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

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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.

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All remaining errors are, of course, my responsibility.

INTRODUCTION

Modern civil rights injunctive practice turned fifty last year. It was in 1955 that the Supreme Court, in its second opinion in *Brown v. Board of Education*, instructed four federal district courts "to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."[1] It was, in ways so many have noticed, an ignoble beginning: Ongoing jurisdiction in the district courts stemmed directly from the Court's reluctance to take the desegregation bull by the horns, a reluctance that had devastating implications for both cessation and remediation of Jim Crow injuries.[2]

Yet the procedural choice the Supreme Court made in *Brown II* was also one that held out tremendous promise. *Brown II* authorized district judges to assess the need for, order, and oversee sweeping changes not only to schools but to the full range of important governmental institutions. The federal courts' own decentralization made it possible for them to individuate application of law to fact and to enter injunctions tailored to address particular or even unique circumstances, institution by institution. If there were lawyers to bring the cases, the wide dispersion of offending governmental structures would not pose a barrier to racial reform. And once those lawyers began to see real success in the task of desegregating American governmental structures,[3] they (and others, of course, but the overlap is important) expanded their ambitions to encompass other kinds of reform as well. They began to bring—and win or settle—cases from a variety of settings. Of particular interest here, civil rights lawyers were successful in obtaining the first federal court orders governing general prison and jail conditions in the early 1970s.[4]

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1 349 U.S. 294, 301 (1955).

2 *See generally* JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION (1984) (arguing that more forceful, less "deliberate" remedial measures would have integrated public schools more effectively); J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961) (describing difficult task of district judges who attempted to desegregate southern schools with only nominal backing of Supreme Court).

3 Progress was slow and did not begin in earnest until passage of the Civil Rights Act of 1964, but at long last in the late 1960s, desegregation began to make real inroads. *See, e.g.*, GARY ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT (1969) (describing increasing integration in public schools beginning in late 1960s); HOCHSCHILD, *supra* note 2, at 26–31 (same).

4 For example, court orders reformed jails and prisons in the following cases: Holt v. Sarver, 300 F. Supp. 825, 828 (E.D. Ark. 1969); Holt v. Sarver, 309 F. Supp. 362, 365–66 (E.D. Ark. 1970) (Arkansas prison litigation), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Brenneman v. Madigan, 343 F. Supp. 128, 133 (N.D. Cal. 1972) (discussing preliminary

The conventional wisdom that has developed declares this history essentially closed; institutional reform litigation is, as many see it, "something that is over and done with."[5] If this were so, the topic nonetheless might merit examination, but its interest would by now be primarily historical, or maybe sentimental. I establish in this Article that the conventional wisdom is not true. In a previous essay in 1999, I began critical examination of the conventional story told about past and present civil rights injunctive litigation. Looking at prison and jail court orders in particular, but suggesting that these shed light on other flavors of institutional reform cases, I argued that the orders themselves have always been less the result of heroic judging[6]—the main interest of most theorists of structural reform litigation—than of a process in which prison and jail administrators, state and local counsel, prisoners' rights lawyers, inmates, and judges all play crucial roles.[7] Accordingly, the increasing conservativism of the federal bench has not been as devastating to civil rights injunctive practice as a more jurocentric view might predict. And I suggested that, indeed, court-order litigation about jails and prisons is not a relic but a continuing legal practice.[8] More broadly, I submitted (though I did not develop) that in area after area of public law, litigation practice has refused to conform to the account of decline. Not only have old cases retained their important policy influence, but new cases continue to be filed and new orders entered, both by consent of the parties and

order of 1971 in Alameda County, California jail litigation); Rhem v. McGrath, 326 F. Supp. 681, 682, 691 (S.D.N.Y. 1971) (Manhattan jail litigation); Jones v. Wittenberg, 323 F. Supp. 93, 95, 100 (N.D. Ohio 1971) (litigation regarding Lucas County Jail in Toledo, Ohio), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); Taylor v. Perini, 413 F. Supp. 189, 194–97 (N.D. Ohio 1976) (Ohio prison litigation reprinting 1972 order); Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 690 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974) (Suffolk County (Boston), Massachusetts jail litigation); Battle v. Anderson, 376 F. Supp. 402, 407, 420 (E.D. Okla. 1974) (Oklahoma prison litigation). For a list of more limited but earlier jail and prison orders see notes 24 & 27 *infra*. For a description of some of the differences between jails and prisons, see text accompanying notes 87–89 *infra*.

[5] ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT 10 (2003) (referring to belief of other legal scholars).

[6] *Cf.* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 90 (1978).

[7] Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2009–30 (1999) [hereinafter Schlanger, *Beyond the Hero Judge*]; *see also* David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1021 (2004) (dividing commentators on institutional reform litigation into "unilateralists" who focus on judges and "multilateralists" who look at other participants as well). For discussion of the quite different dynamics of inmate damage actions, see Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003) [hereinafter Schlanger, *Inmate Litigation*].

[8] Schlanger, *Beyond the Hero Judge*, *supra* note 7, at 2032–33.

after litigation. New arenas of litigation have emerged, following their own trajectories and generating their own topic-specific literature.[9]

This Article more definitively refutes the conventional wisdom. It presents a longitudinal account of court-order litigation involving jails and prisons, and addresses that litigation's life cycle in detail. Examining evidence from the early 1980s to the present, I analyze the changing incidence and nature of prison and jail court orders. Using both systematic data and more qualitative evidence, I establish that, at least as to correctional court orders, the claim that there was a decline in the reach of court-order regulation in the 1980s and 1990s is simply wrong. In both jails and prisons, as of the mid-1990s, new court orders continued to be entered all over the country, and old orders continued to regulate many conditions of jail and prison life. Rather than a 1980s to 1990s decline, we see a long-standing plateau. Thus the conventional story of the demise of public law injunctions in the 1980s misses the continuing strength of injunctive practice during that time. (I would speculate that the situation is similar in other types of civil rights injunctive litigation, as well.)

In 1996, however, Congress intervened. The Prison Litigation Reform Act (PLRA)[10] made old correctional court orders harder for plaintiffs' counsel to sustain and new ones harder to obtain. The conventional wisdom that court-order practice was on its last legs in the mid-1990s would suggest that the PLRA's impact has been small, because its target had already been so diminished. Indeed, several scholars have expressed this view.[11] But this Article demonstrates that, to the contrary, the 1996 congressional intervention of the PLRA significantly constrained correctional court-order practice. I further demonstrate that competing explanations likely cannot account for the decline in jail and prison court orders indicated in the U.S. Department of Justice's 1999 and 2000 correctional censuses.

Still, even after the PLRA's full implementation, I do not propose (and the data do not support) that the PLRA has shut down correctional court-order practice. Although the PLRA has decreased both the stock and flow of orders, it has by no means eliminated them. Just as before, prison and jail court orders continue to be sought and entered. Even today, ten years after passage of the PLRA, the civil rights injunction is more alive in the prison and jail setting than the

[9] *See id.* at 2034–35 (listing areas of ongoing court-ordered reform).

[10] Pub. L. No. 104-134, §§ 801–10, 110 Stat. 1321, 1321-66 to 1321-77 (1996) (codified at 11 U.S.C. § 523 (2000); 18 U.S.C. §§ 3624, 3626 (2000); 28 U.S.C. §§ 1346, 1915, 1915A, 1932 (2000); 42 U.S.C. §§ 1997a–1997h (2000)). The PLRA was part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

[11] *See infra* notes 62–63 and accompanying text.

conventional wisdom recognizes. And by implication, in arenas in which no such congressional intervention has occurred, one might expect to see still more continuity between court-order practice now and in the 1980s.

Several other revisionist accounts have similarly suggested that structural reform litigation flourished in the 1990s and (putting the PLRA to one side) continues to thrive today. They have gone further, however, and argued that injunctive litigation today remains very similar to that of the 1970s. This revisionist story too is incorrect, at least for correctional court orders. The conventional view that court-order practice has died on the vine, though wrong (as the revisionists and I agree), came from *somewhere*. It may have been founded in part in academic fashion; the fading novelty of court-order regulation made it less attractive for articles, less noteworthy when it occurred, and so on. But there was an important real shift as well. Although, in prison and jail court orders, the 1980s and early 1990s did not see a decline in the incidence of regulation via order, there was in that time a transformation in civil rights injunctive practice from what might fairly be described as a "kitchen sink" model to something much more precise. I demonstrate this shift in prison orders, and suggest that it occurred less as a result of a top-down Supreme Court doctrinal diktat than of more diffuse forces. In addition to the obvious increasing conservativism of the federal bench, these included: increasing general skepticism about claims of causation; the increasing prevalence of large pro bono firms in the cases; and the salience, as models, of a handful of cases in which the litigation was extraordinarily comprehensive. These trends predate the PLRA.

In sum, I argue that contrary to prior accounts, correctional injunctive practice did not die over the 1980s and 1990s but was rather transformed. In its new form, however, injunctive practice continued to flourish. In 1996, the PLRA shocked this stable system, causing a significant reduction in the volume of both new and old court-order regulation. There has not been any further notable shift in the nature of injunctive practice.

At the end of the day, the civil rights injunction remains stronger than conventional wisdom would have it. But why should anyone care? For several reasons. First, court orders are an influential government output—indeed, they have been one of the primary vehicles by which litigation has driven social change. So, like statutory or administrative interventions, they deserve study. This is self-evidently true for anyone interested in courts. It is equally true for anyone interested in the institutions subject to court order. As institutional reform practice has survived and matured, court orders, whether born

of defendants' consent or after a contested litigation, have formed an important type of defendant-specific regulation. In requiring or forbidding specified policies and practices, court orders are a major part of the regulatory backdrop against which many types of governmental and nongovernmental actors operate.[12] So for each type of institution that faces a real risk of court-order regulation—including, for example, schools[13] jails and prisons, housing authorities,[14] child welfare systems,[15] unions,[16] and employers[17]—those interested in understanding how these institutions actually work must get past the myth of court order decline in order to understand the reach and impact of this form of regulation, and how it is changing over time. In addition, for jails and prisons more particularly, the stratospheric growth in American incarceration[18] makes it ever more important to understand the accountability and regulatory mechanisms by which we as a polity attempt to control jail and prison administration.

Second, to some extent, progressive scholars and policymakers have thought it relatively low cost to allow conservatives to attack injunctive litigation. After all, if something is already dead, why expend any political capital defending it? For example, the Clinton

[12] In correctional settings at least, court-order litigation contrasts sharply with more individual inmate litigation, which has typically made its mark on jail and prison life and administration more indirectly, by requiring defendants' attention and response, threatening money damages, and creating space for inmate lawyering. Schlanger, *Inmate Litigation*, *supra* note 7, at 1664–90.

[13] For a database of school cases, see Am. Cmtys. Project, Desegregation Court Cases and School Demographic Data, http://www.s4.brown.edu/schoolsegregation/desegregationdata.htm (last visited Feb. 28, 2006).

[14] *See, e.g.*, 2 URBAN INST. METRO. HOUS. & CMTYS., BASELINE ASSESSMENT OF PUBLIC HOUSING DESEGREGATION CASES: CASE STUDIES (2000), *available at* http://www.huduser.org/publications/pubasst/baseline.html (listing cases).

[15] *See, e.g.*, Nat'l Ctr. for Youth Law, Foster Care Reform Litigation Docket (2000), http://www.youthlaw.org/fcrldocket2000.pdf (listing and describing cases).

[16] *See* JAMES B. JACOBS, MOBSTERS, UNIONS AND FEDS: THE MAFIA AND THE AMERICAN LABOR MOVEMENT 143–45 tbl.8-1 (2005) (describing cases); James B. Jacobs, Eileen M. Cunningham & Kimberly Friday, *The RICO Trusteeships After Twenty Years: A Progress Report*, 19 LAB. LAW. 419, 453–56 tbl.I (2004) (same).

[17] The "news archive" of the EEOC's website, http://www.eeoc.gov/press/index.html, includes descriptions of many class action-type court orders. *See, e.g.*, Joint Motion for Entry of Consent Decree, EEOC v. Mitsubishi Motor Mfg. of Am., No. 96-1192 (C.D. Ill. June 23, 1998), *available at* http://www.eeoc.gov/policy/docs/mmma.html.

[18] As of 2004, our jails and prisons incarcerated over two million people on any given day, PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 208801, PRISON AND JAIL INMATES AT MIDYEAR 2004, at 1 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf, and many millions more over the course of a year. (No authoritative annual figure is available, but for one recent estimate of over thirteen million people annually, see Comm'n on Safety and Abuse in America's Prisons, Frequently Asked Questions, http://www.prisoncommission.org/faq.asp (last visited Mar. 16, 2006).) The total incarcerated population is over four times what it was in 1980. *See* Schlanger, *Inmate Litigation*, *supra* note 7, at 1583 tbl.I-A.

Justice Department generally supported the PLRA with only minor cavils.[19] But if, as I argue, civil rights injunctive litigation is far from dead, that should incline those in agreement with the plaintiffs' goals—which are most often, though by no means always, progressive[20]—to fight its curtailment with much more vigor. This point is especially relevant now, as Congress considers the Federal Consent Decree Fairness Act proposed to implement restrictions similar to the PLRA's in other topical areas of governmental injunctive litigation.[21] I argue below that the PLRA has had a sharply constrictive impact on the amount of court-order regulation of jails and prisons; there is every reason to expect that the Consent Decree Fairness Act, should it pass, would operate similarly. I also argue below that court orders have had an enormous impact on the nation's jails and prisons, through the regulating they accomplished, their indirect effects, and the shadow they cast. Again, there is every reason to think that this conclusion applies in non-corrections arenas as well. Accordingly, if this Article is correct about the continuing prevalence of prison and jail orders, the stakes of the proposed congressional "reform" are extremely high. Progressives should think long and hard before they allow this statute or others like it to pass without a strenuous fight.

The Article proceeds as follows. Part I briefly sketches the early history of jail and prison court orders, and then describes the conven-

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[19] *Prison Reform: Enhancing the Effectiveness of Incarceration*: *Hearing on S. 3, S. 38, S. 400, S. 866, and H.R. 667 Before the S. Comm. on the Judiciary*, 104th Cong. 14 (1995) (testimony of Assoc. Att'y Gen. John Schmidt); *see also* Remarks on Vetoing the Departments of Commerce, Justice, and Related Agencies Appropriations Act, 1996, and an Exchange with Reporters, 2 PUB. PAPERS 1908 (Dec. 19, 1995) (veto, by President Clinton, of first version of appropriations bill (H.R. 2076) that included PLRA, listing objections without mention of PLRA); Statement on Signing the Omnibus Consolidated Rescissions and Appropriations Act of 1996, 1 PUB. PAPERS 636 (Apr. 26, 1996) (no mention of PLRA).

[20] For examples of conservative civil rights injunctive litigation, see Settlement Agreement and Release, Lawrence v. Saenz, No. Civ-S-04-1723 (E.D. Cal. Dec. 27, 2004) (available via PACER and on file with author) (settling lawsuit brought by Christian state employee after he was forbidden to post political and religious materials in his workplace, including bumper sticker opposing same-sex marriage); Press Release, Alliance Def. Fund, Cal. Dep't of Soc. Servs. to Employee: Feel Free to Express Yourself . . . Unless We Don't Like It (Aug. 23, 2004), http://www.alliancedefensefund.org/news/story.aspx?cid=2783 (announcing filing of *Lawrence v. Saenz* complaint and describing its basis); Tex. Educ. Agency v. Leeper, 893 S.W.2d 432, 433, 446 (Tex. 1994) (affirming judgment of trial court requiring Texas to allow homeschooling, though reversing injunction enforcing that judgment, because "[t]here is no indication . . . that defendants will attempt to contravene the district court's judgment, or ours").

[21] Federal Consent Decree Fairness Act, S. 489, 109th Cong. (2005) (introduced March 10, 2005 by Senator Lamar Alexander (R-TN)); Federal Consent Decree Fairness Act, H.R. 1229, 109th Cong. (2005) (introduced March 1, 2005 by Representative Roy Blunt (R-MO)).

tional wisdom that institutional reform litigation is moribund along with the revisionist claim that institutional reform litigation shows essential continuity with its 1970s incarnation. Part II sets out changes over time in the amount of court-order regulation, and discusses those changes' causes. Part III then analyzes the changes in the *type* of injunctive regulation and the litigation process in which orders are obtained.

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'

[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,

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-

[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

[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).

C. Revisionism: Reports of the Death of the Structural Reform Injunction Are Greatly Exaggerated

The conventional wisdom just laid out makes sense of the sharp drop-off in scholarly interest in civil rights injunctions between the 1980s and the 1990s, when the stream of books and major law review articles slowed to a trickle. People are more interested in live techniques of seeking social change than in approaches that have faded in importance. Yet there has been a recent resurgence of scholarly interest in institutional reform litigation. Alternative stories about the litigation's life cycle have begun to emerge. Thus a recent book by Ross Sandler and David Schoenbrod discusses what its authors see as the extremely problematic practice of "democracy by decree" very much in the present tense, suggesting that "academic interest may have waned, but the incidence and effect of institutional reform litigation have not. . . . New decrees get issued, piling up on the old, few of which are actually terminated."[64] Sandler and Schoenbrod find continuity in injunctive practice not only in the volume of regulation but in its nature: The case studies they offer to illuminate the ills existing in public law litigation span the 1970s, 1980s, and 1990s, and those ills are described in the present tense.

Like Sandler and Schoenbrod's book, another recent account of structural reform litigation, by Charles Sabel and William Simon, takes issue with the trajectory traced by the earlier conventional wisdom, concluding that institutional reform litigation has not faded away. Instead, Sabel and Simon write of the "protean persistence of public law litigation":[65]

> [D]espite decades of criticism and restrictive doctrines, the lower courts continue to play a crucial role in a still-growing movement of institutional reform in the core areas of public law practice [Abram] Chayes identified: schools, prisons, mental health, police, and housing. . . . There is no indication of a reduction in the volume or importance of Chayesian judicial activity.[66]

Thus, Sabel and Simon share with Sandler and Schoenbrod a revisionist view of public law litigation as a vital contemporary phenomenon, similar to its 1980s presence. Where Sandler and Schoenbrod find almost nothing to praise about their topic, however, Sabel and Simon are very positive. And where Sandler and Schoen-

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[64] SANDLER & SCHOENBROD, *supra* note 5, at 10–11. *See also* Zaring, *supra* note 7, at 1020 (stating that institutional reform litigation "remains a vibrant and active part of the law, governing a variety of different types of local institutions").

[65] Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1021 (2004).

[66] *Id*. at 1018–19 (referring to Chayes, *supra* note 23).

brod's story is one of continuity, not only in volume and importance but in other crucial remedial features, Sabel and Simon offer a description of historical evolution, even ascent. The latter argue that injunctive civil rights practice has grown more effective over time as practitioners have shifted structural remedies "away from *command-and-control* injunctive regulation toward *experimentalist* intervention," which "combines more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability."[67] Still, the impression Sabel and Simon give is that such change is limited to the nature of the remedial regimes established by injunctive litigation; they do not report many discontinuities apart from the purported shift towards "experimentalism."[68] Thus, Simon and Sabel's article and Sandler and Schoenbrod's book share a view of stability in much that is essential to civil rights injunctive practice.

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To summarize these descriptive accounts of court-order practice over time, there are two versions extant, each producing testable hypotheses. The first, conventional story is one of decline; it suggests that court-order intervention in governmental institutions peaked in the 1980s and lessened through the 1990s, and that for jail and prison practice in particular, the fact that the 1996 PLRA both enabled defendants to get out of old court orders more easily[69] and hindered

[67] *Id.* at 1019.

[68] For example, in their fairly extensive discussion of prison and jail court orders they mention only two other changes over time: A footnote (citing an earlier, unpublished version of this Article) briefly states that it appears that prison orders are covering fewer topics than they did twenty years ago, and a sentence in text reports (without citation) that medical care has grown to be a more common topic than overcrowding in prison-regulating orders. *Id.* at 1038 n.67, 1052. The changes in topic number are discussed *infra* Part III.A. The medical care point seems to be erroneous; at least in the census topic data, medical care has not outpaced overcrowding. In 2000, 14% of the total prison population was housed in facilities that reported a crowding order; 6% of the total prison population was housed in facilities that reported a medical care order. Even medical and mental health care *together* only barely outranked crowding as a court-order regulated topic. In jails, the Bureau of Justice Statistics did not ask about mental health orders, but 17% of the jail population was housed in facilities with medical care orders, compared to 28% in facilities with crowding orders. The results are similar when calculated by facility, rather than by population. *See* Margo Schlanger, Technical Appendix to Civil Rights Injunctions over Time, http://schlanger.wustl.edu [hereinafter Technical Appendix].

[69] 18 U.S.C. § 3626(b)(3) (2000) requires courts to grant defendants' motions to terminate existing injunctions unless the court:

> makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that

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.

II
COURT-ORDER REGULATION OF JAILS AND PRISONS OVER TIME

Understanding nearly anything about court-order regulation poses significant challenges. As with all types of litigation, the cases do not necessarily lead to reported decisions. Indeed, because, like most categories of cases, they are likely to settle, they may well not lead to any judicial decisions at all, but rather to negotiated court orders that are completely unobservable by ordinary case research methods. The opinions compiled in law reporters are therefore limited sources; the reporters contain the relevant decision rules but not anything like the universe of cases. Other reasonably available information—primarily case study literature—mostly describes unusually large and contentious cases.[71] The resulting "problem of the worst

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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

orders in Arkansas prison system, Louisiana's Orleans and Jefferson Parish jails located in New Orleans and nearby suburban area, respectively, and Baltimore City Jail); STEVE J. MARTIN & SHELDON EKLAND-OLSON, TEXAS PRISONS: THE WALLS CAME TUMBLING DOWN (1987); WILLIAM BANKS TAYLOR, BROKERED JUSTICE: RACE, POLITICS, AND MISSISSIPPI PRISONS, 1798–1992 (1994); LARRY W. YACKLE, REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM 31 (1989); John V. Baiamonte, Jr., Holland v. Donelon *Revisited: Jail Litigation in Jefferson Parish, Louisiana, 1971–1991*, 70 PRISON J. 38 (1990); Michael J. Churgin, *Mandated Change in Texas: The Federal District Court and the Legislature*, *in* NEITHER ANGELS NOR THIEVES: STUDIES IN THE DEINSTITUTIONALIZATION OF STATUS OFFENDERS 872 (Joel F. Handler & Julie Zatz eds., 1982) (examining relationship between judicial decrees and legislation in context of Texas juvenile justice system); Fred Cohen & Sharon Aungst, *Prison Mental Health Care: Dispute Resolution and Monitoring in Ohio*, 33 CRIM. L. BULL. 299 (1997); Columbus B. Hopper, *The Impact of Litigation on Mississippi's Prison System*, 65 PRISON J. 54 (1985); G. Larry Mays & William A. Taggart, *The Impact of Litigation on Changing New Mexico Prison Conditions*, 65 PRISON J. 38 (1985); Daniel R. Pinello, Palmigiano v. Garrahy *Case Study*, *in* REMEDIAL LAW: WHEN COURTS BECOME ADMINISTRATORS 97 (Robert C. Wood ed., 1990) (examining Rhode Island prison litigation); Judith Resnik & Nancy Shaw, *Prisoners of Their Sex: Health Problems of Incarcerated Women*, *in* 2 PRISONERS' RIGHTS SOURCEBOOK: THEORY, LITIGATION, PRACTICE 319 (Ira P. Robbins ed., 1980) (includes extensive discussion of *Todaro v. Ward*'s reform of health services at New York's Bedford Hills women's prison); Ted S. Storey, *When Intervention Works: Judge Morris E. Lasker and New York City Jails*, *in* COURTS, CORRECTIONS, AND THE CONSTITUTION, *supra* note 42, at 138, 166; Susan P. Sturm, Note, *"Mastering" Intervention in Prisons*, 88 YALE L.J. 1062 (1979) (describing and analyzing role of masters, in particular in Rhode Island prison litigation); Susan Sturm, *The Rhode Island Prison Decree*, *in* DAVID W. LOUISELL ET AL., CASES AND MATERIALS ON PLEADING AND PROCEDURE 1243 (6th ed. 1989); Bert Useem, Crain*: Nonreformist Prison Reform*, *in* COURTS, CORRECTIONS, AND THE CONSTITUTION, *supra* note 42, at 223 (examining court-ordered reform in West Virginia).

Studies that look at more than one litigation, but include extensive and useful information on particular prison or jail cases include: JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS (1993); MARK T. CARLETON, POLITICS AND PUNISHMENT: THE HISTORY OF THE LOUISIANA STATE PENAL SYSTEM (1971); JOHN J. DIIULIO, JR., GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT (1987) (comparing management of Texas, California, and Michigan prison systems); FEELEY & RUBIN, *supra* note 51 (including case studies of prison litigation in Arkansas, Texas, "Old Max" maximum security prison in Colorado, United States Penitentiary at Marion, Illinois, and California state court litigation about conditions in Santa Clara County jails); JACOBS, *supra* note 38 (case study of Stateville, Illinois's largest maximum security prison); FRANK R. KEMERER, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY (1991); PAUL W. KEVE, THE HISTORY OF CORRECTIONS IN VIRGINIA (1986); DAVID M. OSHINSKY, *"Worse than Slavery"*: Parchman Farm and the Ordeal of Jim Crow Justice (1996) (analysis and comparison of Mississippi's Parchman Penitentiary's past and present); TINSLEY E. YARBROUGH, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA 182–217 (1981).

In addition, WAYNE N. WELSH, COUNTIES IN COURT: JAIL OVERCROWDING AND COURT-ORDERED REFORM (1995), deals comprehensively with state and federal court intervention in, and supervision of, California's county jail operations between 1975 and 1989, and includes extensive treatment of litigation over conditions in the county jails of Santa Clara, Orange, and Contra Costa; and Donald P. Baker et al., *Judicial Intervention in Corrections: The California Experience—An Empirical Study*, 20 UCLA L. REV. 452 (1973) examines the multitude of small state and federal court interventions in California's prison practices.

case,"[72] means our knowledge about a few cases is deep but highly unreliable more generally because those few are so aberrational.

As to some issues, informal observation by frequent participants—inmates' advocates and defendants—also seems likely to be somewhat inaccurate. In part, this is because of the changing makeup of the plaintiffs' bar. When jail and prison injunctive litigation began, the cases were initiated by lawyers supported by a variety of public interest law organizations.[73] County by county, federally funded legal services lawyers[74] and private lawyers handled jail litigation all around the country. As for prisons, the NAACP Legal Defense and Education Fund had a large docket of prison cases, and the ACLU's National Prison Project, which remains the leading national inmate litigation shop, got started in the early 1970s.[75] Over time, however, much of the support for injunctive inmate litigation eroded. The NAACP ended its involvement in 1977; legal services offices lost substantial funding during the Reagan years and cut back on their jail dockets; foundation support for the National Prison Project was cut in the 1990s.[76] A sense of declining involvement by these high-profile participants in civil rights injunctive practice in jails and prisons undoubtedly contributed to the common impression, described above, that the practice was itself declining. Around the same time, however, smaller, more regionally focused organizations began to emerge. To list just a few that still litigate jail and prison cases, the Southern Center for Human Rights (in Atlanta), the Southern Poverty Law Center (in Montgomery), Massachusetts Correctional Legal Services (in Boston), and the Prison Law Office (in San Quentin) were all founded in the 1970s.[77] In addition, as legal clinical education devel-

72 Jacobs, *Prisoners' Rights Movement*, *supra* note 38, at 51.

73 Schlanger, *Beyond the Hero Judge*, *supra* note 7, at 2017–21.

74 *See* Philip B. Taft, Jr., *Jail Litigation: Winning in Court Is Only Half the Battle*, CORRECTIONS MAG., June 1983, at 21, 23 ("Because jails are locally controlled, most of the battles have been waged piecemeal by local legal services attorneys."). Between 1970 and 1990, the National Clearinghouse for Legal Services' *Clearinghouse Review* reported the progress of 327 jail and prison conditions injunctive cases, nearly all litigated by legal services lawyers. For more information on the inmate litigation docket of legal services offices, see Schlanger, *Beyond the Hero Judge*, *supra* note 7, at 2019 & nn.100–02; Schlanger, *Inmate Litigation*, *supra* note 7, at 1632 & n.260.

75 *See* Schlanger, *Beyond the Hero Judge*, *supra* note 7, at 2018 (discussing ACLU involvement in early 1970s).

76 *See infra* note 173 and accompanying text.

77 *See* Massachusetts Correctional Legal Services, http://www.mcls.net (last visited Feb. 2, 2006); Prison Law Office, http://www.prisonlaw.com/about.html (last visited Feb. 2, 2006); The Southern Center for Human Rights, http://www.schr.org/aboutthecenter/index.html (last visited Feb. 2, 2006); Southern Poverty Law Center, http://www.splcenter.org/center/about.jsp (last visited Feb. 2, 2006).

oped,[78] a number of law school clinics took on jail and prison cases.[79] Thus, although the changing makeup of the advocacy community may have contributed to shifts in litigation practice over time, it simultaneously counsels in favor of cautious interpretation of the views of the participants, whose impressions of those changes may sometimes be affected by their own altered vantage point.

Accordingly, while this Article incorporates my readings of cases and case studies in addition to my own interviews, for any issue in which quantification seems useful I also analyze what has until now been a largely unexamined data source on these points: the answers given by staff at almost every jail and prison in the country to periodic correctional censuses conducted by the Bureau of Justice Statistics (BJS), a branch of the U.S. Department of Justice.

This Part proceeds as follows: Section A discusses the correctional censuses on which the rest of this Part (as well as Part III.A) is based. In Section B, I begin by looking longitudinally at state level statistics of court-order incidence. These statistics demonstrate essential stability from the 1980s until the mid-1990s, and then a sea change. Between the datapoints in 1993/1995 and 1999/2000—the time in which the PLRA was enacted—there was a large decline in the proportion of states with a substantial incarcerated population subject to court order, in both jails and prisons, coupled with an increase in variance among the states for prisons. For prisons, though less so for jails, the result is concentration of court orders in a few highly regulated states. Indeed, because of the increase in variance among states, Section C's nationwide figures do not show the PLRA's enormous influence; that influence is masked by the presence of outlier states. Section C contributes insight into the strong correlation between facility size and court-order regulation, and an analysis of the incidence of new court orders as compared to old. Section D then canvasses available explanations for the notable decline in court-order

78 What Margaret Martin Barry, Jon Dubin, and Peter Joy identify as "the second wave of clinical legal education" began in earnest in the late 1960s. Margaret Martin Barry, Jon C. Dubin, & Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 12 (2000).

79 A survey in 1979 included a number of projects in which students handled inmate civil cases. COUNCIL ON LEGAL EDUC. FOR PROF'L RESPONSIBILITY, INC., SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION, 1978–1979, at 1–20 (1979). For a list of current prisoners' civil rights projects, see Am. Ass'n of Law Libraries, Special Interest Sections Joint Roundtable: Servs. to Pro Se Patrons & Prisoners, *Law School Clinics Serving Prisoners* (July 12, 2004), *available at* http://www.aallnet.org/sis/ripssis/clinics_serving_prisoners.pdf (handout). *See also* Susan P. Sturm, *Lawyers at the Prison Gates: Organizational Structure and Corrections Advocacy*, 27 U. MICH. J. L. REFORM 1, 89–97 (1993) (describing scope and duration of involvement in corrections litigation by ninety-five law school clinical programs).

prevalence demonstrated in Section B's state-by-state data and argues that the cause of the decline was most likely the PLRA. This attribution of cause suggests that the observed recent decline in correctional court orders may be less severe in other areas of civil rights litigation.

A. The Correctional Censuses

Approximately every five years from the early 1980s until 2000, the Bureau of Justice Statistics asked each local jail and state prison in the country[80] questions about facility operations.[81] Because participation in these censuses was close to complete—nearly every state and local facility in the country (the fifty states and the District of Columbia are included) answered some questions in every census, and the very large majority answered nearly every question relevant here

[80] Federal facilities are included in some but not other censuses, so I omit them entirely. Jails in Indian country are not included; for information on these facilities, see, for example, TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 208597, JAILS IN INDIAN COUNTRY, 2003 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/jic03.pdf.

[81] The relevant citations for the published reports about the censuses are: JAMES J. STEPHAN & JENNIFER C. KARBERG, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 198272, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2000 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/csfcf00.pdf [hereinafter 2000 PRISON CENSUS]; JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 186633, CENSUS OF JAILS, 1999 (2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cj99.pdf; JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 164266, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 1995 (1997), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/csfcf95.pdf; CRAIG A. PERKINS, JAMES J. STEPHAN & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 151651, CENSUS OF JAILS AND ANNUAL SURVEY OF JAILS: JAILS AND JAIL INMATES, 1993–94 (1995), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/jaji93.pdf; JAMES STEPHAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 137003, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 1990 (1992); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 127992, CENSUS OF LOCAL JAILS, 1988 (1991); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 105585, 1984 CENSUS OF STATE ADULT CORRECTIONAL FACILITIES (1987); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 95536, THE 1983 JAIL CENSUS (1984).

The relevant citations for raw data are: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, ICPSR STUDY NO. 4021, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 2000 (2005); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, ICPSR STUDY NO. 6953, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 1995 (2005); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, ICPSR STUDY NO. 6648, NATIONAL JAIL CENSUS, 1993 (1996); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, ICPSR STUDY NO. 9908, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 1990 (2001); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, ICPSR STUDY NO. 9256, NATIONAL JAIL CENSUS, 1988 (2005); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, ICPSR STUDY NO. 8444, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 1984 (2005); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, ICPSR STUDY NO. 8203, NATIONAL JAIL CENSUS, 1983 (2005). These studies are available by study number at http://www.icpsr.umich.edu.

in every census[82]—this dataset is a trove of systematic information about correctional court orders.

Four times, then, between 1983 and 2000, every state prison and nearly every local jail answered a set of federal-government-posed questions about its regulation by court order. Because orders nearly always last at least several years, almost every order entered against a jail or state prison by a court after about 1980 (and many of the prior orders as well) ought to be included in the resulting tally. The information gathered is not detailed, but it is extremely useful nonetheless. As most recently phrased, the first question was: "On June 30, 2000, was this facility under a State or Federal court order or consent decree to limit the number of inmates it can house?"[83] The second question, as most recently phrased, was: "On June 30, 2000, was this facility under a State or Federal court order or consent decree for specific conditions of confinement?"[84] Beginning with the 1984 prison census (not, that is, in the 1983 jail census), facilities that answered yes were asked to check off any applicable item in a list of "specific conditions,"[85] and beginning in 1988 they were also asked "Was this facility under court order or consent decree for the totality of conditions (the cumulative effect of several conditions)?"[86]

Even though the censuses shed a great deal of light unavailable from other sources, they are themselves limited. One important limitation is that the most recent censuses use individual *facilities* as the observational unit for prisons, but *jurisdictions* as the observational unit for jails. In order to use the relevant data, I have, regrettably, been forced to follow suit.[87] Prisons are usually state facilities that house exclusively felony convicts, whereas jails are the county- and city-run institutions that house a combination of pretrial detainees, post-trial convicts not yet admitted to prison, misdemeanants, and

[82] The few missing observations are discussed in this Article's Technical Appendix, *supra* note 68.

[83] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CJ-43, 2000 CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES 2 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cj43.pdf.

[84] *Id.* at 3.

[85] *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CJ-42, 1984 CENSUS OF STATE ADULT CORRECTIONAL FACILITIES 4 (1984).

[86] *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CJ-3, 1988 NATIONAL JAIL CENSUS 1 (1988). Much more information about the censuses is available at note 179 *infra*, and at this Article's Technical Appendix, *supra* note 68.

[87] I could, of course, maintain nominal parallelism by collapsing observations of prisons from the facility level to the jurisdictional—that is, state—level. But actually, jail jurisdictions—that is, county or city level observations—are, if not perfectly analogous, more like prison facilities than like prison jurisdictions (state level observations). So while the ideal comparison would be prison facilities to jail facilities, the comparison used here—prison facilities to jail jurisdictions—is the close second best.

fairly short-term felony offenders.[88] Because most jails are operated by single counties or cities and most counties and cities operate just one jail, for 95% of the nation's nearly 3100 jail jurisdictions, the distinction between jurisdiction and facility makes no difference; where that distinction does become relevant to the analysis below, I discuss it.[89]

A more analytic problem comes from the nature of court-order practice. Court orders have varying profiles. They can apply to a wing of a facility (a death row, for example[90]), to an entire facility,[91] to a group of facilities within a jurisdiction,[92] or to all the jurisdiction's facilities.[93] A single order can govern many areas of prison life and policy,[94] one very crucial area of prison policy (say, medical care[95]), or something more minor in its importance (say, telephone service[96]). An order regulating the imposition of discipline or jail menus can affect every inmate in a facility very deeply; an order setting a minimum frequency for the opportunity to shower might similarly affect every inmate, but more shallowly. An order requiring some exemption from general policy to adherents of a minority religion[97] may be

[88] In six low-population states, state prison systems also include what would in other states be jail inmates. They are: Alaska (which also has six jails), Connecticut, Delaware, Hawaii, Rhode Island, and Vermont. *See* 2000 PRISON CENSUS, *supra* note 81, at 19.

[89] The 95% figure is derived from census data. See Technical Appendix, *supra* note 68, for a more thorough discussion of this issue.

[90] *See, e.g.*, Russell v. Johnson, No. 1:02-cv-00261, 2003 WL 22208029 at *6–8 (N.D. Miss. May 21, 2003) (issuing death row injunction), *aff'd in part, vacated in part sub nom.* Gates v. Cook, 376 F.3d 323 (5th Cir. 2004).

[91] *See, e.g.*, Madrid v. Gomez, 889 F. Supp. 1146, 1155, 1282–83 (N.D. Cal. 1995) (issuing injunctive remedy governing California's Pelican Bay State Prison).

[92] *See, e.g.*, Small v. Hunt, 858 F. Supp. 510, 523–24 (E.D.N.C. 1994) (granting modification of prior order governing conditions at minimum and medium security prisons of North Carolina).

[93] *See, e.g.*, Armstrong v. Wilson, 124 F.3d 1019, 1021 (9th Cir. 1997) (describing district court order governing treatment of prisoners with disabilities throughout California Department of Corrections).

[94] *See, e.g.*, Goldsby v. Carnes, 365 F. Supp. 395, 401–07 (W.D. Mo. 1973) (approving proposed consent judgment governing jail administration and discipline, inmate diet, establishment of law library, and medical and dental care at Jackson County Jail, in Kansas City, Missouri).

[95] *See, e.g.*, Stipulation for Injunctive Relief, Plata v. Davis, No. C-01-1351, at 1 (N.D. Cal. June 13, 2002) (available as document PC-CA-018-005 at http://clearinghouse.wustl.edu). Judge Thelton Henderson recently found California in continuing violation of the *Plata* injunction and ordered the system's medical care put into receivership. *See* Plata v. Schwarzenegger, No. C-01-1351 (N.D. Cal. Oct. 3, 2005) (findings of fact and conclusions of law re appointment of receiver) (available as document PC-CA-018-007 at http://clearinghouse.wustl.edu).

[96] *See, e.g.*, Washington v. Reno, 35 F.3d 1093, 1096, 1104 (6th Cir. 1994) (ordering modification of injunction governing federal Bureau of Prisons' telephone service).

[97] *See, e.g.*, Raymond Lee X v. Johnson, 888 F.2d 1387 (unpublished table opinion), 15 Fed. R. Serv. 3d 344, 1989 WL 126502, at *4 (4th Cir. 1989) (affirming district court ruling

of vital importance to just a few inmates in a facility. Orders can matter more or less to the authorities in charge of a facility, as well, depending not only on the costs of compliance but also on the effects on discipline, morale, and the like. But the census responses do not expressly distinguish among orders except by subject matter.

B. State-by-State Changes over Time

To take a first cut at the issue of changes over time in court-order incidence, this Section examines coverage within states. Table 1 presents the list of what I call "system states"—states in which census-reported court orders cover a large majority of the state's facilities or incarcerated population.[98]

I begin with system states in part because it is systemwide prison cases that get the most scholarly attention: Nearly all the prison court-order case studies, for example, are of systemwide orders.[99] Indeed, many assessments of court-order practice seem to assume that only systemwide cases matter. (Recall, for example, the quotation above in which Feeley and Rubin summarized the decline of court influence by noting that "[b]y the 1980s . . . [n]o systemwide suits had been successful for years."[100]) This is far too limited an approach:

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that Virginia prison was constitutionally required to offer religiously acceptable meals to inmate members of Nation of Islam).

[98] Of necessity, picking a "cut point" for inclusion in my "system state" list of states with a good deal of court-order regulation is a bit arbitrary. But of all the states on the list, only Arizona jails and Illinois jails hover around the cut points. The differences in jail court-order coverage between 1983 and 1999 in Arizona and between 1983 and 1993 in Illinois are not terribly substantial, even though in some of those years coverage falls above, and in others below, my system-coverage cut point.

[99] See *supra* note 71 for a list and description of case studies.

[100] Rubin & Feeley, *supra* note 56, at 661. As Table 1 demonstrates, the factual claim that there were no new systemwide orders in and after the 1980s is incorrect. Among such orders are the following: Twelve John Does v. District of Columbia, Civ. No. 80-2136 (D.D.C. Apr. 28, 1982) (memorandum order and judgment resolving conditions of confinement suit at D.C.'s Lorton prison facilities) (available as document PC-DC-008-006 at http://clearinghouse.wustl.edu); Grubbs v. Bradley, 552 F. Supp. 1052, 1055, 1131–32 (M.D. Tenn. 1982) (finding unconstitutional conditions of confinement at twelve Tennessee prisons); Crain v. Bordenkircher, 342 S.E.2d 422, 425–26 (W. Va. 1986) (discussing earlier consent decree and litigated orders at West Virginia Penitentiary); Cody v. Hillard, 599 F. Supp. 1025, 1062 (D.S.D. 1984) (finding unconstitutional conditions of confinement in South Dakota prison system), see also Cody v. Hillard, 304 F.3d 767 (8th Cir. 2002) (discussing subsequent procedural history); Hubert v. Ward, No. C-E-80-414-M (W.D.N.C. 1985) (decree governing thirteen farm and road camps in North Carolina) (discussed in FEELEY & RUBIN, *supra* note 51, at 41 & n.106); see also Brooks v. Ward, 97 F.R.D. 529, 530–32, 535 (W.D.N.C. 1983) (discussing earlier procedural history in *Hubert v. Ward*); Plyler v. Leeke, No. 3:82-0876-2, 1986 WL 84459, at *2 (D.S.C. Mar. 26, 1986) (approving consent decree governing South Carolina prisons); Small v. Martin, No. 85-987-CRT (E.D.N.C. Dec. 22, 1988) (settlement agreement governing living conditions in North Carolina prisons), *discussed sub nom.* Small v. Hunt, 858 F. Supp. 510, 512–14 (E.D.N.C.

TABLE 1: SYSTEMWIDE COURT ORDER COVERAGE

	State Prisons (n = 51)				Local Jails (n = 46)			
	1984	1990	1995	2000	1983	1988	1993	1999
States with any court orders	**44**	**44**	**41**	**33**	**44**	**46**	**43**	**43**
Alaska	•	•	•	•				
Arizona				•	•			•
California				•		•	•	•
Connecticut				•				
Delaware			•					
D.C.	•	•	•	•	•	•	•	•
Florida	•					•		
Georgia			•					
Illinois					•			
Kansas		•	•					
Louisiana	•	•	•		•	•	•	
Mississippi	•	•	•					
New Hampshire	•	•	•					
New Jersey					•			
New Mexico	•	•	•					
New York				•	•	•	•	
North Carolina			•					
Ohio				•				
Oregon						•	•	
Rhode Island			•	•				
South Carolina		•	•					
South Dakota		•	•					
Tennessee	•	•		•			•	
Texas	•	•	•	•				
Utah		•	•					
West Virginia		•						
Total states with systemwide orders	**9**	**13**	**15**	**10**	**6**	**6**	**6**	**3**

Note: States in which the proportion of the states' facilities reporting court orders, or the proportion of incarcerated population in those facilities, is greater than 70%, or in which the sum of those proportions is at least 99%.

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

Table 1 demonstrates that systemwide coverage has never been the norm for state experiences of correctional court-order regulation. Even in 1995, the peak year for systemwide orders, only 37% of the forty-one states with prison orders reported systemwide regulation. Still, it is useful to look at systemwide orders because if the conven-

1994); Clarkson v. Coughlin, 898 F. Supp. 1019, 1052 (S.D.N.Y. 1995) (ordering injunction relating to deaf inmates in New York state prison system); Dunn v. Voinovich, C1-93-0166 (S.D. Ohio July 10, 1995) (consent decree governing mental health services for mentally ill adults in Ohio prisons) (available as document PC-OH-004-001 at http://clearinghouse.wustl.edu); Cohen & Aungst, *supra* note 71, at 299–327 (discussing and analyzing events of *Dunn*); Hughes v. Goord, No. 97-CV-6431 (W.D.N.Y. Sept. 5, 2000) (conditional dismissal in systemwide religion case in New York State prison system) (available as document PC-NY-040-003 at http://clearinghouse.wustl.edu).

tional wisdom is correct anywhere, it should be correct for system states. But in fact, even limiting inquiry to this high degree of court-order incidence, Table 1 appears to contradict the conventional wisdom of a decline in court-order prevalence beginning in the early 1980s. In prisons, there was actually an *increase* in the number and proportion of states with systemwide court-order coverage up to the 1995 census before a sharp drop in coverage registers in the 2000 census responses. In jails, system coverage plateaued in the 1980s and early 1990s, before a drop-off in the late 1990s.[101]

Table 2 broadens the inquiry beyond system states, presenting summary statistics for *all* court-order regulation of jails and prisons. It sets out the mean and median level of census-reported court-order coverage within states for each census year.

TABLE 2: COURT-ORDER COVERAGE WITHIN STATES: PERCENT OF EACH STATE'S INCARCERATED POPULATION HOUSED IN ENTITIES SUBJECT TO COURT ORDERS

Local Jails (n = 46)				State Prisons (n = 51)			
Year	Median	Mean	Std. Dev.	Year	Median	Mean	Std. Dev.
1983	29%	33%	27%	1984	34%	35%	31%
1988	34%	34%	26%	1990	30%	38%	32%
1993	30%	33%	27%	1995	31%	39%	33%
1999	18%	24%	22%	2000	8%	25%	35%

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

Table 2 thus shows the *central* tendencies of state experience. So, for example, the first row's figures show that in 1983, among the forty-six states (forty-five plus the District of Columbia) with jail systems, on average 33% of the state jail population was housed in jurisdictions

[101] Systemwide coverage is far less common among jails because only rarely have single court orders applied to more than one correctional jurisdiction, and jails are spread among different jurisdictions. *See, e.g.*, Stewart v. Winter, 669 F.2d 328, 329, 338–39 (5th Cir. 1982) (affirming denial of class action certification for case in which plaintiffs sought to sue all eighty-two Mississippi jails); Adams v. Mathis, 458 F. Supp. 302, 304 n.1 (M.D. Ala. 1978) (noting court's rejection of United States' attempt, as intervenor, to expand case to cover all of Alabama's jails). *But see* Washington v. Lee, 263 F. Supp. 327, 333 (M.D. Ala. 1966) (desegregating every penal institution in Alabama), *aff'd*, 390 U.S. 333 (1968); Marcera v. Chinlund, 595 F.2d 1231, 1242 (2d Cir. 1979) (ordering district court to enter preliminary injunction against defendant class of forty-seven sheriffs), *vacated on other grounds sub nom.* Lombard v. Marcera, 442 U.S. 915 (1979); Hamilton v. Morial, 644 F.2d 351, 353–54 (5th Cir. 1981) (per curiam) (allowing consolidation of all pending cases relating to overcrowding issues involving all of Louisiana's jails and prisons). Thus, while systemwide coverage for prisons can signal either many orders governing different facilities or—more often—single orders governing many facilities, systemwide coverage for jails nearly always means the former.

subject to court-order regulation. The corresponding figure for the fifty states plus the District of Columbia in the 1984 prison census was 35%.[102]

Table 2 demonstrates two major points. First, notwithstanding the higher incidence of systemwide coverage for prisons, court orders are very prevalent in jails as well as prisons.[103] Scholarly observers occasionally (and probably inadvertently) neglect jails when they discuss court orders; Table 2 suggests this oversight is quite a serious one. Second, the state-by-state summaries in Table 2 confirm Table 1's basic message by showing essential stability in mean and median court-order incidence from the early 1980s until the last period, at which point there is a dramatic drop in both the mean and median coverage figures. A plateau might feel like a decline after a prior steep increase, which must have characterized the experience of both jails and prisons between 1970 and 1983, when the BJS first asked its court-order questions. Perhaps this is among the factors that has contributed to the erroneous conventional wisdom.

The apparent stability in state experience prior to the late 1990s raises the question of whether that stability is real, or whether what is actually occurring is the simultaneous entry and expiration of orders in different states. Figure 1, below, demonstrates that both are true. Figure 1's panel of histograms shows the *changes* in the percentage of incarcerated population within each state subject to court order. For example, the first row sets out the within-state changes observable by comparing the first census that asked about court orders to the second, for both jails and prisons. The first two rows provide still further confirmation of stability in the 1980s and early 1990s: Nearly all the states experienced some change in proportion of population covered by court orders from the mid-1980s to the mid-1990s, but most

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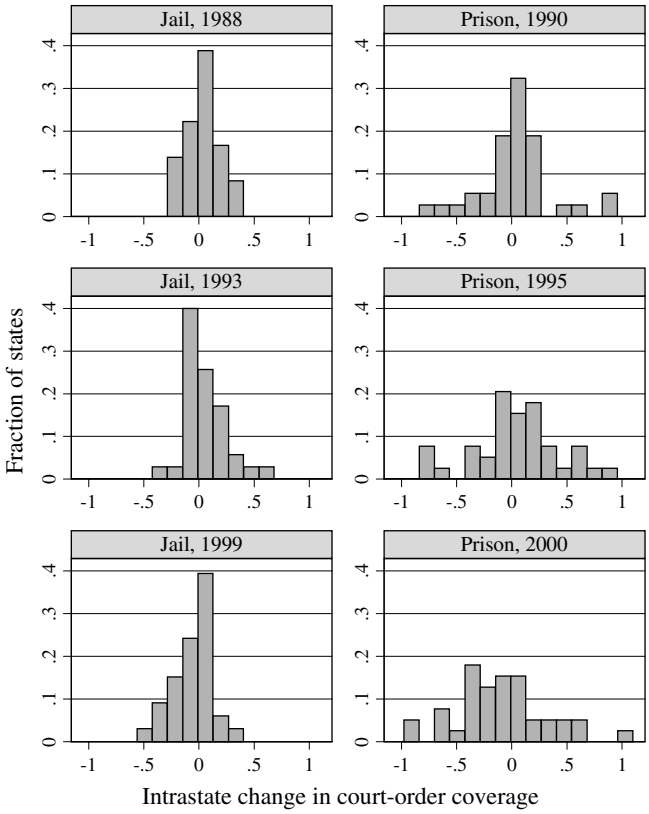
[102] Note that direct comparisons of the population-weighted incidence level between jails and prisons are a bit misleading because the prison data are facility-level but the jail data are jurisdiction-level. Jurisdictional reporting causes Table 2 to *understate* slightly the incidence of court orders by individual jail facility (because jails in multi-facility jurisdictions are more likely than jails in single-facility jurisdictions to report court orders), and to *overstate* more significantly the incidence of court orders by jail population. The magnitude of this overstatement appears to be about 6% to 8% of national jail population. I am able to quantify the overstatement in the years prior to 1999, when facility-level data are available for jails. In each of the three prior census years, the jail population in *facilities* with court orders is six to eight percentage points less than what Table 2 reports, i.e., the jail population in *jurisdictions* with court orders. See Technical Appendix, *supra* note 68, for more details.

[103] As one would expect, given that jails are county and city institutions, and prisons are state institutions, the state-by-state experience of prison court-order coverage is more variant. This is the meaning of the larger standard deviations for prisons in Table 2 and also contributes to Table 1's imbalance between jails and prisons.

states experienced quite small change, and the states experiencing decreases in coverage were balanced by a similar number of states experiencing increases. Moreover, there is no statistically significant difference between the 1983–1988 data and the 1988–1993 data for jails, and likewise for the corresponding data for prisons.[104] Thus the emerging story holds: The plateau continued from the early 1980s until the mid-1990s.

FIGURE 1: CHANGE BY STATE IN PROPORTION OF INCARCERATED POPULATION HOUSED IN ENTITIES SUBJECT TO COURT ORDER



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

[104] In a paired t-test, the distributions of facility-order incidence by state are not demonstrably different across any years (the p-values on the test are all greater than .25, and usually much greater). The population-weighted order incidence by state presents a statistically significant difference only between the penultimate and the final period (p-value for jails = .03, p-value for prisons < .001). Full results are presented in this Article's Technical Appendix, *supra* note 68.

As hypothesized, however, the situation changes notably between the last pre-PLRA data point and the single available post-PLRA data point. As one would expect from Tables 1 and 2, Figure 1's third row of graphs shows that in both jails and prisons, the within-state changes become negative and much larger after the mid-1990s. That is, many more states experienced contraction in court-order coverage in both jail and prison populations than experienced expansion. This is true for both small and large increases, and testing confirms that these differences are statistically significant.[105]

Figure 2 elaborates this last point, showing in more detail the difference between the mid-1990s and the 1999/2000 datapoints for jails and prisons.[106] Like Figure 1, it is a panel of histograms; each bin groups states by their degree of court-order coverage; the y-axis marks the total percentage of states in that bin. For example, in the upper right quadrant, which describes prisons in 1995, census reports for slightly more than 20% of states indicated that between 0 and 10% of those states' prison population was housed in entities subject to court-order regulation. But looking at the lower right quadrant, it appears that by 2000 things had changed drastically: Census reports for a *majority* of state prison systems indicated that only between 0 and 10% of those states' incarcerated population was housed in prisons subject to court-order regulation. A similar trend is evident in the jail histograms as well, though it is less stark. In prisons, but not jails, the decrease of court-order regulation appears not to come primarily from the most heavily regulated bins. Rather, the trend has been to empty out the moderate coverage bins, increasing the degree of variance among states. (This is consistent with the results in Table 2 and Figure 1: In both we see greater variance in 2000 than in previous years.[107])

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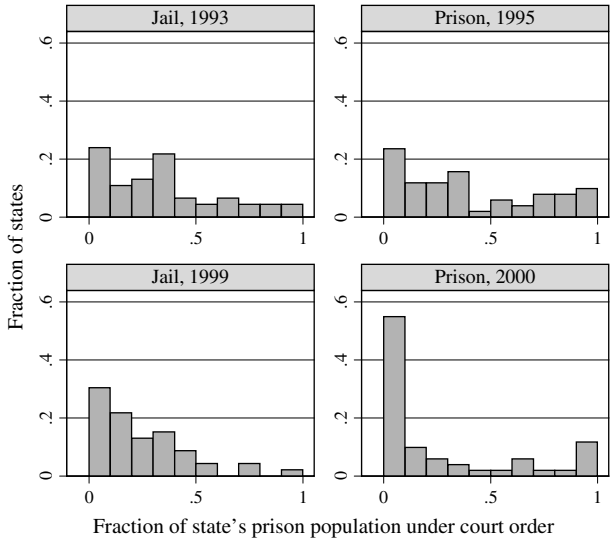
105 *See supra* note 104.

106 This Article's Technical Appendix, *supra* note 68, includes all eight histograms rather than just the four that appear in Figure 2. The first six do not, visually, appear to vary over time, an impression confirmed by statistical testing. In a t-test, unpaired (because the test is already of differences between years) with unequal variances, the mean change in population-weighted order incidence by state presents a statistically significant difference only between the penultimate and the final period (p-value for jails = .01, p-value for prisons = .05). In prisons, the change in standard deviation (in both the pictured population-weighted figures and the unweighted figures) is highly significant over the same time (p-value < .001); for jails, there is no discernible change in variance in the population-weighted figures, but the unweighted version does have such a change (p = .03).

107 In Table 2, comparing 1995 with 2000, the median dropped a great deal more than the mean, and the standard deviation remained as high as it had been with higher overall coverage figures, both signaling increased variance among state prison systems.

FIGURE 2: DISTRIBUTION BY STATE OF WITHIN-STATE COURT ORDER POPULATION COVERAGE



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

Altogether, then, the state-by-state story is clear. Within states, the period from the 1980s to the mid-1990s was marked by essential continuity. States were similarly likely at each datapoint in the period to face court-order regulation of a large percentage of their prison and jail population; within each state, there tended to be only a small degree of change in the level of court-order coverage. But after the mid-1990s the BJS censuses report a sea change—a stark disruption in the long-lived plateau of court-order regulation. Many fewer states report anything more than minimal court-order coverage of their prison population, and coverage is down in jails as well. Moreover, the above data suggest that the final period is characterized by newly divergent experiences among states; a number of states continue to report complete court-order coverage of their prisons, while the majority report no or nearly no court orders. There are fewer than ever in the middle.

C. Nationwide Statistics on the Volume of Court-Order Regulation

I next consider national rather than state-by-state statistics to look more closely at various features of the orders. This Section first examines what appear to be extremely minor changes in court-order incidence between the mid-1990s and after, but finds that appearances are misleading. In fact, the nationwide data are dominated by outliers

in the final period. In addition, I note the consistent correlation between facility size and court-order incidence, and discuss what might underlie that correlation. Finally, I examine court-order incidence in individual facilities over time, looking at the proportion of facilities reporting new regulation versus those reporting continuing regulation.

1. The Increasing Role of Outliers

Table 3 begins with summary information about the prevalence of court orders over time.

TABLE 3: CHANGING INCIDENCE OF COURT ORDERS

	Year	(a) Total population	(b) % of population housed in facilities w/ orders	(c) Total facilities	(d) % of facilities w/ orders
Local Jails	1983	227,541	51%	3338	15%
	1988	336,017	50%	3316	14%
	1993	466,155	49%	3268	16%
	1999	607,978	34%	3365	15%
State Prisons	1984	390,334	42%	903	24%
	1990	635,974	35%	1207	27%
	1995	909,546	39%	1375	27%
	2000	1,170,171	39%	1562	23%
	2000 w/o Ohio, NY	1,048,906	32%	1459	17%

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

The prior tables and figures have presented data about court-order incidence weighted by population. It is also useful to think about court-order incidence by facility (in other words, weighting large and small facilities equally). Like the earlier tables and figures, Table 3's column (b) sets out order-incidence rates by population for both prisons and jails.[108] Column (d) augments this measure by showing the percentage of *facilities* that report court orders.

Even more than the earlier tables and figures, Table 3 demonstrates remarkable stability during the covered period. Once again, there is scant sign that the early 1980s were court orders' heyday. Rather, for both jails and prisons, the orders have continued to apply to a large portion of facilities—and an even larger portion of

[108] That is, it sets out the percentage of incarcerated population housed in correctional facilities (or, more precisely, in correctional facilities for prisons, jurisdictions for jails) that report court orders.

inmates—through the early 1990s and even beyond.[109] Indeed, Table 3's apparent stability extends to the present, unlike earlier tables. The last period, after the PLRA's enactment, does not seem very different from the earlier periods: Comparing court-order incidence in the mid-1990s to the final figures, in both columns (b) and (d), the changes appear extremely small except for the jail population figures (in column (b)).

Does this mean that the observers who expected the PLRA to have little impact were right? No. Recall from above that in the last reported period, state experiences were increasingly divergent. Because Table 3 does not group results by state, the greater variance could derive from outlier states dominating the data. And sure enough, examination of the raw data reveals that two states—Ohio and New York—dominate the prison figures in 2000. Every prison in these states reported a court order—in New York, about religion and disability,[110] and in Ohio, about mental health.[111] When these states are omitted, things look very different. Table 3's final row shows that with New York and Ohio excluded, the incidence of court orders in the rest of the country's prisons declined by over one-third from 1995 to 2000, and the population-weighted rate declined by nearly one-fifth, notwithstanding the increasing average population of the nation's prisons.[112] There are no similar outlier states in the earlier periods—in which, recall, the state-level variance was lower. Dropping states is not a satisfactory analysis, of course. But the insight that just two states play such an outsize role in national figures in 2000 demonstrates the importance of the observed increased variance in the most recent period. Thus, even after the enactment of the PLRA, court orders remain operative for a large minority of jail and prison inmates, and the national experience has become less uniform.

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[109] Statistical analysis confirms a large degree of continuity; most of the entity-level differences over time, in column (b), are not statistically significant. Using a two-sample test of proportions, in jails only between 1988 and 1993 are the differences even barely significant ($p = .05$), and even then, as Table 1 sets out, they are small (less than a 2% shift). In prisons, only between 1995 and 2000 are the differences significant ($p = .003$), and, again as set out in Table 3, they are larger (a nearly 5% shift).

[110] *See* Clarkson v. Coughlin, 898 F. Supp. 1019, 1052 (S.D.N.Y. 1995) (ordering injunction relating to deaf inmates); Hughes v. Goord, No. 97-CV-6431 (W.D.N.Y. Sept. 5, 2000) (ordering conditional dismissal in religion case) (available as document PC-NY-040-003 at http://clearinghouse.wustl.edu).

[111] *See* Dunn v. Voinovich, No. C1-93-0166 (S.D. Ohio, July 10, 1995) (consent decree governing mental health services for mentally ill adults in Ohio prisons) (available as document PC-OH-004-001 at http://clearinghouse.wustl.edu); *see* also Cohen & Aungst, *supra* note 71, 299–327 (describing events in *Dunn v. Voinovich*).

[112] If New York and Ohio are taken out of the dataset for 1995 as well as 2000, the change between the two periods is even greater.

2. *The Size Effect*

The most important new insight from Table 3 is a glimpse of what I believe is a basic (and underexamined) feature of correctional court-order practice: Court orders are more common in large facilities than in small. The facility-level figures in column (b) are, in each year for both jails and prisons, a good deal smaller than the population figures in column (d). That is, court orders affect facilities that, among them, house a disproportionately large inmate population. This "size effect" makes intuitive sense for several reasons. First, regardless of whether judges, inmates, or lawyers are the driving force behind cases, it takes a lot of work to mobilize the litigation apparatus to obtain court-enforceable remedies against correctional administrators. It is almost as much work to put together a case involving a forty-bed facility as one involving a four-hundred-bed facility. Therefore, at least for judges and lawyers, one would expect to see a decided focus on large institutions, where the payoff of that work is greater. Second, the larger an institution, the more people are available to complain about it—and it only takes one to make a lawsuit. Third, very much for jails and somewhat for prisons, large institutions tend to be located near population centers, which have more lawyers to bring cases (and perhaps more liberal lawyers and even judges,[113] who are more sympathetic to the issues). Finally, perhaps large institutions have worse conditions, though evaluation of this possibility is far beyond the scope of this paper. In any event, we learn from Table 3 that the size effect, whatever its source, is part of the court-order story in each and every year of census data.[114] Figure 3 illustrates this size effect in 1993 (for jails) and in 1995 (for prisons).[115]

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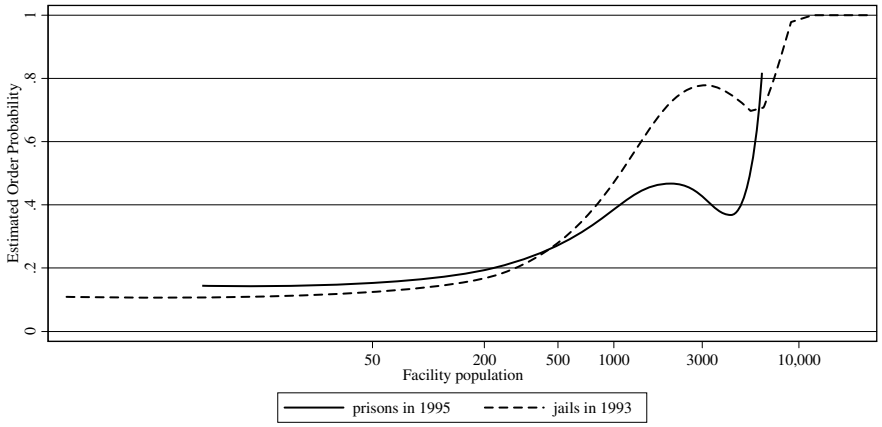
[113] A nice illustration of this point is provided by a map tabulating election results from the 2004 presidential election; Democratic voting is located in high-population-density counties. Robert J. Vanderbei, Election 2004 Results, http://www.princeton.edu/~rvdb/JAVA/election2004 (last visited Mar. 27, 2006) (depicting county-by-county election return data).

[114] Fancier statistical testing confirms this point: I estimated logistic regressions of court-order incidence as a function of year and size (with squared and cubed terms for flexibility); each of the coefficients, except for one of the cubed terms, is statistically significantly different from 0, and the size effect is positive in each year. *See* Technical Appendix, *supra* note 68.

[115] Figure 3 shows the prediction from an estimated logistic regression of court-order incidence as a function of year and size (with squared and cubed terms for flexibility); the estimates are generated separately for jails and prisons. The figure presents the results using a log scale for the x-axis because that captures visually something of the skew in facility size.

FIGURE 3: ESTIMATED PROBABILITY OF COURT ORDER, GIVEN FACILITY SIZE



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

3. New and Old Regulation

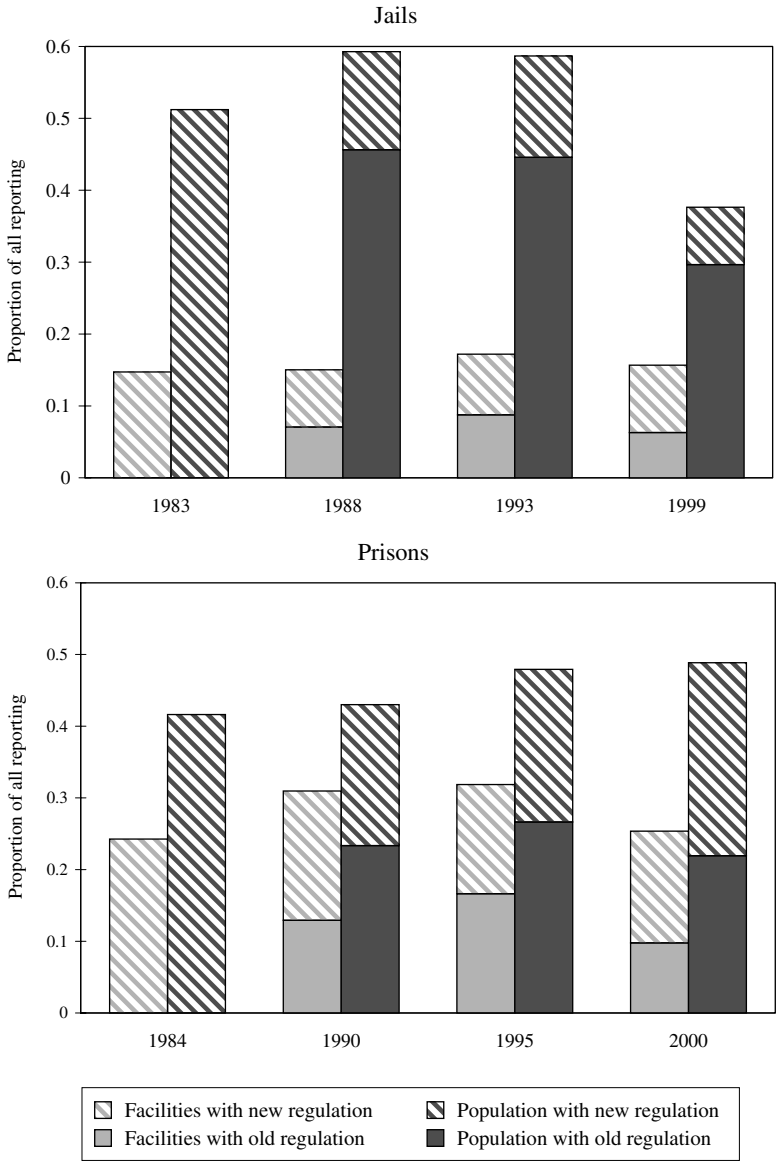
Finally, it is worth considering whether the evident plateau in court-order incidence occurred not because of the ongoing importance of injunctive litigation but because old orders were lingering on years past their real regulatory impact. Figure 4 addresses this issue, augmenting Table 3 by differentiating between continuing and new regulation.[116] It separates by shade newly court-order-regulated facilities from those facilities that reported an order in the prior period.[117]

Figure 4's first, pale grey columns in each year grouping show court-order incidence by facility for prisons and by jurisdiction for jails. The second, black columns show court-order incidence by population. The 1980s–1990s plateau is visually evident in both the grey and black columns prior to 1995. What Figure 4 adds is a distinction between old court orders, which might be lingering years past their usefulness, and new ones, whose entry, if common, might better demonstrate the ongoing relevance of court-order practice. Newly-regulated facilities are cross-hatched and positioned at the top of the columns; those facilities with continuing regulation are solid and at the bottom.

[116] There is no way to tell definitively without docket information if a reported order is part of the same case as a prior order governing the same facility. Even where orders change subjects they can often be part of just one litigation as it waxes and wanes. Alternatively, an order in one litigation can continue in effect while an order in another litigation first joins it and is then terminated.

[117] Because 1983 and 1984 were the first years in which the BJS asked its court order question, the figure presents all the orders in those years as "new" to the dataset.

FIGURE 4: JAIL AND PRISON COURT ORDER INCIDENCE



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

Figure 4's new-versus-continuing regulation detail allows more nuanced assessment of the claim of late-1980s and early-1990s decline. The solid portions of the grey columns represent the percentage of facilities with court-order regulation in both a given census year and the prior census; the cross-hatched portions represent those facilities

whose report of regulation via court order was new. No decline appears. There are, to the contrary, many newly-regulated facilities in each year after the first, and no evidence of a 1980s/early-1990s decline in that number.

The story from the black, population-weighted, columns is more mixed. In prisons, there is no apparent decline. But in jails, the black columns show if not a decline then at least a remarkably low incidence in the population housed in newly-regulated facilities. (That is, the black cross-hatched portions of the columns are very small.) Indeed, only about one-sixth of the population subject to court orders in any year covered by the census is housed in a newly-regulated jail. Is the conventional wisdom regarding the decline in court orders correct as to jails, then? Were the orders governing the larger court-order-regulated jails from the mid-1980s through the 1990s mere relics of a bygone era of judicial activism? I think not, for two reasons. First, across both jails and prisons new incidence of orders tends to be underreported in Figure 4, because the census data are organized by *facility*, not by *order*. That is, just because a facility reported a court order in two censuses in a row does not mean that it did not become subject to a new order or orders. It could well be that many of the facilities in question were regulated by *different* court orders in the prior periods. Indeed, given the difference between the grey and the black columns, this seems probable. The more plausible explanation for the small size of the population in newly regulated facilities—though the point is untestable given this dataset—is that the very large jails were highly unlikely in the 1980s and 1990s to become newly subject to a court order not because court-order practice was decrepit but rather because the jails were so likely to have court orders previously. By 1983, the first year in which the BJS asked jails about court orders, 60% of jails in the top 4 percentile in terms of size[118] reported that they were governed by such an order; in the very top percentile, 80% of jails[119] reported orders. The point is that in these very large jurisdictions, which dominate the population-weighted black columns, prior regulation is so common that it cannot be used as a proxy for prior regulation by the same order. The grey columns, which weight every facility equally instead of giving such heavy weight to very large facilities, suffer less from this phenomenon, and therefore seem likely to present a more accurate picture of the actual proportion of old and new orders.

[118] These were the 121 jurisdictions that housed more than 320 inmates; between them, they housed over 127,000 inmates, 56% of the nation's total jail inmates.

[119] These were the thirty jurisdictions that housed 997 or more inmates; between them, they housed over 77,000 inmates, about 34% of the nation's total local jail inmates.

Moreover, even if every order in a facility that reported an order in the prior period truly *were* old, there are reasons to believe that these already-extant orders were probably not mere relics. First, the orders remained salient enough to prompt administrators to check off the relevant census boxes. Second, for each of the two census periods in which the analysis is possible[120] only about 16% of the jurisdictions reporting old court orders repeat precisely the same subject-matter description; the rest of the records show at least one and nearly always two or more changes in subject matter. Thus, it seems at least probable that even if these were indeed old orders, they were changing their terms over time—a sign of their continuing regulatory importance.

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.

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

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

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

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-

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-

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.

* * * *

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

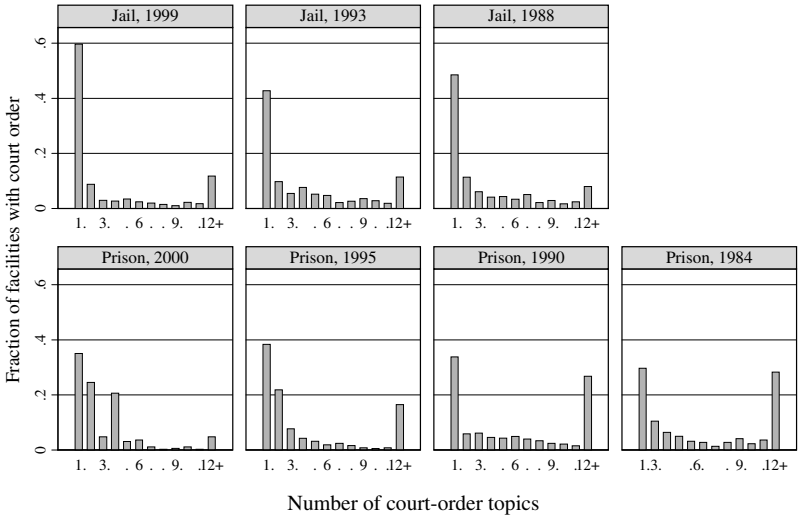
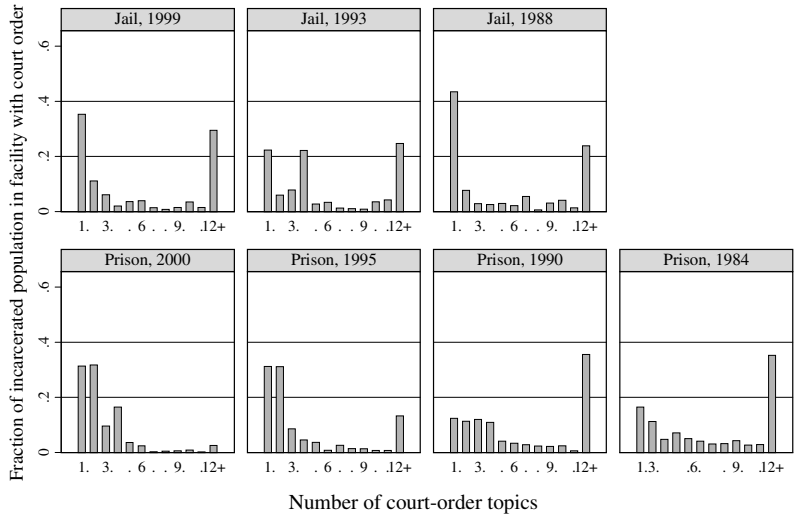


FIGURE 5B: NUMBER OF REGULATED TOPICS AMONG CORRECTIONAL ENTITIES WITH COURT ORDERS (WEIGHTED BY INCARCERATED POPULATION)



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

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.

1. The 1970s: Pugh v. Locke

In the 1970s, prior to the first correctional census datapoint, prison cases were typically litigated by advocates in a fairly limited network of organizations—most prominently, the NAACP Legal Defense Fund and the ACLU's National Prison Project and their

[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

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

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

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

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-

[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.

Finally, to end this examination of trends over time, a final 1990s litigation—and one that currently looms as large as *Ruiz* (and much larger than *Shumate*) in the zeitgeist of prison advocacy—*Madrid v. Gomez*, also involving the California prison system, was litigated all the way to resolution.[240] *Madrid* involved the same kinds of plaintiffs'-side advocates as *Shumate*—a large law firm, Wilson Sonsini, working pro bono; the Prison Law Office, a California prisoners' rights group; and private public-minded law firm Altshuler Berzon.[241] The case concerned the operations of three facilities at Pelican Bay—one maximum security, one "security housing unit" or SHU, and one small minimum security unit. Between the three, Pelican Bay housed between 3500 and 3900 inmates[242] (thus it was about the same size as the Alabama system found unconstitutional in *Pugh*). The case was tried before District Judge Thelton E. Henderson in thirty days spread over two-and-a-half months: There were fifty-seven lay witnesses (inmates, correctional officers, correctional officials) and ten experts; over 6000 exhibits; and thousands of pages of deposition excerpts entered into the record.[243]

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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

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,

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.

D. Jails

In jails, Figure 5 shows, there has been far less movement with respect to the number of topics. That jails are different from prisons is not surprising. For example, the PLRA has dampened the jail inmate litigation rate much less than the prison inmate litigation rate.[255] Still, a final question is, why *this* difference? Two ideas would be worth exploring in future research. Both stem from a basic fact about jails: Jail administrators have very few levers to influence either available resources or necessary expenditures. Jails are usually run by elected sheriffs, who have no ability to tax. They house inmates whose lengths of stay are largely determined by judges' decisions about bail, prosecutors' decisions about plea bargains, and local trial schedules. Prisons, by contrast, are run by wardens, civil service personnel who answer to a state director or secretary or commissioner of corrections. That director is most often a cabinet-level political appointee, though

[255] *See* Anne Morrison Piehl & Margo Schlanger, *Determinants of Civil Rights Filings in Federal District Court by Jail and Prison Inmates*, 1 J. EMPIRICAL L. STUD. 79, 103–05 (2004) (summarizing results from analyses of effect of PLRA on filing rates in jail and prison populations).

usually one with long-term corrections experience. Prisons have, if not a tight connection, a tighter one via the governor's office, to both their funding and their population, which is largely determined by state sentencing law.

The separation between elected sheriffs who run jails and the counties that fund them means that for jails, even more than prisons, much court-order litigation has been if not exactly collusive, at least useful—and accordingly, not so very hard fought. As one jail administrator said to me about a case that served his jail very well, budgetarily, "We got a lot of mileage out of that lawsuit; [we could] whip out [that decree] like a stiletto."[256] Jail orders have been more than just a way for sheriffs and other jailers to strong-arm money out of cash-strapped county governments. Because they so often included population caps, jail orders have been useful for administrators stuck with overcrowded facilities (which are dangerous for staff as well as for inmates), giving them new authority to release pretrial detainees whom they believe are not dangerous.

E. Possible Changes in the Nature of the Regulation: An Agenda for Future Research

As I mentioned in Part I, in a 2004 article Charles Sabel and William Simon suggest that the terms of decrees in public law litigation have altered over time, becoming more "flexible and provisional," and more focused on "procedures for ongoing stakeholder participation and measured accountability."[257] The corrections censuses offer no purchase on decree terms (rather than incidence and topic), which is regrettable both because Sabel and Simon's claim simply cries out for systematic research and because it seems to me suspect in two ways. First, I do not share Sabel and Simon's impression of a significant shift in substantive regulatory approach. Typically, the substantive provisions of most decrees strike me as similar to past decrees. Second, the process by which those substantive provisions are both developed and implemented seems likewise to have stabilized years ago. To the extent that decrees have grown increasingly flexible, that flexibility tends to apply simply to enforcement, as plaintiffs' eroding bargaining position has undermined their ability to

256 Telephone Interview with Patrick Bradley, Superintendent, Suffolk County House of Corrections (Mar. 30, 2001) (regarding Norfolk County House of Correction litigation, Libby v. Marshall, 653 F. Supp. 359 (D. Mass. 1986), *appeal dismissed*, 833 F.2d 402 (1st Cir. 1987)).

257 Sabel & Simon, *supra* note 65, at 1019.

obtain stern enforcement measures, a result plaintiffs' counsel report as far less than satisfactory.[258]

Like Sabel and Simon, I have not done systematic research on this aspect of the topic. No quantitative data are available. I have, however, read dozens and dozens of decrees, and *Shumate v. Wilson*, the California women's medical care case already discussed,[259] seems to me quite typical. Unlike its litigation process described above, the actual provisions of the *Shumate* decree do not look terribly different from those of medical care decrees in the 1970s or 1980s. As in earlier cases (for example the Alabama systemwide medical care case in 1972, *Newman v. Alabama*[260]) those provisions ranged from quite precise to extremely general. For example, the section of the *Shumate* agreement relating to skilled nursing care stated:

> [ ] At the Out-Patient Housing Unit (OPHU) at CIW [the California Institute for Women], medical staff shall respond to call buttons; RNs shall make regularly scheduled rounds; and a health assessment shall be performed before patients are placed in the individual rooms within the OPHU.
>
> [ ] Placement of an inmate in the SNF [Skilled Nursing Facility] or OPHU shall be a medical judgment.[261]

In *Newman*, similarly, the court insisted on individualized assessments of inmates, done by medical rather than correctional staff, ordering:

> That each inmate sent from another institution to the Medical and Diagnostic Center for medical reasons shall be seen on arrival by either a medical technical assistant or a registered nurse and by a physician within 12 hours following his arrival at the Medical and Diagnostic Center. No inmate shall be held in "medical hold" for over a 36-hour period without being seen by a medical technical assistant, a registered nurse, or a physician.[262]

And just like the order in *Pugh v. Locke* described above, the *Shumate* settlement occasionally referenced alternative sets of more detailed standards. For example, one paragraph stated that the prisons

> shall implement appropriate chronic disease guidelines, including medically necessary patient education provisions. Implementation

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258 *See* E-mail from John Boston, *supra* note 30.

259 *See supra* notes 238–39 and accompanying text.

260 *Newman* was consolidated for certain purposes with *Pugh v. Locke*. See *supra* note 183, for the citations to reported opinions.

261 Settlement Agreement at 11, Shumate v. Wilson, No. CIV S-95-00619 (E.D. Cal. Aug. 11, 1997) (available as document PC-CA-011-004 at http://clearinghouse.wustl.edu).

262 Newman v. Alabama, 349 F. Supp. 278, 288 (M.D. Ala. 1972).

> of the CDC Chronic Care Program shall constitute substantial compliance with this subsection.[263]

Again, to my eye, *Shumate* is fairly typical in this regard: Sabel and Simon's argument notwithstanding, the substantive provisions of decrees written now simply do not seem qualitatively different from those in decrees written years ago.[264]

Although there seems to be some use of newly fashionable management techniques in newer decrees, it seems to me that public law litigation has, since its beginning, been the preeminent site of what Sabel and Simon term "procedures for ongoing stakeholder participation."[265] That is no change. What *does* seem to me different are modern enforcement provisions, which have often grown weaker. In *Shumate*, the settlement was structured as a conditional dismissal, at least in part to obtain exemption from the PLRA's requirements for prospective relief. A team of experts was designated to conduct compliance review; if the experts found substantial compliance, the plaintiffs agreed not to oppose defendants' motion for an unconditional dismissal. If the experts found that defendants were not in substantial compliance, defendants agreed not to oppose plaintiffs' motion to restore the case to the court's active docket. Thus, *Shumate* held out no prospect that a noncompliant agency would have its feet held to the fire by a judge with the obligation to enforce the terms of a consent decree. And indeed, the case was eventually dismissed, notwithstanding the deep failings of the California prison system's health care, which caused Judge Henderson to take the drastic measure of putting the entire system in receivership this year as a remedy in another case, *Plata v. Davis*.[266] As one experienced litigator expressed it recently, *Shumate*'s settlement was "essentially a private settlement agreement, and those are categorically weaker than injunctions. The PLRA is as far as I know the only reason a sane plaintiff's lawyer would agree to one, unless the case was before a hostile federal judge."[267]

Clearly, however, there are examples of prison decrees that, as Sabel and Simon highlight, create a remedial framework rather than set out substantive rights. Indeed, the *Plata* settlement decree takes

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263 Settlement Agreement at 12, Shumate v. Wilson, No. CIV S-95-00619 (E.D. Cal. Aug. 11, 1997) (available as document PC-CA-011-004 at http://clearinghouse.wustl.edu).

264 *See* E-mail from John Boston, *supra* note 30.

265 Sabel & Simon, *supra* note 65, at 1019.

266 Plata v. Schwarzenegger, No. C-01-1351 (N.D. Cal. Oct. 3, 2005) (findings of fact and conclusions of law re appointment of receiver) (available as document PC-CA-018-007 at http://clearinghouse.wustl.edu).

267 E-mail from John Boston, *supra* note 30.

precisely this approach.[268] But I do not see much evidence that these kinds of decrees are more common now than they used to be. I concede, however, that while my impression about decree terms is a strong one, I cannot demonstrate its accuracy any more than Sabel and Simon could demonstrate its inaccuracy. Resolution will simply have to await future research.[269]

CONCLUSION

I have suggested in this paper that the conventional wisdom about correctional court orders is simply wrong. Part II of this paper demonstrated that injunctive practice affecting prisons and jails did *not* peak in the 1980s, and it did not fade to almost nothing in the 1990s. Indeed, even after the profound impact of the 1996 Prison Litigation Reform Act, injunctions remain a vital part of the system by which we govern our correctional administration. I suspect that in this divergence between the actual state of affairs and what academics have assumed, prison and jail litigation is not unique. There is every reason to believe that public law litigation and structural reform are alive and well in many arenas, and that the story of the decline of public law litigation will frequently prove false on systematic inquiry, as it has in jails and prisons. Even when there are declines in any given docket, they may well be countered by increases in another. For example, if there are fewer mental health facility conditions cases these days (given the 1970s deinstitutionalization of people with mental illness[270]), since the Supreme Court decided *Olmstead v.*

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[268] *See* Stipulation for Injunctive Relief, Plata v. Davis, No. C-01-1351 (N.D. Cal. June 13, 2002) (available as document PC-CA-018-005 at http://clearinghouse.wustl.edu). As Don Specter, one of the plaintiffs' lawyers in *Plata*, explained:

> If you take a look at the *Plata* decree . . . we use the decree more like a constitution to establish broad responsibilities on the defendants and to set forth the plaintiffs [sic] rights to monitoring and enforcement. I have found that the remedial process is usually very long and that many things change during the process so it's best just to have a framework rather than a [sic] rigid requirements.

E-mail from Don Specter, *supra* note 162.

[269] A new resource, the Civil Rights Litigation Clearinghouse, will make this kind of research far more practicable. *See* Civil Rights Litigation Clearinghouse, http://clearinghouse.wustl.edu (last visited Mar. 5, 2006).

[270] *See* PAUL S. APPELBAUM, ALMOST A REVOLUTION: MENTAL HEALTH LAW AND THE LIMITS OF CHANGE 49–52 (1994) (describing deinstitutionalization movement); JOHN Q. LA FOND & MARY L. DURHAM, BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW AND POLICY IN THE UNITED STATES 12–15 (1992) (same).

L.C.[271] there are many more cases seeking community placements for people with mental disabilities.[272]

Civil rights injunctive practice is a topic with very high stakes right now because Congress is currently considering the so-called "Federal Consent Decree Fairness Act,"[273] a bill that, if enacted, would drastically alter remedial law in cases involving state and local governments in ways similar to the PLRA's effect on prison and jail court-order cases. As introduced, the bill would govern "any final [federal court] order imposing injunctive relief against a State or local government or a State or local official sued in their official capacity . . . that is based in whole or part upon the consent or acquiescence of the parties."[274] The bill would allow defendants subject to such an order to seek termination or modification of the order four years after its entry or on expiration of the term in office of the highest governmental authority who signed off on the settlement, whichever is sooner.[275] This is not, itself, of much significance; currently, defendants can file modification/termination motions (under Federal Rule of Civil Procedure 60(b)) at any point they choose. The proposed statute's power comes from the rules it would set for the decision of such motions: The plaintiff would need to demonstrate some ongoing need for the order to protect against violation of federal law.[276] The current, court-announced standard, set out in *Rufo v. Inmates of Suffolk County Jail*,[277] places the burden on the party seeking modification of a consent decree to demonstrate that "a significant change in circumstances warrants revision of the decree."[278] Thus currently, when a defendant wants a non-correctional consent decree lifted, that defendant must show either its compliance with the

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[271] In *Olmstead v. L.C.*, 527 U.S. 581, 607 (1999), the Supreme Court held that the Americans with Disabilities Act often requires states to deinstitutionalize people with mental disabilities. *Olmstead* is often deemed the "*Brown v. Board of Education* of the disability rights movement." *See, e.g.*, Samuel R. Bagenstos, *Justice Ginsburg and the Judicial Role in Expanding "We the People": The Disability Rights Cases*, 104 COLUM. L. REV. 49, 49 & n.4 (2004) (citations omitted).

[272] *See, e.g.*, Martin Kitchener, Micky Willmott & Charlene Harrington, Home and Community Based Services: Olmstead and Olmstead-Related Lawsuits (Jan. 2005), www.pascenter.org/olmstead/downloads/Olmstead_Cases_Table.pdf (describing *Olmstead*-related litigation state by state).

[273] The bill exists as H.R. 1229, 109th Cong. (2005) (introduced March 10, 2005 by Representative (and Majority Whip) Roy Blunt (R-MO)), and S. 489, 109th Cong. (2005) (introduced March 1, 2005 by Senator Lamar Alexander (R-TN)).

[274] S. 489 § 3(a) (proposing to create a new 111 U.S.C. § 1660(a)(1)(A)). *See also* H.R. 1229 § 3(a) (same).

[275] H.R. 1229 & S. 489 § 3(a) (proposing to create a new 111 U.S.C. § 1660(b)(1)).

[276] H.R. 1229 & S. 489 § 3(a) (proposing to create a new 111 U.S.C. § 1660(b)(2)).

[277] 502 U.S. 367 (1992).

[278] *Id.* at 383.

decree[279] or that some unforeseen change in either the facts or the law justifies altering the bargain the defendant previously struck.[280] Thus consent decree modification under *Rufo* usually has as its touchstone the bargain, not the underlying federal law; as the PLRA has already done for jail and prison court orders, the Consent Decree Fairness Act would reverse this approach.

As plaintiffs' side advocates have seen under the PLRA, reopening a consent decree for adjudication after a year or more can create an extremely high hurdle for plaintiffs' lawyers. Because much of their prior preparation will be stale, they may need to reassemble a full array of evidence to go to trial. One would therefore expect to see two sets of plaintiffs-side responses to the bill's provisions. First, where plaintiffs have strong cases and where the potential terms of litigated relief are as attractive (or nearly as attractive) as the terms offered for negotiated relief, plaintiffs and their counsel will be inclined to pursue litigated judgments, which are not subject to such frequent and disadvantageous re-litigation. (Litigation has no such advantage under the PLRA, and so prison and jail court-order litigation has not followed this path.) Second, where there remain strong reasons to settle—if, for example, the terms of negotiated relief are mutually more attractive than the kind of relief a judge is likely to order—one would expect plaintiffs' lawyers to include as part of that relief the kind of ongoing disclosure that will enable them to counter a termination motion made prior to full decree compliance.[281]

On the other side of the litigation, there is every reason to expect that under the Consent Decree Fairness Act, many defendants will file for termination of many decrees prior to full compliance with them—decrees relating not only to civil rights of every stripe and flavor but to environmental law, zoning and land use, medical care (in particular Medicaid and Medicare compliance), labor law, and many many more.[282] At the same time, it will not be surprising to anyone familiar

279 *See supra* note 123, and accompanying text.

280 *Rufo*, 502 U.S. at 384–90.

281 This kind of ongoing information generation is already somewhat prevalent in consent decrees. *See, e.g.*, Settlement Agreement at 5, Wilkins v. Maryland State Police, No. CCB-93-468 (D. Md. Dec. 1994) (provisions for information disclosure in settlement of racial profiling case) (available as document PP-MD-002-002 at http://clearinghouse.wustl.edu); Revised Third Amended Complaint and Jury Demand at 15–18, Maryland NAACP v. Maryland State Police, No. 1:98-cv-01098-PWG (D. Md. Jan. 13, 2005) (available as document PP-MD-001-002 at http://clearinghouse.wustl.edu) (describing plaintiffs' use of information from *Wilkins* settlement in subsequent lawsuit).

282 The full effect is difficult to predict because, as House Majority Whip Roy Blunt, the Act's chief House sponsor, complains, "[t]here's no record, there's no clearinghouse, no way to look and see how many of these decrees are out there." Congressman Roy Blunt, Remarks from Panel, American Enterprise Institute, Government by Consent Decree?

with the recent history of jail litigation if defendants—especially small jurisdictions in which litigation costs loom larger than compliance costs—file fewer termination motions than the Consent Decree Fairness Act's proponents now expect. Unless a settlement is working quite poorly from a defendant's perspective, there will be little incentive for that defendant to open the door to relitigation, with its attendant expense and risk. These same jurisdictions will for similar reasons be particularly hard hit by any increase in litigation to judgment caused by plaintiffs' reluctance to settle for a decree of such uncertain future.

In sum, then, the Consent Decree Fairness Act is likely to have three major impacts. First, whatever values are served by the thousands of federal consent decrees that currently exist—and these are primarily, but by no means exclusively, progressive values—will be disserved by their early annulment. Second, the predictable boom in litigation-to-judgment, relitigation, and monitoring will surely tax advocates, forcing them to shrink their dockets and circumscribe their agendas. Third, smaller jurisdictions in particular may well be hurt by the Act, rather than aided, because they are the defendants most interested in avoiding litigation costs, which will be increased not only for plaintiffs but for defendants as well.

The point is that both the historical trends and current—and future—situation of injunctive litigation is of far more than academic interest. Because of the conventional wisdom, progressive policymakers have thought it relatively low-cost to accede to conservative proposals to restrict injunctive litigation. This is a major mistake. Public law litigation is far from dead. Even though there is much we do not (but should) know about it, we can be sure that it continues to regulate much government conduct in many jurisdictions. It would be deeply regrettable if uninformed anomie about the current status of structural injunctive litigation opened the door to enactments that produce its actual decline. Rather, civil rights injunctions deserve the energetic defense of those in favor of the values they protect.

More generally, if civil rights injunctive practice is more than a matter of merely historical interest, the conventional account of decline has obstructed the need for research into the actual contours of this crucial regulatory method. With the notable exception of school litigation of various types, there is scant work in *any* area of institutional reform litigation that looks hard and systematically at

(June 9, 2005) (edited transcript available at http://www.aei.org/events/filter.,eventID.1078/transcript.asp). The Civil Rights Litigation Clearinghouse, http://clearinghouse.wustl.edu, has begun to address this problem, though it is limited to civil rights, broadly defined.

court orders. Part III of this paper begins inquiry into the kinds of things researchers should want to know. What I have found, besides the continuation of injunctive practice, is a very important shift in its predicate in prisons. Court orders have gotten more and more onerous to obtain as the litigation has grown more and more complex. I have suggested that the reasons for this shift are not principally doctrinal. More important than the top-down message from the Supreme Court have been two bottom-up factors. First are the influences of particular hard-fought, well-funded cases—Texas's system litigation, *Ruiz v. Estelle*, and California's Pelican Bay litigation, *Madrid v. Gomez*—that then exert great influence as models of how this kind of case should be conducted. Second are the shifting norms of practice, increasing skepticism about causation on the part of judges, and increasing adherence to big firm "litigation playbooks" by pro bono partners in the litigation. I am far from confident that these tendencies have worked in the same way in other types of public law litigation—indeed, it seems likely that they have worked differently even in jail litigation. It is precisely this kind of question that researchers should be asking.