

# RETHINKING THE PLRA: THE RESILIENCY OF INJUNCTIVE PRACTICE AND WHY IT'S NOT ENOUGH

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*During the latter part of the twentieth century, prison populations in the United States increased exponentially and the nation became notorious for mass incarceration. Despite what many viewed as a broken prison system, in 1996 Congress passed the Prison Litigation Reform Act ("PLRA"), with the avowed purpose of hindering prisoners and their advocates from bringing civil rights actions to challenge prison conditions, laws, and policies. To accomplish this, Congress curbed courts' most powerful remedial tool—injunctive relief. As a result, early scholarship predicted that injunctive practice would become a useless tool in prison reform litigation.*

*Instead, twenty-five years after Congress passed the Act, a limited injunctive practice has adapted and survived. Through a survey of fifty consent decrees and a series of case studies, this Article shows that some injunctive practice remains possible where (1) lawyers carefully craft consent decrees to sidestep the PLRA's hurdles to injunctive relief, and (2) judges take persistent and stern measures to help move defendants toward compliance with the decrees.*

*Ultimately, however, this restricted injunctive practice is not enough. This Article demonstrates that despite advocates' and judges' best efforts to circumvent the Act's limitations, the PLRA continues to hamper necessary prison reform. For this reason, it is time to rethink the PLRA—our nation's recent outcry for reconsideration of the criminal justice system is an ideal catalyst for reassessing the Act and its effects on people least able to assert their rights.*

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#### INTRODUCTION

During the last quarter of the twentieth century, tough-on-crime policies swept the country. New laws created more crimes, longer sentences, and harsher release policies. Predictably, prison populations skyrocketed. The United States became notorious for “mass incarceration,” especially as compared to other liberal democracies. Corrections budgets failed to keep pace, resulting in overcrowded prisons, deplorable confinement conditions, and dangerously deficient healthcare. Rather than address what many viewed as a broken prison

system, in 1996 Congress passed the Prison Litigation Reform Act (“PLRA”) with the avowed purpose of hindering prisoners and their advocates from bringing civil rights actions to challenge prison conditions, laws, and policies.

Before the PLRA, courts played an important role in combating prison injustice. But the PLRA aimed to curb courts’ most powerful remedial tool—injunctive relief, typically with ongoing court monitoring to ensure timely compliance. In particular, the PLRA recast the requirements for entry into and termination of injunctive settlements (i.e. court-enforced consent decrees), departing from the broad leeway judges possess when approving, monitoring, and terminating non-PLRA settled decrees. These limitations make it more difficult for courts to approve settlement agreements that call for the court to retain jurisdiction for enforcement purposes. The PLRA also requires judges to terminate decrees after just two years, regardless of compliance with the decree (if the requisite low showing under the PLRA can be made).

Given these restrictions, early scholarship predicted that injunctive relief would become a useless tool in prison reform litigation. Lawyers called for repeal of the Act and filed challenges to parts of the PLRA. These challenges have been mostly unsuccessful, leaving intact what many view as unconstitutional or otherwise draconian measures designed to impede access to the courts for people least able to assert their rights in any forum.

Despite the PLRA’s constraints, twenty-five years after Congress passed the Act, a limited injunctive practice has adapted and survived. Through a survey of fifty consent decrees and a series of case studies, this Article shows that some injunctive practice remains possible where (1) lawyers carefully craft consent decrees to sidestep the PLRA’s entry and termination hurdles, and (2) judges take persistent and stern measures to help move defendants toward compliance. Yet notwithstanding the efforts of attorneys and some judges to enforce prisoners’ rights, the PLRA continues to hamper such reform. It ties judges’ hands and can lead to less than full compliance with the very settlement agreements the parties consented to.

Recent seismic events have refocused the nation on pervasive constitutional violations at prisons across the country and breathed new life into the need for criminal justice reform. COVID-19 is ravaging American prisons, while the killing of George Floyd has galvanized the debate about policing and mass incarceration. Thus, although previous calls for modification and repeal of the PLRA have gone unanswered, our nation’s recent outcry for reconsideration of the criminal justice system—including laws and policies affecting the voiceless—may be just what is needed to ignite rethinking the PLRA.

Part I looks at the history of mass incarceration as well as the prevalence of cruel and inhumane prison conditions across the country, ranging from overcrowding to inadequate healthcare to sexual violence. It also details the nation’s recent call to action around criminal justice reform to highlight the importance of reconsidering the PLRA at this moment in time. Part II outlines the context and legislative history of the PLRA, early scholarship predicting the

demise of injunctive practice, and litigation efforts to dismantle the Act. Part III examines the PLRA's limits on injunctive relief and focuses on the ways plaintiffs have crafted consent decrees that stretch enforcement beyond the PLRA's two-year limit. Part IV uses a survey of fifty consent decrees and a series of case studies to show that while compliance with decrees is often fraught, courts can play a vital role in helping parties remedy prison conditions within the PLRA's limits. In fact, given the lack of political will from other government institutions, courts are one of the only vehicles for prison reform. For this reason, as long as the PLRA remains in effect, lawyers should not shy away from using the courts to enforce injunctive relief. Instead, lawyers should use the lessons learned from the case studies (as well as twenty-five years of PLRA litigation) to stamp out unconstitutional conditions of confinement. Finally, Part V highlights some of the limitations the PLRA presents despite the creative work lawyers and courts are doing within the confines of the Act. It argues that prison reform would ultimately benefit from rethinking the PLRA as it pertains to injunctive practice.<sup>1</sup>

## I. THE PRISON CRISIS<sup>2</sup>

To understand the importance of a fulsome discussion about the PLRA and its restraints on prison reform litigation, we must first explore the crisis facing our nation's prison system.

### A. Mass Incarceration

Beginning in the early 1970s, incarceration in the United States rose dramatically for nearly four decades.<sup>3</sup> Between 1980 and 2010, there was an

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1. This Article recognizes that prison reform litigation can itself perpetuate the carceral state and thus have a detrimental effect on incarcerated populations. *See, e.g.*, Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1843 (2020) ("Abolitionist campaigns expand our notions of law reform, which are typically focused on federal constitutional rights. Abolitionist demands . . . remind us that if we are interested in building a more just world, we cannot wage our battles simply on the terrain of rights, litigation, rule of law, or administrative innovation."); Dorothy E. Roberts, Foreword, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 20 (2019) (concluding that "the carceral system cannot be fixed—it must be abolished"); Amna A. Akbar, *How Defund and Disband Became the Demands*, N.Y. REV. (June 15, 2020), <https://perma.cc/GX52-HLM5> ("[C]alls to defund and disband police have roots in decades of prison abolitionist organizing, which aims to end incarceration and policing in favor of a society grounded in collective care and social provision."). Nonetheless, this Article focuses on reform litigation to highlight some of the ways lawyers and courts have succeeded in the face of the PLRA, while ultimately concluding that the PLRA remains deeply flawed and calling for rethinking the Act.

2. Throughout this Article, the term "prison" often refers to correctional facilities (both prisons and jails) generally.

3. NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 33 (Jeremy Travis, Bruce Western, & Steve Redburn eds., 2014); *see also* Carla I. Barrett, Note, *Does the Prison Rape Elimination Act Adequately*

approximately 222% increase in the rate of incarceration in state prisons, due largely to changes in policy rather than changes in crime rates.<sup>4</sup> Nixon's proclamation of a war on drugs and the "tough-on-crime" mentality that followed led to skyrocketing rates of incarceration.<sup>5</sup> Since the war on drugs began in earnest in the 1980s, the number of people incarcerated for drug offenses soared from 40,900 in 1980 to 452,964 in 2017.<sup>6</sup> That means there are more people incarcerated for drug offenses now than the total number of people in jail or prison for any crime in 1980.<sup>7</sup> Legislatures also began enacting laws which removed sentencing discretion from judges and instead required mandatory incarceration. For example, mandatory minimum sentences,<sup>8</sup> longer sentences for certain types of crimes,<sup>9</sup> "truth-in-sentencing laws" (designed to eliminate opportunities for early release),<sup>10</sup> and three-strikes laws all contributed to mass incarceration.<sup>11</sup>

Today, the United States is the world's leader in incarceration with over 2.2 million people in our prisons and jails.<sup>12</sup> This represents a 500% increase over the last forty years, despite increasing evidence that large-scale incarceration is not an effective means of achieving public safety.<sup>13</sup> Indeed, as of 2014, nearly one out of every 100 adults was in prison or jail, making the U.S. incarceration rate five to ten times higher than the rates in Western European and other liberal democracies.<sup>14</sup>

We are not only sending more people to prison, but keeping them in prison

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*Address the Problems Posed by Prison Overcrowding? If Not, What Will?*, 39 NEW ENG. L. REV. 391, 391 (2005).

4. Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 113 (2018); see also Russell W. Gray, Note, *Wilson v. Seiter: Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law*, 41 AM. U. L. REV. 1339, 1340 (1992) ("The growth in the prison population can be attributed in part to the nationwide crackdown on crime that occurred in the 1970s and 1980s.").

5. Mauer, *supra* note 4, at 114, 119.

6. *Criminal Justice Facts*, SENT'G PROJECT, <https://perma.cc/V7G8-XEC7> (archived May 26, 2021).

7. *Id.*

8. Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 936 (2001).

9. Barrett, *supra* note 3, at 394-95.

10. James Cullen, *Sentencing Laws and How They Contribute to Mass Incarceration*, BRENNAN CTR. FOR JUST. (Oct. 5, 2018), <https://perma.cc/AZH3-RCND>.

11. *Id.*; see also Erwin Chemerinsky, *The Essential but Inherently Limited Role of the Courts in Prison Reform*, 13 BERKELEY J. CRIM. L. 307, 309-11 (2008) (noting that "the enactment of three-strikes laws across the county . . . had the effect of dramatically increasing prison populations").

12. SENT'G PROJECT, *supra* note 6.

13. *Id.*; see also Betsy Pearl, *Ending the War on Drugs: By the Numbers*, CTR. FOR AM. PROGRESS (June 27, 2018, 9:00 AM), <https://perma.cc/DV3C-5HV9> ("Incarceration has a negligible effect on public safety. Crime rates have trended downward since 1990, and researchers attribute 75 to 100 percent of these reductions to factors other than incarceration.").

14. NAT'L RSCH. COUNCIL, *supra* note 3, at 13.

longer. Of the 222% growth in the state prison population between 1980 and 2010, nearly half of that growth was due to an increase in time served in prison for all offenses.<sup>15</sup> There has also been a surge in people serving life sentences, with one in every nine people in prison now serving a life sentence.<sup>16</sup>

This problem is particularly acute for racial minorities. People of color make up 37% of the U.S. population, but 67% of the prison population.<sup>17</sup> Incarceration rates for Black men are about twice as high as those of Hispanic men, and five times higher than those of white men.<sup>18</sup> In fact, close to 10% of Black men in their thirties are in prison or jail on any given day.<sup>19</sup> And as of the late 1990s, one-third of Black men in their twenties were in some form of government custody, whether in prison, on probation, on parole, or under another type of court-ordered supervision.<sup>20</sup> Indeed, in 2001, when the government last tallied how many Black men had spent time in state or federal prison, it was close to 17%; today it is likely closer to 20%.<sup>21</sup>

It is true that incremental changes have been made over the past decade. Congress, for example, passed the Fair Sentencing Act in 2010, which reduced the disparity in sentencing between crack and powder cocaine offenses.<sup>22</sup> It also passed the First Step Act in 2018 to limit mandatory minimums for low-level drug offenses, provide retroactive sentence reductions to people imprisoned under the previous cocaine-disparity laws, and expand rehabilitation in federal prisons.<sup>23</sup> But the reality remains that millions of people are still incarcerated in jails and prisons around the country. The conditions in which they are confined thus remain a vital concern.<sup>24</sup>

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15. SENT'G PROJECT, *supra* note 6.

16. *Id.*

17. *Id.*

18. David Leonhardt, *When Jail Becomes Normal*, N.Y. TIMES (June 3, 2020), <https://perma.cc/22RC-S33J>.

19. *Id.*

20. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272, 1274 (2004).

21. Leonhardt, *supra* note 18.

22. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified as amended in scattered sections of 21 U.S.C.); *see also* SENT'G PROJECT, *supra* note 6.

23. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018); *see generally*, Jesselyn McCurdy, *The First Step Act is Actually the "Next Step" After Fifteen Years of Successful Reforms to the Federal Criminal Justice System*, 41 CARDOZO L. REV. 189 (2019) (describing the history leading up to and key provisions of the First Step Act of 2018); Kara Gotsch, *One Year After the First Step Act: Mixed Outcomes*, SENT'G PROJECT (Dec. 17, 2019), <https://perma.cc/GSP3-CSAD> (discussing successes and challenges of the First Step Act one year after the law's passage).

24. *See, e.g.*, Dirk van Zyl Smit, *Regulation of Prison Conditions*, 39 CRIME AND JUST. 503, 504 (2010) ("In the process of imprisonment the prison authorities exercise direct and enormous power over those who are imprisoned. This power shapes the conditions under which prisoners are held. These conditions not only determine the quality of prisoners' lives but may also literally be a matter of life or death for them. Regulating prison conditions is therefore of prime importance both for prisoners and for society as a whole, which also has a

## B. Deplorable Conditions of Confinement

Inmates should be free from sexual abuse, violence, inadequate healthcare, or other unconstitutional conditions of confinement. Yet deficiencies in staffing, supervision, and overcrowding make all of these problems worse, putting additional strain on an already fraught system. Recent Department of Justice (“DOJ”) reports reveal cruel and inhumane conditions<sup>25</sup> in many prisons and jails across the country.<sup>26</sup>

In one recent investigation, DOJ concluded that the Alabama Department of Corrections was likely violating the Eighth Amendment rights of prisoners housed in Alabama’s men’s prisons:

[V]iolations that are severe, systemic, and exacerbated by serious deficiencies in staffing and supervision; overcrowding; ineffective housing and classification protocols; inadequate incident reporting; inability to control the flow of contraband into and within prisons, including illegal drugs and weapons; ineffective prison management and training; insufficient maintenance and cleaning facilities; the use of segregation and solitary confinement to both punish and protect victims of violence and/or sexual abuse; and a high level of violence that is too common, cruel, of an unusual nature, and pervasive.<sup>27</sup>

During a one-week visit to Alabama’s prisons, DOJ observed: a prisoner stabbed to death, several other prisoners stabbed multiple times, prisoners found with methamphetamine and other hallucinogenic drugs, a sleeping prisoner beaten with a sock filled with metal locks, a prisoner punched in the face so hard he required outside medical treatment, several prisoners reporting sexual assault, a prisoner threatening a correctional officer with a knife, a prisoner setting fire to another prisoner’s bed while he was sleeping, and a prisoner who overdosed on synthetic cannabinoid and later died.<sup>28</sup>

In another recent investigation, DOJ found reason to believe the conditions at the Boyd County Detention Center in Catlettsburg, Kentucky, were violating the Fourth, Eighth, and Fourteenth Amendments.<sup>29</sup> DOJ found that:

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wider interest in the efficacy of prisons.”).

25. Some have characterized treatment like this as amounting to torture. *See, e.g.,* Roberts, *supra* note 1, at 18 (“As carceral logics take over ever-expanding aspects of our society, so does the cruelty that government agents visit on people who are the most vulnerable to state surveillance and confinement. Torture has been accepted as a technique of racialized carceral control.”).

26. *See Special Litigation Section Cases and Matters, Corrections*, U.S. DEP’T OF JUST., <https://perma.cc/9DM6-SPAT> (archived May 26, 2021) (listing recent investigations and litigation involving prisons and jails by state). While these examples do not speak for all jails and prisons, they demonstrate some of the most egregious examples of confinement conditions that have resulted in Department of Justice involvement.

27. U.S. DEP’T OF JUST., INVESTIGATION OF ALABAMA’S STATE PRISONS FOR MEN 1-2 (2019), <https://perma.cc/PF74-JHBD>.

28. *Id.* at 2-3.

29. U.S. DEP’T OF JUST., INVESTIGATION OF THE BOYD COUNTY DETENTION CENTER (CATLETTSBURG, KENTUCKY) 1 (2019), <https://perma.cc/K6VA-VS7N>.

Correctional officers routinely use excessive force when they use chemical agents such as pepper spray or electronic control devices, and when they place prisoners in the restraint chair.

Boyd County violates the constitutional rights of bodily privacy of prisoners by restraining nearly naked prisoners in full view of both prisoners and staff of the opposite gender. Prisoners identified as a suicide risk and non-suicidal prisoners being punished, are stripped of their clothing and placed in suicide smocks with no undergarments, and strapped with their legs apart to the restraint chair in an open hallway, their genitals exposed to passers-by . . . .

In June of 2018, a prisoner died of a drug overdose and in November of 2018 a second prisoner died of a drug overdose. On December 21, 2018, five correctional officers were indicted for first degree manslaughter of a prisoner found dead in a restraint chair on November 29, 2018 from blunt force trauma to his side which fractured three ribs and caused internal bleeding, resulting in death.<sup>30</sup>

At the time of DOJ's report, the Kentucky Department of Corrections had since removed all state prisoners from the jail due to ongoing concerns about security and prisoner safety.<sup>31</sup>

In early 2020, DOJ announced that it had opened an investigation into four of Mississippi's prisons.<sup>32</sup> The action came on the heels of the deaths of fifteen inmates in about six weeks.<sup>33</sup>

While these examples highlight intolerable conditions at only a few prisons and jails, many other facilities across the country have been investigated for inhumane conditions.<sup>34</sup> Thus, not only are large numbers of inmates serving long sentences, but they are often subjected to unconstitutional conditions of confinement. Consent decrees enforced by courts can help remedy these conditions. But the PLRA hinders court action. For this reason, studying the ways advocates and courts have continued to enforce prisoners' rights despite the PLRA is an important endeavor.

### C. A Renewed Call For Action

The COVID-19 outbreak in 2020 also shed new light on the abhorrent conditions in our nation's prisons. Prison overcrowding, for example, came into stark focus. At the end of 2018, in twelve states and the federal Bureau of Prisons ("BOP"), the prison population was equal to or greater than the prisons'

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30. *Id.* at 1-2.

31. *Id.* at 2.

32. *Justice Department Announces Investigation into Conditions in Four Mississippi Prisons*, U.S. DEP'T OF JUST. (Feb. 5, 2020), <https://perma.cc/B38B-YQS3>.

33. See Kim Bellware, *15 Dead in Six Weeks. Can a Federal Investigation Fix the Grim Legacy of Mississippi's Prisons?*, WASH. POST (Feb. 7 2020, 12:15 AM), <https://perma.cc/BTX2-PX98>; Scott Neuman, *DOJ to Investigate Mississippi Prisons After Spate of Inmate Deaths*, NPR (Feb. 6, 2020, 5:01 AM), <https://perma.cc/L2KY-BZQA>.

34. *Special Litigation Section Cases and Matters, Corrections*, *supra* note 26.



maximum capacity, resulting in incarcerated people crammed into dorms and warehoused in rooms with bunkbeds only inches apart.<sup>35</sup> Such conditions have made social distancing during the pandemic impossible, and thus vastly increased the risk of infection and death.<sup>36</sup> In fact, even as coronavirus cases nationwide began to plateau during the summer of 2020, they continued to soar in prisons and jails across the United States, with the five largest clusters of the virus in the U.S. being inside prisons.<sup>37</sup> The importance of adequate staffing also came to the forefront. COVID-19 reduced the number of correctional staff at many facilities, resulting in inadequate security and increased violence and abuse.<sup>38</sup> Perhaps most salient, the woefully inadequate healthcare systems in prisons and jails became impossible to ignore.<sup>39</sup>

The global protests beginning in June 2020 in response to the killing of George Floyd also placed a much-needed spotlight on the racial disparities and inequities in our nation's criminal justice system, including in prisons.<sup>40</sup> Calls

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35. E. ANN CARSON, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 253516, PRISONERS IN 2018 25 (2020), <https://perma.cc/675W-FRRX>; see also *Covid-19's Impact on People in Prison*, EQUAL JUST. INITIATIVE, <https://perma.cc/3AQJ-DQSV> (archived May 26, 2021).

36. EQUAL JUST. INITIATIVE, *supra* note 35; see also Eddie Burkhalter et al., *Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System*, N.Y. TIMES (Apr. 10, 2021), <https://perma.cc/6SA9-R2BE> (stating that more than 525,000 people have been infected and at least 2,683 inmates and correctional officers have died in American jails and prisons, and listing total number of cases by prison and jail, with Fresno County Jail in Fresno, California at the top with 3,985 cases). Lawsuits addressing such pandemic-related challenges in prisons and jails have sprung up around the country. See *Special Collection, COVID-19 (Novel Coronavirus)*, C.R. LITIG. CLEARINGHOUSE, <https://perma.cc/3NET-L3EU> (archived May 26, 2021) (collecting cases that address challenges posed by the COVID-19 pandemic, social distancing, and more); *Responses to the COVID-19 Pandemic*, PRISON POL'Y INITIATIVE, <https://perma.cc/ZP7V-SN2W> (last updated May 18, 2021) (collecting court orders directing releases and other COVID-19 responses); *Covid-19 Behind Bars Data Project*, UCLA L., <https://perma.cc/6584-ST97> (archived May 26, 2021) (tracking COVID-19 conditions in jails and prisons as well as efforts, both in and out of court, to decrease jail and prison populations and improve conditions to ensure the safety of residents and staff).

37. Timothy Williams, Libby Seline & Rebecca Griesbach, *Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide*, N.Y. TIMES (June 16, 2020, updated Nov. 30, 2020), <https://perma.cc/TY3Z-K73Y> ("The number of prison inmates known to be infected has doubled during the past month to more than 68,000. Prison deaths tied to the coronavirus have also risen, by 73 percent since mid-May.").

38. EQUAL JUST. INITIATIVE, *supra* note 35; see also Brendon Derr, Rebecca Griesbach & Danya Issawi, *States Are Shutting Down Prisons as Guards Are Crippled by Covid-19*, N.Y. TIMES (Jan. 1, 2021), <https://perma.cc/E84M-EPEG>.

39. Brie A. Williams, Cyrus Ahalt, David Cloud, Dallas Augustine, Leah Rorvig, & David Sears, *Correctional Facilities in the Shadow of COVID-19: Unique Challenges and Proposed Solutions*, HEALTH AFF. (Mar. 26, 2020), <https://perma.cc/T36A-9X5A> (stating that correctional facilities "lack the medical supplies needed to treat people who get seriously ill from COVID-19 infection[s]," meaning that "widespread community transmission of COVID-19 within a correctional institution is likely to result in a disproportionately high COVID-19 mortality rate," and noting that "correctional healthcare systems are typically understaffed").

40. See Audra D. S. Burch et al., *How Black Lives Matter Reached Every Corner of America*, N.Y. TIMES (June 13, 2020), <https://perma.cc/MT86-HPG6> (recognizing that people

for justice cut across a diverse spectrum of supporters,<sup>41</sup> and people marched in the streets calling for change, despite the risks of demonstrating during a pandemic.<sup>42</sup> As Michelle Alexander put it: “Our democracy hangs in the balance. . . . Over the years, many have said that ‘the degree of civilization in a society can be judged by entering its prisons.’ Today, the same can be said of our criminal injustice system.”<sup>43</sup>

In other words, the prison crisis in the United States has been staring us down for years, and is now unavoidable. So what can we do to begin to address the crisis? While the answers are complex, one potential solution, albeit a modest step in the right direction, lies in what may seem like an unexpected place—robust injunctive action in prison conditions cases. Although the PLRA continues to handicap litigation aimed at prison reform, practitioners and courts have navigated some of the PLRA’s hurdles to continue to vindicate prisoners’ rights and, in some cases, remedy unconstitutional conditions of confinement.<sup>44</sup> Given that this was not a foregone conclusion, how they have done so and the importance of continuing to do so as long as the PLRA remains in effect, is the focus of the sections that follow. The survey of fifty consent decrees below demonstrates the importance of court involvement in forcing states to uphold constitutional standards. And lawyers and judges can look to the case studies below as guidance when considering their own cases involving prospective injunctive relief in prison conditions cases. Injunctive practice certainly won’t solve our nation’s mass incarceration or racial injustice problems on its own, and the PLRA still places unnecessary strain on prison reform litigation generally. Yet looking at what can be accomplished within the confines of the PLRA is one important avenue for pursuing justice in a complicated and fraught system.

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“protested in every single state and in Washington, D.C., with turnouts that ranged from dozens to tens of thousands”); Alan Taylor, *Images From A Worldwide Protest Movement*, ATLANTIC (June 8, 2020), <https://perma.cc/ZX43-F74J> (noting that “[o]ver the weekend, demonstrations took place around the world, with thousands of people outside the United States marching to show solidarity with American protests over the killing of George Floyd by Minneapolis police,” and stating that marchers worldwide voiced their anger about systemic racism and police brutality).

41. See, e.g., Amy Harmon & Sabrina Tavernise, *One Big Difference About George Floyd Protests: Many White Faces*, N.Y. TIMES (June 12, 2020), <https://perma.cc/9Y65-ZESU>; Leila Miller, *George Floyd Protests Have Created a Multicultural Movement That’s Making History*, L.A. TIMES (June 7, 2020, 6:00 AM), <https://perma.cc/CTQ7-J7F3>.

42. See, e.g., Amy Harmon & Rick Rojas, *A Delicate Balance: Weighing Protest Against the Risks of the Coronavirus*, N.Y. TIMES (June 7, 2020), <https://perma.cc/2Y8M-XKXR>; Rowena Mason, *Black Lives Matter Protests Risk Spreading Covid-19, Says Hancock*, GUARDIAN (June 7, 2020, 5:49 PM), <https://perma.cc/HD2E-9D7S>.

43. Michelle Alexander, *America, This Is Your Chance*, N.Y. TIMES (June 8, 2020), <https://perma.cc/M4H7-2MCJ>. Michelle Alexander is the author of *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010). See also Sarah Stillman, *Will the Coronavirus Make Us Rethink Mass Incarceration?*, NEW YORKER (May 18, 2020), <https://perma.cc/9XPJ-8UQF>.

44. See Parts III and IV below.

## II. HISTORY AND CONSEQUENCES OF THE PLRA

## A. Historical Backdrop

In the first half of the twentieth century, most courts believed their role with respect to criminal defendants ended with sentencing.<sup>45</sup> As the Fifth Circuit noted in 1934, “[t]he prison system of the United States is under the control of the Attorney General and Superintendent of Prisons, and not of the district courts. The court has no power to interfere with the conduct of the prison or its discipline.”<sup>46</sup> By the late 1960s, however, civil rights lawyers began challenging prison conditions and practices through the federal courts.<sup>47</sup>

By engaging the courts, throughout the 1970s and 1980s prisoners and their lawyers successfully challenged unconstitutional conditions of confinement: By 1993, forty states were under court order to reduce overcrowding and/or eliminate unconstitutional conditions of confinement.<sup>48</sup> Despite this success, the political context began to change “from reform to retrenchment,” with the “dominant political discourse depict[ing] black citizens as drains on the state rather than rightful claimants of equal opportunity, and criminal offenders as objects of ‘risk’ rather than rehabilitation.”<sup>49</sup>

## B. Legislative History of the PLRA

Against this backdrop, Congress enacted the 1996 Prison Litigation Reform Act.<sup>50</sup> The Act was passed after just one hearing as part of the Republican legislative agenda known as the “Contract with America,” slipping in as a rider

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45. Claude Pepper, *Judicial Activism in Prison Reform*, 22 CATH. U. L. REV. 96, 96 (1972).

46. *Platek v. Aderhold*, 73 F.3d 173, 175 (5th Cir. 1934).

47. Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 L. & SOC’Y REV. 731, 731 (2010); see also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1286 (1976) (The “traditional model” was for judges to remain passive, bound “to decide only those issues identified by the parties, in accordance with the rules established by the appellate courts, or . . . the legislature,” and having “little or no responsibility for the factual aspects of the case or for shaping and organizing the litigation for trial.”).

48. Schoenfeld, *supra* note 47, at 732; see also Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 196 (2013) (noting that “prison population orders—imposed by federal and state trial courts during civil rights litigation or developed as part of court settlements—were once commonplace”).

49. Schoenfeld, *supra* note 47, at 733. For further detail about this historical backdrop, see MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (1998).

50. Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 13 (1996) (codified as amended in various sections: 11 U.S.C. § 523 (2018); 18 U.S.C. §§ 3624, 3626 (2018); 28 U.S.C. §§ 1346, 1915, 1915A (2018); 42 U.S.C. §§ 1997-1997h (2012)).

to the Omnibus Consolidated Revisions and Appropriations Act of 1996.<sup>51</sup>

Supporters of the Act had two main goals: to reduce what they viewed as a large volume of frivolous prisoner litigation, and to discourage “overzealous federal courts” from micromanaging the nation’s prison system.<sup>52</sup> Supporters pushed an agenda premised on the idea that prisoners were unnecessarily litigious, filing federal cases over any and every trivial occurrence and thereby bogging down the judiciary and detracting from potentially serious cases.<sup>53</sup> And they rallied support around a handful of evocative (but not representative) cases—e.g. about peanut butter,<sup>54</sup> melted ice cream,<sup>55</sup> and bad haircuts<sup>56</sup>—to highlight the absurdity of prisoners’ legal claims.

Supporters of the PLRA also believed that federal courts had overstepped their bounds in regulating these cases. In discussing the legislation before its passage, Senator Spencer Abraham stated that the reforms were aimed at “discourag[ing] judges from seeking to take control over our prison systems, and to micromanage them right down to the brightness of the lights.”<sup>57</sup> He made clear that “[m]ost fundamentally, the proposed bill forbids courts from entering orders for prospective relief (such as regulating food temperatures) unless the order is necessary to correct violations of individual plaintiffs’ Federal rights.”<sup>58</sup> Senator Orrin Hatch echoed these remarks: “It is past time to slam shut the revolving

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51. Margo Schlanger, *Anti-Incarcerative Remedies for Illegal Conditions of Confinement*, 6 U. MIAMI RACE & SOC. JUST. L. REV. 1, 8, 27 (2016) (citing REPUBLICAN NAT’L COMM., CONTRACT WITH AMERICA: THE BOLD PLAN BY REPRESENTATIVE NEWT GINGRICH, REPRESENTATIVE DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 53 (Gillespie & Schellhas eds., 1994)); Susan N. Herman, *Slashing and Burning Prisoners’ Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1277 (1998) (“The legislative process leading to the passage of the PLRA was characterized by haste and lack of any real debate.”).

52. *See, e.g.*, 141 CONG. REC. 26,449 (1995) (statement of Sen. Abraham).

53. *Id.*

54. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1568-69 (2003) [hereinafter *Inmate Litigation*] (“Perhaps the paradigmatic case, as described by NAAG members, was about peanut butter: ‘an inmate sued, claiming cruel and unusual punishment because he received one jar of chunky and one jar of creamy peanut butter after ordering two jars of chunky from the prison canteen.’”).

55. *Id.* at 1568 (citing Associated Press, *Vacco Targets Frivolous Lawsuits Filed by Inmates*, BUFFALO NEWS, June 13, 1995, at A4, 1995 WL 548144 (referencing lawsuit about melted ice cream)).

56. Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1772 (2003) (citing Associated Press, *Group Seeks to Cuff Frivolous Inmate Lawsuits*, ORLANDO SENTINEL, Aug. 2 1995, at A8 (listing bad haircuts, lost sunglasses, tight underwear and melted ice cream as subjects of prisoner lawsuits)); *see also* Herman, *supra* note 51, at 1297 (discussing prisoners allegedly filing suit over the lack of a salad bar and the color of inmate towels). Second Circuit Judge Jon Newman researched these allegedly “typical” cases used to drum up support for the PLRA and found that the cases were misleading, and that publicized descriptions of the select cases were sometimes simply false. *Id.* at 1298.

57. 141 CONG. REC. 26,449 (1995) (statement of Sen. Abraham).

58. *Id.*

door on the prison gate and to put the key safely out of reach of the overzealous Federal courts.”<sup>59</sup>

Senator Ted Kennedy, on the other hand, called the Act “patently unconstitutional” and a “dangerous legislative incursion into the work of the judicial branch.”<sup>60</sup> He warned that it would set an unwarranted precedent for “stripping the Federal courts of the ability to safeguard the civil rights of the powerless and disadvantaged groups.”<sup>61</sup> Despite this disagreement over the effect the PLRA would have, everyone agreed that: “No one, of course, is suggesting that prison conditions that actually violate the Constitution should be allowed to persist.”<sup>62</sup>

### C. Post-PLRA Changes

Upon its passage, the PLRA brought sweeping changes to the procedural requirements and remedies available to prisoners trying to remediate unconstitutional conditions in prisons and jails.<sup>63</sup> The changes were primarily divided into two categories: (1) those aimed at individual inmate suits, meant to address the alleged burden on courts from frivolous prisoner litigation; and (2) those pertaining to prospective relief, intended to “get the federal courts out of the business of running jails.”<sup>64</sup> The first set of changes required, among other things, exhaustion of administrative remedies, filing fees even for individuals proceeding in forma pauperis, judicial screening and dismissal of frivolous complaints, limited damages for mental or emotional injury without a showing of physical injury, and limits on attorneys’ fees.<sup>65</sup> The second set of changes—most relevant to this Article—dictated a set of standards for all prospective relief, requiring injunctive settlements to be limited in scope and inviting frequent relitigating of injunctive remedies.<sup>66</sup>

These changes had a dramatic effect on jail and prison litigation. Prisoner

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59. 141 CONG. REC. 26,553 (1995) (statement of Sen. Hatch).

60. 142 CONG. REC. 5193 (1996) (statement of Sen. Kennedy).

61. *Id.*

62. *The Role of the U.S. Dep’t of Justice in Implementing the Prison Litigation Reform Act: Hearing Before the Comm. on the Judiciary*, 104th Cong. 1 (1996) (statement of Sen. Hatch).

63. *Inmate Litigation*, *supra* note 54, at 1627.

64. Roosevelt, *supra* note 56, at 1778 (citing *Benjamin v. Jacobson*, 172 F.3d 144, 182 (2d Cir. 1999) (en banc) (Calabresi, J., concurring)).

65. Margo Schlanger, *Prisoners’ Rights Lawyers’ Strategies for Preserving the Role of the Courts*, 69 U. MIAMI L. REV. 519, 520-21 (2015) [hereinafter *Prisoners’ Rights Lawyers’ Strategies*]; Roosevelt, *supra* note 56, at 1778; *Inmate Litigation*, *supra* note 54, at 1627-33.

66. See 18 U.S.C. § 3626(a)(1)(A) (2018); 18 U.S.C. § 3626(b) (2018). The second category of PLRA changes also set up standards specifically addressing prisoner-release orders, making previously common population cap orders more difficult to obtain. See 18 U.S.C. § 3626(a)(3) (2018); *but see* *Brown v. Plata*, 563 U.S. 493 (2011) (affirming imposition of prisoner release order in California).

filing rates decreased precipitously, with total prisoner civil rights filings in federal district courts decreasing from 38,262 in 1996—the year the PLRA was passed—to 21,978 by 2007; filings per 1,000 prisoners decreased from 23.4 in 1996 to 9.6 by 2007.<sup>67</sup> From 2007 through 2015, filing rates and filings essentially plateaued, and since 2015 a slight uptick has occurred.<sup>68</sup> The PLRA also had a drastic effect on injunctive litigation and the prevalence of court orders governing conditions of confinement. From approximately 1983 to 1995, about half of the nation’s jail inmates, and about forty percent of the nation’s state prisoners, were housed in facilities subject to court orders.<sup>69</sup> But by 2007, only about twenty percent of state or jail inmates were housed in facilities reporting a court order, and the numbers were even lower if calculated by facility, rather than by population.<sup>70</sup> Further, while system-wide court orders aimed at conditions of confinement were common before the PLRA, they are now rare.<sup>71</sup>

#### D. Predictions About the PLRA’s Impact on Injunctive Practice

In the wake of the PLRA’s vast changes to prisoner litigation, legal scholars predicted that injunctive practice would essentially become a useless tool in prison reform litigation.<sup>72</sup> As prison litigation expert John Boston noted:

[T]he most consequential aspect of the PLRA’s recasting of prospective relief law is its provision for termination of relief. . . . This section of the PLRA has had . . . significant consequences for the shape of the remedial process in prisoners’ civil rights litigation. Prior law, still applicable in non-prisoner cases, recognized that institutional change takes time and may face resistance. Accordingly, the Supreme Court has held that a decree should be ended only when the defendant shows that there has been full and satisfactory compliance with the order for a reasonable period of time, the defendant has exhibited a good-faith commitment to the decree and the legal principles that warrant judicial intervention, and the defendant is ‘unlikely to return to its former ways.’ Now, it appears, that likelihood of future recurrence of the constitutional violation has been defined out of the inquiry in prisoner cases.<sup>73</sup>

67. *Prisoners’ Rights Lawyers’ Strategies*, *supra* note 65, at 522-26.

68. *Id.* at 525; MARGO SCHLANGER, SHEILA BEDI, DAVID M. SHAPIRO & LYNN S. BRANHAM, *INCARCERATION AND THE LAW, CASES AND MATERIALS* (10th ed. Supp. 2020), <https://perma.cc/H7CS-TKTK> (mapping at Figure 1.15 the litigation rates for prisoner civil rights lawsuits from 1970-2017).

69. *Prisoners’ Rights Lawyers’ Strategies*, *supra* note 65, at 525.

70. *Id.*

71. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 169-70 (2015) [hereinafter *Trends in Prisoner Litigation*] (defining “system-wide” as “states in which sixty percent or more of the facilities or population are covered by court order,” and noting that “[i]n 2005 and 2006, respectively, only five states reported system-wide court order coverage of their prisons, and only two states of their jails”).

72. *See* Roosevelt, *supra* note 56, at 1772 n.10 (stating that “[t]he enactment of the PLRA inspired a flurry of academic commentary, much of it critical,” and collecting academic works criticizing the PLRA).

73. John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*,

Other lawyers began filing challenges to various provisions of the PLRA. For the most part, however, these lawsuits were unsuccessful, leaving what many view as unconstitutional or otherwise draconian provisions intact.<sup>74</sup>

Still others have called for the PLRA or portions of the Act to be repealed. In May 2007, the American Bar Association's ("ABA") Criminal Justice Section issued a report urging Congress to repeal or amend specific portions of the PLRA, including eliminating the restrictions on the equitable authority of courts in conditions-of-confinement cases.<sup>75</sup> The ABA noted that the scope of courts' equitable powers in cases involving prisoners should be no different than the scope of those powers in cases brought by all litigants.<sup>76</sup> On the twenty-year anniversary of the PLRA, activist groups such as the Prison Policy Initiative similarly called for the Act's repeal.<sup>77</sup> And as recently as 2018, prisoners organized one of the largest nationwide prison strikes in American history, demanding that the PLRA be rescinded.<sup>78</sup>

Notwithstanding calls for repeal, the PLRA still stands after twenty-five years. Within the confines of the PLRA then, have predictions of a futile injunctive practice come to fruition? Not exactly. As sections III and IV demonstrate below, in some cases injunctive practice has survived the PLRA's attempt to decapitate it. Lawyers and courts have worked together to fulfill the

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67 BROOK. L. REV. 429, 447-48 (2001).

74. See, e.g., *Miller v. French*, 530 U.S. 327 (2000) (upholding automatic stay provision in 18 U.S.C. § 3626(e)(2) (2018)); *Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001) (upholding termination of prospective relief); *Hadix v. Johnson*, 230 F.3d 840 (6th Cir. 2000) (upholding attorney fee provision); *Rodriguez v. Cook*, 169 F.3d 1176 (9th Cir. 1999) (upholding three strikes provision); *Nicholas v. Tucker*, 114 F.3d 17 (2d Cir. 1997) (upholding in forma pauperis provisions); see also Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 591 n.126 (2006) [hereinafter *Civil Rights Injunctions Over Time*] ("The constitutionality of the immediate termination provision followed *a fortiori* from the Court's decision in *Miller v. French*."). For further critique of PLRA cases, see also Boston, *supra* note 73, at 451-52 ("The PLRA cases, including the Supreme Court's decision in *Miller v. French*, appear to give Congress the equivalent power to legislate with respect to the remedial powers of the courts in constitutional cases and to apply new laws to prior judgments. The emerging syllogism would seem to be completed by the proposition that now, if a federal court does something that Congress does not like in the course of enforcing the Constitution, Congress can direct the termination or modification of that specific judicial act.").

75. *Report to the House of Delegates*, A.B.A. CRIM. JUST. SECTION 1 (May 2007), <https://perma.cc/ZD2T-4NUY>.

76. *Id.* at 6.

77. Meredith Booker, *20 Years Is Enough: Time to Repeal the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (May 5, 2016), <https://perma.cc/53XX-XWX9>.

78. See *Prison Strike 2018*, INCARCERATED WORKERS ORG. COMM., <https://perma.cc/FY26-G3BU> (archived May 26, 2021) (discussing national prison strike from August 21 through September 9, 2018 and listing demands of individuals in federal, immigration, and state prisons); Julius Mitchell, *Administrative Remedy or Litigation? Contemplating the PLRA's Availability Exception after Townsend v. Murphy*, HARV. C.R.-C.L. L. REV. (Dec. 30, 2018), <https://perma.cc/8ZTY-4HBJ> (discussing 2018 nationwide prison strike).

important mission of curbing constitutional violations in prisons, despite the PLRA's restrictive requirements.

### III. PROSPECTIVE INJUNCTIVE RELIEF

#### A. Modes of Judicial Enforcement

Under the PLRA, there are three primary scenarios in which judicial enforcement of a settlement agreement may come into play: (1) consent decrees,<sup>79</sup> (2) private settlement agreements that allow a case to be reinstated in federal court,<sup>80</sup> and (3) private settlements that can be enforced in state court.<sup>81</sup> The third scenario is rarely used and the second almost never results in reinstatement.<sup>82</sup> For this reason, this Article focuses primarily on the first scenario—settlements where the parties have obtained court approval of a consent decree consistent with the Act's requirements, and the court retains jurisdiction to enforce the agreement.

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79. See detailed discussion below. Although I use the term “consent decree” throughout this Article to denote a post-PLRA agreement which requires court approval and under which the court retains jurisdiction to enforce the agreement, parties to such agreements often use different titles for the operative document. See Elizabeth Alexander, *Getting to Yes in a PLRA World*, 30 PACE L. REV. 1672, 1681 (2010) (noting that for post-PLRA consent decrees, “the most common name for these documents is ‘Settlement Agreement,’ or some close variant, even when the document clearly contemplates some form of court enforcement,” and commenting that “the amount of diversity in form, language and context” of related court orders approving consent decrees “is striking”).

80. Parties can enter into “private settlement agreements” without judicial approval and without meeting the PLRA's restrictions on prospective injunctive relief because “relief” under the PLRA “includes consent decrees but does not include private settlement agreements.” 18 U.S.C. § 3626(g)(9) (2018). And “private settlement agreements” are defined as “agreement[s] entered into among the parties that [are] not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled.” 18 U.S.C. § 3626(g)(6) (2018). The statute makes clear that parties can “enter[] into a private settlement agreement that does not comply with the limitations on relief . . . if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.” 18 U.S.C. § 3626(c)(2)(A) (2018).

81. Parties can also enter into “private settlement agreements,” that provide for state-court enforcement where a breach of the agreement occurs, rather than or in addition to reinstatement of the federal litigation. See 18 U.S.C. § 3626(c)(2)(B) (2018) (“Nothing . . . shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.”).

82. *Prisoners' Rights Lawyers' Strategies*, *supra* note 65, at 538-39 (noting that as of 2015, there were only two cases in which prisoner-plaintiffs had sought to reinstate the case for an allegedly breached settlement: Third Am. Compl. for Civil Rights Violations, Permanent Inj., Declaratory Relief, and Damages ¶¶ 28-29, *Rouser v. White*, No. 93-cv-00767 (E.D. Cal. May 7, 1993) and Compl. ¶¶ 2, 25, *Williams v. City of Philadelphia*, No. 08-cv-01979 (E.D. Pa. Apr. 28, 2008)); *id.* at 540 (commenting that as of 2015, there were no cases involving state court enforcement of a federal prisoners' rights settlement agreement).



## B. Entering Into Court-Enforced Relief

Under the PLRA, courts' authority to approve and enforce settlements has been severely restricted. Prospective relief resulting from either settlement or litigation "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs."<sup>83</sup> Indeed, a 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" (also known as the "need-narrowness-intrusiveness" provision).<sup>84</sup> And prospective relief is broadly defined to include "all relief other than compensatory monetary damages."<sup>85</sup>

These provisions are a far cry from the broad leeway courts are generally given when approving settlements.<sup>86</sup> As the Supreme Court has explained, parties can generally settle on their own terms as long as those terms are not illegal or outside the general scope of the pleadings or the court's subject matter jurisdiction.<sup>87</sup> In traditional settlements, therefore, parties often enter into injunctive settlements, at least in part, to avoid findings of liability and publicity otherwise.<sup>88</sup> In contrast, under the PLRA, courts can only approve prospective relief where there is a finding of liability (i.e., "violation of [a] Federal right").<sup>89</sup> This seemingly turns the incentives for settlement on their head, and thus could have led to many more "private settlement agreements," without continuing court involvement.<sup>90</sup>

However, instead of relinquishing the opportunity for ongoing court enforcement and moving to "private settlement agreements," practitioners have

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83. 18 U.S.C. § 3626(a)(1)(A) (2018).

84. *Id.* See also Boston, *supra* note 73, at 445 (discussing "need/narrowness/intrusiveness" findings); *Prisoners' Rights Lawyers' Strategies*, *supra* note 65, at 528 (referring to 18 U.S.C. § 3626(a)(1)(A) as the "need-narrowness-intrusiveness finding").

85. 18 U.S.C. § 3626(g)(7) (2018).

86. Such provisions are a less significant departure for litigated consent decrees. See *Prisoners' Rights Lawyers' Strategies*, *supra* note 65, at 526-27 n.25 (noting that "[c]ourts have . . . commented that the PLRA does not change [ordinary rules governing contested entry of injunctions in federal court] for litigated relief," and citing *Gilmore v. California*, 220 F.3d 987, 1006 (9th Cir. 2000) and *Smith v. Arkansas Dep't. of Corr.*, 103 F.3d 637, 647 (8th Cir. 1996)).

87. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (internal citations omitted) (stating that consent decrees must generally "spring from and serve to resolve a dispute within the court's subject-matter jurisdiction[,] . . . come within the general scope of the case made by the pleadings, . . . further the objectives of the law upon which the complaint was based," and be lawful; "[t]herefore, a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded at trial").

88. See Boston, *supra* note 73, at 445.

89. See 18 U.S.C. § 3626(a)(1)(A) (2018).

90. See *supra* notes 80-82.

developed creative ways to comply with the PLRA while ensuring courts can retain jurisdiction and enforce the agreements, often without expressly admitting liability.<sup>91</sup> Professor Margo Schlanger has summarized seven types of commonly negotiated provisions that district courts have found to pass muster. These include: (1) stipulations citing to the relevant statutory provision, 18 U.S.C. § 3626(a)(1)(A);<sup>92</sup> (2) stipulations quoting the relevant statutory provision;<sup>93</sup> (3) stipulations stating that the relief is necessary to correct the alleged violation;<sup>94</sup> (4) stipulations expressly denying liability;<sup>95</sup> (5) stipulations stating that the conditions necessitate remedy;<sup>96</sup> (6) stipulations explicitly recognizing a violation of federal rights;<sup>97</sup> and (7) stipulations asking the court to make

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91. See *Boston*, *supra* note 73, at 445 (noting that “[i]n practice, courts have been willing to approve consent judgments that stipulate conclusorily to the required PLRA findings, sometimes with significant reservations, and have not required evidentiary proceedings to support the entry of such agreed orders”); see also *Civil Rights Injunctions Over Time*, *supra* note 74, at 594-95 (“Probably even more prevalent, however, is a magic words strategy: Participants report that ‘[i]n practice, parties who wish to settle agree to these findings and the court approves them.’”); Alexander, *supra* note 79, at 1683-86 (discussing language in court enforced consent decrees sufficient to comply with the PLRA).

92. *Prisoners’ Rights Lawyers’ Strategies*, *supra* note 65, at 530 (citing Stipulation for Injunctive Relief ¶ 149, *Fussell v. Wilkinson*, No. 03-cv-00704 (S.D. Ohio Nov. 22, 2005) (“The court shall find that this Stipulation satisfies the requirements of 18 U.S.C.A § 3626(a)(1)(A) and shall retain jurisdiction to enforce its terms.”)).

93. *Id.* at 530 (citing Settlement Agreement ¶¶ J-K, *Duffy v. Riveland*, No. 92-cv-01596 (W.D. Wash. June 3, 1998) (“The parties stipulate, based upon the entire record, that the relief set forth in this Settlement Agreement is narrowly drawn, extends no further than necessary to correct violations of federal rights, and is the least intrusive means necessary to correct violations of federal rights.”)).

94. *Id.* at 530 (citing Consent Decree, Order and Judgment Approving and Adopting Proposed Settlement Agreement ¶ 11, *Laurna Chief Goes Out v. Missoula*, No. 12-cv-00155 (D. Mont. Oct. 31, 2013) (“The Court finds that the relief provided in the [Proposed Settlement Agreement] is narrowly drawn and extends no further than necessary to correct the alleged violation in conformance with the Prison Litigation Reform Act, 18 U.S.C. § [3626](a)(1).”)).

95. *Id.* at 531 (citing Order and Agreement ¶¶ 2-4, *Etters v. Young*, No. 09-ct-03187 (E.D.N.C. May 21, 2012) (quoting 18 U.S.C. § 3626(a)(1)(A) and stating, “[n]othing in this Order and Agreement, including, specifically, the stipulation . . . constitutes an admission of liability and undersigned Defendants . . . vigorously dispute that they have violated the federal rights of Plaintiff . . . or any other adult female inmate . . . In entering into this settlement, Defendants . . . make no admissions of liability to Plaintiff and voluntarily assume the obligations set forth herein”)).

96. *Id.* at 531-32 (citing Consent Decree ¶¶ 10-12, *United States v. Miami-Dade Cnty.*, No. 13-cv-21570 (S.D. Fla. May 1, 2013) (citing to 18 U.S.C. § 3626(a)(1)(A) and stating, “For the purposes of this lawsuit only and in order to settle this matter, Defendants stipulate, and this Court finds, that the conditions at the [Miami-Dade County Corrections and Rehabilitation Department] Jail facilities necessitate the remedial measures contained in this Agreement.”)).

97. *Id.* at 532-33 (citing Consent Decree ¶¶ 58-60, *United States v. Clay Cnty.*, No. 97-cv-00151 (M.D. Ga. Aug. 20, 1997) (quoting 18 U.S.C. § 3626(a)(1)(A) and stating, “For purposes of this lawsuit only and in order to settle this matter, the Defendants stipulate that they have violated certain federal rights of inmates as alleged in the pleadings.”)).

findings required for prospective relief under 18 U.S.C. § 3626(a)(1)(A).<sup>98</sup>

At least one court has also recognized that parties are free to enter into stipulations that are then approved by the court, without the court making particularized findings, even in the context of PLRA cases: “Of course, we do not mean to suggest that the district court must conduct an evidentiary hearing about or enter particularized findings concerning any facts or factors about which there is not a dispute. The parties are free to make any concessions or enter into any stipulations they deem appropriate.”<sup>99</sup>

Having cleared the need-narrowness-intrusiveness hurdle, parties must soon begin contemplating potential termination of the consent decree, given that termination motions can be filed shortly after entry of a court-enforceable decree.

### C. Terminating Court-Enforced Relief

The PLRA also attempts to limit court involvement when it comes to termination of enforceable consent decrees. Specifically, the PLRA makes any court-enforceable prospective relief in a prison or jail conditions case terminable on a motion by the defendant or an intervenor as early as two years after relief is entered, and every year thereafter until successful.<sup>100</sup> And a court must grant a motion for termination unless “the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.”<sup>101</sup> Further, a motion to terminate prospective relief automatically results in a stay of that relief after thirty days.<sup>102</sup> In other words, irrespective of compliance with a consent decree, after two years (and every year thereafter), a defendant or intervenor can move to terminate the decree; this stays the very relief defendants have agreed to work toward, and requires a court to make written findings about whether the decree should continue based on the same criteria required to enter the decree two years prior.

These termination criteria differ drastically from the standard procedures for

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98. *Id.* at 533 (citing Joint Stipulations Supporting Resolution of Class Action ¶ 2, *Martinez v. Maketa*, No. 10-cv-02242 (D. Colo. Mar. 28, 2011) (“Plaintiffs and Defendant jointly stipulate that the Court should make the findings required for prospective relief under 18 U.S.C. § 3626(a)(1)(A) and issue a permanent injunction . . .”).

99. *Cason v. Seckinger*, 231 F.3d 777, 785 n.8 (11th Cir. 2000).

100. 18 U.S.C. § 3626(b)(1)(A) (2018) (“In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervenor . . . [two] years after the date the court granted or approved the prospective relief; [or one] year after the date the court has entered an order denying termination of prospective relief under this paragraph.”).

101. 18 U.S.C. § 3626(b)(3) (2018).

102. 18 U.S.C. § 3626(e)(2) (2018). Such an automatic stay can be postponed to take effect after ninety days where good cause is shown. 18 U.S.C. § 3626(e)(3) (2018).

terminating or modifying an injunction. The Supreme Court has made clear that in non-PLRA cases, for both litigated and consented injunctions, complete or partial relief from an injunction is proper when a defendant has “complied in good faith with the [ ] decree since it was entered, and . . . the vestiges of past [constitutional violations] have been eliminated to the extent practicable.”<sup>103</sup> In the case of consent decrees, the Court has also emphasized that parties can “settle [a] dispute over the proper remedy for constitutional violations that had been found by undertaking to do more than the Constitution itself requires (almost any affirmative decree beyond a directive to obey the Constitution necessarily does that), but also more than what a court would have ordered absent the settlement.”<sup>104</sup> For that reason, the Court has recognized the importance of maintaining “the finality of such agreements,” because relitigating the merits of a consent decree could “serve as a disincentive to negotiation of settlements in institutional reform litigation.”<sup>105</sup>

Thus, in contrast to the general incentives for negotiated settlements and entry of consent decrees to remedy constitutional violations, the PLRA seemingly does away with the finality of such agreements and incentives for compliance. This opens the door to a flurry of side litigation as early as two years after entry of the decree. Further, while in the normal course defendants must comply with the terms of an injunction for it to be dissolved, defendants operating under a post-PLRA consent decree can argue annually that there is no ongoing constitutional violation, irrespective of the terms of settlement, which are often broader than the constitutional floor. Such termination litigation can delay or derail compliance with the problems the decree was designed to remedy.

Given these termination provisions, when surveying post-PLRA consent decrees, I expected to see an abundance of termination motions filed by defendants. That turns out not to be the case. Instead, similar to lawyers’ creative thinking that allows courts to enforce consent decrees, plaintiffs’ lawyers have also constructed provisions to modify the PLRA’s two-year termination requirement.<sup>106</sup> Professor Schlanger has recognized that termination stipulations take a number of forms, pointing to specific language in various cases.<sup>107</sup> Below, I categorize the different types of termination provisions—substantial compliance, extended termination timeframe, hybrid, and opt out—and provide

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103. *Missouri v. Jenkins*, 515 U.S. 70, 89 (1995) (citing *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249-50 (1991) (discussing relief from injunctions in the context of school desegregation cases)). The Court has also recognized that parties may seek modification of a decree “by showing either a significant change either in factual conditions or in law.” *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 384 (1992).

104. *Rufo*, 502 U.S. at 389.

105. *Id.*

106. Although defendants’ motivations for entering into consent decrees that modify the PLRA’s two-year timeframe differ from case to case, at least in some instances, defendants understand that remedying the issues underlying the decree may take substantial time, and that a longer timeframe may lead to more funding for remediation.

107. See *Prisoners’ Rights Lawyers’ Strategies*, *supra* note 65, at 544-46.

examples of nuances within each category.<sup>108</sup> These nuances are critical because the language of the termination provision may determine whether termination motions are ultimately filed.<sup>109</sup>

### 1. Substantial compliance

Provisions in this category prescribe termination only upon “substantial compliance” with the terms of the settlement for a period of time (e.g., one year). This language seems to be more common in recent years, and helps ensure that termination motions are not filed before compliance is achieved as contemplated by the consent decree. For example, in a case involving inadequate mental health and suicide prevention measures at a jail in Lake County, Indiana, the parties stipulated: “This Agreement shall terminate when [Lake County Jail] has achieved substantial compliance with the substantive provisions of this Agreement and has maintained that substantial compliance for one (1) year.”<sup>110</sup> The parties also made clear that: “The DOJ, in its good faith discretion, will determine whether Lake County has maintained substantial compliance for the one year period and any finding of substantial compliance may not unreasonably be withheld.”<sup>111</sup>

Other parties operating under a “substantial compliance” framework allow for more lenience with respect to timing of termination and which parties or persons bear the burden of showing that substantial compliance has been achieved. For example, in litigation about inadequate staffing, training, and conditions at facilities in Hinds County, Mississippi, the parties stipulated:

This Agreement will terminate if the parties jointly stipulate that the County has achieved and maintained substantial compliance with the Agreement for at least

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108. While not an exhaustive search of all post-PLRA consent decrees involving court enforcement and altered termination provisions, I surveyed over fifty such decrees from 1996 to the present in varying jurisdictions and in both prison and jail cases. The examples presented here encapsulate the most common categories of provisions without attempting to capture every variation that exists within one of these categories. Part IV.A below provides a detailed description of how these cases were selected as well as additional data and insights gathered from the survey of these fifty consent decrees.

109. See Part V below for examples of termination motions being filed despite termination stipulations.

110. Lake Cnty. Jail Settlement Agreement at 28, *United States v. Lake Cnty.*, No. 10-cv-00476 (N.D. Ind. Dec. 3, 2010), ECF No. 9; *see also* Consent Injunction ¶ 56, *Prison Legal News v. Berkeley Cnty. Sheriff*, No. 10-cv-02594 (D.S.C. Jan. 13, 2012), ECF No. 201 (in case involving the denial of certain written literature to inmates, parties stipulated: “Defendants shall not . . . file [a termination] motion until they have achieved a minimum of one year of substantial compliance with the provisions of this Consent Injunction. If Plaintiffs and the United States determine that Defendants have achieved one year of substantial compliance with the provisions of this Consent Injunction, Plaintiffs and the United States will not oppose a motion filed by Defendants seeking to modify or terminate this Consent Injunction.”).

111. Lake Cnty. Jail Settlement Agreement at 28, *United States v. Lake Cnty.*, No. 10-cv-00476 (N.D. Ind. Dec. 3, 2010), ECF No. 9.

two years, and the Court then enters an appropriate order terminating the Agreement and dismissing jurisdiction . . . [But] [i]f the parties do not jointly stipulate to dismissal, the County may file a unilateral motion to dismiss. The County may not file a unilateral motion to dismiss until this Agreement has been in effect for at least two years. Unless otherwise directed by the Court, the burden will be on the County to demonstrate that the County substantially implemented each provision of the Agreement, and that such compliance was maintained continuously for the two years prior to filing of the motion.<sup>112</sup>

Thus, without the consent of plaintiffs, after two years, Hinds County could file a termination motion, but would bear the burden of showing that it had substantially complied with the settlement for a period of two years.

## 2. Extended termination timeframe

Another common approach is for parties to extend the two-year termination timeframe to some number of additional years. The way these cases terminate also varies depending on how the provision is constructed. Some parties use a sunset clause: Once the specified number of years in the decree has run, the decree simply terminates without court involvement. For example, in a case brought by HIV-positive inmates challenging their segregation in an Alabama facility, the parties stipulated:

Unless otherwise agreed in writing by the Parties or extended by Order of the Court or unless a motion to extend the term of this Order is then pending, this Order shall expire by its own terms at 12:00 p.m. (Central Daylight Savings Time) on June 30, 2015. In the event that any such pending motion identified above (as of June 30, 2015) is denied, this Order shall expire on the date on which such motion is denied by the Court.<sup>113</sup>

Other parties agree not to file termination motions until a certain amount of time has passed. In an Arizona case challenging a facility's policy of housing inmates based on race, the parties agreed: "To allow time for the remedial measures set forth in this Stipulation to be fully implemented, the parties shall not move to terminate this Stipulation until at least November 1, 2023."<sup>114</sup>

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112. Settlement Agreement between the U.S. and Hinds Cnty., Miss. Regarding the Hinds Cnty. Jail ¶¶ 164-65, *United States v. Hinds Cnty.*, No. 16-cv-00489 (S.D. Miss. July 19, 2016), ECF No. 8-1 [hereinafter *Hinds Settlement Agreement*]; *see also* Consent Decree at 125, *United States v. Alabama*, No. 15-cv-00368 (M.D. Ala. June 18, 2015), ECF No. 11 ("This Agreement shall terminate when ADOC and Tutwiler have achieved substantial compliance with all of the substantive provisions of this Agreement in three consecutive Compliance Reports. The burden will be on ADOC and Tutwiler to demonstrate that they have maintained substantial compliance with each of the provisions of this Agreement.").

113. Stipulated Order ¶ 20, *Henderson v. Thomas*, No. 11-cv-00224 (M.D. Ala. Sept. 30, 2013), ECF No. 306.

114. Stipulation for Order ¶ 51, *Rudisill v. Ryan*, No. 13-cv-01149 (D. Ariz. Dec. 22, 2015), ECF No. 114; *see also* Stipulation ¶ 37, *Parsons v. Ryan*, No. 12-cv-00601 (D. Ariz. Oct. 14, 2014), ECF No. 1185 ("To allow time for the remedial measures set forth in this Stipulation to be fully implemented, the parties shall not move to terminate this Stipulation for a period of four years from the date of its approval by the Court.").

Similarly, in a California case involving inmates with disabilities, the parties stipulated: “This Agreement shall remain in effect for three (3) years from the Effective Date, after which time its provisions will automatically terminate unless the Court determines that, based on applicable law and specific findings of fact, [] it is necessary to extend the duration of this Agreement.”<sup>115</sup>

### 3. Hybrid

Still other parties choose a hybrid model that includes both a substantial compliance component as well as an extended timeframe. For example, in a case related to medical care at a women’s prison in Virginia, the parties agreed to termination after one year of substantial compliance, but not before three years from entry of the settlement agreement:

This Settlement Agreement shall terminate as of the date on which the Defendant has achieved substantial compliance with all elements of performance of its obligations to provide constitutionally-adequate medical care under the Eighth Amendment, subject to the Compliance Monitor’s evaluation under this Settlement Agreement, and has consistently maintained such substantial compliance for a period of one year, provided, however, that the termination may not take effect less than three years from the Effective Date unless the Parties, by and through their respective counsel, mutually agree to termination within a shorter period of time.<sup>116</sup>

Here, determination of compliance was also put into the hands of a third-party monitor rather than one of the parties.

In another type of hybrid model, the parties agree to terminate upon substantial compliance unless a certain number of years pass, at which point the decree terminates. For example, in a case involving numerous conditions issues at a New Jersey jail, the parties stipulated:

Once Defendants achieve Substantial Compliance for each of the five (5) Compliance Categories for three (3) successive inspections, or five (5) years from the date of the Settlement Agreement, whichever comes first, the Settlement Agreement will terminate. At such time, Plaintiffs will have no further right to enforce the terms of the Settlement Agreement and the Court shall no longer retain jurisdiction, if any, over the enforcement of such Agreement.<sup>117</sup>

In yet another hybrid model, in a class action involving conditions for deaf and hard of hearing inmates, the parties agreed that:

The Court shall retain such jurisdiction over this matter, including to interpret and enforce this Settlement Agreement, and enter appropriate orders requiring

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115. Settlement Agreement at 19, *Johnson v. L.A. Cnty. Sheriff’s Dep’t.*, No. 08-cv-03515 (C.D. Cal. Mar. 24, 2015), ECF No. 210-2.

116. Settlement Agreement at 26, *Scott v. Clarke*, No. 12-cv-00036 (W.D. Va. Sept. 15, 2015), ECF No. 221-1.

117. Settlement Agreement and Order at 17, *Colon v. Passaic Cnty.*, No. 08-cv-04439 (D.N.J. Jan. 6, 2012), ECF No. 94-1.

compliance with the Agreement, for not less than two years following the Effective Date. If the Court finds that, during the two years following the Effective Date, IDOC has failed to show that it is in substantial compliance with any portion of this Settlement Agreement, then the Court will extend the period of its jurisdiction to supervise and enforce any such portion of this Settlement Agreement, until IDOC shows it has achieved substantial compliance, for a period of time not to exceed two additional years.<sup>118</sup>

#### 4. Opt Out

Shortly after passage of the PLRA, a few parties opted out of any timeframe for termination altogether. For example, in a 1997 settlement related to conditions issues stemming from gross overcrowding in a facility in Bernalillo County, New Mexico, the parties stipulated: “Defendants agree to file no motion in the future asserting that this Settlement Agreement should be terminated based upon the provisions of the PLRA.”<sup>119</sup> But in a 2016 settlement that altered the original termination stipulation, the parties agreed to a specific timeframe after which defendants could file for termination: “Two years after the Court enters this Settlement Agreement, the County Defendants will reacquire the right to file motions under the Prison Litigation Reform Act.”<sup>120</sup>

Similarly, in a case involving conditions of confinement issues at a jail in Bonneville County, Idaho, the parties’ initial 1997 consent decree stipulated:

This Consent Decree, Order and Judgment shall be ongoing in nature and shall continue in full force and effect and the parties expressly recognize and stipulate to the continuing jurisdiction of this Court for the limited purpose of carrying out the intent of this Consent Decree, Order and Judgment until the County completes construction of and has a new jail facility fully operational.<sup>121</sup>

A few months later in a supplemental agreement, the parties agreed to a more definitive termination provision:

This Agreement shall continue in full force and effect and the parties to this Agreement recognize and submit to the continuing jurisdiction of this Court for the limited purpose of carrying out the intent of this Agreement for a period of one (1) calendar year from and after the date of the approval hereof by the Court, unless the parties hereto earlier stipulate or it is determined by Order of the Court that the provisions of this Agreement have been satisfactorily implemented at an earlier date and that continuing jurisdiction of this Court is no longer necessary.<sup>122</sup>

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118. Stipulation of Settlement at 39, *Holmes v. Godinez*, No. 11-cv-02961 (N.D. Ill. Apr. 23, 2018), ECF No. 446-2.

119. Order Regarding the Prison Litig. Reform Act at 6, *McClendon v. City of Albuquerque*, No. 95-cv-00024 (D.N.M. Nov. 5, 1996), ECF No. 225.

120. Settlement Agreement at 14, *McClendon v. City of Albuquerque*, No. 95-cv-00024 (D.N.M. Mar. 22, 2016), ECF No. 1213-1.

121. Consent Decree, Order and Judgment at 5, *Makinson v. Bonneville Cnty.*, No. 97-cv-00190 (D. Idaho May 16, 1997), ECF No. 3.

122. Second Supplemental Agreement between Bonneville Cnty. and Pls. Regarding



Opting out of a termination timeframe is the least common means of altering the PLRA's two-year termination provision, and even when such provisions are initially contemplated, they are often later abandoned for a more specific termination provision.<sup>123</sup>

#### IV. THE IMPORTANCE OF INJUNCTIVE PRACTICE IN ACHIEVING COMPLIANCE WITH POST-PLRA CONSENT DECREES

##### A. Achieving Compliance

Having now explored the particulars of prospective injunctive relief in the context of the PLRA, the question remains: despite lawyers' creative strategies for crafting post-PLRA consent decrees, are prisons complying with these decrees? And what involvement, if any, do courts have in enforcing consent decrees and stemming constitutional violations in prison reform cases? A survey of fifty post-PLRA consent decrees suggests that while achieving compliance is often fraught, courts can play a vital role in helping parties remediate disputes and move toward compliance.

The fifty decrees encompassed in the survey include all relevant jail and prison consent decrees in the "Post-PLRA Enforceable Consent Decrees" special collection of the Civil Rights Litigation Clearinghouse ("Clearinghouse") (thirty-eight in total),<sup>124</sup> as well as a handful of additional decrees entered into in the past ten years (twelve in total).<sup>125</sup> The twelve additional decrees were chosen by year, without reference to substance, so as not to preordain the results of the survey. These cases include: one case from 2019, two cases from each year in the 2015-2018 timespan, and one case from each year in the 2010-2013 timespan,

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Consent Decree on File Herein at 16, Makinson v. Bonneville Cnty., No. 97-cv-00190 (D. Idaho June 14, 1999), ECF No. 7.

123. This conclusion is based on the survey of fifty post-PLRA consent decrees discussed in Part IV below.

124. See *Special Collection, Post-PLRA Enforceable Consent Decrees*, C.R. LITIG. CLEARINGHOUSE, <https://perma.cc/AD4B-KVT2> (archived June 9, 2021). Although there were fifty-three cases in the "Post-PLRA Enforceable Consent Decrees" special collection of the Clearinghouse as of January 2021, cases involving juvenile facilities, immigration facilities, mental health facilities, state court enforcement or private settlements, and unclear termination status were removed, bringing the total number of Clearinghouse cases used for this survey to thirty-eight. Further, the Clearinghouse consent decrees only capture cases that have made it past the PLRA's initial hurdles (e.g., exhaustion of administrative remedies and filing fees, even for individuals proceeding in forma pauperis), and that have been approved by a court, which can be difficult to achieve under the PLRA. See *supra* Part III.B.

125. The twelve additional decrees can also be found in the Clearinghouse, but as of January 2021 they were not contained in the "Post-PLRA Enforceable Consent Decrees" special collection. For purposes of this survey, there is no meaningful difference between those decrees contained in the special collection and those outside that collection. Rather, I chose to include a handful of additional decrees to ensure a robust sample for purposes of discussing compliance under court enforceable post-PLRA decrees.

with 2014 and 2011 being excluded because no 2014 or 2011 decrees outside those in the Clearinghouse were found. Although this is by no means an exhaustive list of post-PLRA consent decrees, it provides a sample for purposes of discussing compliance under court enforceable post-PLRA decrees.<sup>126</sup>

Of the fifty cases surveyed, twenty-three (46%) have required court involvement to help the decree move forward.<sup>127</sup> These twenty-three cases include court involvement in: contested termination motions, enforcement motions, contempt/sanctions motions, extension of termination timeframes, and modification of consent decrees. In many cases, court involvement was required for more than one of these categories.<sup>128</sup> Thus by absolute numbers, there are eleven cases with contested termination motions,<sup>129</sup> seventeen cases with enforcement motions, thirteen cases with contempt/sanctions motions, eight cases in which the termination timeframe was extended with court involvement, and fourteen cases in which the decree was modified with court involvement.<sup>130</sup>

One other way to look at the data is by terminated versus ongoing decrees. Of the fifty cases, twenty-three have terminated, while twenty-seven are ongoing.<sup>131</sup> And four of the twenty-three terminated cases required court involvement,<sup>132</sup> while nineteen of the twenty-seven ongoing cases have required court involvement.<sup>133</sup> This suggests that court enforcement can be key to parties accomplishing reforms set out in a consent decree. But should courts be in the business of enforcing consent decrees in prison reform cases?

## B. Role of the Courts

Whether courts are appropriate vehicles for structural reform litigation

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126. See Appendix at <https://perma.cc/N2WA-NWU9> for a chart with case names, case numbers, and information supporting the statistics in the following two paragraphs. The statistics in the Appendix reflect the state of each case as of January 2021.

127. *Id.* Some of the cases outside this 46% are ongoing, so court involvement could become necessary in the future. See below for a discussion of the number of ongoing vs. terminated cases.

128. *Id.*

129. Interestingly, while termination motions were filed in eleven of the fifty cases, only three such cases were filed in the last ten years. Although it is difficult to determine exactly why fewer termination motions are filed in newer cases, a few reasons for this may include: the decrees have not yet matured to the point where filing termination motions would be fruitful, newer decrees tend to be narrower in scope, practitioners have crafted decrees that require a period of substantial compliance before termination can be sought, and in some cases prisons and jails find the decrees helpful for either remedying conditions of confinement or obtaining funding for remediation.

130. One other interesting piece of data is whether the cases in this survey involved compliance monitors. Thirty of the fifty cases have had a monitor or other expert involved in compliance oversight, and of the eleven cases in which termination motions were filed, eight involved a monitor at some point during the case.

131. See Appendix at <https://perma.cc/N2WA-NWU9>.

132. *Id.*

133. *Id.*

(sometimes called “institutional reform litigation”) has been a hotly debated topic for years.<sup>134</sup> As civil rights lawyers began engaging the courts to challenge prison conditions in the late 1960s, Professors Abram Chayes and Owen Fiss kicked off the debate in this arena by defending civil rights injunctions in the face of legal philosopher Lon Fuller’s reservations about the role of litigation.<sup>135</sup> More recently, Malcolm M. Feeley and Edward L. Rubin’s seminal work on the intersection of prisons and courts defends “prison reform cases”—those involving injunctive actions brought pursuant to the Eighth Amendment<sup>136</sup>—asserting that policy making is a routine judicial task and one that should be regarded as ordinary and legitimate.<sup>137</sup>

Judges have also defended their role in at least certain types of prison reform cases. After finding that state penitentiary treatment and conditions in Texas were unconstitutionally cruel in *Ruiz v. Estelle*, Judge William Wayne Justice of the Eastern District of Texas explained: “[T]he procedural structure that most assume is the ordinary way in which courts operate is inadequate as a means of making sense of the operation of a court . . . in proceedings in which the remedy is complex and requires continual judicial superintendence long after the judgment is entered.”<sup>138</sup>

Other scholars have looked at courts in the context of political institutions that could potentially enforce the Constitution in prison conditions cases. The question then becomes not whether courts are the best forum for handling prison reform, but whether, as compared to other institutions, courts should play a role

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134. Susan Poser, *What’s A Judge To Do? Remediating the Remedy in Institutional Reform Litigation*, 102 MICH. L. REV. 1307, 1307 (2004) (recognizing in 2004 the “now nearly thirty-years old” question of “whether judges have the legitimacy and the capacity to oversee the remedial phase of institutional reform litigation”).

135. *Id.* at 1307-08 (listing contributors to the scholarly debate, with Abram Chayes, Owen Fiss, Malcolm Feeley, and Edward Rubin arguing “that the proper role of judges is to remedy rights violations and that judges possess the legitimate institutional authority to order structural injunctions,” while Lon Fuller, Donald Horowitz, William Fletcher, Gerald Rosenberg, Ross Sandler and David Schoenbrod “disapprove of active judicial involvement in structural remedies on the basis of either lack of legitimacy, lack of capacity, or both”); see also Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 199-96 (1999) [hereinafter *Institutional Reform Litigation*] (citing various works by Abram Chayes and Owen M. Fiss and stating that Abram Chayes and Owen Fiss, writing in the 1970s, “set the terms of the scholarly debate . . . in opposition to Lon Fuller’s vision of private dispute resolution by adversarial litigation”).

136. *Institutional Reform Litigation*, *supra* note 135, at 2005 (“When Feeley and Rubin talk about ‘prison reform cases,’ they mean the kinds of cases that are discussed in their five case studies—injunctive actions brought pursuant to the Eighth Amendment.”).

137. FEELEY & RUBIN, *supra* note 49, at 1-5.

138. William Wayne Justice, *The Origins of Ruiz v. Estelle*, 43 STAN. L. REV. 1, 8 (1990) (delivering a speech at Stanford’s commencement on the origins of *Ruiz v. Estelle* after ordering consolidation of prisoner complaints into a class action, finding counsel for the plaintiff class, ordering the U.S. Department of Justice to appear as amicus curiae, and subsequently finding that state penitentiary treatment and conditions in Texas were unconstitutionally cruel).

in enforcing constitutional conditions of confinement. Erwin Chemerinsky has explained:

[I]n some instances the courts are the only entity with the will to enforce the Constitution. The political branches have inadequate incentives to comply with the Constitution when rights of prisoners are violated. Unless judges act, constitutional violations in prisons will go unremedied. In fact, without the threat of judicial enforcement, legislatures and prison officials have little reason other than human decency to keep prison conditions in compliance with Constitutional requirements. Courts can and do make a difference.<sup>139</sup>

Rubin and Feeley similarly ask whether a particular institution is “adequate” for the task, recognizing that although other institutions may be competent at addressing a particular issue, they may lack the political will to use those competencies.<sup>140</sup>

Still other scholars have attempted to contextualize the role of the judiciary in prison reform litigation by looking at the limits on courts as well as the litigation factors at play beyond the role of the judge. One such scholar has recognized that it is not only the judge that is important to the question, but the “significance of the larger context . . . of the litigation.”<sup>141</sup> Specifically, “the rules of litigation largely confine judicial response to the record developed and the arguments presented by the parties; for a plaintiff’s judgment, there must be a connection between the order a court issues and the claims, evidence, and requested relief plaintiffs’ counsel submits.”<sup>142</sup> For this reason, “unlike efforts to urge new executive or legislative policy, litigation gives those seeking change a formal and unique ability to shape the contest.”<sup>143</sup>

While questions of whether courts are the best or an adequate forum for prison reform cases are beyond the scope of this Article, it is clear that appealing to institutions other than courts to remedy unconstitutional conditions of confinement has been futile.<sup>144</sup> Thus, as long as the PLRA remains in effect, it is important to understand the role courts play in curbing constitutional violations in prisons despite the PLRA’s constraints on litigation.

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139. Chemerinsky, *supra* note 11, at 311-12; *see also* Zyl Smit, *supra* note 24, at 551-52 (“A general reason for the courts to intervene, to an extent that would perhaps not be considered necessary or appropriate elsewhere, has to do with the paralysis of other political avenues for reshaping prison policy in order to produce acceptable prison conditions.”).

140. Edward L. Rubin & Malcolm M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617, 636 (2003). *See also* Bailey W. Heaps, Note, *The Most Adequate Branch: Courts as Competent Prison Reformers*, 9 STAN. J. C.R. & C.L. 281, 291-92 (2013).

141. *Institutional Reform Litigation*, *supra* note 135, at 1999-2000.

142. *Id.* at 2015.

143. *Id.*; *see also* Chemerinsky, *supra* note 11, at 313-16 (stating that courts can make a difference in prison conditions cases, but recognizing and laying out ways that “courts are also limited in what they can do”).

144. *See, e.g.*, Chemerinsky, *supra* note 11, at 311-12; van Zyl Smit, *supra* note 24, at 551-52.

### C. Case Studies: Court Involvement in Achieving Compliance

The following case studies demonstrate some of the ways courts have helped parties achieve compliance in prison reform cases.<sup>145</sup> These case studies are not meant to be an exhaustive list of the ways courts can help stem constitutional violations under post-PLRA consent decrees, but rather a collection of some of the ways courts have played an important role in doing so.<sup>146</sup> Nor are these case studies meant to suggest an endorsement of or a best course of action for plaintiffs to achieve compliance with settlement terms. Indeed, given the varying complexity of decrees, the human actors at play, the geography of a particular facility, the language of a particular consent decree, etc., there is no one-size-fits-all strategy. Instead, these case studies demonstrate that under the right circumstances, plaintiffs can achieve compliance with settlement terms without a flurry of side litigation, and that courts, through a variety of tactics, can help in that process. In other words, despite the PLRA tamping down on court involvement in prison conditions cases, injunctive practice has, to some extent, adapted and rebounded to continue the vital work of stemming constitutional violations in prisons.

#### 1. Case study 1—Written opinion of the Court

In some cases, the tone a court sets—including the court’s level of engagement with compliance or the pressure it puts on parties in public forums such as status conferences or written opinions—can become a factor in whether parties move toward compliance and/or whether termination motions are filed

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145. As the fifty-decree survey above makes clear, parties do not consistently require court involvement to achieve compliance. Indeed, although parties may enter into a consent decree that provides for court enforcement, they may not require court involvement to achieve compliance. *See, e.g.,* Henderson v. Thomas, No. 11-cv-00224 (M.D. Ala. Mar. 28, 2011) (agreeing to sunset clause and terminating with little court involvement pursuant to such clause); Long v. Pickell, No. 16-cv-10842 (E.D. Mich. Mar. 8, 2016) (decree terminating with little court involvement pursuant to one-year sunset clause); Bumgarner v. N.C. Dep’t. of Corr., No. 10-ct-03166 (E.D.N.C. Sept. 17, 2010) (decree terminating with little court involvement pursuant to two-year sunset clause). This is encouraging in its own right, but not the focus of this section. Rather, these case studies demonstrate that court involvement can help spur compliance. They may also help lawyers and courts consider the most effective ways to encourage compliance in a variety of cases.

146. These case studies include only consent decrees entered into after the passage of the PLRA. For consent decrees entered into pre-PLRA, 18 U.S.C. § 3626(b) has had significant consequences. For example, 18 U.S.C. § 3626(b)(2) entitles a defendant or intervenor to “immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.” In practice, this meant that between 1996 and 2000, a large number of jurisdictions filed termination motions, and legal protections obtained through years of labor were swiftly swept away. *Civil Rights Injunctions Over Time*, *supra* note 74, at 591; Boston, *supra* note 73, at 447.

prior to compliance. This is exemplified in *United States v. Hinds County*, where an ongoing decree related to conditions of confinement at facilities in Hinds County, Mississippi was assigned to a new judge who made clear that anything less than full compliance would not be tolerated.<sup>147</sup>

To comply with the PLRA's need-narrowness-intrusiveness requirement, the consent decree included a stipulation asserting compliance with and quoting the relevant PLRA provision.<sup>148</sup> The agreement also provided for termination upon a joint motion of the parties after two years of substantial compliance, or a unilateral motion by the County no sooner than two years after the decree went into effect, with the burden on the County to demonstrate substantial compliance for two years before filing for termination.<sup>149</sup> The court approved the settlement agreement in July 2016 in a perfunctory one-page order, and retained jurisdiction to enforce the agreement.<sup>150</sup> The County began working toward compliance, and a status report filed in August 2017 reported that "[p]rogress had been made in a number of areas," including hiring a Compliance Coordinator dedicated to addressing the court-appointed monitor's recommendations and devoting resources to improve staffing concerns.<sup>151</sup>

The case was reassigned to Judge Carlton Reeves in December 2018.<sup>152</sup> And

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147. See generally No. 16-cv-00489 (S.D. Miss. June 23, 2016). During an investigation into conditions of confinement, DOJ found, among other things, that the relevant facilities in Hinds County were chronically understaffed; that staff was inadequately trained and supervised; that staff failed to supervise inmates with a history of violence, mental illness, or suicide attempts; and that inmates were frequently subjected to excessive force.

148. *Hinds Settlement Agreement*, *supra* note 112, ¶¶ 166-67 ("The United States and the County stipulate and agree that this Agreement complies in all respects with the requirements for prospective relief under the Prison Litigation Reform Act, 18 U.S.C. § 3626(a). The United States and the County stipulate and agree that all of the prospective relief in this Agreement is narrowly drawn, extends no further than necessary to correct the violations of federal rights as set forth by the United States in its Complaint and Findings Letter, is the least intrusive means necessary to correct these violations, and will not have any adverse impact on public safety or the operation of a criminal justice system.").

149. *Id.* ¶¶ 164-65 ("This Agreement will terminate if the parties jointly stipulate that the County has achieved and maintained substantial compliance with the Agreement for at least two years, and the Court then enters an appropriate order terminating the Agreement and dismissing jurisdiction. If the parties do not jointly stipulate to dismissal, the County may file a unilateral motion to dismiss. The County may not file a unilateral motion to dismiss until this Agreement has been in effect for at least two years. Unless otherwise directed by the Court, the burden will be on the County to demonstrate that the County substantially implemented each provision of the Agreement, and that such compliance was maintained continuously for the two years prior to filing of the motion.").

150. Order at 1-2, *United States v. Hinds Cnty.*, No. 16-cv-00489 (S.D. Miss. July 19, 2016), ECF No. 8; see also *Hinds Settlement Agreement*, *supra* note 112, ¶¶ 162-63 (specifying that court will retain jurisdiction to enforcement the settlement agreement).

151. Court-Appointed Monitor's Second Monitoring Report at 2, *United States v. Hinds Cnty.*, No. 16-cv-00489 (S.D. Miss. Aug. 23, 2017), ECF No. 16.

152. Order Reassigning Case, *United States v. Hinds Cnty.*, No. 16-cv-00489 (S.D. Miss. Dec. 17, 2018), ECF No. 25. Judge Reeves was appointed by President Barack Obama in 2010 and is the second African American to serve as a federal judge in Mississippi. He is

in June 2019, the United States filed a motion for an order to show cause why defendants should not be held in contempt for their lack of progress toward compliance.<sup>153</sup> The court granted the motion and agreed to set a date for a hearing on the motion, but the parties subsequently filed a joint motion for settlement in December 2019.<sup>154</sup> The joint motion did not replace the original decree, but rather provided short- and long-term steps the County agreed to undertake to comply with the original settlement agreement.<sup>155</sup> The court held a hearing on the proposed settlement and expressed extreme concern and interest that the County comply with terms of the settlement agreements:

When this case was reassigned to me . . . I ordered the parties to come forward and had a status conference to let you all know that I would be taking a central focus in making sure that this case moves along as it should, and I expressed concern. We had another status conference here after the monitor submitted their next report. I expressed concern . . . I took it upon myself to go to the facility itself back in August. Again, since then . . . even after I have notified the county and the United States of the importance of this case to me and the interest that I took in it and how I was so concerned about some of the matters, there's still stuff that was left out of the self-reporting . . . . What the Court cannot tolerate . . . is flagrant violations of its orders. And I've adopted Judge Barbour's order . . . from 2016, and I have been . . . trying to make sure that that order is complied with throughout this year . . . . I'm involved now. I'm fully engaged and we're moving forward.<sup>156</sup>

The court approved the new settlement agreement in January 2019, but called out the County's non-compliance in a twelve-page opinion:

Allowing the County to move forward without facing accountability is concerning given the extent of the County's failings. At least one prisoner has died, and numerous others have been stabbed, brutally beaten, and assaulted while the County failed to meet the terms to which it agreed . . . . These kinds of conditions, here and elsewhere, create the environment for local communities to call into question our very system of criminal justice. Calls to shut down prisons are being made here in Mississippi and across the country. Given failures of those trusted to oversee and ensure the constitutionality of our jails and prisons, as seen in the instant case with Hinds County, the views held by prison abolitionists are resonating with a growing number . . . .

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the author of a number of groundbreaking decisions, including *Campaign for Southern Equality v. Bryant*, which struck down Mississippi's same-sex marriage ban, and *Jackson Women's Health Organization v. Currier*, which struck down a state law banning abortion after fifteen weeks of pregnancy. 64 F. Supp. 3d 906 (S.D. Miss. 2014); 349 F. Supp. 3d 536 (S.D. Miss. 2018).

153. United States' Mot. Order to Show Cause Why Defs. Should Not Be Held in Contempt, *United States v. Hinds Cnty.*, No. 16-cv-00489 (S.D. Miss. June 24, 2019), ECF Nos. 30-31.

154. Joint Mot. for Settlement Entry of Stipulated Order, *United States v. Hinds Cnty.*, No. 16-cv-00489 (S.D. Miss. Dec. 16, 2019), ECF Nos. 53-54.

155. See Settlement Conference Tr. at 5, *United States v. Hinds Cnty.*, No. 16-cv-00489 (S.D. Miss. Dec. 17, 2019), ECF No. 55.

156. *Id.* at 7-8, 100.

While a finding of contempt is warranted, the parties' stipulated order outlines what is perhaps the most comprehensive remedial plan for Hinds County to become compliant that the Court has seen from the parties . . . . However, the Court reminds the parties that "[o]nce invoked, 'the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies.'" *Brown v. Plata*, 563 U.S. 493, 538 (2011) (citation omitted). *This Court will do whatever it takes within the confines of the law to ensure the parties follow the Consent Decree and we finally see an end to the violence and neglect that has plagued the Jail all these years.*<sup>157</sup>

While it remains to be seen whether substantial compliance is achieved, dedicated court involvement in this case has certainly increased the odds that compliance will occur and termination motions will not be filed.

## 2. Case study 2—Enforcement motions

In other cases, judges have taken an active role in response to enforcement motions filed by plaintiffs. For example, in *Scott v. Clarke*, the judge worked with the parties to craft an injunction that included specific directives about how compliance should be achieved.<sup>158</sup>

The case began in 2012, when prisoners at Fluvanna Correctional Center for Women ("FCCW") in Virginia filed a class action lawsuit alleging insufficient medical care in violation of the Eighth Amendment.<sup>159</sup> After extensive discovery, and Judge Norman Moon<sup>160</sup> denying defendants' motion for summary judgment while granting plaintiffs' motion for partial summary judgment,<sup>161</sup> the parties entered into a consent decree.<sup>162</sup> The decree provided for comprehensive changes to the medical care system at the prison, and a monitor to oversee implementation.<sup>163</sup> The court retained jurisdiction to enforce the agreement.<sup>164</sup>

The parties stipulated that they met the need-narrowness-intrusiveness provision by paraphrasing and referencing the relevant PLRA provision.<sup>165</sup> And

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157. Order at 10-12, *United States v. Hinds Cnty.*, No. 16-cv-00489 (S.D. Miss. Jan. 16, 2020), ECF No. 60 (emphasis added).

158. See generally No. 12-cv-00036 (W.D. Va. Jul. 24, 2012).

159. Compl. for Declaratory and Injunctive Relief, *Scott v. Clarke* ¶ 1, No. 12-cv-00036 (W.D. Va. Jul. 24, 2012), ECF No. 1; see also First Am. Compl. for Declaratory and Injunctive Relief ¶ 1, *Scott v. Clarke*, No. 12-cv-00036 (W.D. Va. Feb. 6, 2013), ECF No. 39; Second Am. Compl. for Declaratory and Injunctive Relief ¶ 1, *Scott v. Clarke*, No. 12-cv-00036 (W.D. Va. Jul. 15, 2013), ECF No. 58.

160. Judge Moon was appointed by President Bill Clinton in 1997.

161. *Scott v. Clarke*, 64 F. Supp. 3d 813, 815 (W.D. Va. 2014).

162. Settlement Agreement, *Scott v. Clarke*, No. 12-cv-00036 (W.D. Va. Sept. 15, 2015), ECF No. 221-1.

163. *Id.* at 5-23.

164. Final J. Order at 2, *Scott v. Clarke*, No. 12-cv-00036 (W.D. Va. Feb. 5, 2016), ECF No. 262; Findings of Fact and Conclusions of Law at 28-29, *Scott v. Clarke*, No. 12-cv-00036 (W.D. Va. Feb. 5, 2016), ECF No. 261.

165. Settlement Agreement at 27, *Scott v. Clarke*, No. 12-cv-00036 (W.D. Va. Sept. 15, 2015), ECF No. 221-1.



they agreed to a hybrid approach for termination, specifying that termination could occur upon one year of substantial compliance, as determined by the compliance monitor, but not before three years, unless the parties jointly agreed to an earlier termination date.<sup>166</sup>

Approximately a year and a half into the agreement, plaintiffs filed a motion for order to show cause why defendants should not be held in contempt for failing to meet its obligations under the settlement agreement and requested an evidentiary hearing.<sup>167</sup> After briefing on the motion and extensive discovery motions in preparation for the contempt hearing,<sup>168</sup> the court held a week-long bench trial in June 2018 and granted plaintiffs' motion to show cause.<sup>169</sup>

The court subsequently ordered an injunction to last for the duration of the settlement agreement, making extensive findings of fact and law and directing the parties to take specific steps within defined time periods to remedy noncompliance.<sup>170</sup> The court found that: "the Settlement Agreement sets out twenty-two standards governing FCCW. The Court concludes that Defendants are in violation of eight of them. Indeed, the record shows that VDOC's and FCCW's *own officials* had—by their *own admission*—actual knowledge that FCCW was not complying with parts of the Settlement Agreement."<sup>171</sup> The court also determined that it would "craft its own injunctive order that more appropriately tailors the relief in light of the Court's findings and the evidence," but invited the parties to seek reconsideration of the relief tailored by the court

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166. *Id.* at 26 ("This Settlement Agreement shall terminate as of the date on which the Defendant has achieved substantial compliance with all . . . obligations to provide constitutionally-adequate medical care under the Eighth Amendment, subject to the Compliance Monitor's evaluation under this Settlement Agreement, and has consistently maintained such substantial compliance for a period of one year, provided, however, that the termination may not take effect less than three years from the Effective Date unless the Parties, by and through their respective counsel, mutually agree to termination within a shorter period of time.").

167. Pls.' Mot. for Order to Show Cause Why Defendants Should Not be Held in Contempt at 1-2, *Scott v. Clarke*, No. 12-cv-00036 (W.D. Va. Sept. 5, 2017), ECF Nos. 265-66.

168. Findings of Fact and Conclusions of Law at 4, *Scott v. Clarke*, No. 12-cv-00036 (W.D. Va. Jan. 2, 2019), ECF No. 544 ("For . . . several months, the volume and intensity of discovery rivaled that of the hardest-fought merits litigation.").

169. Oral Order, *Scott v. Clarke*, No. 12-cv-00036 (W.D. Va. June 12, 2018), ECF No. 495 (granting motion to show cause).

170. Injunction Order, *Scott v. Clarke* ¶¶ 5-12, 14, No. 12-cv-00036 (W.D. Va. Jan. 2, 2019), ECF No. 545 (For example, the court directed: "Within 14 days from the date of entry of this injunction, Defendants shall place—in a conspicuous, well-known, and readily available location in every FCCW building that houses at least one Plaintiff—the following equipment: a backboard or stretcher; an oxygen tank and mask; and a suction machine." And, "[w]ithin 30 days from the date of entry of this injunction, Defendants shall develop a protocol ensuring unimpeded access to timely medical care."); Findings of Fact and Conclusions of Law, *supra* note 168.

171. Findings of Fact and Conclusions of Law, *supra* note 168, at 33 (citation omitted).

given the parties' and the compliance monitor's expertise.<sup>172</sup> To that end, both plaintiffs and defendants filed motions to alter or amend judgment,<sup>173</sup> which the court granted in part and denied in part.<sup>174</sup>

Although the decree remains ongoing, the judge has set high expectations for compliance by taking a decidedly active role in response to plaintiffs filing an enforcement motion, acting as factfinder in a week-long trial, and subsequently using such factual findings as the basis for an injunction. The court also recognized its limits and thus solicited input on the injunction from the parties. This may have helped with buy-in for compliance as well as ensuring the injunction provided practical and workable solutions based on the parties' experience on the ground. Such a hybrid approach encourages compliance while sending a clear signal that lack of compliance is a nonstarter. The parties thus continue to work toward compliance without the premature filing of termination motions.

### 3. Case study 3—Remediation of noncompliance

In yet other cases, upon signs of noncompliance courts have encouraged remediation, preempting the filing of enforcement or contempt motions and lengthy hearings on such motions that may ensue. *Hunter v. Beshear* is one such case; it challenged the prolonged housing of individuals awaiting court-ordered competency determinations in county jails, which are ill-equipped to care for individuals with mental illness and intellectual disabilities.<sup>175</sup>

After proceeding to mediation, the parties settled, and in approving the final settlement, the court found that the decree met the PLRA's need-narrowness-intrusiveness requirement.<sup>176</sup> The parties used a hybrid model for termination provisions, stipulating that the agreement would terminate after three years, unless substantial compliance was not achieved for at least nine consecutive months preceding the end date of the agreement, at which point plaintiffs would file a motion to extend jurisdiction and monitoring, and the court would

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172. *Id.* at 50-51.

173. Pls.' Mot. to Alter or Amend J., *Scott v. Clarke*, No. 12-cv-00036 (W.D. Va. Jan. 30, 2019), ECF No. 554; Defs.' Mot. Pursuant to Rule 59(e), *Scott v. Clarke*, No. 12-cv-00036 (W.D. Va. Jan. 30, 2019), ECF No. 556.

174. Am. Inj. ¶¶ 1-2, *Scott v. Clarke*, No. 12-cv-00036 (W.D. Va. May 22, 2019), ECF No. 574; Mem. Opinion and Additional Findings of Fact and Conclusions of Law at 11, *Scott v. Clarke*, No. 12-cv-00036 (W.D. Va. May 22, 2019), ECF No. 573.

175. Compl., *Hunter v. Beshear*, No. 16-cv-00798 (M.D. Ala. Sept. 30, 2016), ECF No. 1. *See also* First Am. Compl., *Hunter v. Beshear*, No. 16-cv-00798 (M.D. Ala. Dec. 23, 2016), ECF No. 26.

176. Final Settlement Approval Opinion and Order at 65-66 n.5, *Hunter v. Beshear*, No. 16-cv-00798 (M.D. Ala. Jan. 25, 2018), ECF No. 93 (“[T]he court believes that the settlement meets the PLRA’s three central requirements: that ‘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.’”).

determine whether substantial compliance had been achieved.<sup>177</sup> If substantial compliance was not achieved, the court could maintain jurisdiction for a period of time determined by the court.<sup>178</sup> The agreement also permitted the defendant to file a motion to terminate after three years, but maintained that the defendant would bear the burden of proof to “demonstrate that termination is appropriate.”<sup>179</sup>

A year after entering into the settlement, the parties filed a joint status report with the court, noting several areas of non-compliance.<sup>180</sup> At a status conference a month later, Judge Myron Thompson<sup>181</sup> urged the parties to attempt to remediate noncompliance in lieu of filing for contempt.<sup>182</sup> The parties took this urging seriously, submitting a proposed order on the status of noncompliance, which provided for the engagement of a compliance consultant and the development of a remedial plan thereafter.<sup>183</sup> After reviewing the consultant’s reports and recommendations, the court ordered the defendant to prepare a remedial plan. But the plaintiffs objected to the defendant’s remediation plan because it lacked details and crucial requirements that would lead to compliance.<sup>184</sup> With the court’s permission, the parties crafted a joint remediation plan, which extended the court’s initial oversight period from three years to four years, and delineated more specific requirements, targets, and goals to provide the defendant with a viable path to reach compliance.<sup>185</sup> Most recently, the parties agreed to a further extension of the decree by an additional year and the court ordered the defendant to prepare another remediation plan to address continued deficiencies.<sup>186</sup>

Thus, upon a report of noncompliance, the court guided the parties toward the path of remediation, ordered preparation of a remediation plan, and

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177. Consent Decree at 24-26, *Hunter v. Beshear*, No. 16-cv-00798 (M.D. Ala. Jan. 25, 2018), ECF No. 94.

178. *Id.*

179. *Id.* at 25.

180. Joint Report on Status of Compliance with Consent Decree, *Hunter v. Beshear*, No. 16-cv-00798 (M.D. Ala. Jan. 25, 2019), ECF No. 116.

181. Judge Thompson was appointed by President Jimmy Carter in 1980 and served as the Chief Judge of the United States District Court for the Middle District of Alabama from 1991-1998. He is the second African-American to serve as a federal judge in Alabama.

182. See Joint Plan to Remediate Def.’s Noncompliance with Consent Decree at 1, *Hunter v. Beshear*, No. 16-cv-00798 (M.D. Ala. Oct. 31, 2019), ECF No. 137.

183. *Id.* at 2.

184. *Id.*

185. *Id.*; see also Order at 1-2, *Hunter v. Beshear*, No. 16-cv-00798 (M.D. Ala. Nov. 4, 2019), ECF No. 138 (order granting extension of “court supervision and monitoring by one year . . . to January 28, 2022”).

186. Order, *Hunter v. Beshear*, No. 16-cv-00798 (M.D. Ala. Mar. 22, 2021), ECF No. 182 (court ordering “Defendant [to] prepare a proposed remedial plan to address . . . continued noncompliance with the consent decree”); Order *Hunter v. Beshear*, No. 16-cv-00798 (M.D. Ala. Mar. 11, 2021), ECF No. 181 (granting parties’ joint extension of the consent decree by another year to January 28, 2023).

discouraged the filing of enforcement or contempt motions to avert protracted litigation. This led to the appointment of a compliance monitor, a negotiated remediation plan with more explicit goals and benchmarks, and multiple extensions of the timeframe for court enforcement beyond the initial three-year timeframe. No termination motions have been filed and the defendants have begun making “modest improvements in ensuring compliance,” but still have work to do.<sup>187</sup> While the parties ultimately agreed on a remediation plan, the court teed up remediation as a path forward, making clear that while contempt or enforcement motions were certainly an option, remediation geared toward compliance was preferred.

#### 4. Case study 4—Extension of decree beyond period initially contemplated

The tone a court sets from the outset can also lead to parties agreeing to an extension of court oversight, rather than the filing of termination motions even where permitted under the termination provisions of a consent decree. *Laube v. Haley* demonstrates how this plays out in practice.<sup>188</sup>

In that case, the Southern Center for Human Rights and private counsel filed a class action and request for preliminary injunction on behalf of all female prisoners in Alabama, challenging conditions of confinement and alleging violation of the inmates’ Eighth and Fourteenth Amendment rights.<sup>189</sup> The court made clear that it expected remediation of the unconstitutional conditions from the start. Judge Myron Thompson granted plaintiffs’ motion for preliminary injunction as to one specific facility (Julia Tutwiler Prison for Women) in December 2002 and wrote a lengthy opinion detailing the illegal conditions:

In sum, the court holds that the plaintiffs are entitled to preliminary-injunctive relief on their claim that they are subject to a substantial risk of serious harm caused by Tutwiler’s greatly overcrowded and significantly understaffed open dorms. Indeed, the court is not only convinced that these unsafe conditions have resulted in harm, and the threat of harm, to individual inmates in the immediate past, it is also convinced that they are so severe and widespread today that they are essentially a time bomb ready to explode facility-wide at any unexpected

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187. Joint Req. to Modify Consent Decree at 1, *Hunter v. Beshear*, No. 16-cv-00798 (M.D. Ala. Feb. 14, 2020), ECF No. 149 (parties filed joint motion to make three small modifications to the original consent decree and in doing so provided brief overview on status of compliance). See also Joint Report on Status of Compliance with Consent Decree, *Hunter v. Beshear*, No. 16-cv-00798 (M.D. Ala. Aug. 19, 2020), ECF No. 157 (providing further status updates, after which the court determined in September 2020 that it would take no further action at that time); Joint Report on Status of Compliance with Consent Decree, *Hunter v. Beshear*, No. 16-cv-00798 (M.D. Ala. May 25, 2021), ECF No. 188 (defendant outlining ongoing remediation efforts and proposing additional remediation steps, and plaintiffs detailing ongoing deficiencies and requests for additional documentation and information to help address the deficiencies).

188. See generally No. 02-cv-00957 (M.D. Ala. Aug. 19, 2002).

189. Compl., *Laube v. Haley*, No. 02-cv-00957 (M.D. Ala. Aug. 19, 2002), ECF No. 1.

moment in the near future.<sup>190</sup>

To that end, the court “preliminarily declared that the unconstitutionally unsafe conditions, resulting from overcrowded and understaffed open dorms . . . violate the Eight Amendment to the United States Constitution,” and ordered the defendants to submit “a plan that redresses immediately and fully the unconstitutional conditions . . . .”<sup>191</sup>

The court rejected defendants’ first remediation plan in another written opinion holding that a lack of state funding was no excuse: “[B]udgetary concerns are not a defense to constitutional violations. Because the lack of funds is the main factor determining relief outlined in the defendants’ plan, the plan must be modified.”<sup>192</sup> The defendants submitted a second proposed plan to cure the identified deficiencies, but before the court could approve the plan, it recognized that it no longer had authority to enforce the preliminary injunction and rule on the proposed remediation plan because PLRA § 3626(a)(2) generally limits preliminary injunctions to ninety days.<sup>193</sup> Although the court invited plaintiffs to renew their motion for preliminary injunction, they did not need to do so.<sup>194</sup> Instead, the defendants assured the court that they planned to move forward with their initial and supplemental remediation plans regardless of the status of the preliminary injunction, and the parties thus headed toward settlement.<sup>195</sup>

In June 2004, the parties asked the court to approve two settlements—one related to conditions and another addressing medical issues.<sup>196</sup> The final agreements met the need-narrowness-intrusiveness requirement by both quoting and referring to the relevant statutory section.<sup>197</sup> The agreements also provided for termination after four years, with the option for defendants to file termination motions as permitted under the PLRA.<sup>198</sup> And the court retained jurisdiction to enforce the agreements.<sup>199</sup>

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190. *Laube v. Haley*, 234 F. Supp. 2d 1227, 1252 (M.D. Ala. 2002).

191. *Id.* at 1253 (emphasis omitted).

192. *Laube v. Haley*, 242 F. Supp. 2d 1150, 1152 (M.D. Ala. 2003) (citation omitted).

193. *Laube v. Campbell*, 255 F. Supp. 2d 1301, 1303-04 (M.D. Ala. 2003).

194. *Id.* at 1304.

195. *Id.* at 1303.

196. Joint Mot. to Adopt Conditions Settlement Agreement and Medical Settlement Agreement, *Laube v. Haley*, No. 02-cv-00957 (M.D. Ala. June 25, 2004), ECF No. 313.

197. Conditions Settlement Agreement at 5-6, *Laube v. Haley*, No. 02-cv-00957 (M.D. Ala. Aug. 23, 2004), ECF No. 341-1 [hereinafter Conditions Settlement]; Medical Settlement Agreement at 14, *Laube v. Haley*, No. 02-cv-00957 (M.D. Ala. Aug. 23, 2004), ECF No. 341-2 [hereinafter Medical Settlement].

198. Conditions Settlement, *supra* note 197, at 6; Medical Settlement, *supra* note 197, at 14 (“This . . . Settlement Agreement shall be in effect for four years from the date the Agreement is approved by the Court. Nothing in this Agreement is intended to preclude Defendants from moving to terminate the Order in the manner permitted by the Prison Litigation Reform Act.”).

199. Conditions Settlement, *supra* note 197, at 5; Medical Settlement, *supra* note 197, at 14.

Despite leaving open the option for defendants to file termination motions pursuant to the PLRA, no such motions were filed. Instead, when plaintiffs filed a motion to show cause why defendants should not be held in contempt for failing to meet certain settlement conditions, the parties agreed to an additional settlement agreement.<sup>200</sup> Further, no termination motions were filed even upon the initially contemplated four-year term of the agreement. Instead, the agreement did not terminate until approximately five and a half years after entry, upon a joint motion of the parties indicating that all settlement conditions had been met and no constitutional violations remained.<sup>201</sup>

Judge Thompson set a firm tone upfront about his expectations for remediation. And although the PLRA restricted his ability to continue enforcing the preliminary injunction after ninety days, the parties had hashed out remediation terms with the court's guidance before the preliminary injunction expired. This paved the way for settlement of the case with court enforcement. Even without a substantial compliance provision and the looming possibility for the defendants to file termination motions as early as two years into the decree, no such motions were filed and the initial four-year term was extended until full compliance with all settlement provisions was achieved.

#### 5. Case study 5—Court-brokered settlement

Courts can also help broker settlements if disputes arise once a decree is in place, rather than taking up enforcement and/or termination motions. In *McClendon v. City of Albuquerque*, for example, when plaintiffs filed a motion to show cause alleging violations of the operative consent decree, the court required a settlement conference and encouraged the parties to resolve the dispute.<sup>202</sup> Plaintiffs withdrew their motion two months later after the parties reached an agreement.<sup>203</sup> Several years later, amid plaintiffs' motion for

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200. Mot. for Order to Show Cause Why Defendants Should Not be Held in Contempt, *Laube v. Haley*, No. 02-cv-00957 (M.D. Ala. May 10, 2006), ECF Nos. 371-72; Joint Mot. to Modify Medical Settlement Agreement, *Laube v. Haley*, No. 02-cv-00957 (M.D. Ala. Aug. 3, 2006), ECF No. 390; Order, *Laube v. Haley*, No. 02-cv-00957 (M.D. Ala. Aug. 10, 2006), ECF No. 393 (granting joint motion to modify Medical Settlement).

201. The initial consent decree was set to terminate on July 1, 2008, but the parties did not terminate the agreement until January 25, 2010. See Joint Mot. for Entry of Final J., *Laube v. Haley*, No. 02-cv-00957 (M.D. Ala. Jan. 20, 2010), ECF No. 435; Final J., *Laube v. Haley*, No. 02-cv-00957 (M.D. Ala. Jan. 25, 2010), ECF No. 436.

202. Joint Mot. for Order to Show Cause and for Further Remedial Relief, *McClendon v. City of Albuquerque*, No. 95-cv-00024 (D.N.M. Aug. 27, 2001), ECF No. 320; Order, *McClendon v. City of Albuquerque*, No. 95-cv-00024 (D.N.M. Nov. 21, 2001), ECF No. 339.

203. Stipulated Agreement, *McClendon v. City of Albuquerque*, No. 95-cv-00024 (D.N.M. Jan. 31, 2002), ECF No. 361.

injunctive relief and defendants' motion to terminate,<sup>204</sup> Judge James Parker<sup>205</sup> issued an order implementing a compromise whereby both parties agreed to withdraw their motions and the defendants agreed not to file another motion based on the PLRA within eighteen months after entry of the court's order.<sup>206</sup> Instead, the parties were instructed to confer with an expert and developed a plan for bringing defendants into compliance.<sup>207</sup> Thus, even in a case with prolonged court supervision, it is possible for a court to assist parties in moving toward compliance. Indeed, although termination motions were filed in this case, the court did not meaningfully entertain them and instead encouraged the parties to resolve any disputes and continue working toward compliance.

While the case remains ongoing, it is clear that defendants are slowly achieving compliance. The parties' most recent settlement agreement contemplates a three-step process for compliance and subsequent disengagement for each of eight "domains" in the agreement.<sup>208</sup> If compliance is achieved, all extant orders related to that domain are vacated, but if defendants have not met their obligations, they must repeat prior steps.<sup>209</sup> Beginning in November 2019, the parties agreed that defendants were in substantial compliance with several domains, and the court granted motions for a finding of initial compliance on three of the eight domains.<sup>210</sup>

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204. See Pls. and Pl.-Intervenors' Joint Mot. for a Temporary Restraining Order and for Injunctive Relief, *McClendon v. City of Albuquerque*, No. 95-cv-00024 (D.N.M. Apr. 23, 2014), ECF No. 1133; Cnty Def.'s Mot. to Terminate Certain Prior Orders Granting Prospective Relief Based on the Prison Litigation Reform Act, *McClendon v. City of Albuquerque*, No. 95-cv-00024 (D.N.M. Apr. 25, 2014), ECF No. 1135.

205. Judge Parker was appointed by Ronald Reagan in 1987 and served as Chief Judge for the United States District Court for the District of New Mexico from 2000-2003.

206. Order Resolving Two Mots. and Order to Show Cause at 3, *McClendon v. City of Albuquerque*, No. 95-cv-00024 (D.N.M. May 12, 2014), ECF No. 1147.

207. *Id.* at 3-5.

208. Mem. Opinion and Order Granting Approval of Settlement Agreement at 12-16, *McClendon v. City of Albuquerque*, No. 95-cv-00024 (D.N.M. June 27, 2016), ECF No. 1225. See also Order at 2-4 n.2, *McClendon v. City of Albuquerque*, No. 95-cv-00024 (D.N.M. Feb. 12, 2020), ECF No. 1395 (The domains are: Mental Health Services, Medical Services, Group A of Jail Operations, Group B of Jail Operations, Population Management, Housing and Segregation, Sexual Misconduct, and Use of Force by Security Staff and Internal Investigations).

209. See Order at 4, *McClendon v. City of Albuquerque*, No. 95-cv-00024 (D.N.M. Feb. 12, 2020), ECF No. 1395.

210. Order, *McClendon v. City of Albuquerque*, No. 95-cv-00024 (D.N.M. Dec. 11, 2019), ECF No. 1387; Order, *McClendon v. City of Albuquerque*, No. 95-cv-00024 (D.N.M. Feb. 12, 2020), ECF No. 1395; Stipulated Order Granting Defendant Bernalillo Cnty. Bd. of Commissioners' Unopposed Mot. for Finding of Initial Compliance and to Set Self-Monitoring Period Regarding Domain #3, *McClendon v. City of Albuquerque*, No. 95-cv-00024 (D.N.M. Feb. 19, 2020), ECF No. 1397. At the time of this writing, the parties had just completed briefing on Plaintiffs' motions for findings of sustained compliance as to domains #5 and #6, and the court was set to make a determination about whether sustained compliance had been achieved as it pertains to these two domains. See Notices of Briefing Complete, *McClendon v. City of Albuquerque*, No. 95-cv-00024 (D.N.M. May 14, 2021), ECF Nos.

## V. WHY PRACTITIONER AND COURT INVOLVEMENT ISN'T ENOUGH

Although lawyers and courts have taken extraordinary measures to curb constitutional violations in prisons in the face of the PLRA, the Act continues to hamper progress in prison reform litigation in unnecessary and undesirable ways. First, to avoid the PLRA's two-year termination timeframe, plaintiffs must negotiate for termination provisions, potentially diminishing their ability to negotiate other important aspects of prison reform. This may result in less robust settlements than plaintiffs would otherwise be able to achieve.

Second, even where a negotiated termination provision dispenses with the PLRA's two-year termination mandate, it often leaves open the possibility for termination motions at some point down the line. In other words, the termination provisions plaintiffs negotiate for are not necessarily ironclad termination waivers, so the parties often end up back under the PLRA's termination standard. For example, in cases where the two-year termination timeframe is extended by some number of additional years, the decree will generally revert to the PLRA's termination standard upon expiration of the extended timeframe.<sup>211</sup> Even in cases that initially opt out of any timeframe for termination altogether, the parties often renegotiate provisions that allow for termination motions after a certain amount of time.<sup>212</sup>

Third, even under seemingly robust "substantial compliance" provisions<sup>213</sup> the threat of termination motions is still ever looming.<sup>214</sup> And the PLRA ties judges' hands when it comes to granting such motions. Judges must grant a motion for termination unless they find that "prospective relief remains necessary to correct a current and ongoing violation of the Federal right," and such relief meets the need-narrowness-intrusiveness requirement.<sup>215</sup> If they don't, they risk reversal. In other words, even when a judge attempts to help parties carry out the terms of a consent decree, that agreement may be whittled down over time or otherwise not fully executed if defendants file termination motions.

*Clark v. California*—a case involving individuals with developmental

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1416, 1417 (referencing briefing at ECF Nos. 1406-07 (motions), 1410-11 (responses), and 1414-15 (replies)).

211. See Part III.C.2. above for examples of extended termination timeframes.

212. See Part III.C.4. above for examples of opt out provisions that were later renegotiated to allow for termination.

213. See Part III.C.1. above for examples of substantial compliance termination provisions.

214. Although it is an open question whether an agreement that alters the PLRA's two-year termination timeframe would be binding on the parties if challenged, some academics have argued that provisions altering the PLRA's timeframe are likely binding. See, e.g., *Prisoners' Rights Lawyers' Strategies*, *supra* note 65, at 544 ("I think the best answer is yes, such agreements would be binding; there's insufficient reason to take the unusual approach of interpreting the PLRA's provisions as unwaivable.").

215. 18 U.S.C. § 3626(b)(3) (2018).



disabilities in the California Department of Corrections—provides one such example.<sup>216</sup> In that case the parties agreed in a 2001 consent decree that defendants could file for termination upon three years of substantial compliance; if plaintiffs opposed termination, they would have the burden of proving defendants were not in substantial compliance.<sup>217</sup> Yet in 2009, defendants filed a motion to terminate, not asserting they had achieved three years of substantial compliance, but instead arguing that termination was appropriate because there were no current and ongoing violations of plaintiffs' federal rights.<sup>218</sup> Plaintiffs noted in opposition that defendants were moving to "terminate the Settlement Agreement, not based on full implementation of the promised reforms, but on the [PLRA's] termination provisions," but focused their argument on what they asserted were ongoing violations of plaintiffs' constitutional rights.<sup>219</sup> The court heard six days of testimony before denying defendants' motion to terminate in a 107-page written opinion, and determining that the entire consent decree should remain in effect given numerous ongoing constitutional violations.<sup>220</sup> Thus, although plaintiffs negotiated a three-year substantial compliance termination provision, defendants filed a motion to terminate irrespective of that provision.<sup>221</sup> This stayed prospective relief until the court entered its final ruling, required great time and expense for the parties to prepare for a six-day evidentiary hearing, and required the court to make extensive findings about ongoing violations of plaintiffs' constitutional rights. And while the court denied the motion to terminate given the considerable ongoing violations, different facts could require a judge to grant a termination motion without true compliance

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216. No. 96-cv-01486 (N.D. Cal. Apr. 22, 1996).

217. Settlement Agreement and Order ¶ 14, *Clark v. California*, No. 96-cv-01486 (N.D. Cal. Dec. 3, 2001), ECF No. 194 ("Defendants may move to vacate this Settlement Agreement and dismiss the case on the ground that they have substantially complied with the plan set forth in Appendix A as modified for a period of three years. Plaintiffs may oppose the motion, and shall have the burden of proving that defendants are not in substantial compliance.").

218. Defs.' Notice of Mot. and Mot. to Terminate Settlement Agreement at 1, *Clark v. California*, No. 96-cv-01486 (N.D. Cal. July 24, 2009), ECF No. 205.

219. Pls.' Opp'n to Defs.' Mot. to Terminate Settlement Agreement at 4, *Clark v. California*, No. 96-cv-01486 (N.D. Cal. Aug. 7, 2009), ECF No. 244.

220. *Clark v. California*, 739 F. Supp. 2d 1168, 1233-36 (N.D. Cal. 2010). The court also granted a motion by plaintiffs to implement further remedial measures, noting that "denying defendants' termination motion without additional action would be insufficient to remedy defendants' violations of federal law." *Id.* at 1234.

221. Despite the parties providing explicit language in the consent decree that it met the PLRA's need-narrowness-intrusiveness standard, and the court approving decree, defendants also argued that the consent decree should be terminated because the court did not make explicit findings at the time of entry that the decree met the need-narrowness-intrusiveness standard. Defs.' Notice of Mot. and Mot. to Terminate Settlement Agreement at 10-11, *Clark v. California*, No. 96-cv-01486 (N.D. Cal. July 24, 2009), ECF No. 205. Although the court found that "the findings required by the statute are implicit in the court's judgment," *Clark*, 739 F. Supp. 2d at 1228-29 (citing *Gilmore v. California*, 220 F.3d 987, 1007 n.25 (9th Cir. 2000)), this argument challenges the very fabric that has allowed PLRA consent decrees with court enforcement to proceed. See Part III.B above.

under a consent decree.

Fourth, although the case studies demonstrate that courts can be helpful in assisting parties to move toward compliance, such compliance and whether termination motions are filed should not be left to the whim of which judge happens to be assigned to a case. Instead, like non-PLRA decrees, compliance should be considered achieved when compliance is actually achieved. In *McClendon v. Albuquerque* (Case Study 5, discussed above), the court did not take up termination motions that were filed, and instead helped broker a settlement that has since assisted the parties with compliance. But not all judges will take such an approach, nor would that approach work in all cases.

For example, in *Harper v. Bennett*—a case involving conditions at Fulton County Jail in Atlanta, Georgia—the parties agreed to a termination provision that provided: “Any party may move to terminate this Consent Order two years after the date the court enters it.”<sup>222</sup> This led to some of the defendants filing a motion to terminate in 2015,<sup>223</sup> in which they conceded that, according to the court monitor, the jail was not in full compliance with the consent order with respect to staffing.<sup>224</sup> Despite this concession, the defendants argued that “full compliance with the Consent Order is not a prerequisite for release from said Order pursuant to 18 U.S.C. § 3626(b)(1)(A),” and thus because “there are no current and ongoing constitutional violations at the Fulton County Jail, this Court should now terminate the prospective relief.”<sup>225</sup> Plaintiffs pointed out numerous provisions in the consent decree related to staffing that had not been met, noted that the jail’s accreditation from the National Commission on Correctional Health Care was recently withdrawn, and argued that the decree remained necessary to correct ongoing violations of their federal rights because the dangerously low staffing was compromising delivery of medical care and permitting violence to occur without intervention or detection.<sup>226</sup> The court terminated the consent decree, noting that “in order to maintain the Consent Order in this case, this Court must find current and ongoing violations of the Federal rights of the Plaintiffs. It is not sufficient that specific terms of the Consent Order are not being met.”<sup>227</sup> The court recognized that “a delay in medical care is reason for concern,” and that “the assault claim is disturbing,” but noted that “jails are dangerous places,” and concluded that plaintiffs could

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222. Consent Order ¶ 114, *Harper v. Bennett*, No. 04-cv-01416 (N.D. Ga. Dec. 20, 2005), ECF No. 87.

223. Defendants filed a similar termination motion in 2013, which was denied. *See* Order, *Harper v. Bennett*, No. 04-cv-01416 (N.D. Ga. Jan. 29, 2013), ECF No. 288.

224. Defs.’ Brief in Supp. of Mot. Terminate Prospective Relief at 4, *Harper v. Bennett*, No. 04-cv-01416 (N.D. Ga. Feb. 6, 2015), ECF No. 349-1.

225. *Id.*

226. Pls.’ Resp. in Opp’n Mot. to Terminate Prospective Relief, *Harper v. Bennett*, No. 04-cv-01416 (N.D. Ga. Mar. 18, 2015), ECF No. 356.

227. Order at 3, *Harper v. Bennett*, No. 04-cv-01416 (N.D. Ga. May 12, 2015), ECF No. 368.

not establish the requisite showing for ongoing court monitoring under the PLRA.<sup>228</sup> Thus, despite the consent decree not being fully carried out as originally negotiated, the court terminated the decree pursuant to the PLRA's strict termination provision.

Fifth, where defendants opt to file incremental termination motions as they allege they have come into substantial compliance with specific aspects of a decree, with each subsequent motion, plaintiffs are forced to consider whether fighting for compliance is worth the time, cost, and risk of a more sweeping termination motion. Although such provisions were agreed to by the parties—and thus presumably contemplated as helpful measures for achieving prison reform—plaintiffs may be forced to relent on strict enforcement given the risks associated with contesting incremental termination. Further, stacking up several incremental termination motions over time could lead to a number of substantive provisions being abandoned, and thus a set of reforms that is far less than what the parties agreed to.

For example, in *Parsons v. Ryan*—a case involving issues related to healthcare and maximum custody prisoners within the Arizona Department of Corrections—the parties agreed in a 2015 consent decree that, “[t]o allow time for the remedial measures set forth in this [decree] to be fully implemented, the parties shall not move to terminate this [decree] for a period of four years from the date of its approval by the Court.”<sup>229</sup> The consent decree also provided that termination of the duty to report on particular performance measures would terminate if that measure was in compliance for eighteen months out of a twenty-four month period, and had not been out of compliance for three or more consecutive months within the past eighteen-month period.<sup>230</sup> Just two and a half years after the court approved the decree, defendants filed a motion to terminate their duty to report on most of the performance measures.<sup>231</sup> The court denied the motion (except as to performance measures plaintiffs agreed should be terminated or those that were inapplicable at certain facilities).<sup>232</sup> And in a written opinion, the court noted that its interpretation of the decree was “consistent with the Court’s statutory obligation under the [PLRA],” because its written findings demonstrated that prospective relief remained necessary to correct a current and ongoing violation of a federal right.<sup>233</sup> Thus, despite agreeing not to move to terminate the decree until four years after its entry, defendants moved to terminate a portion of the decree a mere two and a half

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228. *Id.* at 5-7.

229. Stipulation ¶ 37, *Parsons v. Ryan*, No. 12-cv-00601 (D. Ariz. Oct. 14, 2014), ECF No. 1185.

230. *Id.* ¶ 10(b).

231. Def.s’ Mot. to Terminate Monitoring, *Parsons v. Ryan*, No. 12-cv-00601 (D. Ariz. Aug. 25, 2017), ECF No. 2251.

232. *Parsons v. Ryan*, No. 12-cv-00601, 2018 WL 3238944 (D. Ariz. June 22, 2018), *aff’d*, 949 F.3d 443 (9th Cir. 2020).

233. *Id.* at \*1.

years after its inception.<sup>234</sup> Although the court denied the motion given that it determined there was an ongoing violation of a federal right, it recognized that its authority to deny the motion was limited by the PLRA.

Finally, the PLRA has led to narrower decrees.<sup>235</sup> Although this may be one of the reasons relatively few termination motions have been filed in newer cases,<sup>236</sup> such decrees are inherently antithetical to systemic prison reform. Thus, while the concept of fewer termination motions on its face may present as a positive, when it comes to narrower decrees, the PLRA is actually hindering systemic prison reform.

#### CONCLUSION

Despite the constrained mode of prison reform litigation prescribed by the PLRA (and fears about injunctive practice being eviscerated), lawyers and courts have helped ensure the survival of injunctive practice in a post-PLRA world.

Lawyers have devised creative ways to allow for court enforcement while settling on their terms. And they have modified the PLRA's two-year termination provision to provide more favorable terms for compliance. Practitioners have thus mitigated at least some of the PLRA's hurdles through the careful crafting of consent decrees.

Once a court-enforceable decree is in place, however, compliance is far from ensured. The level of court involvement and the tone a court sets toward compliance are powerful factors that can contribute to whether compliance as contemplated under a consent decree is ultimately achieved. These factors are, at the very least, something defendants must grapple with when deciding whether to file termination motions. As the case studies demonstrate, courts have taken a variety of approaches to encourage compliance—forceful written opinions, encouraging remediation prior to enforcement motions, holding a trial on enforcement motions, extending court oversight, or brokering settlement even where termination motions are filed. In other words, courts often help guide parties toward a path of compliance without a flurry of termination motions and protracted side litigation that may ultimately serve no useful purpose for either side.

Yet despite the efforts by lawyers and judges to fight for prison reform, the

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234. Defendants have since filed additional termination motions. *See, e.g.*, Defs.' Mot. to Terminate Monitoring and Reporting of Maximum Custody Performance Measures 1 through 8, *Parsons v. Ryan*, No. 12-cv-00601 (D. Ariz. Jan. 11, 2019), ECF No. 3108; Defs.' Mot. to Terminate Certain Healthcare Performance Measures, *Parsons v. Ryan*, No. 12-cv-00601 (D. Ariz. Dec. 23, 2020), ECF No. 3840.

235. *Trends in Prisoner Litigation*, *supra* note 71, at 169-70 (noting that system-wide court orders directed at conditions of confinement are now rare but were common before the PLRA).

236. See note 129 above for additional thoughts on why fewer termination motions have been filed in newer cases.

PLRA continues to hamper reform, potentially altering settlement negotiations or tying judges' hands and leading to less than full compliance with consent decrees that parties agreed to. After twenty-five years under the PLRA, it is clear that the Act continues to impede necessary reform, impacting people least able to assert their rights. Given our nation's renewed call to action around criminal justice reform, now is the time to rethink the PLRA and its constraints on injunctive practice.