

Trends in Prisoner Litigation, as the PLRA Enters Adulthood

by Margo Schlanger*

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The Prison Litigation Reform Act (PLRA),¹ enacted in 1996 as part of the Newt Gingrich “Contract with America,”² is now as old as some prisoners. In the year after the statute’s passage, some commenters labeled it merely “symbolic.”³ In fact, as was evident nearly immediately, the PLRA undermined prisoners’ ability to bring, settle, and win lawsuits.⁴ The PLRA conditioned court access on prisoners’ meticulously correct prior use of onerous and error-inviting prison grievance procedures.⁵ It increased filing fees,⁶ decreased attorneys’ fees,⁷

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

² NEWT GINGRICH, DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION, *CONTRACT WITH AMERICA: THE BOLD PLAN BY REPRESENTATIVE 53* (Ed Gillespie & Bob Schellhas eds., 1994) (referring to the PLRA’s predecessor bill, the Taking Back Our Streets Act).

³ Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997).

⁴ For in-depth examination of the PLRA’s impact on damage actions, see Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003) [hereinafter Schlanger, *Inmate Litigation*]. For in-depth examination of the PLRA’s impact on injunctive litigation, see Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006) [hereinafter Schlanger, *Civil Rights Injunctions*]. Note that the subsequent description of the PLRA in this paragraph also appears in my article *How Prisoners’ Rights Lawyers Are Preserving the Role of the Courts*, U. MIAMI L. REV. (forthcoming 2015).

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

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

⁷ 42 U.S.C. § 1997e(d)(3) (2012) (capping defendants’ liability for attorneys’ fees in civil rights cases at 150% of the rate paid publically-appointed defense counsel). In addition, the PLRA has been read to further cap defendants’ liability for attorneys’ fees in monetary civil rights cases at 150% of the judgment. 42 U.S.C. § 1997e(d)(2) (2012); see, e.g., *Robbins v. Chronister*, 435 F.3d 1238 (10th Cir. 2006) (en banc) (reversing district court and disagreeing with appellate panel, holding that this limitation applies even to fees awarded even for a lawsuit involving a pre-incarceration claim). At least one court has held, however, that the statutory text does not support this latter limitation. *Harris v. Ricci*, No. 08-cv-06282-DRD, 2014 WL 1274085 (D.N.J. Mar. 28, 2014).

and limited damages.⁸ It subjected injunctive settlements to the scope limitations usually applicable only to litigated injunctions.⁹ It made prison and jail population caps—previously common—far more difficult to obtain.¹⁰ And it put in place a rule inviting frequent relitigation of injunctive remedies, whether settled or litigated.¹¹

The resulting impact on jail and prison litigation has been extremely substantial. In two articles about a decade ago, I presented descriptive statistics showing the PLRA-caused decline in civil rights filings and plaintiffs' victories,¹² and the likewise declining prevalence of court-ordered regulation of jails and prisons.¹³ More up-to-date information has not been published, so here I update those statistics for use by policymakers, judges, and other researchers, and discuss them briefly. I look in Parts I through III at damage actions, using primarily the data compiled by the Administrative Office of the U.S. Courts (the AO) for each federal district court case "terminated" (that is, marked complete by a district court, whether provisionally—say, pending appeal—or finally). These data are discussed in this Article's Technical Appendix, which follows the main text; replication code is also posted online.¹⁴ Part I examines prisoner filings over time and by state. Part II examines outcomes over time and compares outcomes in other case categories. And Part III looks at litigated damages. (Because the AO's data on damages are error-ridden,¹⁵ I supplement the AO database with docket-based research into individual cases.) All three Parts uncover a number of topics that are ripe for additional research.

In Part IV, I move to the topic of injunctive prison and jail litigation—cases in which prisoner plaintiffs seek a change in policy or other aspects of prison conditions. The PLRA was motivated in large part by Republican discontent with plaintiffs' successes in such litigation,¹⁶ and Part IV demonstrates more comprehensively than prior data that it has succeeded in radically shrinking—but not eliminating—the coverage of such orders.

⁸ 42 U.S.C. § 1997e(e) (2012) ("No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act."); *see, e.g.*, Hilary Detmold, Note, *'Tis Enough, 'Twill Serve: Defining Physical Injury under the Prison Litigation Reform Act*, 46 SUFFOLK U. L. REV. 1111 (2013).

⁹ 18 U.S.C. § 3626(a)(1)(A) (2012) ("Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.").

¹⁰ 18 U.S.C. § 3626(a)(3) (2012) (setting out procedural and substantive hurdles to obtaining a "prisoner release order"); *see also* Plata v. Brown, 131 S.Ct. 1910 (2011) (affirming imposition of such an order in California).

¹¹ 18 U.S.C. § 3626(b) (2012) (allowing defendants in prison conditions cases to periodically seek "termination" of previously entered injunctions).

¹² *See, e.g.*, Schlanger, *Inmate Litigation*, *supra* note 4.

¹³ *See, e.g.*, Schlanger, *Civil Rights Injunctions*, *supra* note 4.

¹⁴ *See* <http://margoschlanger.net>, under "Publications." {Not posted yet}

¹⁵ *See* Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455 (2003).

¹⁶ *See, e.g.*, 141 CONG. REC. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch in support of S. 1279: "While prison conditions that actually violate the Constitution should not be allowed to persist, I believe that the courts have gone too far in micromanaging our Nation's prisons.").

I. Prison Litigation Filings

The PLRA's sharp impact on the prevalence and outcomes in prison litigation is clear. Begin with filings. These are affected by numerous PLRA provisions, including: the rule that filing fees are unwaivable for indigent prisoners;¹⁷ the requirement of administrative exhaustion¹⁸ (which discourages lawsuits where such exhaustion has not occurred, since they will almost certainly fail); the attorneys' fees limits;¹⁹ and the three-strikes requirement compelling frequent lawsuit filers to satisfy filing fees in advance without regard to their ability to pay.²⁰ As before the PLRA, litigation remains one of the few avenues for prisoners to seek redress for adverse conditions or other affronts to their rights. Accordingly, litigation continues—but at a much reduced rate. Table 1 demonstrates. It shows jail and prison populations from 1970 to the present, along with federal court filings categorized by the courts as dealing with “prisoner civil rights” or “prison conditions.”²¹ Figures A and B present some of the same information in graphic form—Figure A shows filings compared to jail and prison population, and Figure B shows filing *rates* compared to jail and prison population.

¹⁷ See 28 U.S.C. § 1915(b) (2012).

¹⁸ See 42 U.S.C. § 1997e(a) (2012).

¹⁹ See 42 U.S.C. § 1997e(e) (2012).

²⁰ See 28 U.S.C. § 1915(g) (2012) (“In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section [that is, in forma pauperis] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.”).

²¹ Litigation figures are calculated using data released annually by the Administrative Office of the U.S. Courts, available in digital form from the Inter-university Consortium for Political and Social Research at <http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/00072/studies>. Prisoner population figures come from a variety of publications by the Bureau of Justice Statistics, a component of the U.S. Department of Justice. Sources are set out comprehensively in the Technical Appendix that follows this Article.

TABLE 1: PRISON AND JAIL POPULATION AND PRISONER CIVIL RIGHTS FILINGS
IN FEDERAL DISTRICT COURT, FISCAL YEARS 1970-2012²²

Fiscal year of filing	Incarcerated population				Prisoner civil rights filings in federal district court			
	Total	State prison	Federal prison	Jail	Total Filings	Non-federal defendants	Federal defendants	Filings / 1000 prisoners
1970	357,292	176,391	20,038	160,863	2,245	2,092	153	6.3
1971	358,061	177,113	20,948	160,000*	3,179	2,969	210	8.9*
1972	356,092	174,379	21,713	160,000*	3,635	3,393	242	10.2*
1973	364,211	181,396	22,815	160,000*	4,665	4,257	408	12.8*
1974	378,466	196,105	22,361	160,000*	5,573	5,185	388	14.7*
1975	413,816	229,685	24,131	160,000*	6,527	6,020	507	15.8*
1976	438,000	248,883	29,117	160,000*	7,096	6,702	394	16.2*
1977	449,563	258,643	30,920	160,000*	8,347	7,842	505	18.6*
1978	453,980	269,765	26,285	157,930	10,087	9,520	567	22.2
1979	474,589	281,233	23,356	170,000*	11,713	11,149	564	24.7*
1980	503,586	295,819	23,779	183,988	13,079	12,496	583	26.0
1981	556,814	333,251	26,778	196,785	16,328	15,539	789	29.3
1982	614,914	375,603	27,311	212,000	16,809	16,075	734	27.3
1983	651,439	394,953	28,945	227,541	17,512	16,788	724	26.9
1984	678,905	417,389	30,875	230,641	18,337	17,468	869	27.0
1985	752,603	451,812	35,781	265,010	18,485	17,658	827	24.6
1986	806,063	496,834	43,712	265,517	20,360	19,654	706	25.3
1987	853,114	520,336	42,478	290,300	22,067	21,410	657	25.9
1988	942,827	562,605	44,205	336,017	22,642	21,866	776	24.0
1989	1,070,227	629,995	53,387	386,845	23,737	22,804	933	22.2
1990	1,151,457	684,544	58,838	408,075	24,051	23,028	1,023	20.9
1991	1,215,144	728,605	63,930	422,609	24,352	23,567	785	20.0
1992	1,292,465	778,495	72,071	441,899	28,544	27,723	821	22.1
1993	1,375,536	828,566	80,815	466,155	31,693	30,842	851	23.0
1994	1,469,904	904,647	85,500	479,757	36,595	35,550	1,045	24.9
1995	1,588,370	989,004	89,538	509,828	39,053	38,022	1,031	24.6
1996	1,643,196	1,032,676	95,088	515,432	38,262	37,126	1,136	23.3
1997	1,733,150	1,074,809	101,755	556,586	26,095	25,226	869	15.1
1998	1,816,528	1,111,927	110,793	593,808	24,212	23,304	908	13.3
1999	1,889,538	1,155,878	125,682	607,978	23,512	22,645	867	12.4
2000	1,915,701	1,177,240	140,064	598,397	23,357	22,399	958	12.2
2001	1,969,747	1,179,954	149,852	639,941	22,131	21,224	907	11.2
2002	2,035,529	1,209,145	158,216	668,168	21,988	21,044	944	10.8
2003	2,082,145	1,225,971	168,144	688,030	22,061	20,914	1,147	10.6
2004	2,137,476	1,244,216	177,600	715,660	21,553	20,337	1,216	10.1
2005	2,189,696	1,261,071	186,364	742,261	22,484	21,317	1,167	10.3
2006	2,260,714	1,297,536	190,844	772,334	22,469	21,443	1,026	9.9
2007	2,295,982	1,316,105	197,285	782,592	21,978	20,825	1,153	9.6
2008	2,302,657	1,324,539	198,414	779,704	23,555	22,395	1,160	10.2
2009	2,274,099	1,319,563	205,087	749,449	22,698	21,552	1,146	10.0
2010	2,255,188	1,314,445	206,968	733,775	22,736	21,614	1,122	10.1
2011	2,227,723	1,290,212	214,774	722,737	23,362	22,067	1,295	10.5
2012	2,221,283	1,266,999	216,915	737,369	22,662	21,628	1,034	10.2

* Estimates (jail population is unavailable for these years).

²² See *infra* Technical App. at A, C–D.

FIGURE A: PRISONER POPULATION AND CIVIL RIGHTS FILINGS, FY 1970-FY 2012.²³

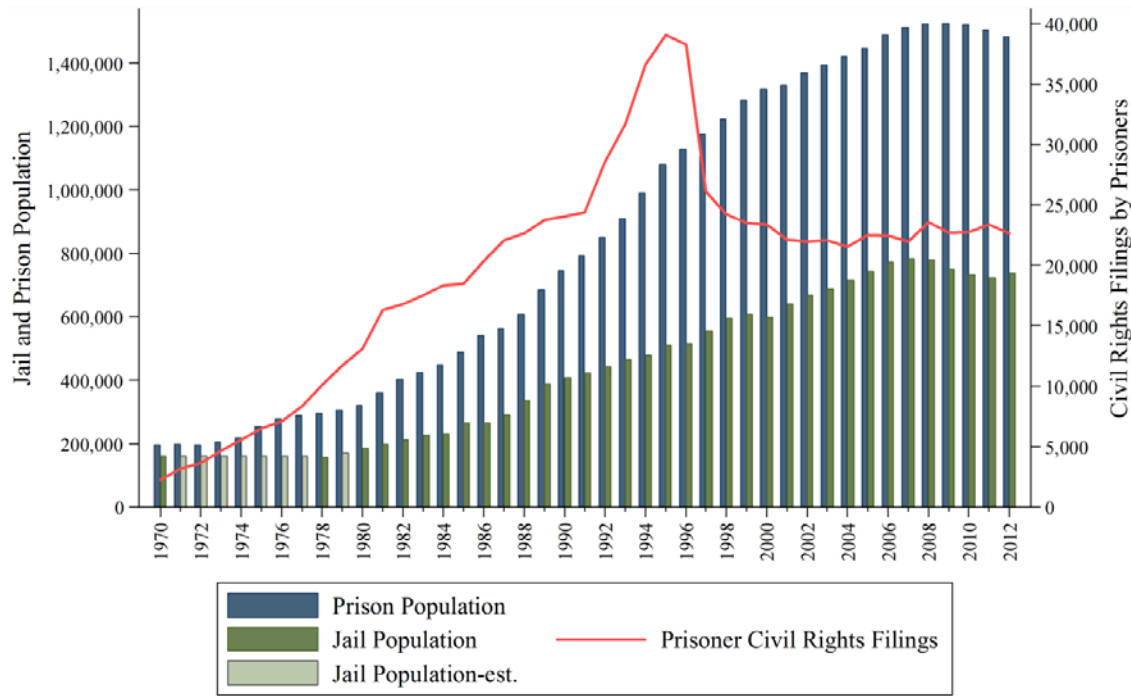
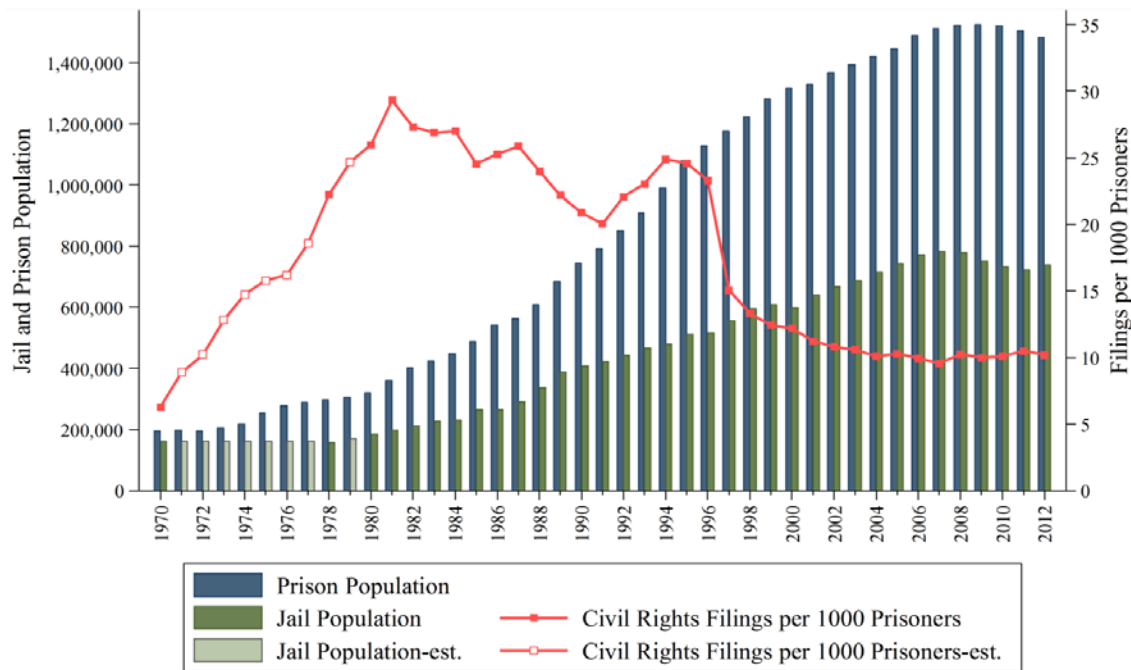


FIGURE B: PRISONER POPULATION & CIVIL RIGHTS FILINGS PER 1000 PRISONERS, FY 1970-2012²⁴



²³ See *supra* note 22.

²⁴ See *supra* note 22.

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

The state-by-state story is far more varied. Table 2 presents the data: it compares 1995 (the year prior to the PLRA) and 2011 (the latest year for which state-by-state jail information—and therefore filing rate information—is available). The first set of columns show the jail and prison population,²⁵ the prisoner civil rights filings in federal district court, and the resulting filing rate in 1995. The states are set out in rank order, with Iowa, the state whose prisoners were in 1995 the most litigious, ranked 1. The second set of columns presents the same information for 2011. The third set of columns shows the change over the 16 year period, as a simple change and as a percent change—so Iowa’s change from a filing rate of 101.7 to 14.5 federal lawsuits per 1000 prisoners is shown both as a change of 87.2 (101.7-14.5), and 85.7%. Nationwide the filing rate shrank by 14.1 filings per 1000 prisoners, and by nearly 60%, from 24.6 to 10.5 lawsuits per 1000 prisoners. For 30 states, the proportional change was that big or bigger, and for most of the rest, nearly as big. But as Table 2 presents, for a few states the change was far smaller. California, in fact, has seen almost no change in filing rate—although it is alone in that experience. Figure C puts the penultimate columns of Table 2 into a histogram, to make plainer the varied experience of the states.

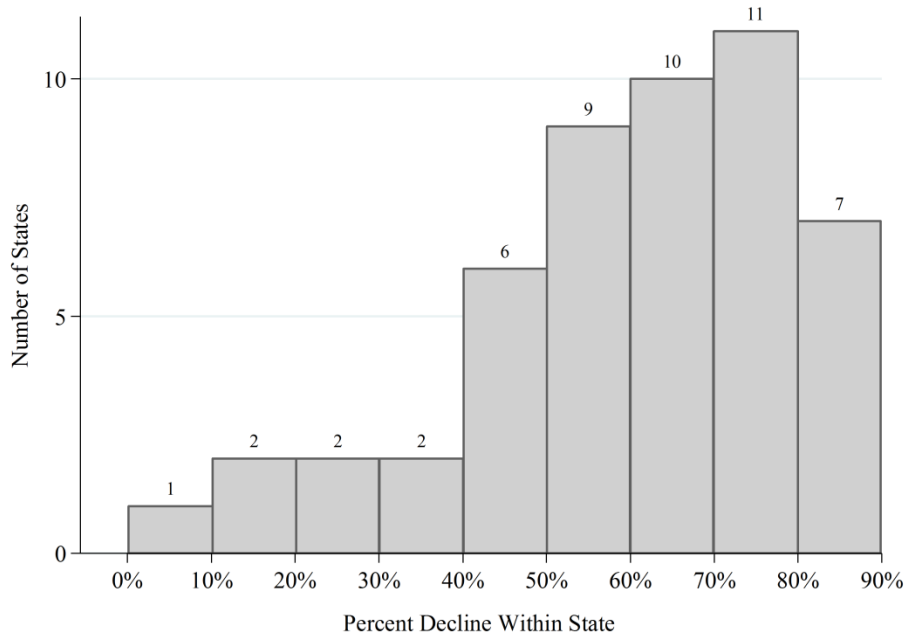
²⁵ Because state-by-state jail population is not available from 1994 to 1999 jail populations for those years are calculated using a linear interpolation between the 1993 and 2000 figures for each state.

TABLE 2: CHANGE IN PRISONER FILINGS IN U.S. DISTRICT COURT AND FILING RATES BY STATE, FY 1995-2011²⁶

State	<u>1995</u>				<u>2011</u>				<u>1995-2011</u>		
	Jail and prison pop.	Filings	Filing rate	Rate rank	Jail and prison pop.	Filings	Filing rate	Rate rank	Rate Change N	%	Rank change
United States	1,588,370	39,053	24.6		2,227,723	23,362	10.5		14.1	57.3%	
Iowa	8,015	815	101.7	1	13,214	192	14.5	9	87.2	85.7%	-8
Arkansas	11,786	967	82.0	2	25,216	731	29.0	1	53.1	64.7%	1
Mississippi	16,273	1,035	63.6	3	32,095	440	13.7	11	49.9	78.4%	-8
Nebraska	4,733	297	62.8	4	8,063	54	6.7	36	56.1	89.3%	-32
Missouri	25,883	1,523	58.8	5	43,635	493	11.3	16	47.5	80.8%	-11
Virginia	41,047	2,166	52.8	6	62,888	625	9.9	23	42.8	81.2%	-17
Alabama	31,639	1,403	44.3	7	44,571	637	14.3	10	30.1	67.8%	-3
Delaware	4,799	205	42.7	8	6,546	145	22.2	2	20.6	48.1%	6
Louisiana	38,106	1,548	40.6	9	55,651	975	17.5	5	23.1	56.9%	4
Nevada	11,898	475	39.9	10	19,242	367	19.1	4	20.9	52.2%	6
Arizona	32,628	1,247	38.2	11	58,537	561	9.6	24	28.6	74.9%	-13
Maine	2,329	87	37.4	12	3,300	31	9.4	25	28.0	74.9%	-13
Kentucky	22,084	824	37.3	13	40,532	249	6.1	40	31.2	83.5%	-27
Indiana	26,922	967	35.9	14	48,005	394	8.2	29	27.7	77.1%	-15
Tennessee	30,799	1,076	34.9	15	48,889	615	12.6	13	22.4	64.0%	2
Pennsylvania	63,720	2,114	33.2	16	100,495	1,571	15.6	7	17.5	52.9%	9
Colorado	20,278	634	31.3	17	37,998	379	10.0	22	21.3	68.1%	-5
Wyoming	1,913	57	29.8	18	3,656	12	3.3	49	26.5	89.0%	-31
Montana	2,575	76	29.5	19	4,160	68	16.3	6	13.2	44.6%	13
Vermont	1,245	35	28.1	20	2,053	13	6.3	38	21.8	77.5%	-18
Hawaii	2,812	76	27.0	21	6,294	51	8.1	30	18.9	70.0%	-9
Kansas	12,373	333	26.9	22	18,871	114	6.0	41	20.9	77.6%	-19
Wisconsin	21,275	559	26.3	23	37,641	312	8.3	28	18.0	68.5%	-5
Utah	6,633	169	25.5	24	12,488	69	5.5	42	20.0	78.3%	-18
West Virginia	6,855	169	24.7	25	19,029	143	7.5	33	17.1	69.5%	-8
South Carolina	26,927	648	24.1	26	41,898	463	11.1	19	13.0	54.1%	7
Washington	20,185	481	23.8	27	30,827	345	11.2	17	12.6	53.0%	10
Connecticut	15,740	370	23.5	28	19,118	148	7.7	32	15.8	67.1%	-4
Georgia	64,977	1,496	23.0	29	105,943	1,138	10.7	20	12.3	53.3%	9
Illinois	56,827	1,270	22.3	30	74,229	1,421	19.1	3	3.2	14.3%	27
Maryland	32,295	708	21.9	31	36,971	467	12.6	12	9.3	42.4%	19
Michigan	56,049	1,217	21.7	32	60,995	734	12.0	14	9.7	44.6%	18
Oklahoma	21,686	437	20.2	33	37,698	188	5.0	44	15.2	75.3%	-11
North Carolina	39,360	760	19.3	34	64,392	424	6.6	37	12.7	65.9%	-3
Rhode Island	2,854	54	18.9	35	3,032	21	6.9	35	12.0	63.4%	0
Texas	194,719	3,597	18.5	36	259,155	1,618	6.2	39	12.2	66.2%	-3
New York	103,799	1,860	17.9	37	90,508	1,394	15.4	8	2.5	14.0%	29
Florida	110,948	1,968	17.7	38	172,361	1,349	7.8	31	9.9	55.9%	7
South Dakota	3,239	57	17.6	39	5,939	44	7.4	34	10.2	57.9%	5
Alaska	2,876	50	17.4	40	6,289	11	1.7	50	15.6	89.9%	-10
Oregon	14,327	227	15.8	41	21,532	186	8.6	27	7.2	45.5%	14
New Mexico	8,022	124	15.5	42	16,165	73	4.5	45	10.9	70.8%	-3
Idaho	4,978	75	15.1	43	11,188	103	9.2	26	5.9	38.9%	17
New Jersey	42,701	639	15.0	44	45,042	504	11.2	18	3.8	25.2%	26
New Hampshire	3,244	47	14.5	45	4,486	45	10.0	21	4.5	30.8%	24
Ohio	57,732	746	12.9	46	72,688	271	3.7	48	9.2	71.1%	-2
California	218,145	2,575	11.8	47	238,496	2,811	11.8	15	0.0	0.2%	32
Minnesota	11,515	124	10.8	48	20,073	88	4.4	46	6.4	59.3%	2
Massachusetts	19,067	153	8.0	49	22,978	97	4.2	47	3.8	47.4%	2
North Dakota	1,112	8	7.2	50	2,496	13	5.2	43	2.0	27.6%	7

²⁶ See supra note 22.

FIGURE C: PERCENT DECLINE IN PRISONER FILING RATE IN U.S. DISTRICT COURT, FY 1995-2011, BY STATE.



Figures D and E focus additional attention on the varying effects of the PLRA by state. Figure D presents the six states that have experienced the steepest decline in filing rates since 1995, showing their changed filing rates by year. (So for example, a drop of 10 filings per 1000 inmates from the rate in 1995—whatever that rate was—is shown as -10.) Figure E is the same information for the six states that have experienced the shallowest decline.

FIGURE D: DECLINE IN PRISONER FILING RATE IN U.S. DISTRICT COURT, FY 1995-2011, SIX STATES WITH LARGEST DECLINES.²⁷

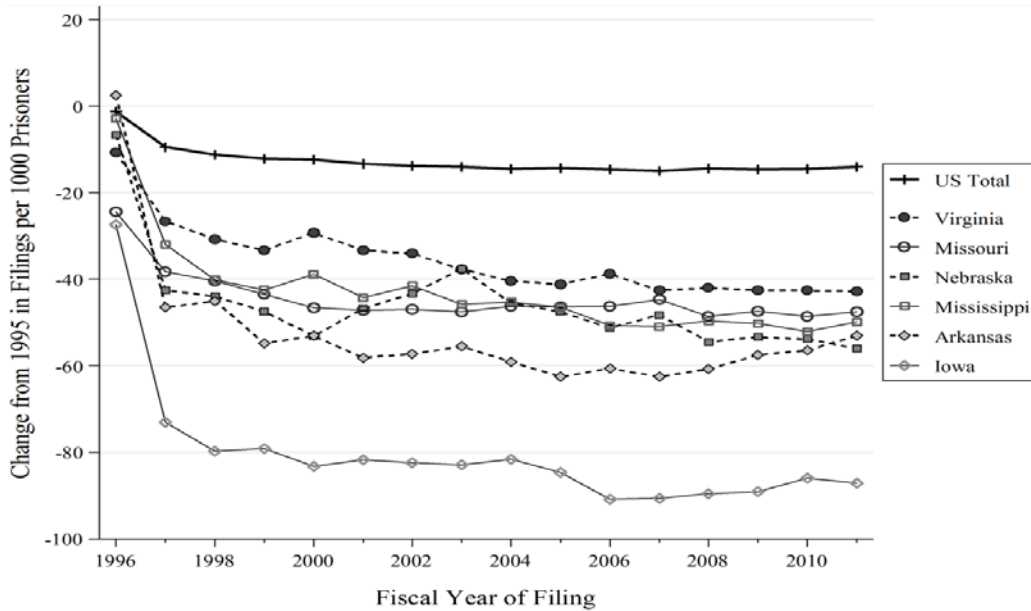


FIGURE E: DECLINE IN PRISONER FILING RATE IN U.S. DISTRICT COURT, FY 1995-2011, SEVEN STATES WITH SMALLEST DECLINES.²⁸

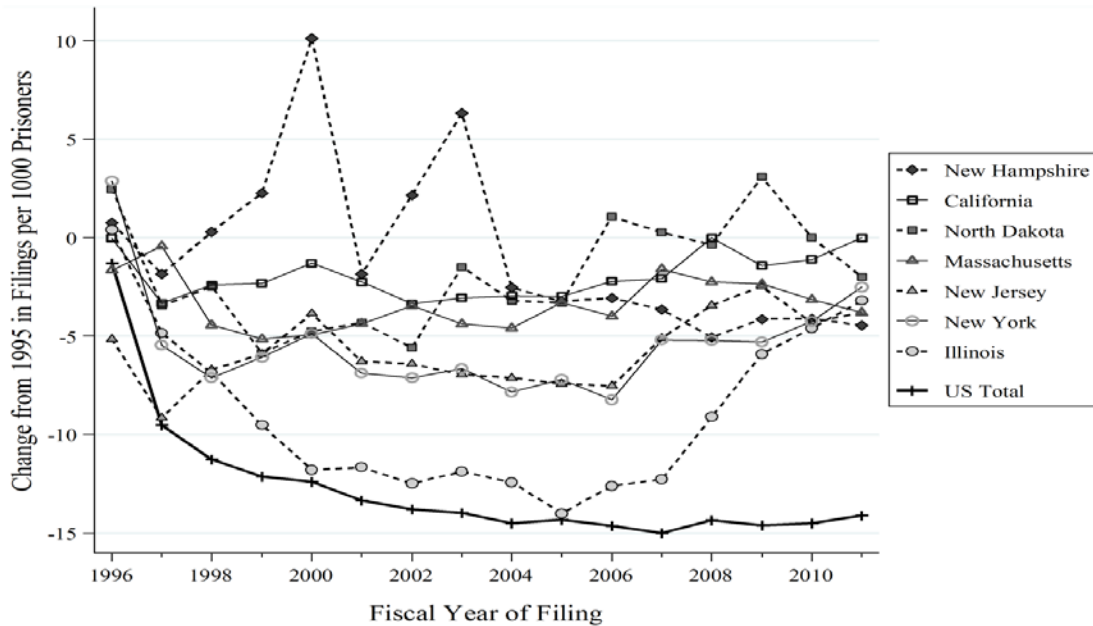


Figure D's states look very like the nation as a whole, although the pattern is more pronounced. But Figure E's patterns are quite different. While the trend lines are not entirely

²⁷ See *supra* note 22.

²⁸ See *supra* note 22.

consistent state to state, they generally are U-shaped curves. That is, even in these least-affected states, filing rates declined for some years after the PLRA's passage. At that point, something—I imagine something different in each state—turned that trend around and caused the filing rate to increase. Future research might uncover what that spur was. We can guess that it was *not* appellate precedent; the states in question are from the First, Second, Third, Seventh, Eighth, and Ninth Circuits—no Circuit has more than one state represented in the bottom six.

II. Prison Litigation Outcomes

One might expect that the drastic pruning of the prisoner civil rights docket that occurred beginning in 1996 would tilt the docket towards higher quality cases—so that prisoner success rates would go up. However, I previously demonstrated, using data through 2001, that the PLRA not only made prisoner civil rights cases harder to bring, as illustrated above, but also made them harder to win.²⁹ In particular, prisoners' cases are thrown out of court for failure to properly complete often-complicated grievance procedures,³⁰ or because they do not allege physical injury, which some courts read the PLRA to require for recovery even in constitutional cases.³¹ Now that we have another decade of data, it's worth reexamining this issue, to see if trends have continued, moderated, or reversed.

More data, presented in Table 3, confirms my earlier conclusions. The table presents outcomes in prisoners' federal civil rights cases, resolved from Fiscal Year 1988 through 2012, the last year for which data is available. (1988 is chosen as a start date because of federal coding protocol changes prior to that year.) Each row is a year; each column is a particular outcome. Scanning the table one column at a time, to detect trends over time, reveals that the courts are becoming less and less hospitable for prisoners' claims. Column (a) shows filings; column (b) terminations; and column (c) the portion of those terminations that constituted judgments. (Most non-judgments are transfers to another court.) Most remaining outcomes are calculated as a proportion of judgment dispositions. Column (d) is pretrial decisions for the defendant; tracing it through the years shows that after the PLRA, such decisions increased although not overwhelmingly so. On the other side, pretrial victories for the plaintiff, in column (e), have declined, though some of that decline predates the PLRA.³² Column (f) shows a decline in settlements, much but not all post-dating the PLRA. Column (g) shows a similar decline in voluntary dismissals, which are often settlements as well. And column (h) shows a decline in trials, again much of it subsequent to the PLRA. (Plaintiffs' victories at those decreasing numbers of trials, in column (i), appear not to have changed.) Columns (j) and (k) show the timing of settlements, before or after "issue is joined," (that is, before or after the filing of an answer to the civil complaint). The declining portion of settlements in column (j) suggests that settlements have become harder to come by for plaintiffs. And finally, column (l) sums up the

²⁹ See Schlanger, *Inmate Litigation*, *supra* note 4, at 1644–64.

³⁰ See *supra* note 5.

³¹ See *supra* note 8.

³² This variable is sufficiently error-ridden, at least in the prisoner litigation data, to counsel against reliance on it. See text accompanying Table 6, discussing high error rates.

portion of the docket in which it appears plaintiffs may have succeeded in any way, adding together settlements, voluntary dismissals, pretrial victories, and victories at trial. Those numbers are down substantially since the early 1990s.

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

TABLE 3: OUTCOMES IN PRISONER CIVIL RIGHTS CASES IN FEDERAL DISTRICT COURT, FY 1995-2012.³³

Fiscal Year	Outcomes, as % of judgment dispositions											
	(a) Filings	(b) Terminations	(c) Judgments (as % of terminations)	(d) Pretrial decisions for deft.	(e) Pretrial decisions for plaintiff.	(f) Settle- ments	(g) Voluntary dismissals	(h) Trials	(i) Plaintiffs' trial victories (as % of trials)	Timing of settlements, as % of settlements/ vol. dismissals		(l) All plaintiff successes (as % of judgments)
										(j) Before issue joined	(k) After issue joined	
1988	22,642	24,077	96.5%	83.2%	1.1%	7.1%	4.0%	3.6%	13.6%	58.5%	41.5%	12.6%
1989	23,737	24,714	96.5%	82.1%	1.0%	7.3%	5.1%	3.7%	14.0%	52.3%	47.7%	13.9%
1990	24,051	24,864	96.0%	82.7%	1.1%	7.6%	5.0%	3.4%	16.6%	48.8%	51.2%	14.3%
1991	24,352	24,877	95.0%	82.1%	0.9%	7.7%	6.1%	3.1%	15.2%	52.1%	47.9%	15.2%
1992	28,544	28,357	94.9%	80.2%	1.2%	7.6%	7.5%	3.3%	12.1%	60.2%	39.8%	16.8%
1993	31,693	31,893	95.1%	81.2%	1.0%	6.8%	8.0%	2.8%	15.3%	60.0%	40.0%	16.2%
1994	36,595	36,098	94.9%	80.9%	0.8%	7.2%	7.2%	2.9%	13.1%	53.8%	46.2%	15.6%
1995	39,053	41,201	94.8%	83.5%	0.7%	6.2%	6.5%	2.5%	10.7%	61.3%	38.7%	13.7%
1996	38,262	42,522	95.0%	84.5%	0.6%	5.5%	6.3%	2.5%	9.5%	61.8%	38.2%	12.7%
1997	26,095	34,982	96.0%	83.8%	0.7%	5.4%	6.8%	2.8%	10.7%	61.2%	38.8%	13.2%
1998	24,212	29,938	95.9%	85.2%	0.5%	5.2%	6.0%	2.5%	8.6%	60.7%	39.3%	12.0%
1999	23,512	26,561	94.7%	86.5%	0.5%	4.7%	5.2%	2.4%	12.1%	56.7%	43.3%	10.7%
2000	23,357	25,176	93.7%	86.3%	0.4%	4.2%	5.7%	2.4%	13.6%	54.0%	46.0%	10.7%
2001	22,131	24,572	93.9%	87.0%	0.4%	3.9%	5.7%	2.1%	14.0%	53.9%	46.1%	10.3%
2002	21,988	24,245	93.9%	87.9%	0.4%	3.6%	5.6%	1.8%	8.8%	55.2%	44.8%	9.8%
2003	22,061	23,653	93.6%	88.0%	0.6%	3.8%	5.1%	1.4%	14.1%	53.2%	46.8%	9.7%
2004	21,553	23,181	92.8%	86.0%	0.4%	3.8%	4.8%	1.4%	13.2%	55.4%	44.6%	9.2%
2005	22,484	23,712	92.5%	85.0%	0.3%	3.8%	4.4%	1.2%	10.0%	53.4%	46.6%	8.7%
2006	22,469	24,846	93.6%	83.2%	0.3%	3.9%	4.0%	1.2%	12.9%	54.3%	45.7%	8.4%
2007	21,978	23,630	92.5%	82.0%	0.2%	3.8%	4.7%	1.3%	9.4%	56.7%	43.3%	8.9%
2008	23,555	25,097	92.2%	85.3%	0.5%	3.7%	4.6%	1.2%	15.1%	53.2%	46.8%	9.0%
2009	22,698	24,454	91.9%	87.0%	0.5%	4.2%	5.3%	1.3%	13.1%	51.2%	48.8%	10.2%
2010	22,736	24,781	91.3%	85.9%	0.5%	4.8%	5.2%	1.3%	14.4%	47.6%	52.4%	10.7%
2011	23,362	24,760	90.4%	85.8%	0.4%	4.9%	5.4%	1.2%	11.6%	49.5%	50.5%	11.0%
2012	22,662	24,673	90.9%	84.9%	0.5%	5.0%	5.4%	1.3%	11.9%	50.6%	49.4%	11.1%

³³ See *supra* note 22.

Table 4 next provides some context for the very limited success prisoner plaintiffs experience, setting out the same outcome information but for other categories of cases, all in Fiscal Year 2012. As it shows, only in the other prisoner category—habeas cases and other similar quasi-criminal matters—do plaintiffs fare anywhere close to as badly.

TABLE 4: OUTCOMES IN FEDERAL DISTRICT COURT CASES BY CASE TYPE, FY 2012.³⁴

	(a)	(b)	(c)	Outcomes (as % of judgments)					(i)	Timing of settlements, as % of settlements/vol. dismissals		(l)
				(d)	(e)	(f)	(g)	(h)		(j)	(k)	
Fiscal Year	Filings	Terminations	Judgments (as % of terminations)	Pretrial decisions for deft.	Pretrial decisions for plaint.	Settle-ments	Voluntary dismissals	Trials	Plaintiffs' trial victories (as % of trials)	Before issue joined	After issue joined	All plaint. successes (as % of judgments)
All	278,442	271,572	87.9%	41.7%	6.8%	32.6%	14.5%	1.1%	43.4%	42.2%	57.8%	54.4%
Habeas, quasi-crim.	26,241	27,245	89.9%	90.2%	2.1%	2.2%	2.3%	0.4%	35.9%	77.0%	23.0%	6.7%
Prisoner civil rights	22,662	24,673	90.9%	84.9%	0.5%	5.0%	5.4%	1.3%	11.9%	50.6%	49.4%	11.1%
Bankruptcy	3,778	2,934	86.8%	52.2%	6.6%	8.6%	8.3%	0.2%	75.0%	56.0%	44.0%	23.7%
Immigration	1,742	1,821	92.9%	57.4%	2.1%	10.5%	27.1%	0.2%	100.0%	77.1%	22.9%	40.0%
Civil rights	19,707	20,661	92.3%	48.8%	1.9%	32.9%	12.7%	3.1%	28.3%	26.4%	73.6%	48.4%
Statutory actions	49,846	48,888	84.4%	29.3%	7.8%	26.2%	23.3%	0.7%	64.3%	51.3%	48.7%	57.7%
Other	5,714	5,253	79.0%	39.0%	17.9%	24.0%	17.9%	0.8%	48.5%	45.3%	54.7%	60.1%
Civil rights empl.	16,261	16,984	92.8%	37.7%	1.1%	45.0%	13.9%	1.8%	34.3%	16.5%	83.5%	60.7%
Torts (nonproduct)	18,051	19,580	85.6%	31.8%	2.2%	46.6%	16.0%	2.7%	52.6%	21.3%	78.7%	66.2%
U.S. Plaintiff	14,055	14,609	89.9%	28.5%	38.4%	15.4%	16.9%	0.3%	63.2%	60.2%	39.8%	70.9%
Contract	23,859	26,358	88.0%	25.0%	12.1%	40.5%	20.3%	1.6%	68.9%	29.0%	71.0%	73.9%
Product liability	22,942	43,914	83.6%	24.1%	0.1%	64.5%	11.0%	0.2%	30.8%	59.6%	40.4%	75.7%
Labor and empl.	18,752	18,652	93.8%	19.0%	15.7%	43.7%	20.5%	0.8%	59.3%	37.0%	63.0%	80.3%

³⁴ See *supra* note 22.

Table 5 provides one piece of the explanation, setting out the proportion of cases, by type of suit, litigated by plaintiffs without counsel. It shows that prisoner cases, as one would expect, are overwhelmingly pro se—and at a much higher rate than prior to the PLRA, which drastically limited attorneys’ fees.

TABLE 5: PRO SE LITIGATION IN U.S. DISTRICT COURTS, CASES TERMINATED SELECTED FISCAL YEARS³⁵

Case Category	1996	2000	2006	2012
Contract	2.5%	2.6%	3.7%	4.4%
Torts (nonproduct)	5.4%	6.0%	8.7%	12.6%
Product liability	0.8%	1.5%	1.5%	1.1%
Civil rights	29.8%	30.1%	32.7%	34.6%
Civil rights employment	16.3%	20.3%	19.2%	19.8%
Prisoner civil rights	83.3%	95.6%	96.5%	94.9%
Labor and employment	2.9%	3.8%	3.0%	2.9%
Statutory actions	6.0%	6.5%	6.4%	8.2%
U.S. Plaintiff	3.4%	1.3%	4.6%	13.2%
Habeas, other quasi-criminal	71.8%	84.1%	84.8%	88.8%
Bankruptcy	12.8%	18.2%	19.0%	20.5%
Immigration				35.4%
Other	11.8%	19.7%	13.6%	14.5%
Total	26.9%	26.2%	25.0%	26.1%
Total w/o prisoner or habeas cases	7.8%	8.6%	8.2%	10.5%

III. Damages in Prison Litigation

As the last aspect of my examination of prisoner damage actions, I look at the damages themselves. I previously conducted a study of cases terminated in 1993, and found that (after excluding one very large outlying award) the average damages in cases with trial judgments for prisoner plaintiffs were about \$18,800, with a median of a mere \$1000.³⁶ I decided to repeat this study, to see what might have changed in the two decades since. To do this, I examined—using the docket sheet and other court documents—each case coded by the court system as ending with a trial or other litigated judgment in Fiscal Year 2012, the latest data available. The AO’s coding is somewhat imprecise, particularly for the non-trials. Of those cases that met these initial selection criteria, most turned out to be defendants’ victories, and others turned out to be settlements: I excluded both. Table 6 presents the results. As it shows, case results for 2012 are entirely consonant with the 1993 study. Of 58 litigated judgments, the mean award was under \$22,000 for trials and under \$19,000 for non-trials, with a median of just \$1525 for trials and \$7000 for non-trials. Across all the cases, nationwide litigated damages totaled a mere \$1,000,000.

³⁵ See *supra* note 22.

³⁶ See Schlanger, *Inmate Litigation*, *supra* note 4 at 1603.

TABLE 6: PRISONER CIVIL RIGHTS LITIGATED VICTORIES, FY 2012³⁷
(EXCLUDES SETTLEMENTS)

	Trials	Non-trials	All
Plaintiffs Wins	36	21	57
Injunctive matters	4	3	7
<= \$1000	15	3	18
\$1001-13,000	8	12	20
25,000-80,000	7	2	9
\$100,000 +	2	1	3
Total damages awarded	\$700,908	\$339,862	\$1,040,770
Cases with damages	32	18	50
Average damages per case	\$21,903	\$18,881	\$20,815
Median damages per case	\$ 1,525	\$7,000	\$4,185

Thus when prisoners do litigate all the way to victory, they tend to win pretty small.

IV. Court Orders

Since the 1970s, court orders have been a major source of regulation and oversight for American jails and prisons—whether those orders entailed active judicial supervision, intense involvement of plaintiffs’ counsel or other monitors, or simply a court-enforceable set of constraints on corrections officials’ discretion.³⁸ The PLRA altered this system with provisions that promote termination of existing court orders, and others that shortened the life span of new orders.³⁹ The impact took some time to manifest, but is now very clear. Table 7 shows the results.⁴⁰

³⁷ See *infra* Technical App. at B.

³⁸ See Schlanger, *Civil Rights Injunctions*, *supra* note 4, at 552.

³⁹ See *supra* notes 10–11.

⁴⁰ Table 7 is based on data reported by jail and prison officials in the censuses conducted by the Bureau of Justice Statistics every five or six years. Since 1983, the censuses have included questions about the existence of court orders on a variety of (specified) topics. The resulting data is the most comprehensive information available, although it includes demonstrable and important omissions. For example, there has been a court order involving mental health care at every California prison since 1997, and another involving medical care since 2002. For information on the mental health orders, see *Coleman v. Brown*, No. 2:90-cv-00520 (E.D. Cal.), CIVIL RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=573>. For information on the medical decree, see *Plata v. Brown*, No. 3:01-cv-01351 (N.D. Cal.), CIVIL RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=589>, and the Order for Adopting Class Action Stipulation as Fair, Reasonable, and Adequate, *Plata v. Davis*, No. 3:01-cv-01351 (N.D. Cal. June 20, 2002), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0018-0005.pdf>; and the underlying Stipulation for Injunctive Relief (June 13, 2002), at <http://www.clearinghouse.net/chDocs/public/PC-CA-0018-0001.pdf>. Yet no California prison reported *any* court order in the Census responses in 2005. So the data in Table 7 should be taken as indicative of trends rather than dispositive about any given state or facility.

TABLE 7: INCIDENCE OF COURT ORDERS, LOCAL JAILS AND STATE PRISONS, 1983-2006⁴¹

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

Columns (a) and (c) show the total number of facilities, and total incarcerated population, for jails and prisons in each census year. Columns (b) and (d) then show the proportion of those totals in which the census responses report court orders. Looking at columns (b) and (d) in the censuses most immediately following the PLRA—1999 for jails and 2000 for prisons—suggests only a very limited impact of the statute. (This is data I reported in 2006, before data from the next iteration of the census was available.) The next census administration is the one where the PLRA’s impact is much more marked: the decline in covered facilities (column b) is very significant, and the decline in covered population (column d) even more so.

And finally, Table 8 emphasizes the new rarity of system-wide court order coverage. The table’s first row lists, by census year, how many states report one or more facilities subject to court order. That number remains substantial. But the second row shows states in which 60% or more of the facilities or population are covered by court order—and that row demonstrates that where this kind of system-wide (or close to it) coverage used to be quite common, it is now rare. In 2005 and 2006, respectively, only 5 states reported system-wide court order coverage of their prisons, and only 2 states of their jails.⁴²

⁴¹ See *infra* Technical App. at E–F. See also margoschlanger.net[location unknown].

⁴² I define “system-wide” as reaching 60% or more facilities or population in a state, in a given census administration, after private and community-corrections facilities are excluded.

TABLE 8: SYSTEM-WIDE COURT ORDER COVERAGE, BY STATE⁴³

	Local Jails (n = 47)					State Prisons (n = 51)				
	1983	1988	1993	1999	2006	1984	1990	1995	2000	2005
States with any court orders	44	46	43	43	39	43	44	41	30	25
Total states with system-wide orders*	8	8	9	3	2	11	14	16	12	5
<u>System-Wide Court Order Coverage</u>										
Alaska						•	•	•	•	
Arizona	•	•	•	•	•				•	
Arkansas						•				
California	•	•	•	•	•				•	
Colorado										•
Connecticut									•	•
Delaware								•		
District of Columbia	•	•	•	•		•	•	•	•	
Florida	•	•	•			•				
Georgia								•		
Illinois	•	•	•							
Indiana							•			
Kansas							•	•		
Louisiana	•	•	•			•	•	•		
Minnesota						•				
Mississippi						•	•	•	•	
Montana									•	•
New Hampshire						•	•	•		
New Jersey	•									•
New Mexico						•	•	•		
New York	•	•	•						•	
North Carolina								•		
Ohio									•	
Oregon		•	•							
Rhode Island								•	•	
South Carolina							•	•		
South Dakota							•	•		
Tennessee			•			•	•		•	
Texas						•	•	•	•	•
Utah							•	•		
West Virginia							•	•		

* States in which the proportion of the states' non-private, non-community corrections facilities reporting court orders, or the proportion of incarcerated population in those facilities, is greater than 60%.

⁴³ See *supra* note 41.

The point is not that courts are no longer part of the prison and jail oversight ecosystem. In California (of all states) the contrary is obvious—numerous injunctive cases have transformed California’s criminal justice system,⁴⁴ and more changes are underway.⁴⁵ But the PLRA has made such cases far more rare.

Conclusion

In my view, court cases and court-enforceable regulation have since the 1970s been useful correctives to dysfunctions and abuses that frequently occur in our low-visibility jails and prisons. But the practice of prisoner litigation is susceptible to criticism, from the left, that prisoner access to courts offers the appearance but not the reality of justice,⁴⁶ and that court orders have both “contributed to mass incarceration,” by promoting the building of new prisons to reduce overcrowding,⁴⁷ and limited prisoner freedom by enhancing prison bureaucracy.⁴⁸ Simultaneously, the critics from the right who got the PLRA passed suggested that prisoner cases are usually frivolous and prison and jail decrees frequently overreaching.⁴⁹ This debate is far beyond the scope of this Article—but perhaps further research will be spurred by publication of these statistics, which demonstrate the kind of variance, over time and location, that researchers might use to shed additional light on how prisoner litigation actually functions. Whichever view is correct, the statistics set out below pose an enormous challenge to us as a polity. Litigation has receded as an oversight method in American corrections. It is vital that something take its place.

⁴⁴ See, e.g., *Brown v. Plata*, 131 S.Ct. 1910 (2011); Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165 (2013).

⁴⁵ For a description of the *Plata* litigation’s recent progress, see Civil Rights Litigation Clearinghouse, *Plata v. Brown*, 3:01-cv-01351-TEH (N.D. Cal.), <http://www.clearinghouse.net/detail.php?id=589>. For descriptions of other ongoing litigated interventions into California’s criminal justice system, see, e.g., Civil Rights Litigation Clearinghouse, *Ashker v. Brown*, 4:09-cv-05796-CW (N.D. Cal.), <http://www.clearinghouse.net/detail.php?id=12103>; Civil Rights Litigation Clearinghouse, *Gray v. County of Riverside*, 5:13-cv-00444 (C.D. Cal.), <http://www.clearinghouse.net/detail.php?id=12729>.

⁴⁶ Cf., e.g., DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* (1997) (presenting and analyzing this critique more broadly).

⁴⁷ Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOC’Y REV. 731, 760 (2010).

⁴⁸ Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications*, 24 PACE L. REV. 433, 466–75 (2004).

⁴⁹ See, e.g., Dennis C. Vacco, Frankie Sue del Papa, Pamela Fanning Carter & Christine O. Gregoire, Letter to the Editor, *Free the Courts from Frivolous Prisoner Suits*, N.Y. TIMES, Mar. 3, 1995, at A26 (letter from Attorneys General of New York, Nevada, Indiana, and Washington); SANDLER & SCHOENBROD, *supra* note 16.

Technical Appendix

I have posted a compiled file containing state-by-state-by-year data:

- Jail population
- State prison population
- Federal prison population
- Federal court prisoner filings (by type of federal/non-federal defendant)

This full panel dataset is available at {URL TK}, and was used to produce Tables 1-2, and Figures A-E. This Technical Appendix includes more information about the sources that underlie that dataset, and also the data used for the remaining tables and figures.

Both federal and state prison populations are year-end counts, and are available for all years for all states. Jail population is entirely unavailable for 1971-1977 and 1979, and only national data are available for 1980-1982, 1984-1987, 1991-1992, 1994-1999, and 2012. Where available, the figure chosen is the average daily population (because that is the most consistently available data for state-by-state data). But for a few years when average daily population is not available, the mid-year count is used instead. Details are included in the data file itself.

A. Federal court filings, outcomes, and other characteristics (Tables 1-6, Figures A-E)

Case filing and outcome figures in Tables 1-5 are derived from data by the Administrative Office of the U.S. Courts (the AO) and cleaned up by the Federal Judicial Center, the research arm of the federal court system. These data include each and every case “terminated” (that is, ended, at least provisionally) by the federal district courts since 1970. The Federal Judicial Center also publishes periodic reports on the data. My figures are not from these written reports, but are instead based on my compilation and manipulation of the raw data to eliminate duplicates, remands, etc. The Federal Judicial Center lodges this database for public access with the Inter-university Consortium for Political and Social Research, which maintains it at <http://www.icpsr.umich.edu>. I used the following datasets, pulling the “civil terminations” data from each. For more detail and replication code see {URL TK}. Unfortunately I am unable to post actual data, because the Bureau of Justice Statistics has instructed the ICPSR that the data be available only for restricted use. By “prisoner civil rights” I mean cases with a “nature of suit” code equal to either 550 (prisoner civil rights) or 555 (prison conditions). I have not been able to ascertain any clear distinction between these two codes. A consolidated codebook for the resulting consolidated database is posted at {URL TK}.

- FEDERAL JUDICIAL CENTER, FEDERAL COURT CASES: INTEGRATED DATA BASE, 1970–2000, ICPSR STUDY NO. 8429 (last updated Apr. 25, 2002).
- FEDERAL JUDICIAL CENTER, FEDERAL COURT CASES: INTEGRATED DATA BASE, 2001, ICPSR STUDY NO. 3415 (last updated June 19, 2002).
- FEDERAL JUDICIAL CENTER, FEDERAL COURT CASES: INTEGRATED DATA BASE, 2002, ICPSR STUDY NO. 4059 (last updated Oct. 8, 2004).
- FEDERAL JUDICIAL CENTER, FEDERAL COURT CASES: INTEGRATED DATA BASE, 2003, ICPSR STUDY NO. 4026 (last updated June 17, 2004).

- FEDERAL JUDICIAL CENTER, FEDERAL COURT CASES: INTEGRATED DATA BASE, 2004, ICPSR STUDY NO. 4348 (last updated Nov. 4, 2005).
- FEDERAL JUDICIAL CENTER, FEDERAL COURT CASES: INTEGRATED DATA BASE, 2005, ICPSR STUDY NO. 4382 (last updated Mar. 17, 2006).
- FEDERAL JUDICIAL CENTER, FEDERAL COURT CASES: INTEGRATED DATA BASE, 2006, ICPSR STUDY NO. 4685 (last updated Mar. 15, 2007).
- FEDERAL JUDICIAL CENTER, FEDERAL COURT CASES: INTEGRATED DATABASE, 2007, ICPSR STUDY NO. 22300 (last updated June 18, 2008).
- FEDERAL JUDICIAL CENTER, FEDERAL COURT CASES: INTEGRATED DATA BASE, 2008, ICPSR STUDY NO. 25002 (last updated June 29, 2009).
- FEDERAL JUDICIAL CENTER, FEDERAL COURT CASES: INTEGRATED DATA BASE, 2009, ICPSR STUDY NO. 29661 (last updated Nov. 26, 2012).
- FEDERAL JUDICIAL CENTER, FEDERAL COURT CASES: INTEGRATED DATA BASE, 2010, ICPSR Study No. 30401 (last updated Nov. 26, 2012).
- FEDERAL JUDICIAL CENTER, FEDERAL COURT CASES: INTEGRATED DATA BASE, 2011, ICPSR STUDY NO. 33622 (last updated Jan. 8, 2013).
- FEDERAL JUDICIAL CENTER, FEDERAL COURT CASES: INTEGRATED DATA BASE, 2012, ICPSR STUDY NO. 34881 (last updated Mar. 18, 2014).
- FEDERAL JUDICIAL CENTER, FEDERAL COURT CASES: INTEGRATED DATA BASE APPELLATE AND CIVIL PENDING DATA, 2012, ICPSR 29281 (last updated Mar. 19, 2014) (I used these data for pending civil cases).

B. Case Outcomes and Damages (Table 6)

Table 6 began using information in the AO data described above, in the terminations data for Fiscal Year 2012. I made two lists of prisoner civil rights cases in that dataset. For the first column in the table, I took the thirty-six cases in which the disposition code indicated a trial judgment in plaintiff's favor (disp = 7, 8, or 9, and judgefor = 1 or 3). The second column includes other, non-trial, cases in which judgment was listed as in plaintiff's favor (judgefor = 1 or 3). For each case on either list, I examined the docket, available via the federal court's Public Access to Court Electronic Records system, and relevant court documents to determine both whether the AO-coded outcome was correct and the actual damages awarded, if any. I was able to find all but one of the cases. Table 6 includes only cases in which the outcome was in fact a litigated plaintiffs' judgment, omitting many cases in which defendants won or the outcome was a settlement. I list the actual damages, which frequently differ from the AO-coded damages.

C. State Prison Population (Tables 1 & 2, Figures A-E)

1970: *Prisoners in State and Federal Institutions: 1968–1970*, NAT'L PRISONER STATISTICS BULL. (U.S. Dep't of Justice, D.C.) Apr. 1972, at 22.

1971 to 1974: *Prisoners in State and Federal Institutions on December 31, 1974*, NAT'L PRISONER STATISTICS BULL. (U.S. Dep't of Justice, D.C.) June 1976, at 14.

1975: *Prisoners in State and Federal Institutions on December 31, 1975*, NAT'L PRISONER STATISTICS BULL. (U.S. Dep't of Justice, D.C.) Feb. 1977, at 36 app. 2.

1976 & 1977: *Prisoners in State and Federal Institutions on December 31, 1977*, NAT'L PRISONER STATISTICS BULL. (U.S. Dep't of Justice, D.C.) Feb. 1979, at 10.

1978 to 2012: U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, Corrections Statistical Analysis Tool (CSAT)—Prisoners, <http://www.bjs.gov/index.cfm?ty=nps> (follow “Quick Tables” hyperlink; then follow “Inmates in custody of state or federal correctional facilities, excluding private prison facilities, December 31, 1978-2012,” available at http://www.bjs.gov/nps/resources/documents/QT_custnopriv_tot.xlsx, and “Inmates in custody of state or federal correctional facilities, including private prison facilities, December 31, 1999-2012,” available at http://www.bjs.gov/nps/resources/documents/QT_custwpriv_tot.xlsx).

D. Federal Prison Population (Tables 1 & 2, Figures A-E)

National population only (Tables 1 & 2, Figures A-E)

For national federal prison population, the sources are the same as for state prison population, part C, supra.

State-by-state population (Table 2, Figures C-E)

Federal prison state-by-state population is not average daily population; the data are for prisoner counts, usually for the end of September. Full details available with the dataset itself.

1970-1993: U.S. Dep't of Justice, Federal Bureau of Prisons, Statistical Report (annual):

- Table A-2 (1970-1983)
- Table 10 (1987)
- Table 12 (1988-1989)
- Table A13 (1990-1993)

1994-2012: BOP Inmate Population by Institution (includes privately managed institutions, but not community corrections). Federal Bureau of Prisons spreadsheet provided June 13, 2014, by Jennifer Batchelder, Supervisory Research Analyst, Office of Research and Evaluation, Federal Bureau of Prisons, on file with author.

E. Jail Population (Tables 1- 2, Figures A-E)

Note: No data available for 1971-1977 and 1979. I assumed a jail population of 160,000 for 1971 to 1977, based on the figures in 1970 and 1978. I assumed a jail population of 170,000 in 1979, based on the figures in 1978.

National population only

1980-2000: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES (2002), *previously available at* <http://www.ojp.usdoj.gov/bjs/glance/sheets/corr2.wk1>, on file with author (June 30 count for jails, Dec. 31 count for prisons, and Jan. 1 count for paroles).

1980-1994: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1994, at 5 (June 1996, NCJ 160091), *available at* <http://www.bjs.gov/content/pub/pdf/cpius94a.pdf> (see also <http://www.bjs.gov/content/pub/sheets/cpi94a.zip>) (June 30 count).

1990-1996: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1996, at 20 (April 1999, NCJ 170013), *available at*

<http://www.bjs.gov/content/pub/pdf/cpius96.pdf> (June 30 count for all, and average daily population 1990-1993).

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

2000-2013: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2013—STATISTICAL TABLES at tbl. 1 (May 2014, NCJ 245350), *available at* <http://www.bjs.gov/content/pub/pdf/jim13st.pdf> (June 30 count and average daily population).

State-by-state population

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

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

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

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

1990: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1990, at 5 (July 1992, NCJ-134946), *available at* <http://www.bjs.gov/content/pub/pdf/cpus90.pdf> (June 29 count).

1993: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1993, at 7 (October 1995, NCJ-156241), *available at* <http://www.bjs.gov/content/pub/pdf/cpop93bk.pdf> (Dec. 31 count).

1994 to 1999: Because state-by-state jail population is not available from 1994 to 1999, jail population for those years is calculated using a linear interpolation between the 1993 and 2000 figures for each state.

2000-2011: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, Mortality in Local Jails and State Prisons, 2000-2011 – Statistical Tables at 17 (Aug. 2013, NCJ 242186), *available at* <http://www.bjs.gov/content/pub/pdf/mljsp0011.pdf> and *downloadable at* <http://www.bjs.gov/content/pub/sheets/mljsp0011.zip> (average daily population). Note: the figures for Tennessee and Oklahoma are adjusted in 2010 and 2011, because Davidson County and Oklahoma City were omitted from published data in those years. Thanks to Daniela Golinelli, Chief, Corrections Unit, Bureau of Justice Statistics, for providing appropriate corrections.

F. Prison Censuses (Table 7 & 8)

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

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

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

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

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

G. Jail Censuses (Tables 7 & 8)

1983: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL JAIL CENSUS, 1983, ICPSR Study No. 8203 (last updated Feb. 13, 1997). *See also* <http://www.bjs.gov/content/pub/pdf/clj83-vol1.pdf>, <http://www.bjs.gov/content/pub/pdf/clj83-vol2.pdf>, <http://www.bjs.gov/content/pub/pdf/clj83-vol3.pdf>, <http://www.bjs.gov/content/pub/pdf/clj83-vol4.pdf>, <http://www.bjs.gov/content/pub/pdf/clj83-vol5.pdf>.

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

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

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

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