

CORRECTIONAL LAW *Reporter*™

VOLUME XXVIII No 5

Pages 69-88

SSN 1043-6766

February/March 2017

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Trends in Prisoner Litigation, as the PLRA Approaches 20

by Margo Schlanger

Introduction

The Prison Litigation Reform Act (PLRA),¹ enacted in 1996 as part of the Newt Gingrich “Contract with America,” is now as old as many prisoners. In the year after the statute’s passage, some commenters labeled it merely “symbolic.”² In fact, as was evident nearly immediately, the PLRA undermined prisoners’ ability to bring, settle, and win lawsuits.³ The PLRA conditioned court access on prisoners’ meticulously correct prior use of onerous and error-inviting prison grievance procedures. It increased filing fees, decreased attorneys’ fees, and limited damages. It subjected injunctive settlements to the scope limitations usually applicable only to litigated injunctions. It made prison

and jail population caps—previously common—far more difficult to obtain. And it put in place a rule inviting frequent relitigation of injunctive remedies, whether settled or litigated.

The resulting impact on jail and prison litigation has been extremely substantial. In two in-depth articles over a decade ago, I presented descriptive statistics showing the PLRA-caused decline in civil rights filings and plaintiffs’ victories, and the likewise declining prevalence of court-ordered regulation of jails and prisons. Here I update those statistics for use by policymakers, judges, and other researchers, and discuss them briefly.⁴ I look in Parts I and II at damage

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Parole Denial Condemned: The Quality of Mercy Is Strained

by Fred Cohen

One of my earliest interests in criminal justice focused on parole; that is, on the discretionary release of prisoners statutorily eligible for supervised release and then the supervision process itself. What fascinated me was the near total discretion of politically appointed parole board (Board) members carried out within the legal framework of the now moribund dichotomy between rights and privileges.

There was, it was argued, an affirmative constitutional right, let’s say, to a jury, counsel, protection from self-incrimination and so on. A prisoner had no right to parole, only a mere hope. “Mere hopes” were lower in the judicial hierarchy of protected values than even expectations. I suspect that a mere

expectation produced the same result as a mere hope: no legally enforceable claim to what was being sought (here, conditional freedom) and no right to a procedural format that might persuade an impartial decision-maker of the merits of your claim.

Parole itself has diminished in popularity in favor of various forms of determinate sentencing. The Sentencing Project in 2013 reported that Illinois, Iowa, Louisiana, Maine, Pennsylvania, and the federal government eliminated parole entirely during the late 1970s.

Life Without Parole (LWOP) sentences abound with some 49,000 prisoners as of 2012 serving such a sentence.

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actions, using primarily the data compiled by the Administrative Office of the U.S. Courts (the AO) for each federal district court case “terminated” (that is, marked complete by a district court, whether provisionally—say, pending appeal—or

is clear. Begin with filings. These are affected by numerous PLRA provisions, including: the rule that filing fees are unwaivable for indigent prisoners;⁶ the requirement of administrative exhaustion⁷ (which discourages lawsuits where such exhaustion has not occurred, since they will almost certainly fail); the attorneys’

ures 1.A and 1.B are clear. A steep increase in prisoner civil rights litigation combined in the 1970s with a steep increase in incarcerated population. The filing rate slowly declined in the 1980s, but the increase in jail and prison population nonetheless pushed up raw filings. Then, as in the 1970s, the 1990s saw an increase in both jail and prison population and filings rates, until 1995. In 1996, the PLRA immediately transformed the litigation landscape. After a very steep decline in both filings and filing rates in 1996 and 1997, rates continued to shrink for another decade (although the increasing incarcerated population meant that the resulting number of filings increased a bit). Since 2007, filing rates, prison population, and filings have all basically plateaued; a few states saw notable upticks in 2014, but filings were back down in 2015.

The state-by-state story is far more varied. Table 2 (p.73) presents the data: it compares 1995 (the year prior to the PLRA) and 2014 (the latest year for which state-by-state jail and prison population information—and therefore filing rate information—is available). The first set of columns show the jail and prison population, the prisoner civil rights filings in federal district court, and the resulting filing rate in 1995. The states are set out in rank order, with Iowa, the state whose prisoners were in 1995 the most litigious, ranked 1. The second set of columns presents the same information for 2014. The third set of columns shows the change over the nineteen-year period, as a simple change and as a percent change—so Iowa’s change from a filing rate of 101.7 to

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The PLRA immediately transformed the litigation landscape. After a very steep decline in both filings and filing rates in 1996 and 1997, rates continued to shrink for another decade and, since 2007, have basically plateaued.

finally), and prison and jail population tallied annually by state by the U.S. Department of Justice.⁵ Part I examines prisoner filings over time and by state. Part II examines outcomes over time and compares outcomes in other case categories. In Part III, I move to the topic of injunctive prison and jail litigation—cases in which prisoner plaintiffs seek a change in policy or other aspects of prison conditions. The PLRA was motivated in large part by Republican discontent with plaintiffs’ successes in such litigation, and Part III demonstrates comprehensively that it has succeeded in radically shrinking—but not eliminating—the coverage of such orders.

I. Filings

The PLRA’s sharp impact on the prevalence and outcomes in prison litigation

fees limits;⁸ and the three-strikes requirement compelling frequent lawsuit filers to satisfy filing fees in advance without regard to their ability to pay.⁹ As before the PLRA, litigation remains one of the few avenues for prisoners to seek redress for adverse conditions or other affronts to their rights. Accordingly, litigation continues—but at a much reduced rate. Table 1 (p. 71) demonstrates. It show jail and prison populations from 1970 to the present, along with federal court filings categorized by the courts as dealing with “prisoner civil rights” or “prison conditions.” Figures 1.A and 1.B (p.72) present some of the same information in graphic form—Figure 1.A shows filings compared to prison and jail population, and Figure 1.B shows filing rates compared to prison and jail population.

The national trends in Table 1 and Fig-

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Correctional Law Reporter (ISSN 1043-6766) is published bimonthly by Civic Research Institute, Inc., 4478 U.S. Route 27, P. O. Box 585, Kingston, NJ 08528. Periodicals postage paid at Kingston, NJ and at additional mailing office (USPS # 0010-277). Subscriptions: \$179.95 per year in the United States and Canada. \$30 additional per year elsewhere. Vol. XXVIII, No. 5, February/March 2017. Copyright 2016 by Civic Research Institute, Inc. All rights reserved. POSTMASTER: Send address changes to Civic Research Institute, Inc., P.O. Box 585, Kingston, NJ 08528.

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10.5 federal lawsuits per 1,000 prisoners is shown both as a change of 91.2 (101.7 – 10.5), and 89.7%. Nationwide the filing rate shrank by 13 filings per 1,000 prisoners, and by over 50%, from 24.6 to 11.6 lawsuits per 1,000 prisoners. For thirty-two states, the proportional change was that big or bigger. But as Table 2 (p. 73) presents, for a few states the change was

smaller, and for five states, inmate litigation was up in 2014. (I cannot calculate state-by-state rates for 2015, because the Department of Justice has not yet released the necessary jail and prison population data. But it is clear that 2015 rates will be significantly lower than 2014. I do not know the cause of the one-year increase.) Figure 2.A (p.79) puts the penultimate columns of Table 2 into a histogram, to make plainer the varied experience of the

states.

Figures 2.B and 2.C (pp.79 and 80 respectively) focus additional attention on the varying effects of the PLRA by state. Figure 2.B presents the six states that have experienced the steepest decline in filing rates since 1995, showing their changed filing rates by year. (So for example, a drop of 10 filings per 1,000 inmates from the rate in 1995—whatever that rate was—is shown as -10.) Figure

See PRISONER LITIGATION, next page

Table 1: Prison and Jail Population and Prisoner Civil Rights Filings in Federal District Court, Fiscal Years 1970–2015

Fiscal year of filing	Incarcerated population (all figures are for people in custody)				Prisoner civil rights filings in federal district court			Filings per 1000 inmates
	Total	State prison, year-end	Federal prison, year-end	Jail, mid-year	Total	Non-federal defendants	Federal defendants	
1970	359,555	178,654	20,038	160,863	2,244	2,091	153	6.2
1971	358,061	177,113	20,948	160,000	3,179	2,969	210	8.9*
1972	356,092	174,379	21,713	160,000	3,635	3,393	242	10.2*
1973	364,211	181,396	22,815	160,000	4,666	4,258	408	12.8*
1974	389,721	207,360	22,361	160,000	5,573	5,185	388	14.3*
1975	413,816	229,685	24,131	160,000	6,526	6,019	507	15.8*
1976	438,000	248,883	29,117	160,000	7,095	6,701	394	16.2*
1977	449,563	258,643	30,920	160,000	8,348	7,843	505	18.6*
1978	454,444	269,765	26,285	158,394	10,087	9,520	567	22.2
1979	474,589	281,233	23,356	170,000	11,713	11,149	564	24.7*
1980	501,886	295,819	23,779	182,288	13,079	12,496	583	26.1
1981	555,114	333,251	26,778	195,085	16,331	15,544	787	29.4
1982	614,914	375,603	27,311	212,000	16,809	16,075	734	27.3
1983	651,439	394,953	28,945	227,541	17,516	16,792	724	26.9
1984	678,905	417,389	30,875	230,641	18,339	17,470	869	27.0
1985	752,603	451,812	35,781	265,010	18,487	17,660	827	24.6
1986	802,132	496,834	39,781	265,517	20,365	19,657	708	25.4
1987	853,114	520,336	42,478	290,300	22,070	21,412	658	25.9
1988	942,827	562,605	44,205	336,017	22,654	21,876	778	24.0
1989	1,070,227	629,995	53,387	386,845	23,736	22,803	933	22.2
1990	1,151,457	684,544	58,838	408,075	24,051	23,028	1,023	20.9
1991	1,215,144	728,605	63,930	422,609	24,352	23,567	785	20.0
1992	1,292,465	778,495	72,071	441,899	28,544	27,723	821	22.1
1993	1,375,536	828,566	80,815	466,155	31,693	30,842	851	23.0
1994	1,469,904	904,647	85,500	479,757	36,595	35,550	1,045	24.9
1995	1,588,370	989,004	89,538	509,828	39,053	38,022	1,031	24.6
1996	1,643,196	1,032,676	95,088	515,432	38,262	37,126	1,136	23.3
1997	1,733,150	1,074,809	101,755	556,586	26,095	25,226	869	15.1
1998	1,816,528	1,111,927	110,793	593,808	24,220	23,312	908	13.3
1999	1,889,538	1,155,878	125,682	607,978	23,512	22,645	867	12.4
2000	1,915,701	1,177,240	140,064	598,397	23,358	22,400	958	12.2
2001	1,969,747	1,179,954	149,852	639,941	22,131	21,224	907	11.2
2002	2,035,529	1,209,145	158,216	668,168	21,989	21,045	944	10.8
2003	2,082,145	1,225,971	168,144	688,030	22,063	20,916	1,147	10.6
2004	2,137,476	1,244,216	177,600	715,660	21,552	20,336	1,216	10.1
2005	2,189,696	1,261,071	186,364	742,261	22,483	21,316	1,167	10.3
2006	2,260,714	1,297,536	190,844	772,334	22,466	21,440	1,026	9.9
2007	2,295,982	1,316,105	197,285	782,592	21,975	20,822	1,153	9.6
2008	2,302,657	1,324,539	198,414	779,704	23,546	22,386	1,160	10.2
2009	2,274,099	1,319,563	205,087	749,449	22,696	21,550	1,146	10.0
2010	2,255,188	1,314,445	206,968	733,775	22,725	21,605	1,120	10.1
2011	2,227,723	1,290,212	214,774	722,737	23,354	22,055	1,299	10.5
2012	2,229,879	1,266,999	216,915	745,965	22,717	21,686	1,031	10.2
2013	2,216,836	1,270,277	214,989	731,570	24,022	22,566	1,456	10.8
2014	2,187,441	1,269,739	209,561	708,141	25,324	24,134	1,190	11.6
2015	NA	1,249,304	195,622	NA	23,433	22,543	890	NA

Notes:

(1) * means estimate, because jail population figures are unavailable for that year.

(2) In the last three rows, filing figures omit 692 (FY2013), 3955 (FY2014), and 252 (FY2015) cases brought by Arizona prisoner Dale Maisano. These cases were nearly all resolved very quickly—one-third of them within a week of filing. I've omitted them to avoid swamping other trends.

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Figure 1.A: Prisoner Population and Civil Rights Filings, Fiscal Years 1970–2015

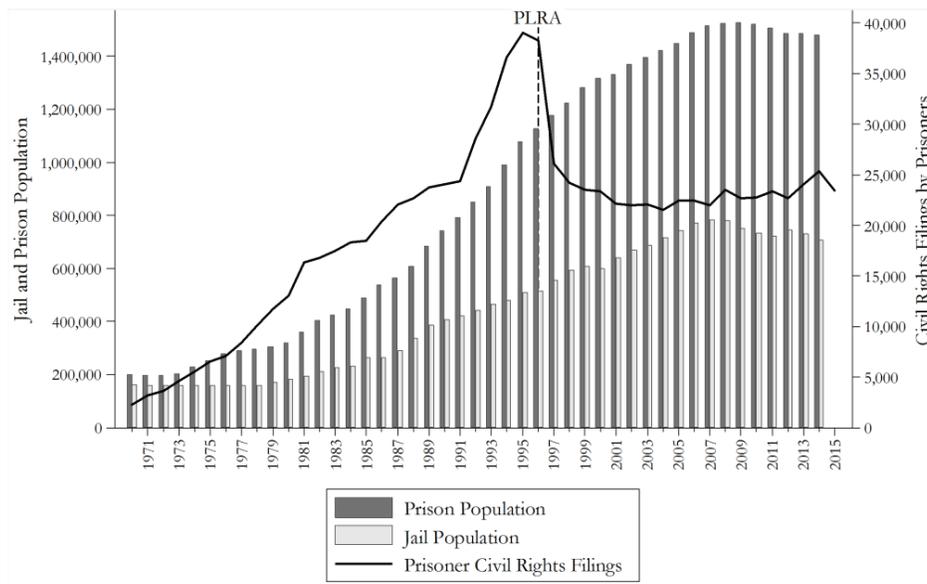
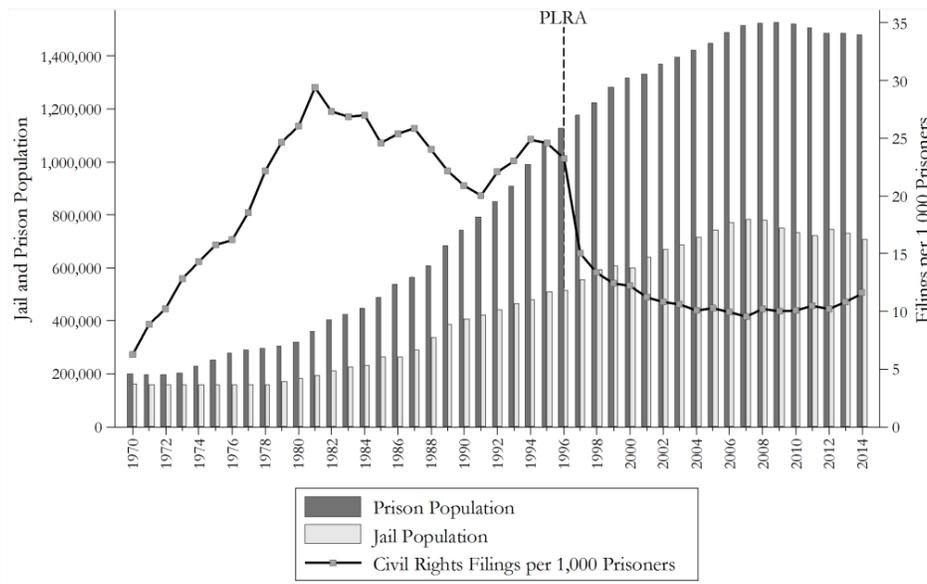


Figure 1.B: Prisoner Population and Civil Rights Filings per 1000 Prisoners, Fiscal Years 1970–2014



2.C is the same information for the five states where the 2014 figures demonstrate a rate increase over that same period.

Figure 2.B's states look very like the nation as a whole, although the pattern is more pronounced. But Figure 2.C's patterns are quite different. While the trend lines are not entirely consistent state to state, they generally are U-shaped curves. That is, even in these states, fil-

ing rates declined for some years after the PLRA's passage. At that point, something—I imagine something different in each state—turned that trend around and caused the filing rate to increase. Future research might uncover what that spur was. We can guess that it was not appellate precedent; the states in question are from the First, Second, Seventh, and Ninth Circuits.

II. Outcomes

One might expect that the drastic pruning of the prisoner civil rights docket that occurred beginning in 1996 would tilt the docket toward higher quality cases—so that prisoner success rates would go up. However, I previously demonstrated, using data through 2001, that the PLRA

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Table 2: Change in Prisoner Filings in U.S. District Court and Filing Rates by State, Fiscal Years 1995–2014

State	1995				2014				1995–2014		
	Jail and Prison Pop.	Filings	Filing Rate	Rate Rank	Jail and Prison Pop.	Filings	Filing Rate	Rate Rank	Rate Change		Rank Change
									N	%	
United States	1,588,370	39,053	24.6		2,186,442	25,324	11.6		13.0	52.9%	
Iowa	8,015	815	101.7	1	12,707	133	10.5	24	91.2	89.7%	-23
Ark.	11,786	967	82.0	2	23,076	839	36.4	2	45.7	55.7%	0
Miss.	16,273	1,035	63.6	3	25,244	397	15.7	10	47.9	75.3%	-7
Neb.	4,733	297	62.8	4	8,499	71	8.4	36	54.4	86.7%	-32
Mo.	25,883	1,523	58.8	5	43,661	348	8.0	40	50.9	86.5%	-35
Va.	41,047	2,166	52.8	6	58,555	779	13.3	16	39.5	74.8%	-10
Ala.	31,639	1,403	44.3	7	41,876	867	20.7	6	23.6	53.3%	+1
Del.	4,799	205	42.7	8	6,730	113	16.8	8	25.9	60.7%	0
La.	38,106	1,548	40.6	9	49,100	623	12.7	19	27.9	68.8%	-10
Nev.	11,898	475	39.9	10	19,853	324	16.3	9	23.6	59.1%	+1
Ariz.	32,628	1,247	38.2	11	54,677	1004	18.4	7	19.9	52.0%	+4
Me.	2,329	87	37.4	12	4,083	31	7.6	42	29.8	79.7%	-30
Ky.	22,084	824	37.3	13	32,923	277	8.4	35	28.9	77.5%	-22
Ind.	26,922	967	35.9	14	51,520	428	8.3	37	27.6	76.9%	-23
Tenn.	30,799	1,076	34.9	15	46,933	684	14.6	13	20.4	58.3%	+2
Pa.	63,720	2,114	33.2	16	84,574	1,214	14.4	14	18.8	56.7%	+2
Colo.	20,278	634	31.3	17	31,499	393	12.5	20	18.8	60.1%	-3
Wyo.	1,913	57	29.8	18	3,795	22	5.8	47	24.0	80.5%	-29
Mont.	2,575	76	29.5	19	5,435	254	46.7	1	-17.2	-58.3%	+18
Vt.	1,245	35	28.1	20	1,979	17	8.6	33	19.5	69.4%	-13
Haw.	2,812	76	27.0	21	5,390	41	7.6	41	19.4	71.9%	-20
Kan.	12,373	333	26.9	22	17,071	123	7.2	43	19.7	73.2%	-21
Wis.	21,275	559	26.3	23	34,582	404	11.7	23	14.6	55.5%	0
Utah	6,633	169	25.5	24	12,549	60	4.8	49	20.7	81.2%	-25
W. Va.	6,855	169	24.7	25	9,900	147	14.8	12	9.8	39.8%	+13
S.C.	26,927	648	24.1	26	31,745	724	22.8	5	1.3	5.2%	+21
Wash.	20,185	481	23.8	27	30,127	355	11.8	22	12.0	50.6%	+5
Conn.	15,740	370	23.5	28	16,814	156	9.3	29	14.2	60.5%	-1
Ga.	64,977	1,496	23.0	29	95,716	897	9.4	28	13.7	59.3%	+1
Ill.	56,827	1,270	22.3	30	67,200	2,427	36.1	3	-13.8	-61.6%	+27
Md.	32,295	708	21.9	31	31,450	489	15.5	11	6.4	29.1%	+20
Mich.	56,049	1,217	21.7	32	59,400	557	9.4	27	12.3	56.8%	+5
Okla.	21,686	437	20.2	33	38,322	224	5.8	46	14.3	71.0%	-13
N.C.	39,360	760	19.3	34	54,552	706	12.9	18	6.4	33.0%	+16
R.I.	2,854	54	18.9	35	3,133	26	8.3	38	10.6	56.1%	-3
Tex.	194,719	3,597	18.5	36	218,699	1,749	8.0	39	10.5	56.7%	-3
N.Y.	103,799	1,860	17.9	37	77,352	1,785	23.1	4	-5.2	-28.8%	+33
Fla.	110,948	1,968	17.7	38	152,707	1,415	9.3	30	8.5	47.8%	+8
S.D.	3,239	57	17.6	39	5,075	70	13.8	15	3.8	21.6%	+24
Alaska	2,876	50	17.4	40	5,300	31	5.8	45	11.5	66.4%	-5
Or.	14,327	227	15.8	41	20,317	180	8.9	31	7.0	44.1%	+10
N.M.	8,022	124	15.5	42	14,327	142	9.9	26	5.5	35.9%	+16
Idaho	4,978	75	15.1	43	11,000	97	8.8	32	6.2	41.5%	+11
N.J.	42,701	639	15.0	44	35,114	461	13.1	17	1.8	12.3%	+27
N.H.	3,244	47	14.5	45	4,729	40	8.5	34	6.0	41.6%	+11
Ohio	57,732	746	12.9	46	71,202	266	3.7	50	9.2	71.1%	-4
Cal.	218,145	2,575	11.8	47	205,445	2,433	11.8	21	0.0	-0.3%	+26
Minn.	11,515	124	10.8	48	16,136	79	4.9	48	5.9	54.5%	0
Mass.	19,067	153	8.0	49	20,313	210	10.3	25	-2.3	-28.8%	+24
N.D.	1,112	8	7.2	50	3,190	19	6.0	44	1.2	17.2%	+6

Note: a negative value in the second to last column means that the rate has increased.

not only made prisoner civil rights cases harder to bring, as illustrated above, but also made them harder to win.¹⁰ In particular, prisoners' cases are thrown out of court for failure to properly complete often-complicated grievance procedures, or because they do not allege physical in-

jury, which some courts read the PLRA to require for recovery even in constitutional cases. Now that we have another decade of data, it's worth reexamining this issue, to see if trends have continued, moderated, or reversed.

The data presented in Table 3 (p.84)

confirm my earlier conclusions. The table presents outcomes in prisoners' federal civil rights cases, resolved from Fiscal Year 1988 through 2015. (1988 is chosen as a start date because of federal coding protocol changes prior to that year.) Each

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Figure 2.A: Percent Decline in Prisoner Filing Rate in U.S. District Court, Fiscal Years 1995–2014, by State

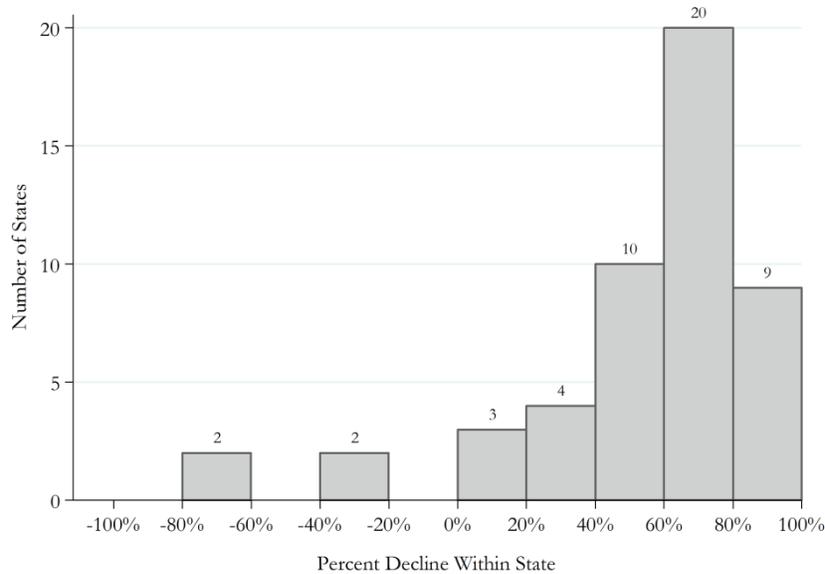
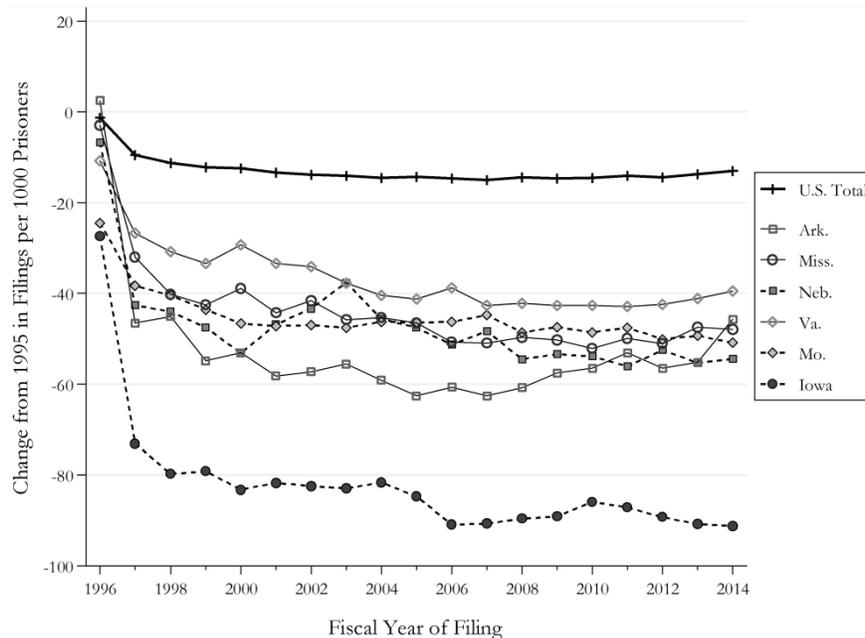


Figure 2.B: Change in Prisoner Filing Rate in U.S. District Court, Fiscal Years 1995–2014, Six States with Largest Declines



row is a year, each column a particular outcome. Scanning the table one column at a time, to detect trends over time, reveals that the courts are becoming less and less hospitable for prisoners' claims. Column (a) shows filings; column (b) terminations; and column (c) the portion of those terminations that constituted judgments. (Most non-judgments are transfers

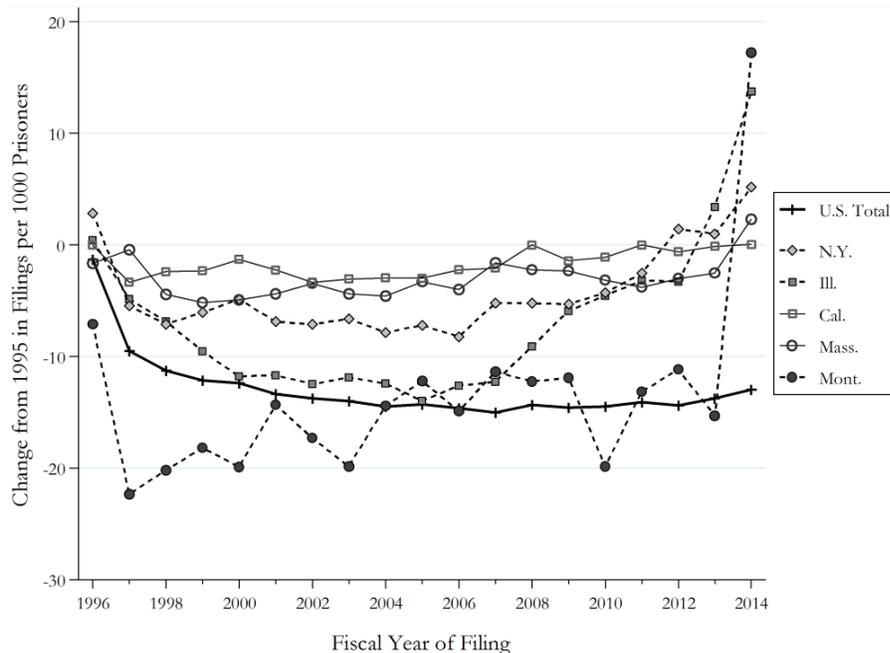
to another court.) Most remaining outcomes are calculated as a proportion of judgment dispositions. Column (d) is pretrial decisions for the defendant; tracing it through the years shows that after the PLRA, such decisions increased although not overwhelmingly so. On the other side, pretrial victories for the plaintiff, in column (e), have declined, though some of

that decline predates the PLRA.¹¹ Column (f) shows a decline in settlements, much but not all postdating the PLRA. Column (g) shows a similar decline in voluntary dismissals, which are often settlements as well. And column (h) shows a decline in trials, again much of it subsequent to the PLRA. (Plaintiffs' victories at those

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Figure 2.C: Change in Prisoner Filing Rate in U.S. District Court, Fiscal Years 1995–2012, Five States with Increases



decreasing numbers of trials, in column (i), appear not to have changed.) Columns (j) and (k) show the timing of settlements, before or after “issue is joined,” (that is, before or after the filing of an answer to the civil complaint). The declining portion of settlements in column (j) suggests that settlements have become harder to come by for plaintiffs. And finally, column (l) sums up the portion of the docket in which it appears plaintiffs may have succeeded in any way, adding together settlements, voluntary dismissals, pretrial victories, and victories at trial. Those numbers are down substantially since the early 1990s.

In short, in cases brought by prisoners, the government defendants are winning more cases pretrial, settling fewer matters, and going to trial less often. Those settlements that do occur are harder fought; they are finalized later in the litigation process. Plaintiffs are, correspondingly, winning and settling less often, and losing outright more often. Probably not all these changes were caused by the PLRA—several of the trend lines seem to start prior to the statute’s enactment. But given the PLRA’s very definite anti-plaintiff tilt, it seems nearly certain that the statute has caused at least some of the declining access to court remedies demonstrated in Table 3 (p. 84).

The same outcome information for

other categories of cases (not presented here, but available in the online appendix) reveals that only in the other prisoner category—habeas cases and other similar quasi-criminal matters—do plaintiffs fare anywhere close to as badly. One piece of the explanation is that prisoner civil rights cases are overwhelmingly *pro se*—and at a much higher rate than prior to the PLRA, which drastically limited attorneys’ fees.

age verdicts pushed the average award to close to nearly \$.5 million. Table 4 (p. 85) summarizes.¹²

III. Court Orders

Since the 1970s, court orders have been a major source of regulation and oversight for American jails and prisons—whether those orders entailed active judicial supervision, intense involvement of plain-

The PLRA not only made prisoner civil rights cases harder to bring, as illustrated above, but also made them harder to win.

Looking at the closing year of the cases, in 1996, 83% of prisoner civil rights cases were coded as *pro se*; the figure for cases terminated in 2015 is 93%.

Moreover, when prisoners do litigate all the way to victory, they mostly win pretty small. In 2012, there were 43 federal civil rights trials in which prisoner-plaintiffs won. Seven of these were big wins, with awards close to or over \$1 million; but in the other 36 taken all together, damages totaled only \$1.3 million. All told, the median award in these 43 trials was \$3000, although those few high-dam-

tiffs’ counsel or other monitors, or simply a court-enforceable set of constraints on corrections officials’ discretion. The PLRA altered this system with provisions that promote termination of existing court orders, and others that shortened the life span of new orders.¹³ The impact took some time to manifest, but became very clear. Table 5 (p. 85) shows the results.¹⁴

Columns (a) and (c) show the total number of facilities, and total incarcerated population, for jails and prisons in each census year. Columns (b) and (d)

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Table 3: Outcomes in Prisoner Civil Rights Cases in Federal District Court, Fiscal Years 1988–2015

Note: In the last three rows, filing figures omit 692 (FY2013), 3955 (FY2014), and 252 (FY2015) cases, and termination figures omit 624 (FY2013), 3984 (FY2014), and 286 (FY2015) cases, all brought by Arizona prisoner Dale Maisano. These cases were nearly all resolved very quickly—one-third of them within a week of filing. I’ve omitted them to avoid swamping other trends.

Fiscal Year				Outcomes, as % of Judgment Dispositions					Plaint. Trial Vict., as % of Trials	Timing of Settlements, as % of Settlements, per Vol. Dismissals		All Plaintiff. Successes, as % of Judgments
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)		(j)	(k)	
	Filings	Terminations	Judgments, as % of Terminations	Pretrial Decisions for Deft.	Pretrial Decisions for Plaintiff	Settled	Vol. Dismissals	Trials		Before Issue Joined	After Issue Joined	
1988	22,654	24,076	96.5%	83.2%	1.1%	7.1%	4.0%	3.6%	13.5%	58.5%	41.5%	12.6%
1989	23,736	24,712	96.5%	82.1%	1.0%	7.3%	5.1%	3.7%	13.8%	52.3%	47.7%	13.9%
1990	24,051	24,855	96.0%	82.7%	1.1%	7.6%	5.0%	3.4%	15.3%	48.8%	51.2%	14.3%
1991	24,352	24,877	95.0%	82.1%	0.9%	7.7%	6.1%	3.1%	14.5%	52.1%	47.9%	15.2%
1992	28,544	28,357	94.9%	80.2%	1.2%	7.6%	7.5%	3.3%	11.7%	60.2%	39.8%	16.7%
1993	31,696	31,893	95.1%	81.1%	1.0%	6.8%	8.0%	2.8%	14.8%	60.0%	40.0%	16.2%
1994	36,601	36,098	95.0%	80.9%	0.8%	7.2%	7.2%	2.9%	12.3%	53.8%	46.2%	15.6%
1995	39,076	41,201	94.9%	83.5%	0.7%	6.2%	6.5%	2.5%	10.4%	61.3%	38.7%	13.7%
1996	38,293	42,522	95.0%	84.5%	0.6%	5.5%	6.3%	2.6%	8.9%	61.8%	38.2%	12.7%
1997	26,095	34,981	96.1%	83.8%	0.7%	5.4%	6.8%	2.8%	10.4%	61.2%	38.8%	13.2%
1998	24,220	29,938	95.9%	85.2%	0.5%	5.2%	6.0%	2.5%	8.5%	60.7%	39.3%	12.0%
1999	23,512	26,561	94.7%	86.4%	0.5%	4.7%	5.2%	2.4%	11.4%	56.7%	43.3%	10.7%
2000	23,358	25,176	93.8%	86.3%	0.4%	4.2%	5.7%	2.4%	13.3%	54.0%	46.0%	10.7%
2001	22,131	24,572	93.9%	87.0%	0.4%	3.9%	5.7%	2.1%	13.7%	53.9%	46.1%	10.3%
2002	21,989	24,245	94.0%	87.8%	0.4%	3.6%	5.6%	1.8%	8.4%	55.2%	44.8%	9.8%
2003	22,063	23,653	93.6%	88.0%	0.6%	3.8%	5.1%	1.4%	13.9%	53.2%	46.8%	9.7%
2004	21,552	23,181	92.9%	86.0%	0.4%	3.8%	4.8%	1.3%	14.0%	55.4%	44.6%	9.2%
2005	22,483	23,712	92.5%	85.0%	0.3%	3.8%	4.4%	1.0%	10.9%	53.4%	46.6%	8.6%
2006	22,466	24,846	93.6%	83.2%	0.3%	3.9%	4.0%	0.9%	16.9%	0.0%	0.0%	8.4%
2007	21,975	23,630	92.5%	82.0%	0.2%	3.8%	4.7%	0.9%	13.5%	0.0%	0.0%	8.9%
2008	23,546	25,097	92.2%	85.3%	0.5%	3.7%	4.6%	1.1%	16.5%	0.0%	0.0%	9.0%
2009	22,696	24,454	91.9%	87.0%	0.5%	4.2%	5.3%	1.3%	13.1%	51.2%	48.8%	10.2%
2010	22,725	24,781	91.3%	85.9%	0.5%	4.8%	5.2%	1.3%	14.4%	47.6%	52.4%	10.7%
2011	23,354	24,760	90.5%	85.8%	0.4%	4.9%	5.4%	1.2%	11.6%	49.5%	50.5%	10.9%
2012	22,717	24,673	90.9%	84.9%	0.5%	5.0%	5.4%	1.3%	11.9%	50.6%	49.4%	11.1%
2013	24,022	26,294	90.9%	83.3%	0.4%	7.1%	5.3%	1.3%	12.9%	0.0%	0.0%	13.0%
2014	25,324	27,167	90.8%	81.6%	0.8%	8.2%	5.6%	1.2%	12.7%	0.0%	0.0%	14.7%
2015	23,433	26,365	90.7%	83.3%	0.4%	6.5%	5.5%	1.4%	12.2%	0.0%	0.0%	12.6%

then show the proportion of those totals in which the census responses reported court orders. Looking at columns (b) and (d) in the censuses most immediately following the PLRA—1999 for jails and 2000 for prisons—suggests only a very limited impact of the statute. The next census administration was the one where the PLRA’s impact became much more marked: the decline in covered facilities (column (b)) is very large, and the decline in covered population (column (d)) even more so.

And finally, Table 6 (p. 86) emphasizes the new rarity of system-wide court order coverage. The table’s first row lists, by census year, how many states reported

one or more facilities subject to court order. That number remained substantial in 2005 and 2006. But the second row shows states in which 60% or more of the facilities or population are covered by court order—and that row demonstrates that where this kind of system-wide (or close to it) coverage used to be quite common, it is now rare. In 2005 and 2006, respectively, only five states reported system-wide court order coverage of their prisons, and only two states of their jails.¹⁵

The point is not that courts are no longer part of the prison and jail oversight ecosystem. In California (of all states) the contrary is obvious—numerous injunctive cases have transformed Califor-

nia’s criminal justice system,¹⁶ and more changes are underway. But the PLRA has made such cases far more rare.

Conclusion

In my view, court cases and court-enforceable regulation have, since the 1970s, been useful correctives to dysfunctions and abuses that frequently occur in our low-visibility jails and prisons. But the practice of prisoner litigation is susceptible to criticism, from the left, that prisoner access to courts offers the appearance but not the reality of justice, and that court orders have both “contributed

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**Table 4: Prisoner Civil Rights Trials,
Fiscal Year 2012**

	N
Plaintiff wins	47
Injunctive Matters	4
<= \$1,000	16
\$1,001–10,000	9
\$25,000–105,000	8
\$250,000–300,000	3
\$920,000 +	7
Total damages awarded	\$19,867,091
Cases with damages	43
Average damages per case	\$462,025
Median damages per case	\$3,000

**Table 5: Incidence of Court Orders, Local Jails and
State Prisons, 1983–2006**

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

to mass incarceration,” by promoting the building of new prisons to reduce overcrowding,¹⁷ and limited prisoner freedom by enhancing prison bureaucracy.¹⁸ Simultaneously, the critics from the right who got the PLRA passed suggested that prisoner cases are usually frivolous and prison and jail decrees frequently overreaching.¹⁹ This debate is far beyond the scope of this Article—but perhaps further research will be spurred by publication of these statistics, which demonstrate the kind of variance, over time and location, that researchers might use to shed additional light on how prisoner litigation actually functions. Whichever view is correct, the statistics set out below pose an enormous challenge to us as a polity. Litigation has receded as an oversight method in American corrections. It is vital that something take its place. ■

**Margo Schlanger is the Henry M. Butzel Professor of Law, University of Michigan. Thanks to Grady Bridges for data management assistance, and to David Shapiro for the very fruitful suggestion discussed at note 12. I wish to acknowledge the generous support of the William W. Cook Endowment of the University of Michigan. This article is updated from a prior version published as Trends in Prisoner Litigation, as the PLRA Enters Adulthood, 5 U.C. Irvine L. Rev. 153 (2015). © Margo Schlanger 2016. This article may be shared for free or at copying cost with students, prison and jail staff, and prisoners. Reprinted with permission.*

End Notes

1. Prison Litigation Reform Act, Pub. L. No. 104-134, tit. 8, §§ 801–810, 110 Stat. 1321, 1321–66 to –77 (1996) (codified as amended at 11 U.S.C. § 523 (2012); 18 U.S.C. §§ 3624, 3626 (2012); 28 U.S.C. §§ 1346, 1915, 1915A, 1932 (2012); 42 U.S.C. §§ 1997a–c, e–f, h (2012)). The PLRA was part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104 134,

110 Stat. 1321.

2. 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 (1997).

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

4. For additional data and discussion, although only up to 2012, see Margo Schlanger, Trends in Prisoner Litigation, as the PLRA Enters Adulthood, 5 U.C. Irvine L. Rev. 153 (2015) [hereinafter Schlanger, *PLRA Enters Adulthood*].

5. Litigation figures are calculated using data released annually by the Administrative Office of the U.S. Courts, available in digital form from the Inter-university Consortium for Political and Social

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Table 6: System-Wide Court Order Coverage, by State

	Local Jails (n = 47)					State Prisons (n = 51)				
	1983	1988	1993	1999	2006	1984	1990	1995	2000	2005
States w/ any Court Orders	44	46	43	43	39	43	44	41	30	25
States w/ system-wide orders*	8	8	9	3	2	11	14	16	12	5
System-wide court order coverage										
Alaska						●	●	●	●	
Ariz.	●	●	●	●	●				●	
Ark.						●				
Cal.	●	●	●	●	●				●	
Colo.										●
Conn.									●	●
Del.								●		
D.C.	●	●	●	●		●	●	●	●	
Fla.	●	●	●			●				
Ga.								●		
Ill.	●	●	●							
Ind.							●			
Kan.							●	●		
La.	●	●	●			●	●	●		
Minn.						●				
Miss.						●	●	●	●	
Mont.									●	●
N.H.						●	●	●		
N.J.	●									●
N.M.						●	●	●		
N.Y.	●	●	●						●	
N.C.								●		
Ohio									●	
Or.		●	●							
R.I.								●	●	
S.C.							●	●		
S.D.							●	●		
Tenn.			●			●	●	●	●	
Tex.						●	●	●	●	●
Utah							●	●		
W. Va.							●	●		

*States in which the proportion of the states' non-private, non-community corrections facilities reporting court orders, or the proportion of incarcerated population in those facilities, is greater than sixty percent.

Research at <http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/00072/studies>. Prison and jail population figures come from a variety of publications by the Bureau of Justice Statistics, a component of the U.S. Department of Justice. For more detail on the sources and coding, see the Technical Appendix to Schlanger, PLRA Enters Adulthood, *supra* note 4. In addition, replication code is posted online. Margo Schlanger, *Data Appendix: Trends in Prisoner Litigation*, <https://www.law.umich.edu/facultyhome/margoschlanger/Pages/Trends.aspx>.

- 6. See 28 U.S.C. § 1915(b).
- 7. See 42 U.S.C. § 1997e(a).

- 8. See 42 U.S.C. § 1997e(c).
- 9. See 28 U.S.C. § 1915(g).
- 10. See Schlanger, *Inmate Litigation*, *supra* note 3, at 1644–64.
- 11. Note: This variable is sufficiently error ridden, at least in the prisoner litigation data, to counsel against reliance on it.
- 12. Table 4 differs substantially from the data I previously published in Schlanger, *PLRA Enters Adulthood*, *supra* note 4; the numbers presented in that article's version of the same table are substantially lower. The reason is that my prior summary included only cases identified as prisoner

civil rights by the Administrative Office of the U.S. Courts, and included both trials and other litigated judgments. On the excellent suggestion of David Shapiro, I decided to look, as well, at prisoner civil rights cases that were, instead, labeled "other civil rights" (nature of suit code 440) in the Administrative Office (AO) data. To locate these, I took all such cases coded as ending in plaintiffs' trial victories—148, all told—and then read court filings for each to identify the 11 that were, in fact, prisoner civil rights cases. Table 4 incorporates those 11, which include 9 of the top 10 prisoner civil rights verdicts that year (most of them not covered by the PLRA because the involved prisoner was dead or no longer incarcerated). I am reasonably certain that the explanation for the sharp difference between these two groups of cases is that lawyers whose practice focuses on police cases are accustomed to checking off the "other civil rights" category on the court's civil cover sheet that gets accompanies each new lawsuit, because that is the category used for police litigation. The result is that counseled prisoner cases may be disproportionately misclassified in the AO data. I have not altered the other tables because there's no way to tell which "other civil rights" cases are, in fact, prisoner cases without laborious case-by-case research—and no particular reason to think that the overall filing and disposition trends would be sharply affected by inclusion of the additional cases. More detail will have to await additional research.

13. For in-depth discussion, see Schlanger, *Injunctions Over Time*, *supra* note 3.

14. Table 4 is based on data reported by jail and prison officials in the censuses conducted by the Bureau of Justice Statistics every five or six years up to 2006. From 1983 to 2006, the censuses included questions about the existence of court orders on a variety of (specified) topics. These historical data remain the most comprehensive information available, although the data include demonstrable and important omissions. The data should be taken as indicative of trends, rather than dispositive about any given state or facility. The most recent census did not, unfortunately, include these questions.

15. I define "system-wide" as reaching sixty percent or more facilities or population in a state, in a given census administration, after private and community-corrections facilities are excluded.

16. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910 (2011); Margo Schlanger, *Plata v. Brown* and Realignment: Jails, Prisons, Courts, and Politics, 48 *Harv. C.R.-C.L. L. Rev.* 165 (2013).

17. Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 *Law & Soc'y Rev.* 731, 760 (2010).

18. Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications*, 24 *Pace L. Rev.* 433, 466–75 (2004).

19. See, e.g., Ross Sandler & David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* (2003); Dennis C. Vacco, et al., Letter to the Editor, *Free the Courts from Frivolous Prisoner Suits*, *N.Y. Times*, Mar. 3, 1995, at A26 (letter from Attorneys General of New York, Nevada, Indiana, and Washington). ■



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