in conditions of confinement are rarely susceptible of simple or straightforward solutions," Kennedy explained. "In addition to overcrowding the failure of California's prisons to provide adequate medical and mental health care may be ascribed to chronic and worsening budget shortfalls, a lack of political will in favor of reform, inadequate facilities, and systemic administrative failures," he continued.

As of yet, no factor, including the current fiscal crises in the states, has provided sufficient political impetus for comprehensive penal reform to slash the inmate population. California, for instance, has been teetering on the brink of fiscal and social disaster for several years. Yet the state has been unable or unwilling to pursue sensible and proven penal reforms to reduce its prison population in ways that do not seriously jeopardize public safety. Indeed, over the past three decades,

the Golden State has gone from spending five dollars on higher education for every dollar spent on corrections to almost a dead-heat on spending. And yet California still holds fast to the toughest three-strikes law in the nation.

Moreover, recent attempts at reform have fallen flat. California voters soundly rejected a ballot initiative in 2008 that would have expanded alternative sentences for nonviolent drug offenders and saved billions of dollars. Governor Arnold Schwarzenegger and four former governors opposed this measure, including Jerry Brown, who was then attorney general and is now once again governor. And a legislative proposal in 2009 to release some nonviolent offenders in response to the federal lawsuit ultimately decided by Brown v. Plata created a political firestorm. A significantly weaker bill eventually passed the state assembly without a vote to spare. One assemblyman opposed to the measure warned: "We might as well set off a nuclear bomb in California with what we are doing with this bill."

Brown v. Plata has unleashed comparable over-the-top law-and order rhetoric, beginning with the Supreme Court justices who dissented from this decision. They were dismissive of leading social science evidence that prison populations could be lowered without adversely affecting public safety. Justice Samuel A. Alito denounced what he misleadingly characterized as "the premature release of approximately 46,000 criminals—the equivalent of three Army divisions. " (Yes, the italics are his.) He charged that the Court was "gambling with the safety of the people of California" and that the result would likely be "a grim roster of victims."

Mass incarceration in the United States is the result of a complex set of political, institutional, and economic developments. No single factor explains the unprecedented rise in the U.S. incarceration rate, and no single factor will reverse the prison boom. What is needed is a broad-based political movement that focuses not just on the economic burden of the penal system, but also on how the massive carceral state rests on stark racial and other inequities and is itself a threat to public safety. Without such a movement, it will not be possible to make deep and sustainable cuts in the incarcerated population and to address the needs of the individuals, families, and communities decimated by the decades-long build up of

the carceral state. One can only hope that Brown v. Plata proves an important first step.

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8 Harv. L. & Pol'y Rev. 327

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Symposium: Smart on Crime

CALIFORNIA PRISON DOWNSIZING AND ITS IMPACT ON LOCAL CRIMINAL JUSTICE SYSTEMS

Joan Petersilia[a1]

California has embarked on a prison downsizing experiment of historical significance. Facing a U.S. Supreme Court decision, Brown v. Plata, which ordered the state to reduce its prison population by 25% within two years, Governor Jerry Brown signed the Public Safety Realignment Act (AB 109). Realignment transferred authority for large numbers of convicted felons from the state prison and parole system to the state's fifty-eight counties. Counties were given state funding to deal with the increased number of offenders, and each county was given nearly unbridled discretion to develop its own custodial and post-custody plan. The hope is that Realignment, with its focus on locally designed rehabilitative services, will not only reduce prison overcrowding but also the state's 64% recidivism rate--meaning that six out of ten people who left a California prison returned to a California prison within three years of release.

At the time of the Plata ruling on May 23, 2011, California's in-state prison population was approximately 162,000, down from an all-time high of 173,614 or 200% of design capacity in 2007.[2] By upholding the three-judge panel's population cap of 137.5%, the Supreme Court was ordering the California Department of Corrections and Rehabilitation (CDCR, the state's prison system) to reduce its prison population to 109,805, a reduction of about 35,000 prisoners or 25% of all prisoners housed at the time. The task was not only daunting; it also represented the largest court-ordered reduction in prison populations ever in the United States. As the editor of Prison Legal News wrote, "Without doubt this is the most significant prisoner rights ruling of the 21st century, and it will no doubt keep that distinction for a long while."

Laws are seldom self-executing, and research has consistently shown that practitioners--those responsible for translating "law-on-the-books" to "law-in-action" --determine eventual success. Realignment impacts every decision along the stages of the criminal justice system, from arrest through sentencing and release from custody. Realignment also allows each county unprecedented flexibility and authority to design programs and services to manage realigned offenders in a way that makes the most sense locally. California is not only experimenting with how to downsize prisons, but its fifty-eight counties are experimenting with fifty-eight different approaches to sentencing and corrections reform.

The Economist recently called Realignment, "one of the great experiments in American incarceration policy."

Ultimately, whether California's Realignment experiment turns out to be just a short-term response to the state's prison crowding problem or a longer-term solution with national implications for reducing mass incarceration and its attendant costs is squarely in the hands of local justice officials. If it works, California--the nation's largest state and home to one out of every ten U.S. prisoners--will have shown that it can downsize prisons safely by transferring lower-level offenders from state prisons to county systems, using an array of evidence-based community corrections programs. California might not only alleviate a crisis, but also become a model for other states. If it does not work, counties will have simply been overwhelmed with inmates, unable to fund and/or operate the programs those felons needed, resulting in rising crime, continued criminality and jail (instead of prison) crowding.

This article presents the results of the first comprehensive look at how California's fifty-eight diverse counties are handling this titanic shift. During the second year of Realignment's implementation, a team of researchers at Stanford Law School conducted wide-ranging interviews with 125 staff in municipal police departments, county sheriffs' departments, courts, prosecutors' offices, public defender agencies, and probation departments. These officials are responsible for turning AB 109 law into reality. We also spoke with victim service agencies and offenders. Interviewees were selected to represent diversity in agency and county perspectives. We basically wanted to know how Realignment was working from their county and agency perspectives and what changes were needed moving forward.

The findings illustrate that Realignment gets mixed reviews so far. Everyone agreed county officials are working more collaboratively toward reducing recidivism, and that new funding has fostered innovative programming. But our interviews also found counties struggling, often heroically, to carry out an initiative that was imposed upon them almost overnight. Along with the increases in jail and probation populations, many counties are dealing with more criminally sophisticated offenders. When offenders reoffend, there is often no space in county jails to house them. Sheriffs worried that the overcrowding and health care problems that led to Brown v. Plata could morph into county-level versions of the state problem. Prosecutors lamented the deep jail discounts given to arrestees due to crowded jails.

Judges were cautiously optimistic that mental health and other collaborative courts could reduce recidivism but worried about the lack of split sentencing. AB 109 allows courts the option to split sentences between time in jail and time under supervised release. Counties administer the programs but the state pays for them. Some counties are taking advantage of split sentencing, but in Los Angeles County, only 5% of felons have their sentences split, and the rest walk out of jail without supervision or services of any kind. Judges, prosecutors, and victim service agencies were increasingly concerned about victim protection, and the neglect of victims' constitutional rights under the Victims' Bill of Rights Act of 2008. The California Constitution provides victims with the right to receive notice of and to be heard at any proceeding involving a post-arrest release decision in which the right of the victim is at issue. Realignment has yet to fully integrate these victim rights with new policy and practices.

Probation officials were the most optimistic about Realignment and hoped that after a reasonable

transition time and the institutionalization of better rehabilitation programming, counties will be able reduce their jail populations without compromising public safety. Doing so will require the use of risk assessments, better coordination of decision-making and information-sharing among state and county agencies, and more innovative and cost-effective use of alternatives to incarceration. Some counties are succeeding with their new responsibilities and funding, and their success can provide a blueprint for other counties on how to reduce offender recidivism.

Despite the distinctive experience across California's counties, most everyone agreed that changes forced by Realignment were overdue and, if given time, AB 109 will result in a better overall system. But legislative revisions are urgently needed. Stakeholders recommended using an offender's entire criminal history and risk level when determining whether the county or state should supervise, capping county jail sentences at three years, and requiring split sentences (jail combined with probation) for all serious felons, along with several other improvements. Elected leaders seem to be listening and progress is being made on these and several other fixes, as discussed in Part IV. If progress continues, California's Realignment experiment may not only satisfy the courts but also serve as a springboard to rethink the nation's overreliance on prisons.

This article proceeds as follows: Part I presents a brief overview of the history of the Plata litigation, with a focus on overcrowding and prison capacity. Part II presents a brief overview of the Public Safety Realignment Act, including a description of its goals beyond prison crowding, target population, and funding plan. Part III lays out the findings from our stakeholder interviews, with separate sections devoted to probation officers, public defenders and prosecutors, the police, sheriffs, judges, and victims. Our conclusions and stakeholder recommendations are contained in Part IV.

I. Brown v. Plata and Its Preceding Litigation

It has been three years since the U.S. Supreme Court affirmed California's prisoner overcrowding order, spurring an unprecedented overhaul of California's sentencing and corrections system. In Brown v. Plata, the Supreme Court affirmed the three-judge district court's 2009 remedial order requiring the state to reduce its prison population to 137.5% of design capacity within two years. Justice Kennedy's majority opinion concluded that "[w]ithout a reduction in overcrowding, there will be no efficacious remedy for the unconstitutional care of the sick and mentally ill" inmates in California's prisons.

. . . .

The Supreme Court did not actually order prisoner releases. Justice Kennedy wrote, "The order in this case does not necessarily require the State to release any prisoners. The State may comply by raising the design capacity of its prisons or by transferring prisoners to county facilities or facilities in other States." Justice Kennedy conceded that there was "no realistic possibility that California would be able to build itself out of this crisis," in light of the state's financial problems. In 2011, California was facing a daunting $25 billion shortfall and future estimated annual budget gaps of $20 billion.

The state had already spent billions of dollars trying to comply with the federal lawsuits, and spending on inmate medical, dental, and mental health care had more than doubled over the last decade to a projected $2.3 billion annually by 2012. California also spends three times more per inmate on medical care than any other state. Overall, state spending on corrections more than tripled as a share of all state expenditures, rising from 3% in 1980 to nearly 11% ($9.6 billion) in 2011. California's annual spending per inmate was $51,889 in 2011-2012--65% more than the U.S. national average of $31,286.

But despite the state's extraordinary spending on prisons, its return-to-prison recidivism rate is among the nation's highest at 57.8%, far outpacing the national average of 43.3%. As I concluded in my review of the California system, "No other state spends more on its corrections system and gets less."

A. Public Safety Realignment (AB 109): California's "Most Viable Plan"

How could state officials possibly respond to the Court's Plata order? After all, it meant reducing the state's prison population to pre-1993 levels when California had six million fewer residents. The answer to the Plata ruling was the 2011 Public Safety Realignment Act ("Realignment" or "AB 109"), signed by Governor Jerry Brown on April 4, 2011. The core of Realignment's population reduction was transferring responsibility for thousands of non-serious, non-violent, and non-sexual cases ("N3s") to counties through detention and/or supervision. Felons convicted of certain serious, violent, and aggravated sex offenses continue to serve their time in state prison, but sentences for more than five hundred other felony crimes must be served through county jail time or probation. After October 1, 2011, counties must now handle virtually all drug and property crime sentences, which represented 54% of all adults convicted in 2010.

Governor Brown expressed confidence that California's system was prepared for these changes, noting, "It's bold, it's difficult and it will continuously change as we learn from experience. But we can't sit still and let the courts release 30,000 serious prisoners. We have to do something, and this is the most-viable [sic] plan that I've been able to put together."

Governor Brown correctly predicted the immediate reduction in prison populations. During 2012, the first full year of Realignment, total admissions to California prisons declined 65%, from 96,700 admissions in 2011 to 34,300 admissions in 2012. Admissions to California prisons on parole violations decreased by 87%, from 60,300 in 2011 to 8000 in 2012. California went from admitting 140,800 offenders to prison in 2008 to 33,990 in 2012-- nearly an 80% decrease in prison admissions in just four years.

Without a doubt, this is the largest reduction in prison admissions ever undertaken in the United States. In fact, the Department of Justice recently announced a 1.7% decline in the U.S. prison population from 2011 to 2012, marking the third consecutive year of slight decreases. But over half (51%) of the nation's entire prisoner count reduction comes from the 10% decline in California. Excluding the decline in California's prison population, the nationwide prison population would have remained relatively stable during recent years.

But by year-end 2013, California's in-state prison population was about 125,000 inmates, still 16,000 inmates over the population cap set by the courts. In January 2013, California told the district courts it would be unable to meet the 137.5% capacity requirement, stating that "the population reductions currently required by the [Supreme] Court cannot be achieved by means that are consistent with sound prison policy or public safety."

On January 24, 2014, the state requested an additional two years to meet the population reduction deadline. In a clear legal win for Governor Brown, on February 10, 2014 the three-judge panel granted California a two-year extension and ordered the state to reduce the adult prison population to 137.5% of design capacity by February 28, 2016. In a statement, Governor Brown said, "the state now has the time and resources necessary to help inmates become productive members of society and make our communities safer."

From the state's perspective, the population targets are within reach, the state is on the right path in redirecting resources from prison to programs, and Realignment just needs more time to work. But the burden shifted to California's counties is enormous, and how they carry out their newfound obligations will ultimately determine Realignment's success.

The critical question remains: How are counties managing the influx of prisoners and parolees? After all, they have to absorb tens of thousands of diverted prisoners and parolees. Shifting these lower-level offenders to local custody could strain county health care and social services programs further. State budget cuts have already devastated many of the essential programs upon which former prisoners depend, especially for mental health care and alcohol and drug treatment.

II. An Overview of Public Safety Realignment (AB 109)

The Legislature made it clear that Realignment was not intended to be solely a narrow mechanism of compliance with the Plata mandate; rather, Realignment was aimed at the source of the overcrowding problem--getting offenders the help they need so they won't recidivate. AB 109 states that "the purpose of justice reinvestment is to manage and allocate criminal justice populations more cost-effectively, generating savings that can be reinvested in evidence-based strategies that increase public safety while holding offenders accountable."

Theoretically, Realignment is designed to promote rehabilitation and reentry by moving offenders closer to their families and community-based services. Community agencies can more easily access inmates in local jails, building relationships and encouraging inmates to access their services after release. In fact, recognizing that change is best achieved at the local level and that counties are better at rehabilitating offenders than the state is one of the underlying premises of the bill.

The Legislature's underlying hope, as written in the general legislative findings to Realignment, declares that instead of solely adding jail capacity, the Legislature views AB 109 as a "reinvest[ment]" of

resources to support "locally run community-based programs" and evidence-based practices "encompassing a range of custodial and noncustodial responses to criminal or noncompliant offender activity." The legislation further defines evidence-based practices as those "supervision policies, procedures, programs, and practices demonstrated by scientific research."

Each county was required to create a Community Corrections Partnership ("CCP") to develop a comprehensive plan for carrying out AB 109's demands in their local jurisdiction. The legislation placed few limits on how counties could spend their money, and it did not require them to report any results to the state or to measure the outcomes of their programs. Built upon the principle of increased local control, counties are free to rely heavily on their local jails, invest in law enforcement personnel, or choose from a wide variety of less severe (public and private) alternatives, such as electronic monitoring, drug courts, day reporting centers, or split sentencing (a sentence in which the offender serves a reduce jail term followed by probation). As a result of these strengthened partnerships, Realignment is providing the space for fifty-eight coalitions to think about how to do things better in their localities. A study of the counties' first year Realignment spending plans found that they vary tremendously in terms of how their funding is allocated and the issues that they have prioritized.

A. Target Offender Population and Program Funding

California's Public Safety Realignment Act (AB 109) is quite comprehensive. It touches every aspect of criminal case processing from arraignment and bail through discharge from parole. The initial Public Safety Realignment Act was signed into law on April 4, 2011. It is now over eight hundred pages long, and has been clarified and amended six times since its original passage.

While the legislation is complex, it has three basic functions. First, it requires offenders convicted of a low-level felony after October 1, 2011 to serve their sentences locally, rather than in state prison. Low-level offenders are defined as those who do not have a current or prior conviction for a violent, serious, or sex crime--the so-called "non-non-non" ("N3") offenders. California Penal Code §1170(h) defines the crimes that cannot be sentenced to prison, and California Penal Codes §1192.7(c) and 667.5(c) define "serious" or "violent" felony convictions. Virtually all drug and property offenses are now served in county jail. In addition, many officials were troubled by AB 109's definition of "low-level offenders," with many suggesting it vastly understated the seriousness of some crimes included in the original bill. In response to that concern, clean-up legislation (AB 118) was passed just one month after AB 109 was signed, identifying approximately eighty non-violent, non-serious, and non-sexual crimes, and designated them as still punishable by state prison. But many other serious crimes remain punishable only by a jail term, including commercial burglary, most drug crimes, vehicular manslaughter, possession of weapons, identity theft, elder financial abuse, and hate crimes. AB 109 did not release any prisoners or make any changes to the length of sentence; it only stipulated that the sentence must be served in county jail and not state prison.

Second, AB 109 requires counties to supervise low-level offenders released from state prison after October 1, 2011. Prior to AB 109, virtually all offenders who completed their prison sentences were

paroled to their home counties, supervised by state parole agents. Since October 1, 2011, lower-level parolees are supervised by county probation rather than state parole. State parole agents will only supervise individuals released from prison whose current offense is serious or violent, or who are assessed to be mentally disordered or high risk sex offenders. Former parolees are now supervised by probation officers under post-release community supervision (PRCS). To qualify for PRCS, "low-level" means that released inmates: (1) did not serve their just completed prison term for a violent or serious felony, although the inmate could have served a prior prison term for a violent or serious felony; (2) are not classified by CDCR as high-risk sex offenders; (3) are not a third-striker under the state's Three Strikes law; and (4) are not required to undergo treatment by the Department of Mental Health.

By December 2013, just twenty-seven months after AB 109 went into effect, CDCR reported that the parole population had fallen from 132,424 in 2010 to 47,885--a 64% decline, bringing it back to 1987-88 population levels. As a result of this massive downsizing, the CDCR Division of Adult Parole Operations reduced its staff by 45 percent in the first two years post-realignment, with additional layoffs continuing. There is no doubt that California has seen some of the nation's steepest increases in parole populations and is now witnessing, by far, the nation's steepest decreases.

Third, AB 109 prohibits the return of most probationers and parolees to prison for "technical" violations (i.e., violations of the rules of supervision rather than the commission of a new crime). Instead, AB 109 establishes a maximum penalty of 180 days in county jail for technical violators. As of July 1, 2013, county court-appointed hearing officers will decide how to respond to technical violations, and they can use their discretion to impose jail time, refer to community programs, or continue on supervision without sanction--but they can not return the offender to prison. Prior to Realignment, these non-serious technical violators--about 15,400 to 18,000 parolees each year--were sent to prison.

Realignment funding may be one of the most important determinants of its success. The California Department of Finance uses a formula to determine each county's funding level primarily based on how many offenders are projected to be realigned to the counties. Roughly speaking, the Legislature funded Realignment by giving counties about half of the current cost of state prison (which was about $56,000 per year, per offender 2012-13) and parole supervision (about $6,000 per year, per offender). Through AB 109, the Legislature has allocated over $7 billion in the first two years of implementation to assist California's fifty-eight counties in carrying out the legislation's provisions. Counties were initially worried that state funding could be discontinued. But California voters passed Proposition 30 in November 2012, a sales and income tax increase, which guarantees in the State Constitution funding for Realignment going forward. With Realignment funding constitutionally guaranteed, county officials might be more willing to commit to long-term planning, prevention, and non-traditional avenues for minimizing the use of prison.

This infusion of new funding far surpasses any similar allocation for adult offender rehabilitation in California history, and the funding is now guaranteed for the next several years. Critics of Realignment say the money could better be spent on health, education, and mental health programs for people not involved in the justice system. But proponents argue that reducing incarceration has far-reaching ripple effects that benefit everyone. Of course, the extent of any impacts from Realignment depends on how it

is going for local criminal justice agencies, the subject to which we now turn.

III. From Rhetoric to Reality: How Stakeholders View The Impacts of Realignment

California is the largest and most diverse state in the nation, and we wanted our study to represent that diversity. To capture this variability, we first selected counties that differed in crime rates, financial resources, politics, demographics, and pre- and post-Realignment orientation towards the use of incarceration versus community-based options. Within the selected counties, we then interviewed the major criminal justice stakeholders. Between November 2012 and August 2013, we interviewed 125 officials in twenty-one counties. Our interviews took place during the second year of AB 109 implementation. By year two, stakeholders had useful experience with how Realignment was impacting counties. After all, more than 100,000 offenders have had their sentences altered through mid-2013. These offenders used to be under state control and faced prison terms but now remain in local communities where jail is the most severe sanction they confront.

Our interviews were informal, semi-structured conversations usually lasting one to two hours. Our goal was to determine how Realignment had influenced their agency's work and what changes they would make to the law.

Broadly speaking, Realignment gets mixed reviews so far. Our interviews elicited a portrait of counties struggling, often heroically, to carry out an initiative that was poorly planned and imposed upon them almost overnight, giving them little time to prepare.

Kim Raney, then-President of the California Police Chiefs Association, said, "The first year was like drinking from a fire hose," as counties scrambled to cope with an influx of offenders far larger than expected, and with more serious criminal histories and needs. That said, everyone agreed Realignment is here to stay and that the old system was yielding disappointing results and siphoning too many taxpayer dollars from other vital public programs. Those interviewed also agreed that Realignment has the potential to improve the handling of lower-level property and drug felons. But as our conversations revealed, AB 109 has wrought tremendous change in every phase and at every level of the criminal justice system, requiring many painful adjustments. Realignment asks stakeholders to put aside personal agendas and work collaboratively toward a shared goal of reducing recidivism. Although everyone embraces that goal, getting there is proving a monumental and often frustrating challenge, and many unintended consequences of this well-intentioned law are surfacing along the way.

Despite the obstacles, our interviews suggest that even in the early going, counties are experiencing some success. Officials reported collaborating with one another in surprising and unprecedented ways, embarking on jointly funded initiatives, eliminating duplication, and approaching justice from a system-wide perspective, rather than a narrower agency perspective. Realignment has also encouraged counties to take a more holistic view of offender needs, treating them within their family and community contexts.

Overall, many stakeholders expressed a realistic attitude toward Realignment, noting that, when it comes to crime and punishment, pendulum shifts take time and achieving results requires stamina and patience. Realignment represents a titanic policy shift and tremendous opportunity for reform, but it will only deliver lasting benefits if counties can make it work. But while these general perspectives were shared, different agencies voiced very different views about how Realignment is going so far.

A. Probation

Of all the agency staff interviewed, representatives of probation--the workhorse of the criminal justice system, especially under AB 109--spoke with the most unified and positive voice. They unequivocally felt that Realignment gave them an opportunity to fully test whether well-tailored rehabilitation services can keep lower-level felony offenders from committing new crimes and returning to prison. If Realignment is to amount to more than an experimental, emergency response to a court directive over prison crowding, it will depend heavily on how well probation agencies deliver effective programs and services. Probation is, in essence, the epicenter of Realignment, burdened with the massive responsibility--unfair as it may seem--of determining how best to change offender behavior.

With more than $300 million--or 25% of the total AB 109 allocations--flowing into probation in the first year alone,[60] there is no doubt that the long-underfunded agencies are producing positive results. Our interviews showed that across the state, probation agencies have launched pilot projects that, if successful, will significantly strengthen community corrections in California and nationally. One of the most promising options is the Day Reporting Center (DRC), often described as “one-stop” centers where offenders can access educational programs, cognitive behavioral therapy, and employment services, and meet with probation officers. Offenders are assessed for needs and then matched to services that best address those needs. At least twenty-five California counties now have DRCs, virtually all of them receiving some AB 109 funding. Most counties have also expanded their electronic monitoring programs, often coupled with rehabilitation and education programs. Interestingly, private correctional companies operate many of the newer AB 109-funded programs, as they were nimble and flexible enough to quickly develop the variety of programs that local counties deemed necessary.

In addition, nearly all probation agencies reported adopting risk and needs classification instruments to measure an offender’s predicted risk of recidivism and to help target treatment to those most likely to benefit. The adoption of such actuarial tools is fundamental to delivering evidence-based services and has professionalized probation by allowing officials to better triage services and the level of monitoring provided by officers.

While new funding has made new things possible, our interviews confirmed the hard realities and additional burden probation agencies are facing. Above all, probation chiefs expressed frustration with the poor policy and planning that preceded Realignment, lamenting that it all happened far too fast, and that at times, they simply feel overwhelmed. The unanticipated volume of offenders was one problem. State prison officials provided counties with a projection, but the numbers were often inaccurate, sometimes wildly so. For example, Orange County Sheriff Sandra Hutchens said that Orange County

received twice as many inmates as the state Department of Corrections and Rehabilitation had forecast.

The seriousness of the realigned population's criminal backgrounds was also unexpected and remains probation officers' most serious challenge. This issue has caused the most controversy throughout all the agencies: the state had indicated that only non-violent offenders would be placed under local supervision, yet a large number of AB 109 offenders have prior convictions for violent crimes. A recent analysis by University of California Irvine (UCI) researchers found that released prisoners diverted to county probation/PRCS supervision were higher risk than those retained on state parole supervision--exactly the opposite of Realignment's intent. The UCI report concludes, "[C]ounties are receiving some of the most criminally active offenders in the state . . . ."

County officials in the larger counties are feeling the burdens most intensely. Los Angeles (LA) County, for example, operates the largest probation population in the world. Prior to AB 109, LA County was supervising more than 80,000 probationers. AB 109 added about 18,400 PRCS adult felons to LA Probation's caseload in the first two years of Realignment.[63] LA Chief Probation Officer Jerry Powers reported that according to their LS/CMI risk assessment, 67% of the offenders who have been sent to LA Probation by the State for PRCS/county supervision score high risk, and just 3% score low risk.

. . . .

Los Angeles Probation recently reported that the one-year recidivism rate--defined as a return to custody based on a new arrest, conviction, revocation, or flash incarceration (a jail stint of ten days or less imposed for violating probation)--for offenders released from prison to Los Angeles County on PRCS was 60%.

Of course, the State says it provided Los Angeles County with nearly $600 million in the first two years to help deal with the situation--increasing LA Probation's annual operating budget by about 35%. The Department is in the process of hiring 360 new officers to bring officers' caseloads down, but there are still seventy-two offenders for every one probation officer--arguably too high to closely monitor such high-risk offenders. The Department is also in the process of arming more of its probation officers to handle these more serious offenders, along with increasing funding for drug and mental health treatment. Chief Powers is making the unprecedented move to more than triple the number of his armed probation officers, from thirty to one hundred. "It is a natural response to an ever increasing number of higher threat individuals and the operations that go along with supervising them," Powers said in our interview.

Central to the larger issues about Realignment's impact on probation going forward is how this infusion of more serious offenders will change the character and culture of the quasi-rehabilitative role that probation has historically played--and AB 109 funding was supposed to strengthen. Historically, probation has been designed to be the supportive stage of the criminal justice process, relative to arrest, trial, and incarceration. How can a probation officer engage in "motivational interviewing" (a technique to create a greater bond between officer and client, and a key component of evidence-based practices) when the probation officer has a weapon strapped to his or her waist?

Compounding these problems, offenders were shifted to county responsibility well before probation departments and service providers had sufficient staff and programs in place to treat them. Hiring new probation staff was one challenge, given cumbersome county government requirements involving a lengthy process of advertising, interviewing applicants, checking references, and giving preference based on seniority. Similar delays slowed the signing of contracts for services, particularly with agencies that were not already part of the county governance structure or community providers that did not have existing contracts with probation, such as electronic monitoring companies. The accelerated timeframe also deprived counties of time to assess programs described as anchored in evidence-based practices or, once funded, to monitor the quality of services being delivered.

Almost two years into Realignment, probation chiefs said such pressures were easing, and many felt confident in the quality of programs taking root in their counties. In fact, the California State Association of Counties highlighted eleven counties in 2013 that are using their AB 109 funding to help offenders succeed. Examples include Ventura County's Specialized Training and Employment (STEPS) program that helps offenders connect with local employers, Merced County's "All Dads Matter" program which teaches fathers parenting skills and how to reconnect with their children, and Marin County's Recovery Coaches effort, which identifies community mentors to assist offenders with drug, alcohol, and mental health needs. These and dozens of other new and innovative programs are being made possible by AB 109 funding and, over time, will undoubtedly serve as incubator sites and pilot tests for scaling up of successful interventions.

Even the best programs, however, cannot produce results if offenders are not participating in them, and, across the state, the lack of split sentencing remains a problem. Split sentencing is a jail term followed by probation supervision. AB 109 allows judges to have significant leeway to impose any distribution of incarceration and supervision that they deem appropriate. A recent study found that rates of split sentencing varied greatly across counties, but that statewide 75% of all offenders in the first year of Realignment did not receive a split sentence. One of the core principles of evidence-based practices is the combination of custody and aftercare. Without split sentencing, probation officials have no ability to work with offenders or monitor their compliance. If that pattern persists, recidivism rates will remain high. Aware of that likelihood, probation officials support legislative changes that would mandate split sentencing, particularly for the more serious realigned felons most in need of supervision and services.

B. Public Defenders and Prosecutors

Both district attorneys and public defenders believed Realignment had given defense attorneys more leverage in their negotiations with prosecutors, but beyond that issue, they did not agree on much in our interviews. Public defenders, who provide legal representation for indigent defendants, supported Realignment as a long-overdue course correction for a system that relied far too heavily on punitive approaches, especially incarceration. By taking prison off the table for lower-level offenders, Realignment gives public defenders the ability to secure acquittals or obtain appropriate community sanctions for more of their clients. They believe the state's high recidivism rate was caused by its high

incarceration rate and that Realignment will result in better outcomes, particularly for low-level drug crimes.

Despite being pleased with the increased use of Day Reporting Centers, specialized courts, and other community alternatives flourishing under Realignment, public defenders did confess some concerns. The first involved the infrequent use of split sentences, a reflection of many defendants' desire to do flat jail time. Aware that the jails are crowded, offenders know they will be released after doing a fraction of their sentence, and thus avoid further monitoring and the probation conditions that go along with it. Several public defenders were worried, too, about the long-term implications for recidivism reduction if offenders continue to eschew probation in favor of straight time. They want their clients in programs that help them confront their criminogenic problems and reduce the chance they will reoffend, but defendants tend to view things from a more short-term perspective.

Public defenders also identified a chasm between the ideal of Realignment and its reality in many counties, noting that treatment was either unavailable or not intensive enough for the most serious offenders. All of those interviewed agreed the most critical needs were services for sex offenders and the mentally ill, as well as housing and crisis beds.

Finally, public defenders said they lacked sufficient resources to handle their increased workload post-AB 109. Already stretched thin by oversized caseloads, public defenders have been overwhelmed by new responsibilities, mostly undertaken without sufficient new funding under Realignment.

As for prosecutors, they seemed less supportive of Realignment than any other group of stakeholders. While they expressed a willingness to work within the new framework, and acknowledged occasional feelings of cautious optimism, they also shared a strong sense of frustration throughout our interviews. Among their misgivings was the perception that taking prison "off the table" for some very serious, repeat offenders had resulted in less deterrence, less incapacitation, and ultimately less public safety. The police arrest, the detectives investigate, the district attorney files and makes the case, the judge passes sentence, and then, under Realignment, the final outcome of this tremendous resource expenditure is that the offender may get a very short stint in county jail, the prosecutors lamented. Moreover, crowding is forcing early releases from jail. Riverside County Sheriff Stan Sniff said 7,000 inmates were released early in 2012 due to a lack of beds. One prosecutor likened it to a "get out of jail free card" and another said felons were increasingly in a "zone of no consequences." This sense of a poor sentencing payoff was expressed not only by district attorneys but also by police and judges.

Steve Cooley, three-term former Los Angeles County District Attorney, was perhaps the most vocal in his criticism, calling Realignment a "public safety nightmare." Like Cooley, most prosecutors believe that Realignment undermines their ability to keep dangerous offenders off the streets--both newly convicted felons and former parolees. By taking the big hammer of prison out of prosecutors' hands Realignment has made negotiations more difficult, leaving district attorneys with weaker bargaining positions and forcing them to agree to plea bargains carrying shorter sentences.

Prosecutors cite AB 109's handling of offenders who commit "technical" violations as another key

deficiency of the bill. A technical violation of probation or parole is misbehavior by an offender under supervision that is not by itself a criminal offense (e.g., testing positive for drug or alcohol use, contacting a victim, failure to attend treatment). Under Realignment, virtually no technical violator can be returned to prison, a major change from the days when the state parole board sent about 35,000 such violators each year to prison for up to a year. Now, courts must handle the hearings for suspected technical violators, and the most serious penalty is a 180-day jail term, even for those whose backgrounds include serious crimes. As a result, prosecutors said repeat offenders were cycling through the system much more often, and that they must charge serious transgressions as new crimes in order to ensure a dangerous offender receives prison time. Between July 1, 2013 (when the state transferred the revocation process from the state Board of Parole Hearings to the County Superior Courts) and December 20, 2013, there have been over 33,100 parole violations. Out of these violations, only 4,000 (12%) have resulted in a parole petition to the Court requesting revocation to state prison. All other technical violations (29,000 as of January 2014) must be handled locally. Some prosecutors wondered whether Realignment would turn out to be a Faustian bargain, a deal done for present gain without regard for future costs or consequences.

While all prosecutors noted shortcomings of AB 109, some also believe it can spawn needed change and innovative strategies. San Francisco District Attorney George Gascón says Realignment has freed him up to accomplish things not possible under the old state-dominated correctional system. Realignment, he said, challenges those in the criminal justice system to think differently and find new policy solutions to hold offenders accountable and help reduce recidivism. A key virtue of Realignment rests on classic economics: it requires counties to internalize the costs of conviction and sentencing made at the county level--costs previously externalized on state prisons and parole agents. Gascón created a new position, an Alternative Sentencing Planner, to help prosecutors determine which punishment best fits offenders. He also created California's first-ever county Sentencing Commission, which analyzes sentencing patterns and outcomes and will suggest sentencing changes to enhance public safety and offender reentry.

In Los Angeles, the newly elected District Attorney, Jackie Lacey, also expressed a moderate view of Realignment. While acknowledging the serious challenges in the sprawling county, Lacey said, "We've run out of room at the state prisons. We have run out of room at the county jail. . . . Let's peel the lower-risk people off and save room for people who are very dangerous."

C. Police

Police officers walking the beats in cities across California had few positive comments about Realignment. They considered it an unfunded state mandate, imposed on them at a time when they were already facing budget cuts that had led to officer layoffs and expanded obligations. Moreover, unemployment remains high and the fiscal crisis that began in 2008 forced budget cuts in California's social services--the very services offenders need. As Sacramento Police Chief Rick Braziel put it:

> Sacramento had a three-year reduction in crime, but now we've seen a 21 percent increase in violent crime--from assault with a deadly weapon all the way up to

> homicide--compared to last year. . . . We don't see that trend changing, and we expect it to get worse as we see more and more prisoners getting out without supervision, without services, and without jobs. Even if a released prisoner wants to turn his life around, there's no support system.

California's long-term crime decline is reversing, and police said Realignment is to blame. During our interviews, police continually warned of crime increases, and academic studies now confirm their views. A recent study by the nonpartisan Public Policy Institute of California (PPIC) found that crime rates increased significantly during the first year of Realignment (from 2011 to 2012). Property crime continued to drop nationally, but in California it rose nearly 8%, and California's property crime increases were higher than the increases in states whose crime trends were similar to those of California before Realignment. Violent crimes in California also increased by 3.2% in the first year after Realignment, but that increase closely tracks national trends and closely matches the rate of increase experienced by other states that had similar crime rates to California before Realignment. The report finds there is "robust evidence that realignment is related to increased property crime. . . . In particular, we see substantial increases in the number of motor vehicle thefts, which went up by 14.8 percent between 2011 and 2012." Police said they did not need an academic study to tell them what they already knew: more criminals are on the streets and crime is rising as a result.

In addition to coping with rising crime, police said they now have fewer options to control offenders' behavior. When an arrest is made in some counties, offenders are quickly released due to jail crowding. From the police point of view, this means officers have invested valuable resources and completed abundant paperwork with little perceived benefit. Police expressed frustration not only with newly convicted felons being sentenced to jail and promptly set free--"they beat me home," one officer said--but also with the handling of parole violators, who now face few consequences for breaking supervision rules. Police said offenders appeared to be getting bolder as the penalties grew weaker. The revolving door of state prison has become the revolving door of county jail--and it swings faster.

Municipal police agencies provide service to more than three out of four Californians, and their officers make almost two-thirds of all felony and misdemeanor arrests in the state. Despite the importance and reach of these local crime fighters, the potential impacts of Realignment on policing were not well examined by planners, and police departments have not been fully compensated for the extra work AB 109 requires of them. Struggling to cope, many police officers expressed anger and said their concerns had been overlooked.

Specifically, they said Realignment threatened recent progress made through community policing and other problem-solving techniques designed to proactively address crime--strategies they believed had led to California's crime decline over the past few decades. Stretched thin, police departments reported that they can no longer engage in such efforts and, in some cases, no longer respond to calls reporting lower-level crimes.

By far the largest concern expressed by police was the need for a statewide, centralized database of all

the newly-realigned offenders. In the past, an officer who stopped a suspect could check the state parole database quickly to determine his status--and conduct a legal search if the suspect was a parolee. That extra authority often meant the difference between a routine traffic ticket and a drug bust. Now, officers lack that tool, which they said had seriously eroded their effectiveness in controlling crime and apprehending criminals.

D. County Sheriffs

California's sheriffs are responsible for running the county jails, but their role under Realignment extends far beyond custody and basic crime control. As jails have become more crowded with AB 109 offenders, and as both funding and the need for community alternatives have increased, sheriffs have become central figures in offender treatment. In some counties, they are making decisions about who should remain in custody, who should be released pre- and post-conviction, and what community services and sanctions an offender receives, both initially and in response to a technical violation of probation or parole. Many sheriffs are even running their own work release and electronic monitoring programs, very similar to the programs run by probation. Ironically, if the state had given the same discretionary release authority and "relief valve" to prison officials to control inmate populations, California might have avoided the Plata litigation that ultimately led to AB 109.

Sheriffs were divided over the impacts of Realignment. Despite their concerns about glitches and unanticipated consequences, many sheriffs acknowledged that the old system was not working well, that the revolving door between jail and prison was not protecting the public, and that a new approach was needed. As such, sheriffs said they were working more closely than ever with probation departments to develop alternatives to custody so they can keep jails at a constitutionally acceptable capacity. They also are joining forces to create a fuller menu of appropriate treatment, following the principles of evidence-based practices. Sheriffs said they understand the potential benefits of community-based sanctions and services. Orange County Sheriff Sandra Hutchens echoed what we heard from many, noting that, "they are coming home anyway . . . they are our citizens . . . we have seen them before . . . let's see if we can't do something different this time." Collaborating with probation, some sheriffs have created a full continuum of sanctions, ranging from fines to county jail and onto electronic monitoring and discharge. Some questioned this expanded role for law enforcement, but others seemed enthusiastic about the countywide approach.

One key challenge faced by sheriffs is the deterioration of jail conditions as populations swell to accommodate diversions from state prisons. In the quarter preceding the start of Realignment, the average daily jail population was 71,293 but by yearend 2012 it reached 80,136, an increase of approximately 11%. California's large and abrupt change in jail inmates has impacted national statistics. The increase in the national jail population between midyear 2011 and midyear 2012 was 8,923 inmates. According to the U.S. Bureau of Justice Statistics' estimates, 85% of that increase is attributable to California jails.

Because jails are typically not well equipped to house people for extended periods, the increase in

individuals serving long sentences in jails was a concern of many stakeholders. In interviews with public defenders, the one consistent concern was that some clients were suffering in deplorable jailhouse conditions. In particular, some offenders needing mental or medical care have waited weeks before receiving any treatment. Indeed, in talking with jail inmates about such conditions, we found a surprising twist: many offenders, particularly those facing long terms, would prefer to do their time in prison. One reason is that in jails plagued with overcrowding, sheriffs often feel the only option to assure inmate safety and prevent violence is to keep more inmates in lockdown. In the most crowded jails, they are also converting any available space to house inmates. Santa Barbara County recently released a report showing its jail was so cramped for space that part of the jail's basement was converted into inmate housing to provide fifty more beds. As a result of jail crowding, fewer offenders have access to rehabilitation programs and extreme idleness is a problem.

Many sheriffs noted an increase on inmate-on-inmate assaults since AB 109. A recent Associated Press study confirmed their impressions. That study found that "county jails that account for the vast majority of local inmates in California have seen a marked increase in violence since they began housing thousands of offenders who previously would have gone to state prison." They looked at data from the ten counties that account for 70% of California's total jail population and found a surge in jail violence (both toward other inmates and staff) in the year following AB 109. Los Angeles County, the largest jail system in the U.S., experienced a 44% increase in inmate-on-inmate assaults last year compared to an increase of 21% in its inmate populations.

Simultaneously, CDCR saw a 15% drop in inmate-on-inmate assaults within state prisons, while attacks on employees dropped 24% as the prison population dramatically declined. In Fresno County, where inmate-on-inmate fights have increased 48% since Realignment, Fresno County Assistant Sheriff Tom Gattie observed, "The violence is just being transferred to the local facilities from the state system." Many sheriffs observed that Realignment makes the county jail system more like a prison, with more serious inmates serving longer than a year in a facility not built for that purpose.

Orange County also reported a marked increase in contraband and gang activity in the jail since Realignment began, and a recent Grand Jury Report confirms these impressions. County officials' hypothesis is that the sophistication of the AB 109 population accounts for the increase. They believe offenders are intentionally getting "flash incarcerated" (i.e., ten days jail time for technical violations) so they can enter the jail, deliver contraband, and connect with gang members, knowing that they will be released in a number of days.

Some of these conditions seem startlingly familiar, closely mirroring the problems that produced the successful claim in Plata that state prison conditions violated the Eighth Amendment. Has Realignment simply moved these constitutional violations from the state prisons to the county jails? Could the health care problems that led to Plata morph into county-level versions of the state problem? Currently, thirty-seven of California's fifty-eight county jails are operating under either a self-imposed or court-ordered population cap. Given the success of the Plata litigation, a surge of county-level Eighth Amendment suits is likely to emerge. The Prison Law Office has already filed class action lawsuits seeking to remedy Eighth Amendment violations in the Fresno County and Riverside County jails. Sheriffs are trying to

intervene early and address jail conditions before the courts become involved.

New funding provided by the State (AB 900) will help, providing twenty-one of California's fifty-eight counties with dollars for jail construction--enough to add about 10,926 beds. But construction takes time, and no new jails will be completed before 2015.

Some projections show that by year-end 2017, California will have nearly the same number of inmates in correctional custody (jail plus prison) as it did before Realignment. If that proves true, Realignment will not have reduced California's overall incarceration rate but will have only changed the place where sentences are served (i.e., jail instead of prison). But the shift from prison to jail may still be a positive development if jails are better able to deliver locally-based treatment programs and connect offenders to family and jobs, bringing down their recidivism rates. Progressive sheriffs are using their state jail construction funds to build a different type of jail, one that has space for more programming with an eye towards reentry planning. Santa Barbara County Sheriff Bill Brown, for example, is building a new $80 million state-funded jail. But instead of building a traditional brick-and-mortar jail, he is using this as an opportunity to rethink how the physical space can better used to foster offender reentry. He is considering a Reentry Pod where the last months of jail are spent learning job and living skills, and reconnecting with family and community organizations that can assist after release.

Meanwhile, many sheriffs have become highly creative in managing their release authority under Realignment, using risk assessments, and operating their own work furlough programs, electronic monitoring systems, and day reporting centers. Sheriffs also said they are using good time credits and flash incarceration for probation violators. By necessity, their expanded duties under Realignment have turned these elected law enforcement leaders into treatment providers, probation managers, and reentry coordinators. For sheriffs in counties rich in resources and with jail beds to spare, Realignment has been an opportunity to expand and create innovative programming, apply evidence-based practices to reduce recidivism, and absorb a population that they firmly believe is best managed at the local level.

E. Judges

Judges' opinions regarding Realignment varied widely. All of those interviewed voiced frustration that AB 109 was poorly drafted, was undergoing continual revisions, and, given its 800-page length and multiple amendments, required extensive judicial training. Most judges agreed that it would have made more sense to test Realignment on a smaller scale before rolling it out statewide, especially given the lack of time for preparation and planning. Summing it up compellingly, Los Angeles County Judge David Wesley said adjusting to Realignment was "like trying to change the tires on the bus while the bus is moving." All judges also expressed concerns about the added workload under AB 109, particularly given their new responsibility for nearly all parole, probation, and PRCS revocation hearings.

Some judges were strongly opposed to Realignment's new mandates, saying that instead of individualizing sentencing, as intended, AB 109 had done just the opposite. While the judge imposes the final sentence, the actual sentence served is now more a function of jail capacity. Other judges,

particularly those accustomed to drug courts and other collaborative courts, shared probation's more positive view of Realignment. These judges have experience working with probation and community treatment specialists to provide services to offenders with mental health, substance abuse, and domestic violence issues. They have seen evidence that investing in a holistic and intensive community approach, one that is more patient with relapses and not as quick to incarcerate, holds promise. Santa Clara County Judge Steve Manley, a highly respected jurist who presides over drug, mental health, and veteran courts, said Realignment opens the door for judges to not only impose sentences but to actively manage offenders' treatment and compliance post-sentencing. Judge Manley said the coercive power of the court can play a significant role in offender recovery, exerting not just a punitive force but also a therapeutic one.

But collaborative courts are expensive, and not all judges favor them. Some said their counties could not afford to spend so much money on such a small part of their caseloads, noting that serious criminal work accounted for less than 15% of the total cases that came before them. In addition, some judges said their counties simply do not yet have the community-based resources to make such courts work, rendering Realignment appealing in principle but difficult to execute in reality.

One concern many judges shared was the lack of post-custody time and supervision that they could impose on an offender. They worried that they lacked sufficient discretion to ensure that criminals are both properly incapacitated and properly monitored when released. Some judges said the limitations of post-release community supervision do not allow enough time to change criminal behavior and reduce recidivism. For many counties, this situation has become a catch-22: Judges do not have faith in probation to deliver effective programs, so they sentence more and more inmates to straight time (i.e., jail without post-custody programs or supervision). As more straight-time offenders recidivate, probation may be blamed for ineffective programming. But research shows that probation is most effective when it combines custody and aftercare (i.e., split sentencing), and probation officials are not afforded that opportunity when offenders are sentenced to straight time.

Finally and importantly, judges pointed out that while AB 109 was designed to give judges more discretion and more flexibility to individualize sentencing, taking into account risk factors and community alternatives, it has not done that. Rather, AB 109 has undermined their discretion and shifted it outside of the courtroom and into the jails.

Most of the judges we interviewed felt that judicial discretion has been reduced while the sheriff's discretionary authority has increased. Some judges said this increased authority of sheriffs threatens the concept of independent and impartial judges, and raises questions about due process and the separation of powers.

F. Victim Rights and Safety

Virtually every judge and prosecutor we spoke with was concerned about how victims were faring under AB 109. California has long been a national leader in the field of victim rights, and voters further

expanded these rights in 2008 when they approved Marsy's Law, the California Victims' Bill of Rights Act of 2008. It created seventeen distinct rights for victims, including the right to restitution from the offender, to confer with prosecutors, to receive notice of any proceedings related to the case (bail hearings, pretrial release hearings, plea agreement hearings), and to be heard at sentencing. Victims also have a right to be notified when their offender is up for parole or released from jail or prison custody. The state prison system had a rather well developed statewide system to notify victims of their offenders' release and revocation; it was relatively easy with just one statewide system. The state computerized system recorded victim notification wishes and contact information. Judges say it is not clear how these victim rights are being protected post-Realignment. But offenders released from prison to county-level supervision are supervised by local law enforcement agencies, and CDCR no longer has jurisdiction over any person who is released from prison to county-level supervision. All of these procedures need to be recreated at the county level, and they have not been to date. The fifty-eight different county systems have little experience handling these issues, which may be allowing victim notification to fall through the cracks.

Judges also often order victim restitution, no contact restraining orders, and other special probation or parole terms that are designed to protect victim safety. As a greater number of offenders get discharged from supervision, it is unclear who is responsible for collecting restitution or assuring compliance with restraining orders. Crimes that involve fraud, property damage, or injuries caused by drunken driving, for example, often include payments to victims.

The state's prisons had a seamless system for siphoning 50% of the money out of an inmate's prison account--money earned from a prison job or deposition by family or friend--to pay victims for their losses. But now that the N3s are serving their time in county jails, the jails do not have either the in-custody work programs or the administrative structure to collect restitution. At first, county jails did not even have the authority under the Realignment law to take prisoners' money for restitution, a loophole that took more than a year to close. Corrective legislation went into effect on January 1, 2013, giving the counties the authority to collect money from jail inmates, but with few work programs, unclear administrative procedures, and sheriffs preoccupied with crowding, our research found that collecting restitution often does not happen. If jailed inmates are released without any probation supervision, there is no mechanism to collect victim restitution when the offender returns to the community. Judges and prosecutors told us that a critical oversight of AB 109 was that no one addressed these victim issues.

There is even more urgency to address victim issues now that judges have taken over revocation hearings. Victims of alleged violations have a state constitutional right to attend hearings and present testimony. California law allows victims to provide victim impact statements and requires judges to consider those statements in making sentencing decisions. But judges said they are not sure who is giving victims notice of such hearings in case they wish to participate. With sheriffs now making jail release decisions more frequently, offenders are often being released without split sentences and without victim notification.

The CDCR had an automated system that allowed victims, family members of victims, or witnesses who testified against the offender to request to be notified of the release, parole hearing, death, or escape of

their offender. Under state parole supervision, there was also a statewide database for checking criminals' status on the street. Local police chiefs are apprehensive because there is no similar statewide system for offenders on county probation.

California used to have some of the strongest victim rights of any state, but judges worry that AB 109 is diluting some of these long-fought-for legal rights. A few counties are trying to rectify these oversights; for example, the Calaveras County DA's office is adding a new victims' services program coordinator to its staff. But judges say that California's victim rights are not being upheld under Realignment, and they anticipate litigation in this area.

IV. Getting It Right: Stakeholder Consensus Recommendations

In just two short years, Realignment has changed the face of California's criminal justice system and everyone agrees that it is here to stay. County stakeholders are basically on board, as they know the previous system was failing on almost every dimension, and that a new approach was needed. Although most thought AB 109 was rolled out too fast and still needs major tweaks, those interviewed endorsed the law's foundation, with counties accepting responsibility for lower-level offenders and the state handling the most serious and violent criminals. Surprisingly, nobody we interviewed said Realignment should be repealed.

But stakeholders felt that Realignment should not merely push state prison ills onto county governments and that the Legislature needed to urgently fix some major flaws. The most commonly recommended changes were to: (1) allow an offender's entire criminal history and risk level to be considered when determining whether the county or the state will supervise a parolees; (2) cap county jail sentences at a maximum of three years; (3) permit certain repeated technical violations (e.g., violations of domestic restraining orders, sex offender restrictions) to be punished with a prison sentence; (4) create a statewide tracking database for offenders under state and county correctional supervision; (5) collect data at the individual- and county-level to determine what is working and what is not; and (6) require that all felony sentences served in county jail be split between jail time and mandatory supervision, unless a judge deems a split sentence unnecessary.

The Legislature and Governor Brown seem to be listening. In 2013, California State Senator Ted Lieu became particularly concerned with the number of sex offenders who were cutting off their electronic monitoring devices and facing few consequences (since technical violations could not be returned to prison). In explaining the need for new legislation, Lieu said:

> An increasing number of California parolees are cutting off their GPS monitoring devices because they're convinced little will happen to them. . . . Cutting off an ankle bracelet is a parole violation, which can incur 180 days in county jail. When you count in the overcrowded county jails and other factors, sometimes they don't serve any time, or sometimes just a few days.

Senate Bill 57 was signed into law by Governor Jerry Brown and requires convicted sex offenders who cut off their court-ordered GPS bracelets to be returned to jail for a minimum of 180 days. SB 57 went into effect January 1, 2014. Of course, such mandatory penalties, while perhaps warranted, could worsen jail crowding.

In January 2014, State Assembly member V. Manuel Pérez introduced the Realignment Omnibus Act of 2014 (Assembly Bill 1449) to incorporate this study's first three major recommendations. Attorney General Kamala Harris is working with law enforcement officials to establish a statewide offender database and recently launched the California Recidivism Reduction and Re-Entry initiative to disseminate best practices. And on January 9, 2014, Governor Brown released his proposed state budget for 2014-15 and included several of the Realignment changes practitioners were hoping for. According to the Sacramento Bee, the budget proposes $500 million more for jail facilities to ease overcrowding, provides an additional $100 million for court operations to support the expanded duties of the judiciary under AB 109, and importantly, proposes legislation to require county jail felony sentences to be split between incarceration and mandatory supervision, unless the court finds it in the interest of justice not to do so.

That last item is extraordinarily important. Though AB 109 gives the Courts the power to split sentences, some judges have declined to do so. If passed, this provision creates a right to a split sentence (unless the court makes a special finding), releasing offenders to the supervision of Probation and optimally involving them in rehabilitation programs that will help reintegrate them into the community. To support expanded community supervision, the proposed budget expands funding for mentally ill offenders, and county substance abuse and reentry programs. And to ease the challenges that long-term inmates are posing for sheriffs, inmates sentenced to more than ten years in county jails under Realignment would again serve their time in state prison.

These recommendations and budget adjustments should reduce the burdens Realignment has placed on the counties, and allow them to concentrate on those offenders evidence has shown to be most amendable to evidence-based programs. Most county officials believe Realignment can work--if the state will work with them to tweak the flaws in the original legislation. And now that the Court has given California two more years to fix its prison crowding problem, counties are more optimistic about long-term criminal justice reform.

V. Conclusions

Over the two years since Realignment began, California's justice system has changed in ways that are unprecedented in both depth and scope. The reallocation of responsibility across the major components of California's corrections system has been nothing short of remarkable, as thousands of individuals have been shifted from the state's jurisdiction to counties' jurisdictions. Only time will tell whether California's Realignment experiment will fundamentally serve as a springboard to change the nation's overreliance on prisons. It is an experiment the whole nation is watching.

On August 12, 2013, Attorney General Eric Holder delivered the keynote address to the American Bar Association meeting in San Francisco. He announced that the federal government was committed to reducing the nation's bloated prison population. He directed all federal prosecutors to exercise more discretion toward the harsh sentencing of low-level drug crimes. At the time of his speech, 47% of all inmates in the Federal Bureau of Prisons were held on drug offenses. Mr. Holder said, "We need to ensure that incarceration is used to punish, deter and rehabilitate--not merely convict, warehouse and forget." He urged new approaches for the handling of lower-level drug offenders whom he said were "best handled at the local level." He directed federal prosecutors across the country to develop new guidelines and programs to divert prisoners to community sanctions instead of prisons.

Given that his speech was given in San Francisco, it is surprising that the Attorney General did not use the opportunity to look into the future using California's experiment in prison downsizing to see how such a program might play out. Just 8.7% of California's prisoners are now held on drug crimes, down from 20% in 2005. California has cut the number of prisoners in state facilities for drug convictions in half during the last two years.

It is one thing to urge prison downsizing, but such pronouncements will be hugely counterproductive if policymakers act without giving serious thought to how communities will deal with all the offenders who are released. The United States has "downsized" before--just recall the disastrous consequences of the nation's deinstitutionalization of the mentally ill. It is easy to implement policies of no-entry that drive down incarceration rates. California has done that. The much harder challenge is to increase prisoner re-entry. California is just starting to work on that.

The criminal justice system is complicated and has a lot of moving parts, and actions in one part of the system can cause unanticipated and harmful effects elsewhere. The stakeholders interviewed here, and the lessons California is learning about the impacts of downsizing the nation's largest prison system are hugely instructive.

Realignment represents an extraordinary policy shift and opportunity for reform, but the devil will be in the details. It will only produce true and lasting reform if counties are able to make it work. If we fail to listen to these expert "voices from the field," we will likely misstep. If we listen and follow their on-the-ground experiences and advice, we might just begin--step-by-step, decision-by-decision--to create a criminal justice system that better protects victims, does not overburden taxpayers, and facilitates offender reintegration back into society.