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## ARTICLE

## INMATE LITIGATION

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## INMATE LITIGATION

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*In 1995, prison and jail inmates brought about 40,000 new lawsuits in federal court — nearly a fifth of the federal civil docket. Court records evidence a success rate for inmate plaintiffs under fifteen percent. These statistics highlight two qualities long associated with the inmate docket: its volume and the low rate of plaintiffs' success. Then, in 1996, Congress enacted the Prison Litigation Reform Act (PLRA), which dramatically altered the litigation landscape, restricting inmates' access to federal court in a variety of ways. This Article examines inmate litigation before and after the PLRA. Looking first at the litigation process itself, it brings together prior research, the results of new quantitative analysis of a comprehensive database of federal district court cases, and interviews and other qualitative inquiry. The Article canvasses filing trends, subject matter, and settled and litigated outcomes, exploring what is happening in each of these areas and why. Then it uses a variety of analytic tools to uncover and assess the PLRA's impact. Most obviously, the PLRA has shrunk the number of new federal filings by inmates by over forty percent, notwithstanding a large increase in the affected incarcerated population. Simultaneously, the statute seems to be making even constitutionally meritorious cases harder both to bring and to win. Finally, the Article looks beyond federal courthouses to the ways litigation affects jail and prison operations. Specifically, it explores agencies' efforts to respond efficiently to the high-volume, low-probability docket and to reduce their liability exposure, and offers some tentative observations about the PLRA's likely impact on these efforts. The Article suggests in conclusion that use of the PLRA as a model for broader litigation reforms should proceed with enormous caution given the statute's problematic effects.*

### INTRODUCTION

On any given day there are over two million people in jail or prison in the United States, a population that has nearly quadrupled since 1980.<sup>1</sup> Driven at least in large part by the steep increase in the number of jail and prison inmates, and notwithstanding the nearly complete disappearance of what used to be an active and influential prisoners' rights movement,<sup>2</sup> the

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<sup>1</sup> See *infra* Table I.A.

<sup>2</sup> See generally RONALD BERKMAN, OPENING THE GATES: THE RISE OF THE PRISONERS' MOVEMENT (1979); James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts*, in NEW

amount of civil litigation brought by inmates in federal court increased steadily during the 1980s, and more steeply in the early 1990s. In 1995, inmates filed nearly 40,000 new federal civil lawsuits<sup>3</sup> — nineteen percent of the federal civil docket.<sup>4</sup> About fifteen percent of the federal civil trials held that year were in inmate civil rights cases.<sup>5</sup>

But in the mid-1990s, the state officials who were the most frequent targets of the growing inmate docket were finally able to capitalize on the rightward move in American politics<sup>6</sup> and mobilize a major campaign against the lawsuits. Building on years of (noninmate) tort reform drives as well as law-and-order rhetoric,<sup>7</sup> state officials got their proposed legisla-

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PERSPECTIVES ON PRISONS AND IMPRISONMENT 33 (1983) [hereinafter Jacobs, *Prisoners' Rights Movement*].

<sup>3</sup> To compute the figures for 1995, I followed the Administrative Office of the U.S. Courts and used a fiscal year; fiscal 1995 runs from October 1, 1994 to September 30, 1995.

This and all filing and outcome figures in this Article are derived from a database compiled by the Administrative Office of the U.S. Courts and cleaned up by the Federal Judicial Center, the research arm of the federal court system. The database includes each and every case “terminated” (that is, ended, at least provisionally) by the federal district courts since 1970. The data, that is, cover not just a sample but the entire universe of federal civil litigation (except for bankruptcy filings in the bankruptcy courts). 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>. See Federal Judicial Center, *Federal Court Cases: Integrated Data Base, 1970-2000* (pts. 38-55, 64-65, 73-74, 86-88, 98, 103-04, 115-17 (civil terminations 1970-2000), 118 (civil pending 2000)) (ICPSR Study No. 8429, last updated Apr. 25, 2002) [hereinafter *Federal Court Cases Database, 1970-2000*], at <http://www.icpsr.umich.edu:8080/ICPSR-STUDY/08429.xml>; Federal Judicial Center, *Federal Court Cases: Integrated Data Base, 2001* (pts. 2 (civil terminations), 3 (civil pending)) (ICPSR Study No. 3415, last updated June 19, 2002) [hereinafter *Federal Court Cases Database, 2001*], at <http://www.icpsr.umich.edu:8080/ICPSR-STUDY/03415.xml>. The Federal Judicial Center also publishes periodic reports culled from this dataset. Except where otherwise noted, my figures are not from these written reports, but are instead based on my extensive analysis compiling and manipulating the raw data. This work is discussed in the Data Appendix to this Article, which appears at its end, but the basic idea is not complicated: I put all the different years of data together and eliminated duplicates. I cite my compiled dataset and all other supporting analysis as Margo Schlanger, *Inmate Litigation Technical Appendix* (2003) [hereinafter Schlanger, *Technical Appendix*], available at <http://www.law.harvard.edu/faculty/schlanger/projects/index.php>. This website posts the code I used to compile the dataset, run the charts, and perform other analyses discussed in this Article.

<sup>4</sup> The “civil docket” I refer to does not include habeas corpus petitions and other like actions by prisoners seeking collateral criminal review. If such filings were included, both the number of inmate filings and their proportion of the docket would be much higher. I omit them because I think they are properly conceptualized as part of the criminal, rather than civil, justice system.

<sup>5</sup> More precisely, of trials in federal nonhabeas civil cases “terminated” in 1995, fifteen percent were in inmate civil rights cases. The figure remains consistent whether the set of trials includes only cases whose recorded judgments are trial verdicts, or any case ended by any procedural means during or after a trial. Schlanger, *Technical Appendix*, *supra* note 3.

<sup>6</sup> See generally, e.g., THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS (1992).

<sup>7</sup> Cf. Roger Roots, *Of Prisoners and Plaintiffs' Lawyers: A Tale of Two Litigation Reform Efforts*, 38 WILLAMETTE L. REV. 210 (2002) (comparing noninmate tort reform efforts and the campaign against inmate litigation).

tive solution into the Republican Congress's 1994 Contract with America.<sup>8</sup> When it could not be passed as a freestanding bill,<sup>9</sup> the initiative was eventually included as a rider to an appropriations bill,<sup>10</sup> and was finally enacted in that form as the Prison Litigation Reform Act (PLRA).<sup>11</sup> The statute drastically altered the corrections litigation environment, imposing filing fees on even indigent inmates, requiring them to exhaust administrative remedies prior to filing lawsuits, and limiting their damages and attorneys' fees. The PLRA's passage was aided by its connection to several longstanding political trends. In particular, it marked the overlap of conservatives' discontent with so-called "imperial" judging,<sup>12</sup> tort reformers' concern with the problem of frivolous lawsuits, and new congressional willingness to legislate federal court procedure. The PLRA has had an impact on inmate litigation that is hard to exaggerate; to set out just the most obvious effect, 2001 filings by inmates were down forty-three percent since their peak in 1995, notwithstanding a simultaneous twenty-three percent increase in the number of people incarcerated nationwide.<sup>13</sup>

Clearly, anyone who is interested in corrections or in civil rights litigation needs to understand both inmate litigation and the PLRA. But the litigation, even apart from its recent congressional regulation, is of broader

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<sup>8</sup> CONTRACT WITH AMERICA: THE BOLD PLAN BY REPRESENTATIVE NEWT GING-RICH, REPRESENTATIVE DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 53 (Ed Gillespie & Bob Schellhas eds., 1994) [hereinafter CONTRACT WITH AMERICA].

<sup>9</sup> Violent Crime Control and Law Enforcement Improvement Act of 1995, S. 3, 104th Cong. § 103 (Civil Rights of Institutionalized Persons) (Jan. 4, 1995); *Taking Back Our Streets Act of 1995: Hearing on H.R. 3 Before the House Comm. on the Judiciary, Subcomm. on Crime*, 104th Cong. (1995) [hereinafter *Hearing on H.R. 3*]; Violent Criminal Incarceration Act of 1995, H.R. 667, 104th Cong. tit. II (Stopping Abusive Prisoner Lawsuits) & tit. III (Stop Turning Out Prisoners) (Jan. 25, 1995); Stop Turning Out Prisoners Act, S. 400, 104th Cong. (Feb. 14, 1995); Civil Justice Fairness Act of 1995, S. 672, 104th Cong. tit. V (Control of Abusive Prisoner Litigation Practices) (Apr. 4, 1995); Local Law Enforcement Enhancement Act of 1995, S. 816, 104th Cong. § 102 (Stopping Abusive Prisoner Lawsuits), § 103 (Appropriate Remedies for Prison Conditions) (May 17, 1995); Prison Litigation Reform Act of 1995, S. 866, 104th Cong. (May 25, 1995); Prison Conditions Litigation Reform Act, S. 1275, 104th Cong. (Sept. 26, 1995); Prison Litigation Reform Act of 1995, S. 1279, 104th Cong. (Sept. 27, 1995); Prisoner Lawsuit Efficiency Act of 1995, H.R. 2468, 104th Cong. (Oct. 11, 1995); Crime Prevention and Family Protection Act of 1996, H.R. 2992, 104th Cong. subtit. B (Stopping Abusive Prisoner Lawsuits) & C (Stop Turning Out Prisoners) (1996); Criminal Correction and Victim Assistance Act of 1996, H.R. 3206, 104th Cong. § 5 (Stopping Abusive Prisoner Lawsuits) (Mar. 29, 1996).

<sup>10</sup> Prison Litigation Reform Act of 1995, H.R. 2076, 104th Cong. tit. VIII.

<sup>11</sup> Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-66 to -77 (Apr. 26, 1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; 42 U.S.C. §§ 1997-1997h). The PLRA was part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, which ended the 1996 federal government budget standoff. See Ann Devroy & Eric Pianin, *Government Shuts Again After Talks Collapse: Partial Closing To Idle 280,000*, WASH. POST, Dec. 16, 1995, at A1; Eric Pianin & John F. Harris, *Clinton, Congress Reach '96 Budget Agreement*, WASH. POST, Apr. 25, 1996, at A1.

<sup>12</sup> This phrase seems to have originated with Nathan Glazer, *Towards an Imperial Judiciary?*, PUB. INT., Fall 1975, at 104. For a recent full-length treatment, see ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* (1996).

<sup>13</sup> See *infra* Table I.A.

interest. The inmate docket provides a fruitful field for inquiry into how litigation's processes work, a topic that has preoccupied both theorists and empiricists. Even more generally, examination of inmate litigation can elucidate the complex ways in which litigation influences out-of-court behavior: specifically, whether and how liability and litigation, and the fear of liability and litigation, influence non-litigation behavior by potential defendants situated in complex social institutions. Yet remarkably little work has been done along these lines. While the enormous number of inmate lawsuits has ensured that judges, prison and jail officials, and policymakers have paid serious and sustained attention to them,<sup>14</sup> the cases have attracted relatively little scholarly interest.<sup>15</sup> (In this, they are quite different

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<sup>14</sup> See generally FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS 7 (1980) [hereinafter ALDISERT REPORT] ("giving special attention to prisoner conditions-of-confinement cases" because "[t]he volume of cases is large"); FEDERAL JUDICIAL CENTER, RESOURCE GUIDE FOR MANAGING PRISON LITIGATION, WITH SPECIAL EMPHASIS ON THE PRISON LITIGATION REFORM ACT (1996) [hereinafter FJC, PLRA RESOURCE GUIDE]; sources cited *infra* note 31. Researchers from the National Center for State Courts and the federal Bureau of Justice Statistics have published particularly valuable statistical studies. See ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEP'T OF JUSTICE, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 16 (1994) [hereinafter HANSON & DALEY, REPORT ON SECTION 1983 LITIGATION]; JOHN SCALIA, U.S. DEP'T OF JUSTICE, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980-2000 (2002) [hereinafter SCALIA, PRISONER PETITION TRENDS].

<sup>15</sup> Work examining the constitutional doctrines governing corrections is extremely voluminous, but there are just a handful of extended treatments with an empirical rather than doctrinal base: The most extensive body of work is by Theodore Eisenberg, with several coauthors. See Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982) [hereinafter Eisenberg, *Section 1983*]; Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987) [hereinafter Eisenberg & Schwab, *Constitutional Tort Litigation*]; Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719 (1988) [hereinafter Schwab & Eisenberg, *Explaining Constitutional Tort Litigation*]; Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567 (1989) [hereinafter Eisenberg, *Litigation Models*]; Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501 (1989) [hereinafter Eisenberg & Schwab, *What Shapes Perceptions*]; THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS 534-42 (4th ed. 1996) [hereinafter EISENBERG, CASES AND MATERIALS]; Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947 [hereinafter Clermont & Eisenberg, *Plaintiphobia*]. In addition, much of Eisenberg's more general work on civil litigation includes data about inmate cases in federal court. See Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990); Theodore Eisenberg, *The Relationship Between Plaintiff Success Rates Before Trial and at Trial*, 154 J. ROYAL STAT SOC'Y, SERIES A 111 (1991) [hereinafter Eisenberg, *Plaintiff Success Rates*]; Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992) [hereinafter Clermont & Eisenberg, *Trial by Jury or Judge*]; Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995) [hereinafter Ashenfelter, Eisenberg & Schwab, *Politics and the Judiciary*]. Important contributions by other authors include: JIM THOMAS, PRISONER LITIGATION: THE PARADOX OF THE JAILHOUSE LAWYER (1988) [hereinafter THOMAS, PRISONER LITIGATION]; Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of*

from the more-studied “court order” cases — litigation in which groups of inmate plaintiffs, represented by counsel, seek court-enforceable orders to govern some general set of prison or jail practices.<sup>16</sup>

The PLRA and its effects ought to be of similarly broad concern, far beyond those who care about the immediate topic or parties, to those interested in our civil justice system more generally, including the politics of civil justice reform and its associated debates. While the PLRA has hardly been a stealth statute, its status as a federal tort reform measure and as a congressional modification of the generally trans-substantive<sup>17</sup> Federal Rules of Civil Procedure have both gone nearly unrecognized. As to the latter, for example, one close observer recently wrote: “In only one instance during [1988–2001] did Congress adopt legislation — the Private Securities Litigation Reform Act — that altered the operation of an existing rule.”<sup>18</sup> In fact, however, the PLRA changed the operation of numer-

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*Counsel*, 17 S. ILL. U. L.J. 417 (1993) [hereinafter Howard Eisenberg, *Rethinking Prisoner Cases*]; William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610 (1979) [hereinafter Turner, *When Prisoners Sue*].

<sup>16</sup> The normative and qualitatively descriptive literature about these cases is both voluminous and distinguished. See, e.g., MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998) [hereinafter FEELEY & RUBIN, *JUDICIAL POLICY MAKING*]; Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). For an analytic review of the scholarship on correctional court orders, see Malcolm M. Feeley & Roger A. Hanson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the Literature*, in *COURTS, CORRECTIONS, AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS* 12 (John J. DiIulio, Jr. ed., 1990) [hereinafter Feeley & Hanson, *Judicial Impact on Prisons*]. Much of the most interesting work has been case studies. See, e.g., LEO CARROLL, *LAWFUL ORDER: A CASE STUDY OF CORRECTIONAL CRISIS AND REFORM* (1998) (Rhode Island prison litigation); BRADLEY STEWART CHILTON, *PRISONS UNDER THE GAVEL: THE FEDERAL COURT TAKEOVER OF GEORGIA PRISONS* (1991) (Georgia prison litigation); BEN M. CROUCH & JAMES W. MARQUART, *AN APPEAL TO JUSTICE: LITIGATED REFORM OF TEXAS PRISONS* (1989) (Texas prison litigation); STEVE J. MARTIN & SHELDON EKLAND-OLSON, *TEXAS PRISONS: THE WALLS CAME TUMBLING DOWN* (1987) [hereinafter MARTIN & EKLAND-OLSON, *TEXAS PRISONS*] (same). And Susan Sturm's work is also extremely useful. See Susan P. Sturm, *Lawyers at the Prison Gates: Organizational Structure and Corrections Advocacy*, 27 U. MICH. J.L. REFORM 1 (1993); Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639 (1993); Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981 (1993); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355 (1991); Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805 (1990); Susan P. Sturm, Note, “Mastering” Intervention in Prisons, 88 YALE L.J. 1062 (1979).

<sup>17</sup> See Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732 (1975). On the “trans-substantive” debate, see, for example, Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 514 (1996); Cover, *supra*; Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237 (1989); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27 (1994).

<sup>18</sup> Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1196 (2002). Willging is in a singularly good position to observe the congressional-judicial fight; he is a senior researcher at the Federal Judicial Center and has been the Center's representative at meetings of the Advisory Committee on Civil Rules since 1988. *Id.* at 1121 n.\*. So his omission of the PLRA from his account is unlikely to be idiosyncratic. For a similar omis-

ous civil rules — including, for example, Rule 4 (issuance of a summons); Rule 53 (special masters); and Rule 55 (default judgments). Anyone who cares about civil rights remedies, tort reform, or the raging debates over both the appropriate locus of procedural rulemaking activity and whether that activity should be trans-substantive or topic-specific, needs to pay attention to the PLRA, which may very well serve Congress as a model for future interventions in non-corrections arenas.<sup>19</sup>

This Article examines inmate litigation before and after the PLRA shut the courthouse doors to many inmates. My investigation is of individual cases — lawsuits brought by individual inmates seeking damages or, occasionally, individual accommodations. I should be very clear that I am not discussing court-order cases; they need their own, quite separate analysis. The Article proceeds as follows: I begin, in Part I, by looking at the cases in the courthouse, focusing by necessity on federal filings because little information about state court cases is available. I describe first the constellation of empirical claims made by the PLRA's supporters, and then what we know about individual inmate cases — especially their subject matter and changing numbers over time. My task here is analogous to that undertaken more generally by a large group of scholars, mostly writing in the Law and Society tradition, who have attempted to answer anecdotes about abusive and frivolous litigation with systematic data<sup>20</sup> — the primary difference being that more of the inmate docket is low-merit than such scholars typically describe.

In Part II, I continue the examination of the inmate docket, looking at the outcomes of the cases — how many get dismissed, how many settled, how many tried, and with what result. The purpose is again to report what actually goes on (or, more precisely, what went on in cases filed prior to 1996; for later filings, the PLRA's enactment and the large number of still-pending cases complicates interpretation), and to compare inmate and non-inmate case outcomes. Several findings emerge: Inmates fare worse than all other federal court plaintiffs in all measures of success. But they none-

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sion from someone similarly well-informed, see, for example, Burbank, *supra* note 17, discussing Congress's new assertion of rulemaking authority and the challenge it poses to the judiciary's rulemaking process, and observing that “[i]f, however, the Civil Justice Reform Act was a wake-up call, the Private Securities Litigation Act of 1995 was a fire alarm.” *Id.* (footnote omitted).

<sup>19</sup> See, e.g., Judicial Improvement Act of 1998, S. 2163, 105th Cong. § 3 (proposing limits on how long prospective relief can last in any case against state or local governmental officials); 144 CONG. REC. S6181 (daily ed. June 11, 1998) (statement of Sen. Ashcroft) (describing the bill as “expanding provisions of the Prison Litigation Reform Act to cover other local and state institutions”); 146 CONG. REC. H1089 (daily ed. March 16, 2000) (debate over the Private Property Rights Implementation Act of 2000, H.R. 2372, 106th Cong., comparing the proposed modification of court procedures for constitutional takings claims to the PLRA).

<sup>20</sup> Marc Galanter discusses the early work in this tradition in *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285, 300 & nn.83–88 (2002), and lists a sampling of the relevant literature in *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 721–22 n.14 (1998) [hereinafter Galanter, *Oil Strike*].

theless settle a large portion of the cases that survive motions practice. In addition, inmates win punitive damages in an extraordinarily large portion of their trial victories. I assess the causes of both findings, and also the stakes of inmate cases.

Continuing to focus on in-court effects, I move next to the impact of the PLRA. Part III summarizes the provisions of the 1996 statute as well as the legal regime it replaced. Part IV examines the impact of the PLRA on filings and outcomes, arguing that the PLRA did indeed reduce the quantity of inmate lawsuits but that its interventions were far from neutral for constitutionally meritorious cases, which it simultaneously made more difficult both to bring and to win.

Part V substantially broadens the frame, looking outside the courthouse to the operational and deterrent effects of individual inmate litigation on jail and prison administrators. The relevant antecedents to this Part are sociolegal inquiries into how legal authority and fear of liability get translated into organizational practice, and more general academic and judicial theorizing about “deterrence,” “overdeterrence,” and what I call “antideterrence” (a tendency to encourage the very behavior sought to be deterred). The Part ends with a brief look at the preliminary evidence about the changes the PLRA is causing in these areas. Part VI offers some concluding thoughts.

My project is, thus, a hybrid. This Article is in large part an empirical undertaking, with varied sources. I have examined all the quantitative systematic data available — data from records of district court cases coded by court clerks as relating to “prisoner civil rights” or “prison conditions.” I have audited and supplemented this data using hundreds of actual case docket sheets, which are more reliable and far more detailed. I also have conducted a written survey of administrators of state departments of corrections and large and small jails, with good if not amazing response rates. I have conducted dozens of interviews of correctional and detention administrators and their lawyers, litigation officers, corrections experts, plaintiffs’ lawyers, court personnel and researchers,<sup>21</sup> And I have read a good many of the rich memoir accounts of life in prison (by

<sup>21</sup> Telephone interviews with Elizabeth Alexander, Director, ACLU National Prison Project (Mar. 6, 2001); Calvin L. Beale, Senior Demographer, Economic Research Service, U.S. Department of Agriculture (May 16, 2002); John Boston, Director, Prisoners’ Rights Project of the Legal Aid Society of New York (Spring 2002); Patrick Bradley, Superintendent, Suffolk County (Mass.) House of Correction (Mar. 30, 2001); Kevin C. Brazile, Assistant County Counsel, Los Angeles County (Apr. 24, 2002); Jean Bysse, General Counsel, Prison Health Services (Mar. 5, 2003); Catherine Campbell, prisoners’ attorney (May 7, 2001); William C. Collins, Editor, *Correctional Law Reporter* (Apr. 18, 2001); Gary W. DeLand, corrections consultant, former Executive Director, Utah Department of Corrections (Mar. 26, 2001); Bernard J. Farber, Editor-in-Chief, Americans for Effective Law Enforcement publications (Apr. 2, 2001); David C. Fathi, attorney, ACLU National Prison Project (Mar. 5, 2001); Chuck Fissette, litigation officer, Duval County (Fla.) Jail (Mar. 29, 2000); Captain Alan Griner, legal counsel, Leon County Sheriff’s Office (Mar. 28, 2001); Caitlin Halligan, New York Solicitor General (May 13, 2002); Edward Harrison, President, National Commission on Correctional Health Care (Mar. 5, 2003); Sarah Vandenbraak Hart, former Philadelphia prosecutor, current Director, National Institute of Justice (May

read a good many of the rich memoir accounts of life in prison (by both inmates and correctional officers), as well as academic writing on corrections.<sup>22</sup> But in addition to its empirical base, the piece builds on economically minded litigation theory, more traditional legal scholarship on constitutional tort litigation, and sociolegal inquiry into how law functions in organizational contexts.

Throughout, I aim not only to illuminate inmate litigation using whichever tools seem most appropriate to each subtopic,<sup>23</sup> but also to put these

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30, 2002); Thomas C. Hnatowski, Chief, Magistrate Judges Division, Administrative Office of the U.S. Courts (Apr. 29, 2002); Gerard Horgan, Superintendent, Suffolk County (Mass.) Jail (Apr. 13, 2001); Susan Hunter, Chief, Prisons Division, National Institute of Corrections (Apr. 5, 2001); Virginia Hurley, Operations Manager, U.S. District Court for the District of Massachusetts (Jan. 14, 2003); Thomas W. Hussey, attorney, Office of Immigration Litigation, U.S. Department of Justice (Spring 2001); Richard A. Jaffe, Chief, Judicial Impact Office, Administrative Office of the U.S. Courts (May 3, 2002); W. Kenneth Katsaris, Florida corrections consultant, former Leon County (Fla.) Sheriff (May 11, 2001); Kathleen Kenney, Deputy General Counsel, Federal Bureau of Prisons (May 4, 2001); Patrick King, Senior Deputy Attorney General, Litigation Division, Nevada Attorney General's Office (Sept. 5, 2001); Elizabeth Koob, plaintiffs' attorney specializing in prisoner damage actions (May 22, 2002); Dan R. Larsen, Assistant Attorney General, Utah Attorney General's Office (Apr. 2001); Joseph D. Lehman, Secretary, Washington Department of Corrections (May 1, 2001); Patricia Lombard, Senior Researcher, Federal Judicial Center (May 1, 2002); Robert Lowney, Chief, District Court Administration Division, Administrative Office of the U.S. Courts (Apr. 30, 2002); Mel Mahoney, Vice President, Correctional Medical Services (Mar. 5, 2003); Susan Munsat, former State Initiatives counsel, National Association of Attorneys General (May 1, 2002); Gary McWilliams, Vice President, Correctional Medical Services (Mar. 5, 2002); Vincent Nathan, frequent special master in prison cases (Aug. 16, 2001); James Pauley, Director, Government Affairs, National District Attorneys Association (May 2, 2002); Michael J. Pybas, Senior Litigation Counsel, Federal Bureau of Prisons (Feb. 17, 2002); William G. Saylor, Director, Office of Research and Evaluation, Federal Bureau of Prisons (Apr. 11, 2001); Dora Schriro, then-Director, Missouri Department of Corrections (May 30, 2001); Donna Smith, Director of Risk Services, National Association of Counties (June 25, 2002); Richard L. Stalder, Secretary, Louisiana Department of Public Safety and Corrections (Spring 2001); Sue Ann Unger, Senior Deputy Attorney General, Pennsylvania Attorney General's Office (June 4, 2002); Reginald A. Wilkinson, Director, Ohio Department of Rehabilitation and Correction (Apr. 27, 2001); Thomas E. Willging, Senior Researcher, Federal Judicial Center (Mar. 22, 2001); Paul Wright, inmate and Editor, *Prison Legal News* (May 15, 2002); Ruth A. Zittrain, (non-prisoner) plaintiffs' attorney (Apr. 8, 2002); Joyce A. Zoldak, Associate General Counsel, Federal Bureau of Prisons (Feb. 22, 2001).

<sup>22</sup> These sources are cited throughout as relevant. I have some personal knowledge of the subject as well because I used to sue jails and prisons as a trial attorney in the Civil Rights Division of the U.S. Department of Justice. This knowledge, I should note, is of quite limited use in this Article's context — I worked entirely on large injunctive cases, which are not my subject here. Still, it should be obvious that any conclusions expressed here are mine and have nothing to do with the Justice Department.

<sup>23</sup> I have, that is, tried to meet the challenge posed by my subject matter. As Deborah Hensler writes, "many of the civil justice phenomena that need study are not suited to current quantitative analytic techniques," so qualitative research is necessary. But such research should follow, she continues:

standards . . . [that] derive from the same methodological paradigms that more quantitative analysts use: observing a large enough number of courts, lawyers, judges, or disputes; including the variety that exists among the population; and using techniques that are systematic enough so that another researcher using the same approach could expect to uncover the same facts. A researcher needs to provide enough raw descriptive information to enable a critic to decide whether the story constructed from these observations is supported by the data, or whether a contrary story is equally plausible.

sources in generative conversation with each other. Understanding how this and any other flavor of litigation<sup>24</sup> work requires a combination of theoretical open-mindedness and a highly concrete grasp of the institutional settings in which the litigation operates. This is, in sum, an institutional microanalysis — a form of inquiry often urged<sup>25</sup> but somewhat less often attempted.

### I. INMATE LITIGATION TRENDS

Congress enacted the sweeping changes of the Prison Litigation Reform Act based on a highly critical vision of the effects of inmate litigation. In September 1995, Senator Orrin Hatch, Chair of the Senate Judiciary Committee, introduced the Act on the Senate floor. In his speech, Hatch explained the goals of the legislation:

This landmark legislation will help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits. Jailhouse lawyers with little else to do are tying our courts in knots with an endless flood of frivolous litigation. Our legislation will also help restore balance to prison conditions litigation and will ensure that Federal court orders are limited to remedying actual violations of prisoners' rights, not letting prisoners out of jail. It is past time to slam shut the revolving door on the prison gate and to put the key safely out of reach of overzealous Federal courts. . . . 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.<sup>26</sup>

These were the basic themes of supporters of the PLRA. Their reform, they said, had two targets: frivolous litigation by inmates, especially by recreational "frequent filers" (part of my subject in this Article); and population caps and other inappropriate regulatory orders imposed on prisons and jails by prisoners'-rights crusaders on the federal bench who had seized control of state and local systems (a subject for another day). The PLRA thus marked the thematic joining of conservative tort reform and anti-judicial-activist rhetoric.<sup>27</sup>

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Deborah R. Hensler, *Researching Civil Justice: Problems and Pitfalls*, 51 L. & CONTEMP. PROBS. 55, 63 (1988).

<sup>24</sup> Cf. Marc Galanter, *The Life and Times of the Big Six; or, the Federal Courts Since the Good Old Days*, 1988 WISC. L. REV. 921, 951-53 (urging scholars and policymakers interested in litigation to disaggregate available case data into subject matter cohorts so specific issues may be analyzed without reliance on mere anecdote).

<sup>25</sup> See, e.g., Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Micro-analysis of Institutions*, 109 HARV. L. REV. 1393 (1996).

<sup>26</sup> 141 CONG. REC. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch). Hatch was introducing S. 1279, a bill version nearly identical to the enacted statute.

<sup>27</sup> The PLRA and its habeas-reform counterpart, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) (amending 28 U.S.C. §§ 2244, 2253-2255, and adding 28 U.S.C. §§ 2261-2266), were only one component of the litigation reform program on the Contract with America agenda of the 104th Congress. Other measures proposed included: the Common Sense Product Liability and Legal Reform Act, H.R. 956, 104th Cong. (1995), see William J.

Critiques of inmate litigation did not, of course, originate in the Congress. The PLRA was put on the agenda of the 104th Congress (via the 1994 Republican Contract with America, which included a pledge to enact the Taking Back Our Streets Act, a broad statute that included the earliest version of the PLRA)<sup>28</sup> by the potent alliance of the National Association of Attorneys General (NAAG) and the National District Attorneys Association (NDAA). NAAG, which came to the topic first, led the charge against what it characterized as frivolous inmate cases (these received more of the focus in the House). The NDAA took the lead against population caps in particular and court orders in general (these received more of the focus in the Senate).<sup>29</sup> Members of these groups wrote early drafts of many PLRA provisions, gathered the information and anecdotes cited in support of the bill, and worked hard to secure its passage.<sup>30</sup> The state attorneys general of NAAG and the local prosecutors of the NDAA in turn relied on long-existing strands of scholarship and policy analysis,<sup>31</sup> as well as their own experience and interests. In 1995, they found ready allies, particularly in members of Congress whose states were the sites of particular and long-

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Clinton, *Message on Returning Without Approval to the House of Representatives the Common Sense Product Liability Legal Reform Act of 1996*, in 32 W.K.L.Y. COMP. PRES. DOC. 780, May 31, 1996 (vetoing a bill that would have imposed a variety of controls for products liability cases, including punitive damages caps); Attorney Accountability Act of 1995, H.R. 988, 104th Cong. (passed by the House, but not the Senate, under threat of veto); Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.) (passed over presidential veto, see 109 Stat. 765 (1995)). The merger of tort-reform and anti-judicial activism rhetoric has been a broader trend as well. See Charles R. Epp, *The Fear of Being Sued: Variations in Perceptions of Legal Threat Among Managers in the United States 1* (Paper Presented at the Law & Society Association, Budapest, Hungary, July 4-7, 2001) (on file with author) ("The national Republican party in recent election campaigns has labored to construct the 'litigation explosion' and 'judicial activism' as twin enemies.").

<sup>28</sup> CONTRACT WITH AMERICA, *supra* note 8, at 53.

<sup>29</sup> The difference in emphasis in the two chambers is evident from the hearings held in each. Compare *Hearing on H.R. 3*, *supra* note 9, with *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing on S. 3 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995).

<sup>30</sup> Hart Interview, *supra* note 21; Pauley Interview, *supra* note 21. (Hart and Pauley were both active players in the NAAG and NDAA campaign.)

<sup>31</sup> See, e.g., FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972), reprinted in 57 F.R.D. 573, 586-88 (1972) (Paul A. Freund, Chairman) ("The number of these petitions found to have merit is very small, both proportionately and absolutely. . . . It is satisfying to believe that the most untutored and poorest prisoner can have his complaints or petitions considered by a federal judge, and ultimately by the Supreme Court of the United States. But we are, in truth, fostering an illusion."); Warren E. Burger, *Chief Justice Burger Issues Yearend Report*, 62 A.B.A. J. 189, 190 (1976) ("Federal judges should not be dealing with prisoner complaints which, although important to a prisoner, are so minor that any well-run institution should be able to resolve them fairly without resort to federal judges."); ILLA JEANNE SENSENICH, FEDERAL JUDICIAL CENTER, COMPENDIUM OF THE LAW ON PRISONERS' RIGHTS 10-11 (1979) ("[I]t is generally agreed that most prisoner rights cases are frivolous and ought to be dismissed under even the narrowest definition of frivolity. . . . Most of the money damage claims, realistically evaluated, could be handled by a small claims court at the state level."). (U.S. Magistrate Sensenich wrote her *Compendium* in connection with the Federal Judicial Center's Committee on Prisoner Civil Rights.)

standing contention over inmate litigation.<sup>32</sup> In the first heady days of Republican control of both chambers of Congress, prisoners made awfully attractive targets — and Republican leaders vying for support from the party faithful were happy to outbid one another in anti-criminal tough-on-crime government officials and legislators who were the driving force behind the PLRA presented the following account of the cases: inmates, they said, were unduly litigious, making federal cases out of the most trivial mishaps; the cases were deluging both executive and judicial officials who were supposed to respond to them, and the serious cases therefore risked getting drowned out by the frivolous; and the entire apparatus led to remarkably few successes for inmates.<sup>34</sup> Their conclusion seems logically compelled: inmate litigation was a wasteful system demanding drastic amendment, even all-but-complete elimination.

The official critics of inmate litigation did not, of course, present anything like a balanced view of the inmate docket. As is typical in litigation-reform efforts (and, perhaps, in most of lawmaking), they instead used stylized anecdotes and gerrymandered statistics.<sup>35</sup> The critics' arguments about inmate cases were summed up by Letterman-like "Top Ten Frivolous Filings Lists," compiled by NAAG members.<sup>36</sup> Two such lists made it into the *Congressional Record*;<sup>37</sup> many others were released by state attorneys general back home.<sup>38</sup> The lists were full of silly lawsuits about topics

<sup>32</sup> Hart Interview, *supra* note 21.

<sup>33</sup> ACLU National Prison Project director Elizabeth Alexander recalls that Senators Dole and Gramm, both presidential hopefuls, seemed to be competing to be the toughest. Alexander Interview, *supra* note 21.

<sup>34</sup> In all but its last clause, this account should look entirely familiar to anyone who has read about the tort reform wars. And the PLRA's method will look equally familiar. As Marc Galanter has summarized, the tort reformers' ideas for

needed reforms, it turns out, make it more difficult for individual claimants to use the system to challenge corporate entities, reduce levels of accountability, place ceilings on remedy, and in some cases move organizational disputes with workers, customers, and patients from public forums into 'alternative' forums sponsored by the corporation itself.

Galanter, *Oil Strike*, *supra* note 20, at 719. Galanter is a stalwart opponent of tort reform — but this description seems to me factually entirely accurate, if skeptical in tone.

<sup>35</sup> *Cf. id.* at 725 (arguing that the "jaundiced view" of litigation pushes "three kinds of items: global characterizations, atrocity stories, and assertions about aggregate patterns").

<sup>36</sup> See Press Release, Citizens Against Lawsuit Abuse, CALA Praises Attorneys General Efforts; Officials Working To Stop Frivolous Lawsuits by Prisoners (Aug. 2, 1995) (on file with author) (praising the "move by the National Association of Attorneys General" and describing the coordinated release of "Top 10 lists" by twenty-four attorneys general).

<sup>37</sup> 141 CONG. REC. S14,629 (daily ed. Sept. 29, 1995) (statement of Sen. Kyl) ("Top 10 List: Frivolous Inmate Lawsuits in Arizona"; "Top 10: Frivolous Inmate Lawsuits Nationally"). For other examples of purportedly frivolous lawsuits, see 141 CONG. REC. S14,626–27 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch); 141 CONG. REC. S14,413–14 (daily ed. Sept. 27, 1995) (statement of Sen. Dole); *id.* at S14,418 (statement of Sen. Kyl); 141 CONG. REC. S7524–25 (daily ed. May 25, 1995) (statement of Sen. Dole).

<sup>38</sup> See, e.g., Francie Noyes, *Most Frivolous Inmate Lawsuits on Woods' List*, ARIZ. DAILY STAR, Aug. 2, 1995, at 1B, available at 1995 WL 3278735 (Arizona); Kris Newcomer, *Norton's Top 10 Lawsuits: Attorney General Compiles a List of Wildest Inmate Claims*, ROCKY MOUNTAIN NEWS (Den-

like melted ice cream<sup>39</sup> and mind control devices.<sup>40</sup> 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.”<sup>41</sup> (The peanut butter case thus took its place in the pantheon of outrageous lawsuits, along with spilled McDonald’s coffee,<sup>42</sup> damage to a patient’s psychic powers by a CAT scan,<sup>43</sup> and, back in the inmate realm, the Church of steak and wine.<sup>44</sup>) Some of the lawsuits were indeed just as trivial as presented, though others

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ver), Aug. 3, 1995, at 4A, available at 1995 WL 3205653 (Colorado); Associated Press, *No Matter Too Trivial for State’s Inmates: Frivolous Inmate Lawsuits Cost Taxpayers \$2 Million a Year*, *Attorney General Says*, ORLANDO SENTINEL, Aug. 3, 1995, at C3, available at 1995 WL 9702762 (Florida); Barb Albert, *Attorney General Seeks To End Frivolous Suits*, INDIANAPOLIS STAR, Nov. 15, 1994, at A1 (Indiana); Dianne Williamson, *Frivolous Litigation Is “a Joke”: AG’s Bill Would Stop Prisoners’ Absurdity*, SUNDAY TELEGRAM (Worcester, Mass.), July 2, 1995, at B1, available at 1995 WL 4277894 (Massachusetts); Carl Manning, *State Is Working To Cut Number of Inmates’ Suits*, ST. LOUIS POST-DISPATCH, June 26, 1994, at 7D, available at 1994 WL 8166723 (Missouri); Ed Vogel, *Prisoner Litigation Targeted*, LAS VEGAS REV.-J., Aug. 2, 1995, at 3B, available at 1995 WL 5798649 (Nevada); Eugene Kiely, *State Targets Frivolous Suits by Inmates*, RECORD (Northern New Jersey), Aug. 2, 1995, at A3, available at 1995 WL 3473469 (New Jersey); Associated Press, *Vacco Targets Frivolous Lawsuits Filed by Inmates*, BUFFALO NEWS, June 13, 1995, at A4, available at 1995 WL 5481447 (New York) [hereinafter Associated Press, *Vacco Targets Frivolous Lawsuits*]; James Bradshaw, *Inmates Would Pay Costs of Frivolous Suits*, COLUMBUS DISPATCH, Aug. 2, 1995, at 2B, available at 1995 WL 8809288 (Ohio); Ron Jenkins, *State Attorney General Campaigns for Federal Restraints on Inmate Suits*, J. REC. (Okla. City), Aug. 3, 1995, available at 1995 WL 6388853 (Oklahoma); Brett Lieberman, *Prisoner Suits: They Want Their MTV*, HARRISBURG PATRIOT, Aug. 2, 1995, at A2, available at 1995 WL 5071930 (Pennsylvania) [hereinafter Lieberman, *Prisoner Suits*]; Stephen Hunt, *Graham: Put Lid on Prisoners’ Lawsuits*, SALT LAKE TRIB., Aug. 2, 1995, at B1, available at 1995 WL 3149959 (Utah).

<sup>39</sup> Associated Press, *Vacco Targets Frivolous Lawsuits*, *supra* note 38 (New York).

<sup>40</sup> Lieberman, *Prisoner Suits*, *supra* note 38 (Pennsylvania).

<sup>41</sup> 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).

<sup>42</sup> *Liebeck v. McDonald’s Rests., P.T.S., Inc.*, No. CV-93-002419, 1995 WL 360309 (D.N.M. Aug. 18, 1994). The plaintiff suffered very severe burns when she spilled coffee on her lap. The jury awarded \$200,000 in compensatory damages (less 20% for comparative negligence) and \$2,700,000 in punitive damages. The trial judge later reduced the punitive award to \$480,000, and the case was ultimately settled for an amount not disclosed. For a comprehensive report of the McDonald’s coffee trial and its subsequent cultural reception, see Michael McCann, William Haltom & Anne Bloom, *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113, 119–20, 128, 130 (2001).

<sup>43</sup> The case, *Haines v. Temple University Hospital*, 39 Pa. D. & C.3d 381 (Pa. Ct. Com. Pl. 1986), is discussed in Galanter, *Oil Strike*, *supra* note 20, at 726–28. The plaintiff, who worked as a “spiritual adviser,” had suffered a severe allergic reaction to the dye used for the CAT scan; the jury was instructed to award her damages for the immediate reaction only — not for any claimed loss of psychic powers. In any event, her jury award was set aside by the trial judge, and she was eventually nonsuited prior to retrial.

<sup>44</sup> See *Therault v. Silber*, 453 F. Supp. 254, 260 (W.D. Tex. 1978) (denying religious recognition to the Church of the New Song — CONS — and noting that plaintiffs’ “one attempt at a paschal type feast produced a tongue-in-cheek request for prison authorities to supply steak and wine”).

were less so.<sup>45</sup> And the counterpunches offered by the PLRA's opponents were no more systematic. Prisoners' rights advocates publicized their own "Top Ten Non-Frivolous Lawsuits," which were filled with horror stories that had led to both individual and court-order lawsuits.<sup>46</sup> The debate, then, was a war of extremes, and generally failed to mention any less-anecdotal evidence. But less-anecdotal evidence is both available and important for assessing either the value or the function (or dysfunction) of inmate litigation. Accordingly, my goal in this Part is to correct the omission.

In section A, I collect and present prior research by others, summarizing and explaining the broad scope of inmate cases' subject matter. In section B, I take up the issue of inmate litigiousness or, as sometimes alleged, hyperlitigiousness. I conclude that while inmates are extraordinarily more litigious than noninmates *in federal court*, the obvious differential disappears once it is recognized that the appropriate comparison should include state-court filing rates as well. I then discuss some possible causes of any slight differential in tendency to file lawsuits. In section C, I set out longitudinal data on inmate case filings, and observe, as have others before me, that although the number of inmate filings in federal court rose over time (until 1996, that is), the increase was largely driven by rising incarceration. Here, what I am adding to prior scholarship is more detailed, accurate, and up-to-date information on filing rates; some statistical support relating to the connection between filings and inmate population; and a working hypothesis about the proportion of the inmate case docket filed by jail inmates. In section D, assessing the charge that the mass of trivial or frivolous cases filed by inmates has actually rendered courts unwilling or unable to find and process the serious cases, I adduce relevant quantitative evidence (in particular, Administrative Office data not previously discussed by scholars) as to the time spent by federal judges on inmate cases. I conclude that it does seem to be true that judges and court staff spent remarkably little time on the average inmate case.

#### A. *The Varied Subject Matter of Inmate Litigation*

This Article's quite extended look at inmate civil rights litigation requires clarity about the subject matter of the cases. The several published

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<sup>45</sup> Second Circuit Court of Appeals Judge Jon Newman investigated the three frivolous-sounding cases described by several Attorneys General in a letter to the *New York Times*. See Vacco et al., *supra* note 41. Newman researched each of the cases discussed in the letter, and found them far less trivial than the descriptions, which he described as "at best highly misleading and, sometimes, simply false." Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520 (1996) (detailing findings).

<sup>46</sup> Paul Wright & Dan Pens, *Prison Legal News' Top Ten Non-Frivolous Prisoner Lawsuits*, in THE CELLING OF AMERICA 58, 58-61 (Daniel Burton-Rose with Dan Pens & Paul Wright eds., 1998); ACLU National Prison Project, *The Top Ten Non-Frivolous Lawsuits Filed by Prisoners* (Feb. 11, 1996), at <http://www.prisonwall.org/ten.htm>.

detailed inquiries into district court inmate case dockets<sup>47</sup> relate quite consistent accounts, together establishing that four leading topics of correctional-conditions litigation in federal court are physical assaults (by correctional staff or by other inmates), inadequate medical care, alleged due process violations relating to disciplinary sanctions, and more general living-conditions claims (relating, for example, to nutrition or sanitation).<sup>48</sup>

<sup>47</sup> Assessing case subject matter requires laborious field research looking at case files. (Reported judicial opinions are not at all reliable as a window into the filed docket, since only a small and decidedly nonrandom portion of the docket results in published opinions. See, e.g., Eisenberg & Schwab, *What Shapes Perceptions*, *supra* note 15, at 535.) I am aware of eight such field studies, which between them cover inmate cases filed at various times in a large number of federal district courts from 1971 to 1994. They are: William S. Bailey, *The Realities of Prisoners' Cases Under 42 U.S.C. Section 1983: A Statistical Survey in the Northern District of Illinois*, 6 LOY. U. CHI. L.J. 527, 529, 550 tbl.2 (1975) (examining all 366 § 1983 cases filed by inmates in the federal district court for the Northern District of Illinois in 1971 and 1973); Turner, *When Prisoners Sue*, *supra* note 15, at 616 (1979) (examining 664 inmate civil rights cases filed or terminated between 1975 and 1977 in five district courts — the District of Massachusetts, the Eastern District of Virginia, the District of Vermont, the Northern District of California, and the Eastern District of California); Eisenberg, *Section 1983*, *supra* note 15, at 524, 530 (examining all 212 § 1983 cases filed by prisoners in 1975 and 1976 in the Federal District Court for the Central District of California); THOMAS, PRISONER LITIGATION, *supra* note 15, at 117–19 tbl.5e (examining all 3232 inmate civil rights findings filed between August 1977 and 1986 in the federal district court for the Northern District of Illinois); HANSON & DALEY, REPORT ON SECTION 1983 LITIGATION, *supra* note 14, at 8 (examining a random sample of 2738 § 1983 inmate litigation cases terminated in sixteen large federal district courts in 1992); Howard Eisenberg, *Rethinking Prisoner Cases*, *supra* note 15, at 455–56 (examining all 737 inmate civil rights suits filed in 1991 in the district courts for the Southern District of Illinois and the Eastern District of Arkansas, and 200 of the 800 such cases filed in the Eastern District of Missouri); Kim Mueller, Note, *Inmates' Civil Rights Cases and the Federal Courts: Insights Derived from a Field Research Project in the Eastern District Court of California*, 28 CREIGHTON L. REV. 1255, 1284–85 (1995) (examining all fifty-three inmate civil rights cases filed in April 1991 in the Eastern District of California); Henry F. Fradella, *In Search of Meritorious Claims: A Study of the Processing of Prisoner Cases in a Federal District Court*, 21 JUST. SYS. J. 23, 28 & n.4 (1999) [hereinafter Fradella, *In Search of Meritorious Claims*] (examining a random sample of 200 cases filed in 1994 and terminated prior to February 1997).

<sup>48</sup> The following table summarizes eight prior studies of inmate litigation, listing the portion of each studied docket in each of these categories:

Source	% of total docket			
	Assaults	Medical Care	Discipline	Conditions
Bailey, <i>supra</i> note 47, at 550–51 tbl.2.	16.9%	13.4%	32.5%	13% <sup>i</sup>
Turner, <i>When Prisoners Sue</i> , <i>supra</i> note 15, at 623 & n.78.	7.5–10.4% <sup>ii</sup>	20–25% <sup>iii</sup>	3.7–18.8%	5–12%
Eisenberg, <i>Section 1983</i> , <i>supra</i> note 15, at 555 tbl.VI.	8.5% <sup>iv</sup>	13.2%	12.7%	5.2%
THOMAS, PRISONER LITIGATION, <i>supra</i> note 15, at 117–19 tbl.5e.	18.1%	10.8%	12.0%	5.3%

Less frequent but often seen are complaints about freedom of speech, free exercise of religion, and access to courts or mail. In addition, a significant portion of what is usually counted as part of the “inmate civil rights” docket actually consists of filings that less comfortably fit this classification. A small but noticeable percentage of filings are placed in the category by court clerks because their plaintiffs are in prison or jail, though the cases actually concern alleged tortious conduct by non-correctional defendants (usually police). And many more of the cases seek to challenge their plaintiffs’ terms of confinement, based on alleged infirmities in the original convictions, in calculation of sentence, or in parole or probation decisions.<sup>49</sup> The decision to file such cases as ordinary civil complaints rather

HANSON & DALEY, REPORT ON SECTION 1983 LITIGATION, <i>supra</i> note 14, at 17 tbl.3.	21%	17%	13%	13%
Howard Eisenberg, <i>Rethinking Prisoner Cases</i> , <i>supra</i> note 15, at 457. <sup>v</sup>	17.3%	17%	16.3%	13% <sup>vi</sup>
Fradella, <i>In Search of Meritorious Claims</i> , <i>supra</i> note 47, at 34 tbl.5.	6.2%	14.8%	6.9%	11.4%
Mueller, <i>supra</i> note 47, at 1285–86.	21.2%	19.2%	11.5%	can’t tell

Table notes: (i) This figure is an extrapolation; (ii) Staff brutality only — no discussion of violence between inmates; (iii) D. Vt. not included; (iv) Includes “guard harassment” and “mistreatment by other inmates”; (v) Figures are averaged across three districts; (vi) Includes 7% in segregation units.

<sup>49</sup> The following table summarizes the same eight studies’ findings about the portion of the studied inmate dockets *not* involving conditions of confinement:

Source	% of total docket	
	Nonprison defendants	Challenges to conviction, etc.
Bailey, <i>supra</i> note 47, at 550–51 tbl.2.	None listed	34.4%
Turner, <i>When Prisoners Sue</i> , <i>supra</i> note 15, at 623.	Combined: over 20% in each district except D. Vt.	
Eisenberg, <i>Section 1983</i> , <i>supra</i> note 15, at 555 tbl.VI.	8.5%	42.0%
THOMAS, PRISONER LITIGATION, <i>supra</i> note 15, at 117–19 tbl.5e.	5.3%	18.6%
HANSON & DALEY, REPORT ON SECTION 1983 LITIGATION, <i>supra</i> note 14, at 17 tbl.3.	3%	12%
Howard Eisenberg, <i>Rethinking Prisoner Cases</i> , <i>supra</i> note 15, at 457.	None listed (averaged across the three subject districts)	9.7%
Fradella, <i>In Search of Meritorious Claims</i> , <i>supra</i> note 47, at 34 tbl.5.	None listed	10.3%

than as petitions for a writ of habeas corpus is their plaintiffs', but under current doctrine, it is a disqualifying mistake.<sup>50</sup>

It seems from this listing that notwithstanding the many top-ten lists, inmates' civil rights suits, at least in federal court (where the information is), mostly concern real hardships inherent in prison life, not peanut butter. Of course, the categories I mention could be capacious enough that even lawsuits about peanut butter (or mind-control or other sillinesses) are hidden in them. But the researchers who did the work compiling the categories and putting cases in them say otherwise.<sup>51</sup> The lawsuits may be obviously legally nonmeritorious — suing immune defendants, or alleging mere negligence rather than deliberate indifference, say. They may even be full of lies (something researchers have no way of telling). But the best evidence available demonstrates that the 1995 top-ten lists' major accusation — that typical inmate complaints were, on their face, trivial, laughable, and obviously undeserving of serious concern, much less legal accountability — was incorrect.

The above topic analysis covers only the federal civil rights suits; there are also a good many suits, about which far less is known, brought under state law and non-civil rights federal causes of action.<sup>52</sup> So while the top-

Mueller, <i>supra</i> note 47, at 1285–86.	None listed — but this may be the result of the selection criteria
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<sup>50</sup> See *Heck v. Humphrey*, 512 U.S. 477, 487 (1994) (“[W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.”); *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) (“[W]hen a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.”).

<sup>51</sup> Ted Eisenberg noted in 1982 that “[a]s is true of nonprisoner cases, most prisoner section 1983 complaints are not plainly trivial assertions implicating little or no federal interest.” Eisenberg, *Section 1983*, *supra* note 15, at 538. Thomas’s observations in the Northern District of Illinois were that 38% of prison conditions cases were screened out as meritless (though not necessarily frivolous), and then about 60% of the remaining cases resulted in some kind of plaintiffs’ relief. THOMAS, PRISONER LITIGATION, *supra* note 15, at 177 tbl.7b. He summarizes: “the high proportion of prisoner suits receiving some relief (about half) suggests that there are far fewer frivolous cases than commonly assumed.” *Id.* at 120–21. Hanson and Daley found that only 19% of the cases they looked at were dismissed as frivolous. HANSON & DALEY, REPORT ON SECTION 1983 LITIGATION, *supra* note 14, at 20 tbl.5. Fradella noted that only six of 290 claims (in 200 cases) were “factually absurd”; he characterized another nine as “I don’t like it” claims. Fradella, *In Search of Meritorious Claims*, *supra* note 47, at 47 tbl.12. And Howard Eisenberg conceded that many inmate cases were unsuccessful, legally, because of “restrictive decisions in previous cases,” but he emphasized that his file reviews demonstrated to him that the cases “present serious claims that are supported factually,” and that the “most ‘frivolous’ cases are neither fanciful, ridiculous, nor vexing.” Howard Eisenberg, *Rethinking Prisoner Cases*, *supra* note 15, at 440.

<sup>52</sup> Inmates typically enforce their federal constitutional rights using the federal Civil Rights Act of 1871, 42 U.S.C. § 1983 (2000), which authorizes private suits in federal or state court against nonfederal government actors for violation of federal rights. Constitutional lawsuits against federal official

ten lists are misleading as general characterizations of inmate litigation's subject matter, there is a reality that underlies state and local officials' feeling that they are overwhelmed by lawsuits over a huge range of issues: they are. Indeed, individual inmate civil rights litigation itself covers a far wider range of topics than most federal civil rights litigation. The reason is the one the Supreme Court noted in a much-quoted passage from *Preiser v. Rodriguez*:

For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor,

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defendants proceed similarly, though without statutory authorization. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). But lawsuits may be founded on a variety of nonconstitutional bases as well. The relevant areas of law vary a good deal by jurisdiction. Federal inmates can file administrative claims and eventually Administrative Procedure Act lawsuits relating to discipline and other grievances, including those about lost and damaged property and workplace injuries. On discipline, see 28 C.F.R. § 541.19 (2001), which provides for administrative appeals of Federal Bureau of Prisons disciplinary decisions. On grievances in general, see 28 C.F.R. pt. 542 (2001), which establishes the Administrative Remedy Program. On workplace injuries in particular, see 18 U.S.C. § 4126(c)(4) (2000), requiring compensation for inmates' work injuries, and 28 C.F.R. pt. 301 (2001), establishing the Inmate Accident Compensation program. On the availability under the Administrative Procedure Act, 5 U.S.C. § 706 (2000), to federal inmates of judicial review for arbitrary and capricious decisions, see, for example, *Thompson v. U.S. Federal Prison Industries*, 492 F.2d 1082, 1084 (5th Cir. 1974). In many circumstances, federal inmates seeking compensation for a variety of personal injuries also can first file administrative claims, 28 C.F.R. §§ 543.30–32, and then federal court cases under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2401(b), 2671–2680 (2000). See *United States v. Muniz*, 374 U.S. 150 (1963) (allowing Federal Tort Claims Act lawsuit by federal prisoners for personal injuries caused by the negligence of government employees).

State and local inmates can file analogous lawsuits in state court, under a variety of common-law and statutory causes of action. Because so little information is available about state filings by nonfederal inmates and non-civil-rights filings by federal inmates, the rest of this Article focuses on federal civil rights filings by inmates and, in particular, those federal court filings classified by the various district court clerks' offices as "prisoner civil rights" cases. But I pause here to note that such data as are available demonstrate that state-court litigation is an important piece of the litigation landscape: a very gross estimate might be that about a quarter of what prison and jail officials think of as inmate litigation is currently filed in state court. I derive this estimate from twenty-five responses to a survey I sent last year to all fifty state prison systems as well as large jails around the country. The proportion of litigation in state court varied widely: four agencies estimated that 15% or less of their litigation was in state court; four estimated between 20% and 40%; five estimated 50%; seven between 60% and 75%; and three estimated 90%. The *average* estimate was 50% — but the agencies that reported a lower percentage of state litigation also tended to report more litigation overall. Adding up all reported litigation across agencies, one quarter of the total was in state court. This simple sum is not very satisfactory methodologically, but additional analyses and fuller results of the survey are beyond the scope of this Article and will be reported in a future publication. For now, suffice it to note that a 25% estimate is not inconsistent with the tiny bit of evidence available elsewhere. See Dean J. Champion, *Jail Inmate Litigation in the 1990s*, in *AMERICAN JAILS: PUBLIC POLICY ISSUES* 197, 211 (Joel A. Thompson & G. Larry Mays eds., 1991) [hereinafter *AMERICAN JAILS*] (reporting a declining proportion of civil rights litigation in state court by inmates in seventy-one non-randomly chosen jails, from over half in 1981 to one-third in 1985).

with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State.<sup>53</sup>

That is, first, more types of injuries are federally actionable for inmates than for people whose relationships with the state are less all-embracing.<sup>54</sup> And second, in any area of law in which inmates retain legal rights similar to those of noninmates, those rights tend to run not against many different persons, firms, or agencies, but against one litigating opponent — the prison or jail that holds them, which is bound to feel unusually burdened by the resulting litigation.

### B. Inmate Litigation Rates

The comparatively broad scope of constitutional rights in prison and jail explains not only the variety of topics in inmate litigation, but also inmates' filing rates in federal courts, which, as the litigation's critics have emphasized, have long been extremely high.<sup>55</sup> The national average shows a dramatic filing difference between inmates and noninmates. In 1995, for example, inmates filed federal civil rights cases at the rate of about twenty-five per 1000 inmates;<sup>56</sup> noninmates, in contrast, filed civil suits in federal court at a rate of about 0.7 per 1000 noninmates.<sup>57</sup> So nationally, inmates filed about thirty-five times as frequently as noninmates.

Disaggregated, both inmate filing rates and their trends over time have varied enormously from state to state and even from prison to prison. In 1993,<sup>58</sup> Iowa had the highest state rate: nonfederal inmates there filed law-

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<sup>53</sup> *Preiser*, 411 U.S. at 492.

<sup>54</sup> *Compare Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that "deliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment), and *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) (holding that a mentally retarded person involuntarily committed to a government institution has "constitutionally protected interests in conditions of reasonable care and safety"), with *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 201 (1989) (distinguishing *Estelle* and *Youngberg*, and holding that, ordinarily, state and local governments have no constitutional obligation to protect citizens from harm by private actors).

<sup>55</sup> See, e.g., *Cleavinger v. Saxner*, 474 U.S. 193, 211 (1985) (Rehnquist, J., dissenting) ("With less to profitably occupy their time than potential litigants on the outside, and with a justified feeling that they have much to gain and virtually nothing to lose, prisoners appear to be far more prolific litigants than other groups in the population."); 141 CONG. REC. S7524 (daily ed. May 25, 1995) (statement of Sen. Dole).

<sup>56</sup> See *infra* Table I.A.

<sup>57</sup> The Administrative Office reports that 162,268 nonprisoner/nonforfeiture cases were filed in federal district court in 1995 (bankruptcy filings not included), ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1995 REPORT OF THE DIRECTOR 144 tbl.C-3 [hereinafter JUDICIAL BUSINESS: 1995], while the total U.S. population in 1995 was 262,803,000, see U.S. Census Bureau *Current Population Reports*, in STATISTICAL ABSTRACT OF THE UNITED STATES 2001, at 16 tbl.14.

<sup>58</sup> I chose 1993 for this computation because it is the last year before the PLRA for which state-by-state jail population data are available. For jail population data, see BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL JAIL CENSUS, 1993 (ICPSR Study No. 6648, July 13, 1996) [hereinafter BUREAU OF JUSTICE STATISTICS, 1993 JAIL CENSUS], at

suits at a rate of over eighty cases per 1000 inmates. Massachusetts and North Dakota had the lowest: nonfederal inmates there filed only three or four petitions per 1000 inmates. Nearly as much variability exists among prisons. Wisconsin conducted an audit of its own inmate litigation from 1988 to 1992 and found that the litigation rate at its most litigious facility (a maximum security men's prison) was over five times the rate at another maximum security men's prison, and nearly fifteen times the rate of litigation at the least litigious facility (a medium security men's prison).<sup>59</sup> Not only do the rates vary by state, but the trends do as well.<sup>60</sup> Still, while this detail may be interesting for a full assessment of inmate filings, it is clearly the general situation that inmates file more *federal* claims, proportional to their population, than do noninmates. But the Supreme Court's point in *Preiser* suggests that comparison of inmates' and noninmates' *federal* filing rates is misleading. For noninmates, grievances analogous to inmate cases (against "landlord[s]," "tailor[s]," "neighbor[s]," or "banker[s]," for instance) are litigated in state rather than federal court. And noninmate filing rates are vastly higher in state court than in federal court. In 1995, the nation's state courts reported nearly fifteen million filings; excluding family and traffic cases, overall filing rates were fifty-six per 1000 population<sup>61</sup> — *double* the inmate federal filing rate.<sup>62</sup> Even if

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<http://www.icpsr.umich.edu:8080/ICPSR-STUDY/06648.xml>. For other data and compilation, see Schlanger, *Technical Appendix*, *supra* note 3. Using data from 1995, Lynn Branham makes a similar point. See LYNN S. BRANHAM, CRIMINAL JUSTICE SECTION, AM. BAR ASS'N, LIMITING THE BURDENS OF *PRO SE* INMATE LITIGATION: A TECHNICAL-ASSISTANCE MANUAL FOR COURTS, CORRECTIONAL OFFICIALS, AND ATTORNEYS GENERAL 23–27 (1997) [hereinafter BRANHAM, *PRO SE* INMATE LITIGATION].

<sup>59</sup> Derived from BRANHAM, *PRO SE* INMATE LITIGATION, *supra* note 58, at 26 tbl.2 (reporting 1993 research by the Wisconsin Legislative Audit Bureau).

<sup>60</sup> Schlanger, *Technical Appendix*, *supra* note 3.

<sup>61</sup> Figures derived from BRIAN J. OSTROM & NEAL B. KAUDER, EXAMINING THE WORK OF STATE COURTS, 1995: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 19 (1995). Because Georgia and Pennsylvania did not report, neither the numerator nor the denominator includes figures from those states.

<sup>62</sup> For many states, total filing figures include probate and other estate cases as well. But when estate cases are subtracted, the state filing rate drops only by three per 1000 population. See *id.* at 17 (estimating estate cases at twelve percent of the unified and general jurisdiction docket, and under two percent of the limited jurisdiction docket). And a good many cases — as much as forty percent — were brought by corporations rather than individuals. But even corporate cases resolve disputes among natural persons. This estimate is derived from BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: CONTRACT CASES IN LARGE COUNTIES 2 tbl.1, 3 tbl.3 (1996); and BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: TORT CASES IN LARGE COUNTIES 4 tbl.5 (1995). These sources report that there were about 764,000 civil cases in the categories of tort, contract, and real property disposed of in state courts in the nation's seventy-five largest counties between July 1, 1991 and June 30, 1992. Of this total, 354,000 of the tort cases (93.6% of all tort cases) and 94,000 of the contract cases (25.7% of all contract cases) were brought by individuals. No information is provided on the nature of the plaintiffs in real estate cases. Assuming (implausibly but conservatively) that *none* of the real estate cases were brought by individuals, 58% of the cases in the sampled docket were brought by individual plaintiffs. The *full* state court docket also in-

inmates file as many cases in state court as they do in federal court (a very high estimate of state court filings — it's more likely that inmates file only one-third as many cases in state court as in federal court<sup>63</sup>), the total (state and federal) inmate filing rate approximates the total noninmate filing rate. Oddly enough, given *Preiser's* prominence, I am not aware of any prior scholarship that has undertaken this analysis, though it seems to me crucial for any fair account of inmate litigiousness.

It is important to note, however, that the litigation rate per person does not really capture what is usually meant by "litigiousness" — something more like a "taste" for litigation as a means of resolving disputes. As Deborah Hensler has commented:

Most researchers would agree that measuring litigiousness requires relating the number of claims or suits filed (or some other measure of litigation) to the number of opportunities that arise. At best, however, researchers tracking the amount of litigation nationwide have been able to relate aggregate filings only to population. By themselves, such data do not show much about the propensity to sue.<sup>64</sup>

Researchers have found that in many (non-automobile) contexts, unincarcerated people file lawsuits around ten percent as often as they experience a loss of at least \$1000 that they blame on someone else.<sup>65</sup> Whether inmates' claiming behavior is similar is unknown. It is not implausible that inmates are more likely to bring lawsuits over their disputes, all else equal, than noninmates. After all, inmates' relationship with the state is highly negative, so the frequently observed neighborly avoidance of litigation in the interest of an ongoing amicable relationship<sup>66</sup> seems inapplicable. And inmates obviously lack the option of problem-solving by "exit" rather than by "voice,"<sup>67</sup> and they have plenty of time on their hands. There may be something about prison culture, too, that stigmatizes "lumping it," as theorists, following Felstiner,<sup>68</sup> often term a decision not to seek a remedy for

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cludes, especially, small claims — which presumably are more often filed by individual plaintiffs. See OSTROM & KAUDER, *supra* note 61, at 17 (reporting that in 1995, small claims made up 22% of the caseload in unified and general jurisdiction courts in seventeen states and 32% of the caseload in limited jurisdiction courts in twelve states). So, again, estimating corporate filings at 40% of state court dockets is, if anything, too high.

<sup>63</sup> This estimate is explained above. See *supra* note 52.

<sup>64</sup> Hensler, *supra* note 23, at 56 (footnotes omitted).

<sup>65</sup> See, e.g., David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLAL. REV. 72, 86–87 (1983) (reporting that 11.2% of all disputes between individuals involving at least \$1000 result in a lawsuit).

<sup>66</sup> See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 64 (1991) (concluding in the context of cattle trespass, that "[o]rdinary people, it seems, do not often turn to attorneys to help resolve disputes").

<sup>67</sup> See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

<sup>68</sup> William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 L. & SOC'Y REV. 63, 81 (1974). See generally William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 L. & SOC'Y REV. 631

an event conceptualized as an injury. Prison memoirs and accounts by observers are replete with the idea that, in prison, to “lump” a grievance is to be perceived as weak and thereby to be rendered an attractive target for predators.<sup>69</sup> This attitude could easily contribute to litigiousness over what outsiders might consider to be minor annoyances. For example, Kenneth Parker, the poster child for the anti-inmate lawsuit forces, explained to the *New York Times* why he brought his lawsuit over peanut butter: “It was just the idea of them taking something from me . . . . If I didn’t file the suit, I would have felt like I was punked out. Like you could take anything from me and get away with it.”<sup>70</sup>

Yet presumably at least some inmates avoid suing because they are afraid of retaliation; one survey found that inmates were more likely to have observed jailhouse lawyers being disciplined than any other group of prisoners.<sup>71</sup> The prevalence of such retaliation is unknown, but retaliation certainly occurs.<sup>72</sup> And regardless of retaliation’s real prevalence, the survey results demonstrate that inmates believe it happens, which is the point here.

Whatever the impact of these factors (which would tend respectively to boost and dampen inmate propensity to litigate), ultimately the evidence is clear: once state and federal filings are combined, inmates and noninmates have comparable per capita civil litigation rates. Unless everyone in America is hyperlitigious,<sup>73</sup> the charge of inmate hyperlitigiousness proves inapt.

### C. Inmate Filing Rates over Time: The “Deluge”

The next piece of the PLRA advocates’ case was that inmate suits had skyrocketed and were deluging both courts and state and local governments. Figures I.A and I.B present the number of newly filed complaints categorized since 1970 by the Administrative Office of the U.S. Courts as pertaining to “prisoner civil rights” or “prison conditions,” together with

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(1980–1981) (exploring the processes by which injury is or is not perceived, does or does not yield a grievance, and does or does not yield a dispute).

<sup>69</sup> See, e.g., Norval Morris, *The Contemporary Prison: 1965–Present*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 227, 231 (Norval Morris & David J. Rothman eds., 1995) (diary of a prisoner, explaining this dynamic).

<sup>70</sup> Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort To Limit Filings*, *N.Y. TIMES*, Mar. 21, 1994, at A1 (internal quotation marks omitted).

<sup>71</sup> *THE PRISON DISCIPLINE STUDY, THE PRISON DISCIPLINE STUDY: EXPOSING THE MYTH OF HUMANE IMPRISONMENT IN THE UNITED STATES* (1991), reprinted in *CRIMINAL INJUSTICE: CONFRONTING THE PRISON CRISIS* 92, 96 (Elihu Rosenblatt ed., 1996).

<sup>72</sup> See, e.g., *Sisneros v. Nix*, 884 F. Supp. 1313, 1323–24, 1333–35 (S.D. Iowa 1995) (describing retaliation against an inmate who filed several grievances concerning prison policy).

<sup>73</sup> The broad charge of American hyperlitigiousness, of course, animates many of the noninmate tort reform efforts around the country. As the Contract with America put it, “[a]lmost everyone agrees that America has become a litigious society: We sue each other too often and too easily.” *CONTRACT WITH AMERICA*, *supra* note 8, at 144.

filing rates per 1000 inmates. Table I.A presents the same data in more detail and includes inmate population figures.

Before I discuss the trends set out in the figures and table, two methodological points are important to underscore. First, the filings numbers in Table I.A are somewhat different from the figures published annually by the Administrative Office of the U.S. Courts. For a variety of reasons I have, here and elsewhere, relied on my own manipulations of the Administrative Office's raw data (described in more depth in the Data Appendix) rather than on its published numbers. With respect to the current filings discussion, the published filings numbers are quite appropriate for analyzing court workload (which is the primary reason the Administrative Office collects its data). But for my purpose — scrutiny of litigation trends and burdens — the published numbers inflate total filings, because they record each time a case file is opened *or reopened* in any district court.<sup>74</sup> Thus many cases are counted twice or more: cases that are transferred from one district to another, or closed by the district court and then reopened for some reason (for example, on remand from the court of appeals). In addition, using raw data allows calculation of a consistent statistical year. (When I analyze outcomes, below, the assembled database becomes not simply more accurate but absolutely necessary, because the published tables do not cover outcomes at all.)

In addition, the filing *rates* I set out below differ even more dramatically from those used in prior scholarship,<sup>75</sup> because figures presented in both Justice Department publications and prior academic discussions<sup>76</sup> were calculated using inmate population data from prisons only, completely omitting the one-third of the nation's inmate population housed in

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<sup>74</sup> In 2001, for example, the Administrative Office reported 250,907 "total filings," of which 203,931 were listed as "original" and 30,683 were "removals from state courts." The remaining 16,293 filings were "remands," "reopens," "transfers," or "cases of unknown origin" — each of which was also counted at least one other time when it was itself "original." See JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2001 REPORT OF THE DIRECTOR 44 tbl.S-7. The charts that separate out cases by "nature of suit" — including inmate civil rights — include only "total" numbers. *Id.* at 130 tbl.C-2. Moreover, as I describe in the Data Appendix, *infra*, it is possible to detect numerous other cases that are actually reopenings though classified by the Administrative Office as "original" filings.

<sup>75</sup> See, e.g., Eisenberg & Schwab, *Constitutional Tort Litigation*, *supra* note 15, at 667 tbl.IV; Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 16 tbl.2 (1986) [hereinafter Galanter, *The Day After*].

<sup>76</sup> See, e.g., SCALIA, PRISONER PETITION TRENDS, *supra* note 14, at 4 tbl.3. This is just an example of the broad tendency of observers of inmate litigation — indeed, observers of much about corrections — to ignore jails. See, e.g., Michael O'Toole, *Jails and Prisons: The Numbers Say They Are More Different than Generally Assumed*, AM. JAILS MAG. (1996) [hereinafter O'Toole, *Jails and Prisons*], <http://www.corrections.com/aja/mags/articles/toole.html>. To be completely clear about my terms, a "jail" is paradigmatically a county or city facility that houses pretrial defendants who are unable to make bail, misdemeanor offenders, relatively short-term felony offenders (the term varies by state — most often, it's under a year, but it can be far more), and short- and long-term offenders awaiting transfer to a state prison. A prison, by contrast, is a state (or federal) facility that houses long-term felony offenders. For more on the operative differences between jails and prisons, see *infra* section V.B.1.

local jails. Leaving jail inmates out of the denominators for litigation rates would make sense if suits against jail officials were rare. But the available evidence from field research establishes that there are a great many jail cases,<sup>77</sup> a fact that supports Table I.A's inclusion of jail inmates in calculations of overall inmate filing rates.

But while Table I.A presents one filing-rate figure per year, that is not to say that jail and prison inmates file cases at the same rate.<sup>78</sup> Indeed, re-analyzing the same field research actually allows a ballpark estimate of the relation between the filing rates of jail inmates and those of state prisoners. The method by which I have derived this estimate is conceptually simple (though somewhat complicated to carry out). I compared the amount of jail litigation found in two studies with the number of jail inmates in the relevant jurisdictions during the relevant time frame. The first study, by Hanson and Daley, found that about one-third of inmate cases involved jails, in districts that (taken together) turn out to have had an incarcerated population about evenly split between jails and prisons.<sup>79</sup> Thus, jail in-

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<sup>77</sup> Three published studies include data on jail versus prison litigation. In the largest of the studies, which randomly selected inmate cases terminated in 1992 in sixteen large district courts, Hanson and Daley found just over a third of the cases they examined involved jails. HANSON & DALEY, REPORT ON SECTION 1983 LITIGATION, *supra* note 14, at 8, 16. Their sample was pulled from: M.D. Ala., N.D. Cal., M.D. Fla., S.D. Fla., N.D. Ind., S.D. Ind., M.D. La., E.D. La., E.D. Mo., W.D. Mo., E.D.N.Y., S.D.N.Y., E.D. Pa., W.D. Pa., N.D. Tex., and S.D. Tex. The general conclusion that jail inmates bring a large number of lawsuits is buttressed by two other studies. Jim Thomas looked at inmate civil rights cases in the Northern District of Illinois and found that fifteen percent of those filed between 1977 and 1986 were brought by jail inmates. See THOMAS, PRISONER LITIGATION, *supra* note 15, at 122 tbl.5g. Henry Fradella looked at a sample of 200 inmate civil rights cases filed in 1994 and terminated by early 1997 in two of the divisions of the federal district court for the District of Arizona, and found that half were filed by jail inmates. See Fradella, *In Search of Meritorious Claims*, *supra* note 47, at 29.

<sup>78</sup> There are two ways to think of filing rates. A rate could be calculated from the typical number of inmates in a given facility or set of facilities — either by average daily population or by a sample one-day count. This is what I have chosen to do, using the one-day count done at year-end by prisons and mid-year by jails. A rate could, however, be calculated instead from annual admissions figures, which record how many people are taken into a given facility in a given year. This would make sense in some ways — the filing rate would represent the proportion of people who came into contact with an institution who decided to sue it. If filing rates were by admissions rather than a population count, jail inmates' filing rate would look vastly lower, because in the course of a year, jails admit over twenty times as many people as they house on any given day. See O'Toole, *Jails and Prisons*, *supra* note 76.

<sup>79</sup> See HANSON & DALEY, REPORT ON SECTION 1983 LITIGATION, *supra* note 14, at 16. The overrepresentation of jail inmates occurred because this study focused on large district courts, which are typically in urban areas, where jail inmates are concentrated. My population estimate is derived as follows: I used data from the federal Bureau of Justice Statistics 1990 Prison Census, and 1988 and 1993 Jail Censuses. 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), *at* <http://www.icpsr.umich.edu:8080/ICPSR-STUDY/09908.xml>; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL JAIL CENSUS, 1988 (ICPSR Study No. 9256, last updated June 24, 1997), *at* <http://www.icpsr.umich.edu:8080/ICPSR-STUDY/09256.xml>; BUREAU OF JUSTICE STATISTICS, 1993 JAIL CENSUS, *supra* note 58. Because the censuses do not include federal court district information, I first pulled out facilities in the relevant states and then added in district information, after looking up the

mates filed at one-half the rate of prison inmates. The second study, by Thomas, found that jail inmates brought fifteen percent of all inmate litigation, in a district in which, by my calculation, jail inmates made up sixty percent of the incarcerated population.<sup>80</sup> In that sample, the jail litigation rate was about twelve percent of the prison litigation rate.<sup>81</sup> In sum, while it is clear that jail inmates often sue their jailers, they appear to sue at a substantially lower rate than prison inmates.<sup>82</sup> It may be possible to use statistical methods to gain a more systematic sense of the relationship be-

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addresses from the censuses. Occasionally, where address information was missing in the census, I used the name of the facility or its county code. I was unable to figure out the federal court district for seven prisons and thirty-one jails, but they were small facilities, holding less than 0.3% of the total relevant population, and I therefore simply left them out. In order to compare jails and prisons, I needed populations in the same year. So to approximate the 1990 jail population, I took the 1988 jail population and added two-fifths of the increase between 1988 and 1993. Using this estimate, fifty-two percent of the incarcerated population in Hanson and Daley's districts lived in jails in 1990.

<sup>80</sup> See THOMAS, PRISONER LITIGATION, *supra* note 15, at 122 tbl.5g. Like Hanson and Daley's, Thomas's study was of an urban district (the Northern District of Illinois), which explains the overrepresentation of jail inmates. My methodology for deriving an estimate of the population split between jails and prisons in the Northern District of Illinois was similar. I looked at the Bureau of Justice Statistics 1984 Prison Census and 1983 Jail Census. 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), at <http://www.icpsr.umich.edu:8080/ICPSR-STUDY/08444.xml>; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL JAIL CENSUS, 1983 (ICPSR Study No. 8203, last updated Feb. 13, 1997), at <http://www.icpsr.umich.edu:8080/ICPSR-STUDY/08203.xml>. Significant underrepresentation of jail inmates among the group of litigating prisoners makes some sense, because Thomas's study district included the Illinois prison Stateville, which has long been famous for its jailhouse lawyers. See, e.g., *Cooper v. Pate*, 378 U.S. 546, 546 (1964) (allowing a lawsuit by an inmate in Stateville to proceed, in the first modern inmate civil rights decision by the U.S. Supreme Court); see also JAMES B. JACOBS, STATEVILLE: THE PENITENTIARY IN MASS SOCIETY 37 (1977) [hereinafter JACOBS, STATEVILLE] (describing official efforts to squelch the activities of Stateville's inmate writ-writers); THOMAS, PRISONER LITIGATION, *supra* note 15, at 87. For my work on both Thomas's and Hanson and Daley's data, see Schlander, *Technical Appendix*, *supra* note 3.

<sup>81</sup> For each study, the comparison of the jail filing rate to the prison filing rate is equal to the ratio of (*jail filing proportion/jail population proportion*) to (*prison filing proportion/prison population proportion*).

<sup>82</sup> The only data that suggest otherwise come from Henry Fradella's study of inmate civil rights suits in two divisions of the District of Arizona. Fradella found that jail inmates brought half of the cases in his study. I estimate that at the relevant time, jail inmates made only about thirty percent of the incarcerated population in the areas covered. (I used data from the Bureau of Justice Statistics 1993 and 1999 Jail Censuses and 1995 Prison Census to derive the estimate. See BUREAU OF JUSTICE STATISTICS, 1993 JAIL CENSUS, *supra* note 58; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL JAIL CENSUS, 1999 (ICPSR Study No. 3318, last updated Aug. 16, 2002) [hereinafter BUREAU OF JUSTICE STATISTICS, 1999 JAIL CENSUS], at <http://www.icpsr.umich.edu:8080/ICPSR-STUDY/03318.xml>; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 1995 (ICPSR Study No. 6953, Apr. 20, 1998), at <http://www.icpsr.umich.edu:8080/ICPSR-STUDY/06953.xml>.) Jail inmates, then, filed at twice the rate prison inmates did. But the defendant in nearly all of the jail suits in Fradella's study was the Maricopa County Sheriff's Office. See Fradella, *In Search of Meritorious Cases*, *supra* note 47, at 30 tbl.1. Maricopa County Sheriff was at the time (and continues to be) Joe Arpaio, who boasts of being "America's toughest sheriff" and has the litigation docket to prove it. See *infra* pp. 1679-80.

tween the jail and prison rates without further field research, by joining available information on jail and prison populations by state and by year with information on filing trends by state. But this awaits future research; for present purposes, it is enough to say that if the Hanson and Daley and Thomas studies yield a representative range of the proportion of individual inmate cases filed by jail inmates, jail inmates file between six and twenty percent of the individual inmate cases against nonfederal defendants in federal court — far too high a percentage to ignore.<sup>83</sup> For this reason, Table I.A includes jail inmates in its filing-rate calculations.

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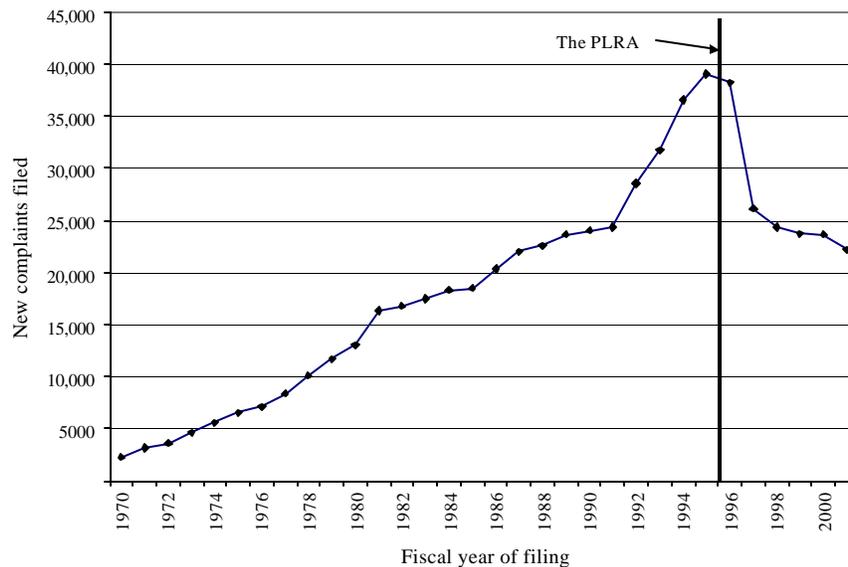
<sup>83</sup> The estimate is calculated as follows: Jail inmates constitute one-third of the total inmate population. If, as I derive from the Thomas study, their filing rate is 12% of prison inmates' filing rate, then jail inmates file four cases ( $12 \times 1/3$ ) for every sixty-seven cases ( $100 \times 2/3$ ) prison inmates file. The jail inmates' four cases amount to 5.7% of the total of the two categories, seventy-one. If, as I derive from the Hanson and Daley study, jail inmates file at one-half the rate prison inmates do, then they file 16.67 cases ( $50 \times 1/3$ ) for every sixty-seven cases prison inmates file — which makes 20% of the sum.

TABLE I.A: INMATE POPULATION AND CIVIL RIGHTS FILINGS  
IN FEDERAL DISTRICT COURT, 1970–2001<sup>84</sup>

Fiscal year of filing	Incarcerated population (all figures are for people in custody)				Inmate civil rights filings in federal district court			Filings per 1000 inmates (estimates)
	Total	State prison, year-end	Federal prison, year-end	Jail, mid-year	Total	Non-federal defendants	Federal defendants	
1970	357,292	176,391	20,038	160,863	2267	2106	161	6.3
1971		177,113	20,948		3163	2949	214	(8.8)
1972		174,379	21,713		3620	3373	247	(10.2)
1973		181,396	22,815		4646	4233	413	(12.8)
1974		196,105	22,361		5559	5156	403	(14.7)
1975		229,685	24,131		6523	6004	519	(15.8)
1976		248,883	29,117		7076	6661	415	(16.2)
1977		258,643	30,920		8335	7810	525	(18.5)
1978	454,444	269,765	26,285	158,394	10,068	9473	595	22.2
1979		281,233	23,356		11,681	11,094	587	(24.6)
1980	503,586	295,819	23,779	183,988	13,047	12,439	608	25.9
1981	556,814	333,251	26,778	196,785	16,302	15,483	819	29.3
1982	612,496	375,603	27,311	209,582	16,793	16,019	774	27.4
1983	647,449	394,953	28,945	223,551	17,485	16,719	766	27.0
1984	683,057	417,389	30,875	234,500	18,300	17,377	923	26.8
1985	744,208	451,812	35,781	256,615	18,445	17,560	885	24.8
1986	800,880	486,655	39,781	274,444	20,324	19,506	818	25.4
1987	858,687	520,336	42,478	295,873	22,005	21,231	774	25.6
1988	950,379	562,605	44,205	343,569	22,582	21,661	921	23.8
1989	1,078,935	629,995	53,387	395,553	23,647	22,580	1067	21.9
1990	1,148,702	684,544	58,838	405,320	24,004	22,814	1190	20.9
1991	1,219,014	728,605	63,930	426,479	24,331	23,355	976	20.0
1992	1,295,150	778,495	72,071	444,584	28,530	27,501	1029	22.0
1993	1,369,185	828,566	80,815	459,804	31,679	30,614	1065	23.1
1994	1,476,621	904,647	85,500	486,474	36,551	35,153	1398	24.8
1995	1,585,586	989,004	89,538	507,044	39,008	37,649	1359	24.6
1996	1,646,256	1,032,676	95,088	518,492	38,223	36,770	1453	23.2
1997	1,743,643	1,074,809	101,755	567,079	26,132	25,002	1130	15.0
1998	1,816,931	1,113,676	110,793	592,462	24,345	23,185	1160	13.4
1999	1,893,115	1,161,490	125,682	605,943	23,705	22,566	1139	12.5
2000	1,931,339	1,176,269	133,921	621,149	23,598	22,412	1186	12.2
2001	1,955,705	1,181,128	143,337	631,240	22,206	20,973	1233	11.4

<sup>84</sup> For year-end state prison population figures in 1970, see U.S. DEP'T OF JUSTICE, PRISON-

Figure I.A: New Inmate Civil Rights Filings  
in Federal District Court, 1970–2001



ERS IN STATE AND FEDERAL INSTITUTIONS: 1968–1970, NAT'L PRISONER STATISTICS BULL., Apr. 1972, at 22 tbl.10c. For the 1971 to 1974 figures, see U.S. DEP'T OF JUSTICE, PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DECEMBER 31, 1974, NAT'L PRISONER STATISTICS BULL., June 1976, at 14 tbl.1. For the 1975 figures, see U.S. DEP'T OF JUSTICE, PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DECEMBER 31, 1975, NAT'L PRISONER STATISTICS BULL., Feb. 1977, at 36 app. 2, tbl.1. For the 1976 figures, see U.S. DEP'T OF JUSTICE, PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DECEMBER 31, 1977, NAT'L PRISONER STATISTICS BULL., Feb. 1979, at 10 tbl.1. For figures covering 1977 to 1998, see BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN CUSTODY OF STATE OR FEDERAL CORRECTIONAL AUTHORITIES (2000), available at <http://www.ojp.usdoj.gov/bjs/data/corpop05.wk1>. For figures covering 1998 to 2001, see BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2001, at 2 tbl.1 (2002), available at <http://www.ojp.gov/bjs/pub/pdf/p01.pdf>.

For year-end federal prison population figures, see the sources cited *supra*, which contain information for both state and federal prisons.

For mid-year jail population figures in 1970, see LAW ENFORCEMENT ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE, NATIONAL JAIL CENSUS 1970, at 10 tbl.2 (1971). For figures covering 1978, 1983, 1988, and 1993, see BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAIL INMATES, BY SEX, HELD IN LOCAL JAILS (1997), available at <http://www.ojp.usdoj.gov/bjs/data/corpop09.wk1>. For figures covering 1980 to 2000, see BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES (2002), available at <http://www.ojp.usdoj.gov/bjs/glance/sheets/corr2.wk1>.

In order to approximate filing rates for years for which jail population data are not available, I have assumed a jail population of 160,000 in 1971 to 1977 and 170,000 in 1979.

As Figure I.A shows, those who claimed in 1995 that inmate filings had increased sharply had a point. Federal inmate civil rights suits rose quite steadily throughout the 1970s and 1980s, with that increase accelerating in the early 1990s. (The 1996 enactment of the PLRA caused the number of filings to drop precipitously, and filings have so far continued to decline slightly each year.)

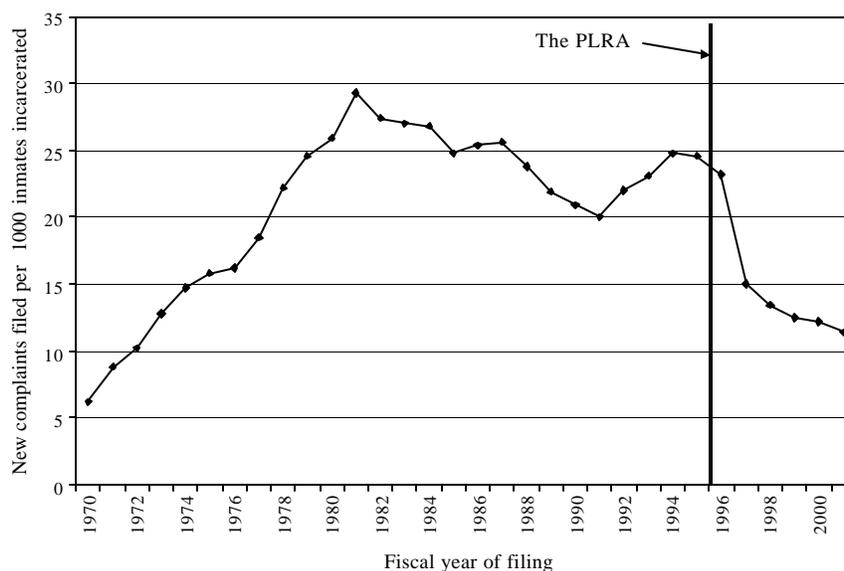
But absolute filing numbers alone are helpful only if the issue is litigation processing, not litigation rates. That is, the increase in filings in the early 1990s clearly put pressure on federal court personnel<sup>85</sup> and may even explain the overwhelmed feelings of state and local officials and their lawyers, but the claim of “deluge” trades implicitly on an accusation of increasing litigiousness. For that, what is relevant are filing *rates*, not absolute numbers.<sup>86</sup> As Figure I.B demonstrates, over the same period, the federal civil rights filing *rate* per inmate followed quite a different trend: it increased steadily through the 1970s but peaked in 1981, then dipped and rose again several times until 1996, when it dropped sharply because of the PLRA. The rate has declined slightly every year since.

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<sup>85</sup> Judicial complaints about the litigation have come not from state benches but from federal ones. The reason is probably that inmate litigation is a far, far smaller fraction of state than of federal civil dockets. As discussed in the text, state courts see vastly more cases than federal courts do. *See supra* p. 1576. So even if there were just as much state inmate litigation as federal, which is unlikely, the inmate docket would be a tiny portion of the entire state docket, and so would feel less overwhelming.

<sup>86</sup> *See, e.g.,* Eisenberg & Schwab, *Constitutional Tort Litigation*, *supra* note 15, at 666-67; Galanter, *The Day After*, *supra* note 75, at 18.

Figure I.B: Federal Civil Rights Filing Rates per 1000 Inmates (Includes Inmates in State and Federal Prisons, and Local Jails)



Making the strongest case available to the advocates of the PLRA, I should note that the filing rate increases of the early 1990s were quite significant. After eight filing rate decreases in ten years, the annual rate increases — and, therefore, very steep absolute increases — from 1992 to 1994 must have been alarming to those whose job it was to process and respond to the complaints. And given the vast growth in incarceration, the increase in filings was very large: had inmates filed in 1995 at the 1991 rate, 7300 fewer federal cases would have been begun. Nearly twenty percent of the 1995 inmate filings in federal district court stemmed from the recent filing rate increase. A claim of deluge in 1995, though inappropriately short-term as a justification for a permanent legislative change, was substantially more reasonable than such a claim would have been three or four years before. Nonetheless, because after 1981, annual increases in inmate federal civil rights filings were primarily associated, in nearly every state, with the growing incarcerated population,<sup>87</sup> it would be equally ap-

<sup>87</sup> Researchers at the National Center for State Courts report that “analysis indicates that between 1972 and 1997, every increase of 10,000 in the state prison population is associated with an increase of about 363 lawsuits filed,” and that “[t]he dynamic regression model explains 93 percent of the yearly variance in the number of Section 1983 cases.” Fred Cheesman II, Roger Hanson, Brian Ostrom &

appropriate to talk about a “deluge” of inmate requests for food. A claim of “deluge,” that is, seems not exactly inaccurate but rather inappropriately censorious.

*D. Of Babies and Bath Water: The Processing of Inmate Cases*

The *New York Times* article that essentially marked the beginning of the anti-inmate-lawsuit campaign by the National Association of Attorneys General concluded with a quotation by New York Assistant Attorney General Alan Kaufman. Kaufman told the *Times*: “It’s a struggle not to throw out the baby with the bath water.”<sup>88</sup> Congressional supporters of the PLRA made similar arguments: “The crushing burden of these frivolous suits makes it difficult for the courts to consider meritorious claims,”<sup>89</sup> Senator Hatch explained in one typical speech. It’s a politically appealing argument. The frivolous cases are worse than a waste of time, the PLRA’s proponents suggested; they pose an affirmative obstacle to appropriate adjudication of the more serious cases.<sup>90</sup> And indeed, the charge that serious cases have frequently been overlooked seems plausible. After all, even if

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Neal Kauder, *Prisoner Litigation in Relation to Prisoner Population*, CASELOAD HIGHLIGHTS: EXAMINING THE WORK OF STATE COURTS, Sept. 1998, at 4, 5 n.10 [hereinafter Cheesman et al., *Prisoner Litigation*], available at [http://www.ncsconline.org/D\\_Research/csp/Highlights/Prisoner%20V4%20No2.pdf](http://www.ncsconline.org/D_Research/csp/Highlights/Prisoner%20V4%20No2.pdf). (A later version of the same paper with more methodological information is available as Fred Cheesman II, Roger A. Hanson & Brian J. Ostrom, *A Tale of Two Laws: The U.S. Congress Confronts Habeas Corpus Petitions and Section 1983 Lawsuits*, 22 L. & POL’Y 89 (2000) [hereinafter Cheesman et al., *Tale of Two Laws*]. I cite the first one because the years covered fit my purposes better.)

I have not done a comprehensive analysis, but I did check these results by “panelizing” the data into observations by state as well as by year. Next, I performed a series of two-way linear regressions of annual filings against state prison population for each state. In every state but one (Rhode Island), there is a positive correlation between the state prison population and filings. And in every state but Rhode Island and Wyoming, the correlation is highly significant ( $p < .001$  for nearly all of the tests). The coefficients vary from six per 1000 (that is, an increase of 1000 inmates is associated with an increase of six filings) to 131 per 1000, and the rank order of the states is quite similar to their typical filing-rate rank. See Schlanger, *Technical Appendix*, *supra* note 3.

<sup>88</sup> Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort To Limit Filings*, N.Y. TIMES, March 21, 1994, at A1.

<sup>89</sup> 141 CONG. REC. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch); *see also, e.g.*, 141 CONG. REC. S19,114 (daily ed. Dec. 21, 1995) (statement of Sen. Kyl) (“If we achieve a 50-percent reduction in bogus Federal prisoner claims, we will free up judicial resources for claims with merit by both prisoners and nonprisoners.”).

<sup>90</sup> A structurally analogous critique from observers far to the left of the PLRA’s advocates is that the litigation system ratifies a socially destructive criminal justice system by providing only the false appearance of judicial review of prison life. *See, e.g.*, Tammy Landau, *Due Process, Legalism and Inmates’ Rights: A Cautionary Note*, 6 CANADIAN CRIMINOLOGY FORUM 151, 161 (1984) (“The few occasions where prisons have been subject to judicial or public scrutiny have been unsuccessful in guaranteeing inmates even the most basic ‘rights.’ Still, reformers persist in ‘incessant demands for more doses of the same, a belief that more will work where less has not.’ However, the effects of such reform ideology is [sic] to win public consent and support for efforts which, in fact, legitimately reorder or re-form the social structure, with the convicted prisoner at the bottom of the social hierarchy.” (citation omitted) (quoting Richard V. Ericson, *The State of Criminal Justice Reform* (Paper Presented to the Annual Meeting of the Canadian Sociology and Anthropology Association, Vancouver, 1983))).

inmates were not increasingly litigious during most of the relevant time period, it's certainly true that the courts were facing more and more prisoner petitions. As Justice Jackson wrote about prisoners' habeas petitions in *Brown v. Allen*, "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."<sup>91</sup>

Indeed, a number of careful observers have found such attitudes in practice. There has seemed to be a wide divergence between what judges have been doing and the nominal requirement that judges read pro se pleadings especially generously.<sup>92</sup> For example, in 1982, Ted Eisenberg based the following on his laborious review of inmate case files in the Central District of California:

[U]pon investigation so many prisoner claims prove weak that it is easy to lose objectivity in assessing the merits of their allegations. The conscientious judge who allows cases to proceed beyond the pleading stage may find the claims fabricated or distorted. He then becomes less eager to allow future cases to proceed, and his decisions dismissing cases rarely receive substantive appellate review. Perhaps for these reasons, federal magistrates and judges in Los Angeles appear to have become less than fully sensitive to prisoner claims. Their inclination to resolve ambiguities in pleadings against pro se litigants is the clearest outward manifestation of this attitude.<sup>93</sup>

And Eisenberg's findings accord with those of many other commentators.<sup>94</sup> Judges themselves occasionally confess their disinclination to give pro se

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<sup>91</sup> *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in the result).

<sup>92</sup> See *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (reversing dismissal of a prisoner's pro se complaint, when the Court could not "say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'" (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957))).

<sup>93</sup> Eisenberg, *Section 1983*, supra note 15, at 544-45.

<sup>94</sup> See, e.g., Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 971-72 (1990); Howard Eisenberg, *Rethinking Prisoner Cases*, supra note 15, at 444 (suggesting that in "[m]any of the cases reviewed in Missouri, Illinois, and Arkansas for this article . . . there were serious questions whether the liberal pleading rules were actually applied"). Roger Hanson argues that the Administrative Office's procedural progress data disprove Ted Eisenberg's assertion. Hanson looked at Administrative Office data for cases from four districts in the 1980s, comparing inmate cases and private civil cases resolved "before issue joined" — that is, prior to the filing of an answer. Roger A. Hanson, *What Should Be Done When Prisoners Want To Take the State to Court*, 70 JUDICATURE 223, 225 tbl.1 (1987). He argues that because disposition of the median inmate case in this procedural category took only a month less than the median noninmate case in the analogous cohort (173 days compared to 202 days), "these data do not indicate that these decisions are made hastily or without a careful consideration of the facts and the law." *Id.* at 224. In fact, it makes no sense to compare groups of cases based on when in the process they were terminated, because Eisenberg's very claim is that they are disposed of at an inappropriately early point in the process. If anything, Hanson's data support Eisenberg's point, since in Hanson's dataset sixty-eight percent of inmate cases, but only twenty-nine percent of other civil cases, were disposed of

pleadings a full and fair examination. Jim Thomas presents the following transcript of a 1986 interview with a federal district judge:

What makes a good case? Well, the first thing that makes a good case is good spelling, good typing, good grammar. You don't see a lot of that in prisoner cases . . . . If I can read it, I take the time to read it. If it's illegible, I don't take the time to translate it. I just can't. I don't have the time.<sup>95</sup>

More quantitative information cannot confirm that inmate cases typically have gotten less time than they *should*, but it certainly confirms that they have received very little judicial attention. An exhaustive time study carried out between 1987 and 1993 by the Federal Judicial Center (the research arm of the federal court system) found that the average inmate civil rights case took under an hour of judge time, from filing to disposition. Because relatively few inmate cases settle, and because a small number of cases (the court order cases) can take up a very large amount of time indeed, an *average* of less than an hour means that judges spent little time on the rest, even though most of these remaining cases were resolved by courts rather than the parties.<sup>96</sup> (No information is available on the more revealing median.<sup>97</sup>) Using the case weights that resulted from the Federal Judicial Center time study, in 1996 (the last year before the PLRA really had an impact on filings) inmate civil rights filings made up 14.7% of the total district court new docket, but just 5.1% of the judges' weighted caseload.<sup>98</sup>

Still, even if judges spent little time on prisoner cases, most district courts adopted a variety of mechanisms intended to process inmate cases more efficiently and with less involvement of judges, who often do not like the cases. "Pro se lawclerks" (called "staff attorneys" in some districts), whose jobs are nearly entirely dedicated to processing inmate cases, became common — currently district courts around the country have over 130 such employees, who split all or most of their time between habeas and other inmate filings, depending on the district.<sup>99</sup> And many of the dis-

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at this stage. *Id.* at 225 tbl.1. But without baseline information about the comparative merits of the dockets, this comparison, too, is only suggestive.

<sup>95</sup> THOMAS, PRISONERLITIGATION, *supra* note 15, at 146.

<sup>96</sup> The Federal Judicial Center used its time study to assign "case weights" to all cases filed in the district courts, to try to estimate how much judge time those cases consume. "Prisoner civil rights" cases were assigned a case weight of .28 (with those classified as involving a federal defendant given a case weight of .48). Federal Judicial Center, New Case Weights for Computing Each District's Weighted Filings Per Judgeship 6 (1994) (memorandum, on file with author). A case weight of 1.0 is supposed to represent about three hours of judge time, so the .28 case weight means that the Administrative Office estimates that each prisoner case consumes about fifty minutes of judge time from start to finish. Lombard Interview, *supra* note 21.

<sup>97</sup> Lombard Interview, *supra* note 21.

<sup>98</sup> *See id.*; ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1996 REPORT OF THE DIRECTOR 380 tbl.X-1A [hereinafter JUDICIAL BUSINESS: 1996]. Inmate filing numbers are from Table I.A, *supra*.

<sup>99</sup> Lowney Interview, *supra* note 21.

trict courts' 500-odd magistrate judges spent a significant amount of their time on inmate cases — as much as half of their time in districts with the largest inmate caseload, although generally less.<sup>100</sup> What is impossible to know without detailed and careful inquiry is whether these kinds of court institutions ameliorate the problem Justice Jackson and Eisenberg identified, or instead exacerbate it by fostering concentrated exposure to inmate cases.

To return to the PLRA's supporters' babies-and-bathwater argument that high case volume has deterred courts from being good screeners of inmate cases, the criticism is quite credible. It is difficult to see how judges *could* adequately process so many non-settling cases in so little time. (There is, however, a notable disconnect between the argument and Congress's 1996 solution of drastic filing limits.)

## II. OUTCOMES IN INMATE CASES (PRIOR TO THE PLRA)

For many years, observers have commented that the two central features of the inmate docket are the large number of cases, discussed in Part I, and the low rate of success, discussed in this Part.<sup>101</sup> I present the data in section A, along with some comparative observations. In section B, I address some reasons for the observed outcomes. If a successful case is one that leads to a litigated victory or to a settlement, it's not a new finding that inmate plaintiffs have very, very few successes.<sup>102</sup> But I add sev-

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<sup>100</sup> Hnatowski Interview, *supra* note 21. In fiscal year 1996, magistrate judges disposed of 20,479 "prisoner civil rights" cases — approximately ten percent of their civil nonevidentiary caseload. See JUDICIAL BUSINESS: 1996, *supra* note 98, at 351 tbl.M-4A. And they held hearings in 1318 prisoner civil rights cases, approximately thirty-one percent of their nontrial evidentiary work (civil and criminal). See *id.* at 354 tbl.M-5.

<sup>101</sup> See, e.g., ALDISERT REPORT, *supra* note 14, at 8–11 (noting that because of the high volume of cases, many of which are frivolous, "it is difficult to ensure that the meritorious complaint is found and given careful attention"); Howard Eisenberg, *Rethinking Prisoner Cases*, *supra* note 15, at 435–46 (identifying "volume and frivolity" as the "twin devils" of the inmate civil rights docket, though disagreeing with prevalent assumptions that the cases are nearly all frivolous).

<sup>102</sup> Prior work quantifying inmate litigation success rates has not been presented in easily comparable formats, and has very often merged together categories that need to be separate for a real understanding of the case dispositions. But to summarize as best as possible: William Bailey examined the dispositions of 218 cases, of which plaintiffs won four; he did not discuss settlements. Bailey, *supra* note 47, at 531 & n.21. Of Turner's sample of 664 cases, seven plaintiffs won temporary restraining orders, five won preliminary injunctions, three won permanent injunctions, and two won damages. Turner did not discuss settlements. Turner, *When Prisoners Sue*, *supra* note 15, at 661–63. In Ted Eisenberg's sample of 212 cases, one settled and three reached trial. Eisenberg, *Section 1983*, *supra* note 15, at 554 tbl.V. Thomas's evidence was vastly different and has largely been ignored — he reported that of 2900 cases in the Northern District of Illinois, 1048 settled and 130 reached trial, with sixty-five plaintiffs' victories for a total plaintiffs' success rate of 34.4%. THOMAS, PRISONER LITIGATION, *supra* note 15, at 177 tbl.7b. Hanson and Daley are not entirely clear, but seem to report that 4% of their sample of 4483 was disposed of by settlement ("stipulated dismissal"). It may be, however, that this is only a portion of the actual settlements. They report a trial rate of 2% but do not set out the verdicts. HANSON & DALEY, REPORT ON SECTION 1983 LITIGATION, *supra* note 14, at 19 tbl.4. Combining the data compiled in Howard Eisenberg's study of inmate case disposition in three

eral things to prior knowledge. First, although inmates settle fewer cases than do plaintiffs in any other category, the settlement rates among cases that survive pretrial litigation are nonetheless quite high. As for litigated outcomes, I present several findings and a methodological innovation. Most broadly, defendants in inmate civil rights cases filed prior to 1996 typically won dismissals in about eighty percent of the cases; the rest were settled or tried, and inmate plaintiffs won about ten percent of the trials. All this confirms prior scholarship, though it is more detailed, more up-to-date, and broader in both geographical and temporal scope. I do have several new findings as well: First, and most dramatically, inmates won *punitive* damages in over a fifth of their trial victories. In addition, I present information on litigated case stakes, which have not previously been analyzed. The method by which I uncovered both the startling punitive damage result and the new stakes data is somewhat novel as well — and is likely to prove extremely useful to future civil litigation researchers.

Section B then analyzes *why* inmate plaintiffs fare so poorly. The answers are not surprises. Low inmate success rates prior to the enactment of the PLRA were the result of a constellation of factors. A large portion of the inmate cases filed in the district court were, as the cases' critics insisted, legally insufficient. But while this deficit did contribute to the end

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different states reveals that on average, 9% of inmate cases were voluntarily withdrawn by plaintiffs, with or without settlements; another 4% settled, and 4% were tried to verdict. Apparently, his sample did not include any plaintiffs' verdicts. Howard Eisenberg, *Rethinking Prisoner Cases*, *supra* note 15, at 458. In Fradella's study of dispositions in the District of Arizona, one of 200 cases was litigated to a plaintiff's victory, and five more settled. Plaintiffs' success rates in this study are surely somewhat depressed by its exclusion of the 8.9% of the docket filed in 1994 that was still pending when he conducted his study. Fradella, *In Search of Meritorious Claims*, *supra* note 47, at 36 (results); *id.* at 28 & n.4 (method). Of Kim Mueller's forty-eight cases, six were settled, one was tried to a defendant's verdict, and six were still pending. Mueller, *supra* note 47, at 1285 fig.D.

Using the same dataset I treat in this Article (though with a somewhat different approach to coding particulars), Ted Eisenberg presents several summaries of inmate outcomes:

Source	Years	Districts	Settled (% of cases)	Litigated Plaintiffs' Judgments (% of cases)	Trial win rate (% of trials)
EISENBERG, CASES AND MATERIALS, <i>supra</i> note 15, at 538 tbl.II.	1980–1981 filings	N.D. Ga., E.D. Pa., C.D. Cal.	17% <sup>i</sup>	1%	
Eisenberg, <i>Litigation Models</i> , <i>supra</i> note 15, at 1576, 1578.	1978–1985 trials	All			14%
Clermont & Eisenberg, <i>Trial by Jury or Judge</i> , <i>supra</i> note 15, at 1175 app. A.	1979–1989 trials	All			13%
Eisenberg, <i>Plaintiff Success Rates</i> , <i>supra</i> note 15, at 115 app. A.	1978–1985 terminations	All		2%	13%

Table note: (i) Seems to include voluntary dismissals.

result of low plaintiff success, other causes also played an important role: the absence of counsel in inmate cases, the problem of inmate inability to make predictive judgments about likely outcomes and damages, the low cost of litigation for both inmates and defendants, the high cost of settlements for defendants, and the oppositional culture of corrections.

Before I get to the data and my explanation of them, it is important to note that litigation outcomes are notoriously difficult to interpret. Even the definitions are slippery — should a case be counted as a plaintiff “success” simply because the plaintiff recovered *something* (even, say, a dollar)? Or need a plaintiff recover his or her costs, or perhaps even more? Is a case a success if the defendant stops doing whatever it is that the plaintiff is objecting to as a result of the lawsuit, without any court compulsion?<sup>103</sup> It is clear that settlements need to be counted, and that most of them ought to count as plaintiffs’ successes, because they result in a transfer of money from defendants to plaintiffs. But one certainly can imagine settlements that are actually defendant victories — where, for example, a plaintiff agrees to end the suit in exchange for withdrawal of a sanctions motion or a counterclaim. Moreover, settlements further complicate the categorization of trial outcomes. If a plaintiff turns down a settlement and proceeds to trial, should a subsequent plaintiff’s verdict be counted as a plaintiff success only if it exceeds the defendant’s best offer? For my purposes, the simplest definition seems adequate: I count as a plaintiff’s success any plaintiff’s judgment and any settlement and, perhaps, any voluntary dismissal.<sup>104</sup>

#### A. Outcomes: The Data

Three tables below present relevant outcome data from prior to the PLRA’s enactment. Table II.A looks at inmate civil rights cases filed between 1990 and 1995, presenting results averaged across this six year period.<sup>105</sup> Table II.B is a one-year snapshot of outcomes of all nonhabeas civil cases “terminated” by district courts in fiscal year 1995, grouped by type of case.<sup>106</sup> Table II.C looks at the small portion of the docket in

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<sup>103</sup> For a judicial discussion of this question in the context of attorneys’ fees awards, see *Buckhammon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), which held that a defendant’s voluntary change in conduct as the result of a lawsuit is insufficient to qualify a plaintiff as a “prevailing party” entitled to attorneys’ fees.

<sup>104</sup> This seems particularly appropriate for inmate cases because they are so low-cost for plaintiffs. I also list as *possible* successes voluntary withdrawals of lawsuits (to be precise, voluntary dismissals, pursuant to Rule 41(a)(1)), some of which certainly occur because of out-of-court settlements, but others of which are actually decisions by plaintiffs to give up.

<sup>105</sup> Note that while the filing date used is a case’s first appearance in the dataset (if a case appears more than once), the outcome listed describes each case’s *final* appearance. This seemed the most appropriate way to get at case outcomes. See Data Appendix, *infra*.

<sup>106</sup> For analysis of the appellate career of federal cases by category, looking at the small portion that are appealed, see Clermont & Eisenberg, *Plaintiphobia*, *supra* note 15, at 953–70.

which plaintiffs do in fact win monetary judgments, setting out data on both compensatory and punitive damages; and Figure II.A relates punitive damages to the compensatory awards they accompany.

Table II.A: Outcomes in Federal District Court  
 Inmate Civil Rights Cases Filed Fiscal Years 1990–1995<sup>107</sup>  
 (n = 184,103)

	Average per year	Average percentage per year
Filings	30,700	
Filing rate per 1000 inmates	22.6	
Non-judgment dispositions <sup>108</sup>	1500	4.6% of docket
Still pending	50	0.1% (same)
Judgment dispositions	30,200	95.3% (same)
Pretrial resolution for defendant	24,800	82.0% of judgment dispositions
Pretrial resolution for plaintiff <sup>109</sup>	250	0.9% (same)
Settled	2000	6.7% (same)
Voluntary dismissals	2100	6.9% (same)
Trials	900	3.0% (same)
Plaintiffs' trial victories <sup>110</sup>	90	0.3% (same)
		10.3% of all trials
Total plaintiffs' successes <sup>111</sup>	4400	14.9% of judgment dispositions
Settlements "before issue is joined"	1060	3.5% of all cases
Settlements "after issue is joined"	960	48.6% of cases not disposed of pretrial

In each year, the great majority of the inmate civil rights cases — eighty percent or more of the cases that proceeded to an actual judgment (that is, leaving out pending cases, interdistrict transfers, and the like) — were resolved pretrial for the defendants. Pretrial resolutions often occurred on the judges' own initiatives, without any motions by defendants. Probably more often, however, they were in response to defendants' motions — either motions to dismiss,<sup>112</sup> which provisionally assume the factual accuracy of the plaintiffs' allegations but contest the legal conclusion of resulting liability, or motions for summary judgment,<sup>113</sup> which rebut the plaintiffs' factual assertions using documentary evidence and sworn state-

<sup>107</sup> Schlanger, *Technical Appendix*, *supra* note 3.

<sup>108</sup> Non-judgment dispositions include interdistrict transfers, remands to state court, and statistical closings.

<sup>109</sup> An audit reveals that these outcomes are highly suspect. *See infra* note 115.

<sup>110</sup> An audit reveals that cases coded as plaintiffs' victories but with damages coded as equal to zero are frequently but not always defendants' victories. Assuming that all of the cases recorded as plaintiffs' victories with zero damages are in fact defendants' victories depresses the plaintiffs' trial victory rate by about a quarter.

<sup>111</sup> Total plaintiffs' successes include settlements, voluntary dismissals, and litigated victories.

<sup>112</sup> *See* FED. R. CIV. P. 12(b)(6).

<sup>113</sup> *See* FED. R. CIV. P. 56.

ments. The remaining cases were either settled, voluntarily dismissed<sup>114</sup> (withdrawn by the plaintiff without any court-acknowledged benefit for the plaintiff), or tried.<sup>115</sup> The total settlement rate is very low — just six percent of all cases filed. In thinking about how cases proceed through the litigation process, it is analytically useful to separate settlements into those made prior to decision on dispositive motions (that is, prior to summary judgment adjudication) and those made after such motions.<sup>116</sup> For inmate cases, about half of settlements occurred prior to summary judgment adjudication, and about half after.<sup>117</sup> The result was that about half of the

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<sup>114</sup> See FED. R. CIV. P. 41(a)(2).

<sup>115</sup> Plaintiffs are coded as winning hardly any pretrial judgments. But even these few are somewhat suspect: what I have grouped together as plaintiff pretrial victories are outcomes coded in the Administrative Office data as judgments for the plaintiff (or “both” parties) “on motion before trial” or “on other” (a catchall that is supposed to exclude any category more specifically covered by another code, such as trials, settlements, voluntary dismissals, default judgments, and pretrial motions). I looked at a random sample of dockets of such cases from 1993 and 1996. Those cases in which plaintiffs actually won are in fact a combination of judgments by magistrate judges, consent judgments, settlements, default judgments, a few trials and preliminary injunctions, and other miscellany. Importantly, however, a good number — around half — are actually *defendants’* judgments of various kinds. It might be justified, then, to recode, as defendants’ victories, the most likely errors — cases in which the plaintiff is coded as winning, but no amount of money damages is coded and the type of judgment is not coded either as an injunction or a “forfeiture or other” (the Administrative Office’s catchall for non-money judgments). Doing this reduces the number of plaintiffs’ pretrial victories to nearly zero but does not change the overall trend lines in any important way. Therefore, I have presented the raw rather than the corrected version of the data in the charts.

<sup>116</sup> I am resisting here some theoretical models of litigation in which the relevant moments/decisions are the plaintiffs’ decision whether to file, the parties’ decision whether to settle, and the judge’s or jury’s decision at trial. This approach, I think, loses sight of the most important periodicity in litigation — the difference between motions practice and trial practice. In nearly every area of litigation, a case’s value to the parties is very different before and after adjudication of dispositive motions (usually summary judgment), as are the litigation costs and incentives.

I do not mean to imply that all litigation theorists forget about non-trial adjudicated outcomes. But litigation theory articles, including the most canonical, very frequently use the word “trial” when they apparently mean all adjudicated outcomes. To cite as examples only two that I refer to often in this Article, see George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); and Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493 (1996). However, the insight that litigation occurs in stages is certainly not novel. See Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats To Sue*, 25 J. LEGAL STUD. 1, 25 (1996) (“Divisibility . . . can play a major strategic role in settlement bargaining. . . . Economic analysis in the field of litigation and settlement should recognize and pay close attention to the strategic importance of divisibility.”); see also David Rosenberg & Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT’L REV. L. & ECON. 3 (1985) [hereinafter Rosenberg & Shavell, *Nuisance Value*] (discussing the costs of initial responses to negative-expected-value suits).

<sup>117</sup> To be precise, about half the cases are coded as settling “before issue is joined,” by which the Administrative Office means prior to a defendant’s filing of a formal answer to the plaintiff’s complaint; the other half are coded as taking place “after issue is joined.” Since summary judgment adjudication requires prior filing of an answer, FED. R. CIV. P. 56, while dismissal for failure to state a claim does not, FED. R. CIV. P. 12(b)(6); 28 U.S.C. § 1915 (2000), I will use the Administrative Office’s category of “issue joined” as a rough approximation of summary motion adjudication. This makes sense in inmate litigation, in which dismissals are the most common outcome. See *supra* Table II.A.

cases that survived pretrial adjudication, and that were not voluntarily withdrawn, settled. This is actually an unexpectedly high number — far higher than one would think from most of the literature about inmate cases, which has not usually distinguished between pre- and post-summary-judgment settlements.<sup>118</sup> Even so, a large number of cases went to trial. In 1995, for example, inmate civil rights cases accounted for fifteen percent of all civil trials held in federal district court.<sup>119</sup> Of the cases coded between 1987 and 1995 as going to trial, plaintiffs won at least *something* in eight to fifteen percent; defendants prevailed in the rest.<sup>120</sup> The final stage of litigation, appeal, is not on the charts, but I don't think it

Note that there clearly are errors in the “procedural progress” variable — trials coded as taking place “before issue is joined,” and so on. Still, if there are errors, the noise they generate can't block out the fact that the proportion of settled inmate civil rights cases terminated “before issue is joined” is consistently far higher than in the other categories of federal litigation.

<sup>118</sup> *But cf.* THOMAS, PRISONER LITIGATION, *supra* note 15, at 176–77 (separating those inmate filings that survived in forma pauperis screening from those that did not, and pointing to the high settlement rate in the former group).

<sup>119</sup> *See supra* note 5.

<sup>120</sup> Although the absolute numbers of inmate filings were increasing over the relevant time, *see* Table I.A, the outcomes reported in Table II.A were largely longitudinally consistent. But even though outcome changes over time were small, they certainly happened. Most notably, the pretrial dismissal rate began to inch up, very gradually, beginning in the late 1980s, with concomitant declines in trial and settlement rates. At the same time, plaintiffs' trial win rates began to decline as well. Table II.A.1 compares outcomes for inmate civil rights cases filed in fiscal year 1990 to those filed in 1995:

TABLE II.A.1: OUTCOMES, INMATE CIVIL RIGHTS CASES FILED 1990 AND 1995

Disposition	Fiscal year 1990	Fiscal year 1995
All judgments	23,913	38,718
Pretrial dismissals (% of judgments)	19,752 (82.6%)	32,013 (83.9%)
Settled (% of judgments)	1,673 (7.0%)	2,329 (6.1%)
Voluntary dismissals (% of judgments)	1,453 (6.1%)	2,466 (6.5%)
Trials (% of judgments)	814 (3.4%)	986 (2.6%)
Plaintiffs' trial victories (% of trials)	117 (14.4%)	83 (8.4%)
Total plaintiffs' successes (% of judgments)	3,443 (14.4%)	5,110 (13.4%)

The table overstates the decline in trial wins somewhat, because 1990 was a peak year for inmate plaintiffs' trial victories. Fuller longitudinal information is available online. *See* Schlanger, *Technical Appendix*, *supra* note 3; *see also infra* section IV.B.2. I have no confirmed explanations for any of the outcome shifts. Perhaps increasing filings led courts to clamp down a little in pretrial adjudication. Perhaps increasing filing rates per prisoner, *see supra* Table I.A, meant that the “quality” of the docket went down a little. It is even possible that part of what was going on was limited to several of the very large districts, opening up all kinds of particular explanations: focused tort-reform campaigns, *cf.* Stephen Daniels & Joanne Martin, “The Impact That It Has Had Is Between People's Ears”: *Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453 (2000); Stephen Daniels & Joanne Martin, Whatever Happened to the “Litigation Explosion” in Texas: The Strange Success of Tort Reform (Paper Presented at the Annual Meeting of the Law and Society Association, May 30, 2002) (on file with author), or even the appointment or retirement of a few judges. The dataset is sufficiently large and detailed that a well-designed study probably could suss out these or other phenomena by comparing outcomes among different districts or states or circuits. But I have not undertaken this research task, except to check that no single district or state is dominating the trends reported.

changes the story much,<sup>121</sup> except that appeals by defendants certainly promote sub-verdict settlements in the few cases yielding large trial verdicts.

To summarize, before the PLRA's passage in 1996, inmates typically won some relief in about one percent of their federal civil rights cases; they received something worth settling for in another six to seven percent; and they either simply gave up and decided to quit, or received something justifying the withdrawal of the lawsuit, in another six to eight percent of cases. In the rest of the cases, defendants won.

These success rates sound low, and Table II.B demonstrates that inmate cases were comparatively as well as absolutely unsuccessful for plaintiffs. Table II.B groups cases from the dozens of separate case categories into nine larger panels. It shows that, among cases terminated in 1995, not only did inmate plaintiffs rank last in their overall success rates,<sup>122</sup> they also ranked last in every one of the separate components of the overall success numbers; in pretrial victories, settlements, and trial win rates, they fared worse than any grouped set of

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<sup>121</sup> Inmate plaintiffs occasionally appeal, though they do not often win their appeals. According to data recently published by Clermont and Eisenberg, inmate plaintiffs win just 6.4% of their appeals from trial losses and 8.3% of their appeals from pretrial losses. Clermont & Eisenberg, *Plaintiphobia*, *supra* note 15, at 954–55 tbl.2, 967 tbl.5.B. Nearly all these victories are already accounted for in the data I present, because my data are from cases' final appearances in the district court terminations dataset, which include the dispositions after appellate remand, if any. It's true that defendants more often win victories on appeal than do plaintiffs; Clermont and Eisenberg's data show that of the trials defendants actually bring to a decisive appellate outcome (that is, leaving out the ones they drop or settle), defendants win 37.7%. *Id.* at 954–55 tbl.2. And admittedly, these reversals are less often included in my presentation because while sometimes defendants win vacate and remand orders, they often win outright on appeal, so the cases never go back to district court for revision of the judgments. Still, what Clermont and Eisenberg do not emphasize, because it is not what their article is about, is just how few inmate cases are actually in the group from which the rate of wins on appeal is calculated. They report that of cases terminated in district court between 1988 and 1997, the number of trials won by inmate plaintiffs, appealed by defendants, and actually affirmed or reversed by the courts of appeals was just sixty-one. *Id.* By my calculation, that works out to a 10% reversal rate — 10% of plaintiffs' victories at trial are reversed or vacated on appeal — and a good number of these must have resulted in remands, and are therefore already accounted for in my data. So extrapolating, if in a given year 0.5% of cases were resolved by a plaintiff's trial verdict, after appeal that number may have been reduced to between 0.5% and 0.45%. I don't think this changes the picture presented in the text in any significant way. (Clermont and Eisenberg do not report the number of plaintiff trial wins, but I calculate it as around 650. This number is lower than one would expect from the data reported in Table II.A, because Clermont and Eisenberg don't count as plaintiffs' victories cases coded as "judgment for both," whereas I do. As I explain in the Data Appendix, *infra*, I found no real distinction between the "judgment for plaintiff" and "judgment for both" categories.)

<sup>122</sup> For ease of presentation, Table II.B groups the cases into categories. But even looking at individual case codes, there is no nontrivial set of cases in which plaintiffs succeeded less, overall, than in inmate civil rights cases — except habeas, which I have excluded from my analysis. (The three small nonhabeas categories in which plaintiffs did worse, overall, had only sixteen cases terminated in 1995 among them.)

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plaintiffs and, in fact, worse in each column than nearly any other individual plaintiff category.<sup>123</sup>

Table II.B: Federal District Court Cases Terminated by Judgment, Fiscal Year 1995<sup>124</sup>

Type of case	Dispositions by judgment (n)	Pretrial dismissals	Voluntary dismissals	Pretrial plaintiffs' victories	Settlement rate	Pre-answer settlement rate	Trial to post-answer settlement ratio	Trials	Plaintiff victory rate at trial
Contract	27,355	24%	17%	12%	43%	10%	9.8	3%	59%
Torts (non-product)	22,769	27%	13%	2%	50%	8%	6.2	7%	51%
Product liability	5446	28%	14%	2%	49%	8%	6.1	7%	34%
Civil rights	15,209	53%	10%	2%	28%	6%	4.2	5%	31%
Civil rights employment	14,987	37%	13%	1%	41%	5%	5.2	7%	30%
<b>Inmate civil rights</b>	<b>39,080</b>	<b>82%</b>	<b>7%</b>	<b>1%</b>	<b>6%</b>	<b>4%</b>	<b>1.0</b>	<b>3%</b>	<b>10%</b>
Labor	14,197	24%	19%	18%	36%	11%	12.3	2%	48%
Statutory actions	26,044	42%	13%	10%	30%	10%	11.4	2%	53%
U.S. plaintiff	12,772	21%	12%	43%	21%	8%	7.5	2%	68%
Other	1357	40%	15%	14%	27%	7%	5.3	4%	54%
Total	179,216	43%	12%	9%	30%	8%	6.2	4%	40%
Total without inmate cases	140,136	32%	14%	11%	37%	9%	7.1	4%	45%

<sup>123</sup> Even if all of the inmate cases coded as plaintiffs' pretrial victories were accurate — which is clearly not the case, *see supra* note 115 — in 1995, the only group that saw fewer pretrial victories than inmates was “airplane personal injury” plaintiffs (but their overall rate of litigated success plus settlements was nearly 70%); in settlements, only social security claimants did worse than inmates (but they fared better enough in pretrial victories to do slightly better than inmate plaintiffs overall); in trials, social security claimants, again, did worse than inmates, as did plaintiffs in the miniscule category “motor vehicle product liability” (but they had a very high settlement rate, and hardly ever went to trial).

<sup>124</sup> See the Data Appendix, *infra*, for a description of the components of each category. As always, the code for this analysis is included in Schlanger, *Technical Appendix*, *supra* note 3.

The differential between inmates' success and that of other plaintiffs is most marked with respect to settlement; in 1995, inmates settled about one-sixth as often as did plaintiffs in the rest of the docket as a whole, and had fewer voluntary dismissals as well.<sup>125</sup> But while the analogous rate in the noninmate docket is just under twice as high, the inmate settlement rate "after issue is joined" is much higher than one might expect based on the rhetoric of frivolity that surrounds inmate cases. Nonetheless, the data establish that the inmate docket is, absolutely speaking, quite low in "merit" (by which I mean not some abstract measure of quality, but simply high ex ante probability of litigated success). Even if all of the cases leading to plaintiffs' successes — that is, to voluntary dismissals, settlements, and litigated victories — are meritorious cases, that is only about fifteen percent of the docket. (Presumably at least some of the trial losses are, ex ante, high-probability plaintiffs' successes that do not, in the end, pan out. But I'll leave this out for simplicity.)

What is somewhat less plain is just how the merits of the inmate docket compare to other case categories. While it is true that inmates have done far worse both at trial and in settlements than plaintiffs in other case categories, it does not necessarily follow that the inmate docket's merits (rather than its results) make it as much an outlier as Table II.B might be thought to suggest. This point builds on work by a generation of theorists who have developed the insight, first presented by George Priest and Benjamin Klein in their landmark article *The Selection of Disputes for Litigation*, that the distribution of filed disputes around a litigation decision standard does not, in itself, have any dispositive connection to the success rate at trial or, indeed, to the settlement rate.<sup>126</sup> Lots of low-merit cases could cause either lots of settlements (albeit at low amounts) or very few settlements, and the cases left over after settlement for adjudication could be, on average, stronger or weaker than the full set of filings and so could have a high or a low success rate at trial.<sup>127</sup> And the higher the settlement rate, the weaker the logical relationship between litigated outcomes and the

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<sup>125</sup> Voluntary dismissals can mark a plaintiff's decision simply to give up — in which case what the voluntary dismissal column in Table II.B might be showing is that inmates give up less often than other plaintiffs do. But voluntary dismissals can also be settlements, so that the voluntary dismissal column might somewhat moderate the settlement differential between inmates and other plaintiffs.

<sup>126</sup> Priest & Klein, *supra* note 116, at 4.

<sup>127</sup> Note, however, that Ted Eisenberg argues that case categories in the federal docket demonstrate a strong correlation between non-trial success rates and success rates at trial. Eisenberg's results suggest that while there is no *necessary* theoretical connection between results at trial and a docket's underlying merits, the two nonetheless tend to move in tandem. See Eisenberg, *Plaintiff Success Rates*, *supra* note 15, at 113-14; Theodore Eisenberg, *Negotiation, Lawyering, and Adjudication: Kritzer on Brokers and Deals*, 19 L. & SOC. INQUIRY 275, 292-99 (1994). I have essentially replicated Eisenberg's results using federal district court cases terminated in fiscal year 2000, finding a highly significant correlation between non-trial and trial success rates, though I use a classification protocol somewhat different from Eisenberg's. (For my results, see Schlanger, *Technical Appendix*, *supra* note 3). But exploration of the point is beyond the scope of this Article.

merit of a docket as a whole. In a case category — like the inmate civil rights docket — with a very low settlement rate, a very low plaintiffs' litigated victory rate necessarily indicates the low merit of the docket taken as a whole. But as Table II.B shows, settlement is vastly more common in other case categories. For them, then, one cannot infer the merits of the docket from case outcomes.<sup>128</sup> So while it is likely that the inmate civil rights docket is relatively low-merit compared to other federal case categories, there is no way to assess the magnitude of this difference.

The logical next question about outcomes is what happens when inmates *do* win their cases? How much do they win? Or, stated more generally, how much is at stake in these cases? Answering this question with any degree of accuracy would once have been extremely difficult. The Administrative Office data on damages are quite unreliable,<sup>129</sup> so an interested researcher would have had first to use the Administrative Office dataset to identify cases won by plaintiffs,<sup>130</sup> and then to obtain court records from a large number of district courts — an expensive and extremely time-consuming process. But I was able to do the necessary research far

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<sup>128</sup> See generally Daniel Kessler, Thomas Meites & Geoffrey Miller, *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233, 237–48 (1996) (summarizing research on different stakes, information and sophistication, settlement and litigation costs, and agency arrangements that might affect the relation between trial outcomes and merit); Priest & Klein, *supra* note 116 (arguing that, if a very large portion of a docket settles, the few cases that go to trial will be the close cases, so that their outcomes will, all else equal, split evenly); *id.* at 24–29 (discussing the way in which differential stakes and risk aversion could alter this “fifty percent” hypothesis); Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 494 (1996) (agreeing with the central insight of the Priest and Klein paper that cases that go to trial are unrepresentative of settled cases, and arguing that whatever the probability of success in a docket taken as a whole, asymmetric information renders it possible for “the cases that go to trial to result in plaintiff victory with any probability”).

<sup>129</sup> See Data Appendix, *infra*. Scholars have used the Administrative Office damages data with some regularity, albeit with growing qualms as to their validity. See Theodore Eisenberg, John Goerdt, Brian Ostrom & David Rottman, *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE U. L. REV. 433, 439 n.13 (1996) [hereinafter Eisenberg et al., *Litigation Outcomes*]; Kimberly A. Moore, *Judges, Juries, and Patent Cases — An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365, 381 (2000); Stewart J. Schwab, *Studying Labor Law and Human Resources in Rhode Island*, 7 ROGER WILLIAMS U. L. REV. 384, 394 (2002). More systematic work has demonstrated serious problems in other, similar, monetary-amount variables in the Administrative Office's separate bankruptcy database. See Jennifer Connors Frasier, *Caught in a Cycle of Neglect: The Accuracy of Bankruptcy Statistics*, 101 COM. L.J. 307 (1996) (reporting on systematic analysis of AO bankruptcy statistics); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Use of Empirical Data in Formulating Bankruptcy Policy*, L. & CONTEMP. PROBS., Spring 1987, at 195, 222–24 (criticizing the accuracy and utility of AO bankruptcy data). But until this project, no systematic audit had demonstrated the depth of the problem in the “amount awarded” variable. This methodological finding is amplified and its import analyzed in Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Empirical Analysis*, NOTRE DAME L. REV. (forthcoming 2003) [hereinafter Eisenberg & Schlanger, *Reliability of AO Database*].

<sup>130</sup> Even though Administrative Office data on the *amount* of damages are very frequently incorrect, the data on *who* won are extremely reliable, at least for cases in which *some* damages are coded. Eisenberg & Schlanger, *Reliability of AO Database*, *supra* note 129.

more efficiently by taking advantage of a technological innovation intended to assist litigators monitoring cases: the federal court system's "Public Access to Court Electronic Records," or PACER, which enables subscribers to obtain docket sheets over the Internet.<sup>131</sup> Using PACER (occasionally supplemented by old-fangled methods like calling a clerk's office), I conducted a study of plaintiffs' victories in inmate cases terminated in one representative year, 1993. I gathered information on each case coded by the Administrative Office as a damage judgment for the plaintiff.<sup>132</sup> Table II.C summarizes my findings:

TABLE II.C: INMATE DAMAGE AWARDS GREATER THAN \$0, CASES TERMINATED FISCAL YEAR 1993

Compensatory award group	Compensatory award	Punitive award	Total award	
\$1-10	n	21	7 (33%)	21
	Mean	\$2.3	\$547	\$185
	Median	\$1	\$125	\$2
	Sum	\$49	\$3826	\$3875
\$11-100	n	12	0 (0%)	12

<sup>131</sup> In nearly every district, PACER allows public internet-based access to docket sheets recorded since 1993; in some districts, other case materials are also available. For details, see Data Appendix, *infra*. PACER is well known among federal litigators, but much less so among researchers. In fact, there are remarkably few scholarly references to PACER (references searchable on Westlaw, that is), and all but one that I know of are in or about the bankruptcy literature. See, e.g., Lynn M. LoPucki, *The Politics of Research Access to Federal Court Data*, 80 TEX. L. REV. 2161 (2002) (describing bankruptcy research strategies); Jennifer Shack & Susan M. Yates, *Mediating Lanham Act Cases: The Role of Empirical Evaluation*, 122 N. ILL. U. L. REV. 287, 294 (2002); Jay Lawrence Westbrook, *Empirical Research in Consumer Bankruptcy*, 80 TEX. L. REV. 2123, 2148 (2002).

<sup>132</sup> More particularly, I started with the 143 cases terminated in fiscal year 1993 in which the Administrative Office dataset variable "judgment for" had a value of "plaintiff" or "both [plaintiff and defendant]," and the value for the variable "amount awarded" was greater than zero. Although most court clerks do not include damages information for settlements, some do, so some of these cases actually represented settlements rather than litigated victories. Of the 143 cases, I was unable to obtain dockets for fifteen cases, and in three more the actual outcome was unclear from the docket. Thus, twelve percent of the original sample was unavailable. In addition, after discovering from the docket sheets the actual outcomes and damages awarded, I eliminated any case in which plaintiffs did not receive damages in a litigated victory — twenty settlements and four (erroneously coded) defendants' verdicts. The remaining sample was precisely 100 cases. The only assumption I made as to these cases was that if the docket did not mention punitive damages, I assumed none had been awarded. If this assumption were incorrect, it would tend to dampen the punitive damage results reported in the text.

To be clear, this leaves out 330 cases coded as judgment for plaintiff or for "both," but with no damage award coded. I audited these cases by looking at twenty percent, or sixty-seven, of them chosen at random. About a third of the sample was unavailable, mostly because the relevant district court had not made its dockets web-accessible (for a couple, the docket didn't contain the relevant information). Of the others, only one was in fact a damage action with a "costs only" judgment. The others were a combination of various non-judgment outcomes such as consolidations (4); injunctions and/or consent decrees (5); settlements or voluntary dismissals (8); and erroneous coding of defendant victories (26). Thus, this category of cases may be safely left out of the denominator of the chart above.

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## INMATE LITIGATION

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	Mean	\$71		\$71
	Median	\$86		\$86
	Sum	\$850		\$850
\$101-500	n	13	2 (15%)	13
	Mean	\$334	\$1250	\$525
	Median	\$300	\$1250	\$400
	Sum	\$4324	\$2500	\$6824
\$501-1000	n	11	2 (18%)	11
	Mean	\$820	\$4250	\$1593
	Median	\$900	\$4250	\$900
	Sum	\$9024	\$8500	\$17524
\$1001-5000	n	10	1 (10%)	10
	Mean	\$3548	\$5000	\$4048
	Median	\$3689	\$5000	\$3689
	Sum	\$35,478	\$5000	\$40,477
\$5001-20,000	n	17	5 (29%)	17
	Mean	\$10,203	\$38,600	\$21,556
	Median	\$10,000	\$25,000	\$13,600
	Sum	\$173,456	\$193,000	\$366,456
\$20,001-50,000	n	9	3 (33%)	9
	Mean	\$33,797	\$9500	\$36,964
	Median	\$35,000	\$10,000	\$36,975
	Sum	\$304,176	\$28,500	\$332,676
\$50,001-375,000	n	6	2 (33%)	6
	Mean	\$168,750	\$40,000	\$182,083
	Median	\$93,750	\$40,000	\$116,250
	Sum	\$1,012,500	\$80,000	\$1,092,500
\$6,463,275	n	1	0 (0%)	1
	Sum	\$6,463,274		\$6,463,274
Total	n	100	22 (22%)	100
	Mean	\$80,031	\$14,606	\$83,245
	Median	\$687	\$5000	\$1000
	Sum	\$8,003,132	\$321,326	\$8,324,458

As Table II.C shows, in 1993, even successful inmate cases led to quite small returns. Leaving out one enormous award of \$6.5 million, the mean damages for cases won at trial by inmate civil rights plaintiffs was \$18,800, and the median was a mere \$1000. Again, comparisons to other kinds of cases may be useful. Because of the unreliability of the Administrative Office damages data, few valid federal comparisons are available. But what data exist suggest that plaintiffs' damages in other federal catego-

ries are at least an order of magnitude higher.<sup>133</sup> More reliable state court comparisons yield similar results: one large sample of state tort trials, for example, put the mean verdict for winning plaintiffs at approximately \$430,000 and the median at \$31,000.<sup>134</sup>

At the same time, when inmate civil rights plaintiffs actually managed in 1993 to win compensatory damages at trial, they quite often — twenty-two percent of the time — also won punitive damages. This rate is extraordinarily high: estimates of the general prevalence of punitive damages converge on a rate of about four percent.<sup>135</sup> And the high rate is not unique to 1993 terminations. Among cases terminated in 2000, there were fifty-five trials with damages coded for plaintiffs: twenty-seven percent of those for which I could obtain information have punitives recorded on the docket sheet.

Which cases tend to have punitive awards? That is harder to say. Docket review does not reveal much that one would want to know to answer the question. And the small absolute number of punitive damage awards counsels caution in any event. But for whatever it is worth, if the spread of the data is reduced by using the natural logarithms, visual inspection seems to indicate at least some relationship between the size of

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<sup>133</sup> See, e.g., Eisenberg et al., *Litigation Outcomes*, *supra* note 129, at 439 tbl.2; Eisenberg & Schlanger, *Reliability of AO Database*, *supra* note 129.

<sup>134</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 1996, at 7 tbl.6 (1999) [hereinafter BUREAU OF JUSTICE STATISTICS, CASES AND VERDICTS, 1996] (reporting the results of the 1996 Civil Justice Survey of State Courts, which looked at cases in state courts in the seventy-five largest counties in the United States).

<sup>135</sup> Several research institutions and scholars have gathered data for analysis of civil justice outcomes. The most systematic data collection efforts are those by the Civil Trial Court Network (a project of the U.S. Bureau of Justice Statistics and the National Center for State Courts); RAND's Institute for Civil Justice; and Stephen Daniels and Joanne Martin. Studies based on each dataset confirm a low rate of punitive damage awards. For analysis of Civil Trial Court Network data, see Theodore Eisenberg, Neil LaFountain, Brian Ostrom, David Rottman & Martin T. Wells, *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 749 tbl.1 (2002) [hereinafter Eisenberg et al., *Juries, Judges, and Punitive Damages*] (finding punitive damages awards in 4% of plaintiffs' verdicts in a 1996 sample covering 9000 trials in forty-five large county state courts); Theodore Eisenberg, John Goerd, Brian Ostrom, David Rottman & Martin T. Wells, *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 634 tbl.1 (1997) (6%); BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 8 tbl.8 (1995) [hereinafter BUREAU OF JUSTICE STATISTICS, CASES AND VERDICTS, 1992] (6%); and BUREAU OF JUSTICE STATISTICS, CASES AND VERDICTS, 1996, *supra* note 134, at 9 tbl.8 (4.5%). For analysis of RAND data, see ERIK MOLLER, TRENDS IN CIVIL JURY VERDICTS SINCE 1985, at 54–55 tbl.A.9 (1996) (3.6%); MARK A. PETERSON, SYAM SARMA & MICHAEL G. SHANLEY, PUNITIVE DAMAGES: EMPIRICAL FINDINGS (1987); and Erik K. Moller, Nicholas M. Pace & Stephen J. Carroll, *Punitive Damages in Financial Injury Jury Verdicts*, 28 J. LEGAL STUD. 283, 301 tbl.3 (1999) (7.2%). Daniels and Martin published their research in STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 215–16 tbl.6.1 (1995) (8.3%); and Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 45 (1990) (less than 15%).

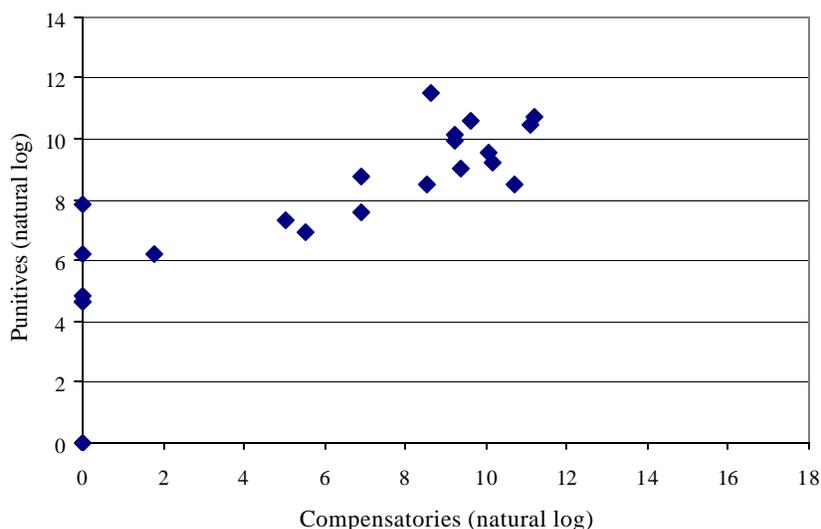
compensatory awards and the size of punitive awards.<sup>136</sup> Figure II.A presents the data.

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<sup>136</sup> After the log transformations, the Pearson's correlation coefficient is 0.83, with an extremely high degree of significance ( $p < 0.001$ ). However, if no log transformation is performed, the degree of correlation as well as its significance is less: the coefficient is reduced to 0.36, and the p-value increases to 0.09. If the several cases with punitive awards and one-dollar compensatory awards are excluded, the log-transformed results do not change importantly — the coefficient, now 0.731, remains highly significant. Leaving out the one-dollar cases makes the untransformed results insignificant.

A heated debate is currently going on about whether levels of compensatory and punitive awards in *noninmate* cases are significantly correlated. See, e.g., Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages*, *supra* note 135, at 745 (finding substantial correlation); JONI HERSCH & W. KIP VISCUSI, PUNITIVE DAMAGES: HOW JUDGES AND JURIES PERFORM 4 (John M. Olin Ctr. for Law, Econ. & Bus., Harvard Law Sch., Discussion Paper No. 362, May 2002), available at [http://www.law.harvard.edu/programs/olin\\_center](http://www.law.harvard.edu/programs/olin_center) (disputing existence of correlation). This is not my main subject, and, again, the number of punitive awards in my set is small enough that firm conclusions seem inappropriate.

FIGURE II.A: INMATE CIVIL RIGHTS CASES TERMINATED 1993  
RELATIONSHIP BETWEEN COMPENSATORY AND PUNITIVE DAMAGES  
( $n = 22$ )<sup>137</sup>



### B. Outcomes: Explanations

Tables II.A and II.B demonstrate conclusively (for anyone who doubted it) that inmates are only very rarely successful in their federal civil rights actions. Why is this so?

1. *Limited Legal Rights/Exacting Decision Standard.* — It only makes sense that a large proportion of inmate cases filed prior to 1996 (as since) were legally insufficient, given the way the entire system combines limited legal rights with liberal court-access rights. Led by the Supreme Court, federal courts have become quite hostile to many kinds of inmate claims,<sup>138</sup> especially those about the in-prison scope of rights also enjoyed by noninmates,<sup>139</sup> or in which real but minor injury

<sup>137</sup> Schlanger, *Technical Appendix*, *supra* note 3.

<sup>138</sup> Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1230 (1998).

<sup>139</sup> See *Sandin v. Conner*, 515 U.S. 472, 476–77, 484 (1995) (refusing to find a constitutionally protected liberty interest in avoiding disciplinary segregation in prison, when conditions of segregation did not amount to an “atypical and significant hardship . . . in relation to the ordinary incidents of prison life”); *Turner v. Safley*, 482 U.S. 78, 89 (1987) (“[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”); *Parratt v. Taylor*, 451 U.S. 527, 543–44 (1981) (holding that states satisfy the Constitution’s due process

results, or in which harm is likely but unproven.<sup>140</sup>

Even in the relatively expansive Eighth Amendment jurisprudence, which governs incarceration-specific constitutional claims,<sup>141</sup> current doctrine directs judges and juries to focus less on the actual conditions inmates face and more on the prison officials' mental culpability — a more difficult standard to meet, especially for unsophisticated litigants. Specifically, in cases alleging Eighth Amendment violations, plaintiffs must establish defendants' "deliberate indifference to serious . . . needs of prisoners."<sup>142</sup> That is, the plaintiff needs to persuade the judge or jury of more than a bad outcome, more than a defendant's knowledge of and ability to prevent that outcome, more than negligence. Deliberate indifference, the Supreme Court held in 1994, amounts to a highly culpable mental state:

[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.<sup>143</sup>

Finally, individual government officers are immune from damages suits, even for proven constitutional violations, if their conduct was not objectively unreasonable because the right in question was not "clearly established."<sup>144</sup>

These extremely defendant-friendly standards, joined with judge and jury suspicion and dislike of incarcerated criminals, have made inmate cases extremely hard to win. One telling piece of evidence is the high rate of punitive damages among cases in which inmates win at trial, illustrated by Table II.C, which demonstrates that juries were reluctant to award damages to inmates unless the conduct alleged was proven extremely egregious. Or, to state the same thing in terms of law-on-the-books doctrinal requirements rather than law-in-action persuasive requirements, the high rate of punitives underscores the high hurdle imposed by the law: even compensatory liability requires decisionmakers to believe the defendant

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requirements when they authorize inmates to seek return of lost or stolen property and that no federal forum is required).

<sup>140</sup> *Lewis v. Casey*, 518 U.S. 343, 346, 349 (1996) (holding that a prison system would be responsible for denying inmates "access to courts" only when inmates demonstrate "actual injury" from the denial of legal resources and services).

<sup>141</sup> In this category, the Supreme Court has been fairly sympathetic to inmates — unexpectedly so, given its general conservative inclinations in recent years, and its anti-prisoner moves in other contexts. *See Helling v. McKinney*, 509 U.S. 25, 30 (1993) (holding that exposure to secondhand smoke may violate the Eighth Amendment); *Hudson v. McMillian*, 503 U.S. 1, 1 (1992) (holding that correctional officers' use of excessive force against an inmate may constitute cruel and unusual punishment even if the inmate does not sustain any serious physical injury).

<sup>142</sup> *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

<sup>143</sup> *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

<sup>144</sup> *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

acted with the same kind of bad intent that can establish punitive liability.<sup>145</sup> Either way, the point is that the evidence of a very high prevalence of punitive damages in cases in which an inmate plaintiff wins at trial helps to establish just how hard it is for inmates to establish liability at all.

2. *Easy Access to Courts.* — While courts and their factfinders use very strict standards for liability in inmate cases, inmates remain able to file cases very easily. Prisons and jails are required to provide inmates with pen, paper, mail, and, more or less, a law library or other assistance.<sup>146</sup> And, as indigents, prior to the PLRA inmates usually could file without payment of the ordinary district court filing fee.<sup>147</sup> Inmates had essentially no other litigation costs.<sup>148</sup> Thus, even if inmates understood

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<sup>145</sup> Under § 1983, punitive damages are permissible when the plaintiff shows “reckless or callous disregard for the plaintiff’s rights,” *Smith v. Wade*, 461 U.S. 30, 51 (1983), a standard with significant if not precise overlap with the compensatory liability standard under the Eighth Amendment. See *Farmer*, 511 U.S. at 837 (allowing Eighth Amendment liability for poor conditions of confinement only when a defendant corrections official actually knows of and consciously disregards an excessive risk to inmate health or safety). Previous studies have found similarly high frequencies of punitive awards in noninmate intentional tort cases, which also require a showing of culpable intent. See RESTATEMENT (SECOND) OF TORTS § 908 cmt. c (1979) (“[I]n torts like malicious prosecution that require a particular antisocial state of mind, the improper motive of the tortfeasor is both a necessary element in the cause of action and a reason for awarding punitive damages.”); BUREAU OF JUSTICE STATISTICS, CASES AND VERDICTS, 1996, *supra* note 134, at 9 tbl.8 (summarizing the results of a comprehensive 1996 survey of state court cases in the nation’s seventy-five largest counties, and setting out punitive damages award rates by case category, including a rate of twenty-four percent for the category “intentional tort”); BUREAU OF JUSTICE STATISTICS, CASES AND VERDICTS, 1992, *supra* note 135, at 8 tbl.8 (summarizing the results of a similar study in 1992, and reporting a punitive damages award rate of 18.5% in the intentional tort case category).

<sup>146</sup> See *Lewis v. Casey*, 518 U.S. 343, 356 (1996) (reaffirming inmates’ right of “access to courts,” though narrowing the right to one of “reasonably adequate opportunity to file nonfrivolous legal claims challenging their convictions or conditions of confinement”); *Bounds v. Smith*, 430 U.S. 817, 824–25, 828 (1977) (finding it “indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them,” and holding that “the fundamental constitutional right of access to the courts requires prison authorities to . . . provid[e] prisoners with adequate law libraries”).

<sup>147</sup> See 28 U.S.C. § 1915(a) (1994) (since amended). While a number of district courts, prior to the PLRA, experimented with assessing in forma pauperis inmates partial filing fees, the required fees were very low and often ad hoc. See Marie Cordisco, *Pre-PLRA Survey Reflects Courts’ Experiences with Assessing Partial Filing Fees in In Forma Pauperis Cases*, FJC DIRECTIONS, June 1996, at 25 (1996).

<sup>148</sup> The litigation costs that some inmates might incur if they could — for example, deposition costs — are simply beyond their means. Note, however, that there is one set of costs that inmates do sometimes incur involuntarily. Like other litigants, inmates who lose their cases may be held liable for their *defendants’* “costs,” used here in a specialized sense that includes transcription fees and not much else. See *infra* note 241 and accompanying text. I do not have any information on either the frequency of orders awarding costs against inmates, or how often defendants actually try to collect. In any event, the risk of being forced to pay the defendant’s costs does not seem to be well known to inmates, so its incentive effects are minimal.

In addition, some facilities are authorized by state law to charge inmates for the costs of their own incarceration. Many facilities rarely exercise this authority for inmates who are not on work release or working in relatively high-paying “prison industries” jobs, but it sometimes can give defendants extra anti-litigation leverage: when inmates file suits against them, the defendants can counterclaim for the cost of incarceration. I have heard about this strategy (and even seen evidence of it in

how low their probability of success was — an understanding made far less likely by the absence of lawyers to serve as information conduits — they had little disincentive to file cases in which the expected values were low<sup>149</sup> because their litigation costs were low or nonexistent. Also, litigating a case might provide a useful relief from prison boredom<sup>150</sup> (might be, in inmate parlance, a good way to do time). These two factors apply to cases with low expected damages (“low-stakes cases”), low chances of success (“low-probability cases”), or both.<sup>151</sup>

Whether the point is made in an inmate-friendly way by underscoring a high legal standard or the presence of skeptical decisionmakers, or less sympathetically by underscoring the absence of negative incentives or simply labeling the cases “meritless,” the argument I’ve just presented remains essentially a claim that pre-PLRA inmates filed legally insufficient cases. And, to *some* extent, that claim is correct: it is undoubtedly true

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case dockets), but have no information on how frequently it is used or with what degree of success. On the prevalence of inmate room-and-board fees in prisons, see Susan Clayton, *Inmate Fee-for-Service Programs*, CORRECTIONS COMPENDIUM, Aug. 1998, at 7 (reporting the results of a survey of prisons in forty-three states; thirteen imposed room-and-board fees on at least some non-work-release inmates); DALE PARENT, U.S. DEP’T OF JUSTICE, RECOVERING CORRECTIONAL COSTS THROUGH OFFENDER FEES 53 tbl.D-1 (1990) (reporting that various kinds of offender fees were authorized in 1988 for thirty-six state prison systems, and for jails in twenty-six states); *id.* at 7 tbl.2-3 (reporting that three of the eighteen prison agencies and four of the seventeen jail agencies that responded to a survey reported that they imposed fees for the cost of ordinary, non-work-release confinement). For an example of a state statute that expressly authorizes offender fee setoffs in inmate litigation, see ARIZ. REV. STAT ANN. § 31-238D (West 2002).

Finally, corrections defense counsel sometimes answer inmate litigation with other counterclaims. For example, an inmate seeking damages for excessive force in a cell extraction may be met with a counterclaim for the injury suffered by a correctional officer during the incident. The example is one given to me by a lawyer who has defended inmate cases for the Pennsylvania Department of Corrections for many years. See Unger Interview, *supra* note 21.

<sup>149</sup> A case’s expected value to its plaintiff is the amount of damages expected in the event of victory, discounted to reflect the probability of failure, less the costs of litigation.

<sup>150</sup> Some have speculated that one large motive for inmate filings is prisoners’ desire to take field trips. See, e.g., *Merritt v. Faulkner*, 823 F.2d 1150, 1157 (7th Cir. 1987) (Posner, J., concurring) (“Inmates love turning the tables on the prison’s staff by hauling it into court. They like the occasional vacation from prison to testify in court.”). This seems to me quite unlikely. For one thing, evidentiary hearings are very rare in inmate cases, so it is just not very common for inmates to gain a physical trip to the courthouse by means of their lawsuit. Also, a trip to the courthouse could be a mixed blessing even for a very bored prisoner, if his prison required him to “roll-up” to make the journey, putting his possessions in storage and reassigning his cell. Prison officials explain that while they would prefer to allow prisoners to return to their previous cell assignments, sometimes the space is needed, especially if the litigating prisoner is gone for more than a day or two. See, e.g., Telephone Interview by H.L. Rogers, Harvard Law School student, with Russ Marlin, public information officer, Michigan Department of Corrections (July 3, 2002).

<sup>151</sup> The basic insight that plaintiffs will not litigate unless the expected value of the judgment exceeds their costs underlies early work on the economics of litigation. See, e.g., William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 284-88 (1973); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 437 (1973); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 58-62 (1982).

that the inmate docket had a high proportion of both low-stakes and low-probability cases. But there were clearly a number of other things going on as well. In the next two sections, I look at two important factors: absence of counsel and obstacles to settlement.

3. *The Absence of Counsel.* — Nearly all the cases in the inmate federal civil rights docket are filed and litigated pro se — far more than in any non-prisoner part of the docket. Table II.D presents the available data on pro se rates in the federal civil docket for fiscal year 2000 (unfortunately, data are available only for very recent years<sup>152</sup>):

TABLE II.D: PRO SE CASES IN FEDERAL DISTRICT COURT,  
CASES TERMINATED FISCAL YEAR 2000<sup>153</sup>

Case category <sup>154</sup>	Total cases	% pro se
Contract	27,856	2.8
Tort (non-product)	26,819	6.0
Product liability	16,772	1.5
Civil rights	19,601	29.8
Civil rights: employment	22,553	20.1
<b>Inmate Civil Rights</b>	<b>25,176</b>	<b>95.6</b>
Labor	14,334	3.9
Statutory actions	39,647	6.9
U.S. plaintiff	30,659	11.7
Other	1216	20.9
Habeas, quasi-criminal	31,611	84.1
Total	256,244	27.6
Total without inmate civil rights/habeas	199,457	10.1

As Table II.D sets out, inmate civil rights plaintiffs are coded in the Administrative Office dataset as unrepresented by counsel in over ninety-five percent of their cases terminated in 2000. The counseled rates in the inmate docket varied a good deal by district, from zero to twelve per-

<sup>152</sup> The Administrative Office for the U.S. Courts added a variable for the pro se or counseled status of terminated cases in the codebook for 1996 terminations, see *Federal Court Cases Database, 1970–2000*, *supra* note 3, pt. 103 (civil terminations, 1996 codebook) at 3, but the computer files themselves do not consistently include pro se data until 2000 terminations. See Schlanger, *Technical Appendix*, *supra* note 3.

<sup>153</sup> These data are derived from Federal Judicial Center, *Federal Court Cases Database, 1970–2000*, *supra* note 3, pt. 117 (civil terminations 2000). The code is available at Schlanger, *Technical Appendix*, *supra* note 3. I have classified a case as pro se if its plaintiff is coded as pro se, except where the United States is the plaintiff (to be precise, where the basis of federal court jurisdiction is “U.S. plaintiff”). But I have also included cases in which the jurisdictional basis is “U.S. plaintiff” and the defendant is pro se — mostly forfeiture and other quasi-criminal actions.

<sup>154</sup> Case categories are grouped as in Table II.B. See the Data Appendix, *infra*, for a full list.

cent.<sup>155</sup> Unfortunately, comprehensive data are not available for cases terminated prior to 2000, let alone before 1996, when the PLRA and congressional restrictions on legal services were enacted,<sup>156</sup> but it seems more than likely that the rates were higher — and thus that the *number* of counseled cases was far higher.<sup>157</sup> Regardless of the precise pro se rate in 1995, it is clear that inmate civil rights cases were, then as now, vastly more likely than cases in any other category to be litigated pro se.

It is also clear that cases with counseled plaintiffs are more successful for those plaintiffs. Among cases terminated in 2000, counseled cases were three times as likely as pro se cases to have recorded settlements, two-thirds more likely to go to trial, and two-and-a-half times as likely to end in a plaintiff's victory at trial.<sup>158</sup> One-quarter of settlements and one-third of plaintiff's trial victories occurred in the four percent of cases with counsel.<sup>159</sup>

Why do plaintiffs with lawyers fare so much better? The two possible answers are: lawyers add value, or lawyers (or the judges or other court personnel who sometimes appoint them) are good screeners of cases. Both

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<sup>155</sup> Districts varied pretty evenly from a counseled rate of 0–1% (in the bottom 15% of districts) to 10–12% (near the top of the range). The top seven districts had purported counseled rates that were discontinuous with the rest of the distribution, ranging from 17.5% to 100%. A partial audit of docket sheets from these districts indicated that these outlying rates were at least in large part erroneously reported, but because only a few cases are affected, I have left them in the table in the text. Schlanger, *Technical Appendix*, *supra* note 3.

<sup>156</sup> For a description of the PLRA and legal services funding provisions discouraging the appearance of counsel in inmate cases, see *infra* pp. 1631, 1632.

<sup>157</sup> In their study of civil rights cases terminated in sixteen districts in 1992, Hanson and Daley report rates similar to the ones I found in 2000 — four percent overall. See HANSON & DALEY, REPORT ON SECTION 1983 LITIGATION, *supra* note 14, at 21. But the districts in Hanson and Daley's study *currently* show a significantly lower rate of representation — just three percent. See Schlanger, *Technical Appendix*, *supra* note 3. Similarly, though far more removed in time, Schwab and Eisenberg's data from docket reviews of inmate cases filed in the Central District of California, the Eastern District of Pennsylvania, and the Northern District of Georgia in fiscal year 1981 demonstrate a very steep fall-off in the counseled rate. Schwab and Eisenberg reported a counseled rate of 8.2%, 32.4%, and 11.3%, respectively. Schwab & Eisenberg, *Explaining Constitutional Tort Litigation*, *supra* note 15, at 773 tbl.XI. The rates in the same districts in cases terminated in 2000 were 1.9%, 1.5%, and 1.7%. Schlanger, *Technical Appendix*, *supra* note 3. The scarce data that exist, then, support the hypothesis that counseled rates have declined over time.

<sup>158</sup> Of 55,376 inmate civil rights cases that ended in 2000, 49,492 were coded as pro se. Of these, 1411 (2.85%) were coded as having settled; 491 (0.99%) were coded as having gone to trial; 52 (0.10%) were coded as ending in a trial victory for the plaintiff. There were 5797 cases coded as not pro se; according to their codes, 519 (8.96%) settled; 95 (1.64%) went to trial; 25 (0.43%) of trials) ended in plaintiff's trial victories. See Schlanger, *Technical Appendix*, *supra* note 3. In Schwab and Eisenberg's three-district 1981 study, the success rate of counseled inmates — which included litigated plaintiffs' judgments, settlements, and voluntary dismissals — was 52%. See Schwab & Eisenberg, *Explaining Constitutional Tort Litigation*, *supra* note 15, at 727 (defining success), 771 tbl.X (summarizing data). The success rate of the entire group of plaintiffs (counseled and pro se), by contrast, was 18%. EISENBERG, CASES AND MATERIALS, *supra* note 15, at 538 tbl.II.

<sup>159</sup> Not enough information is available to assess whether the amount of damages awarded varies with the counseled status of the case.

answers are undoubtedly right, but the first seems to me more important than the second. It should come as no surprise that lawyers litigate better than non-lawyers, improving the results for their clients.<sup>160</sup> And this point holds particularly true for inmates. Typical inmates' legal research skills are obviously limited — even mere literacy is relatively uncommon.<sup>161</sup> But illiteracy is actually the least of an inmate plaintiff's problems. Inmates are unable to conduct most kinds of informal investigations; they cannot interview most witnesses, for example.<sup>162</sup> And they cannot conduct effective discovery either, in part because of lack of legal skills and in part because prisons and judges are extremely nervous about sharing information with prisoners.<sup>163</sup> Even in a very strong case, inmates have no cash and little access to credit, so they cannot fund litigation expenses (for example, deposition costs or expert fees) on the expectation of an eventual judgment or settlement.<sup>164</sup> If inmates do get to trial, they are bound to be particularly bad spokesmen for their causes: on liability, a convicted criminal is not in a good position to be arguing about a guard's mental culpability, and on damages, inmates — like any other pro se personal injury plaintiffs — have the nearly impossible task of simultaneously conducting effective litigation and trying to demonstrate to the court or jury just how devastating their injury was. In sum, inmate plaintiffs need lawyers to make their cases "good cases."

Admittedly, however, the higher success rate of counseled cases is not entirely attributable to lawyers' added value. Lawyers who agreed prior to

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<sup>160</sup> Cf. Karl Monsma & Richard Lempert, *The Value of Counsel: 20 Years of Representation Before a Public Housing Eviction Board*, 26 L. & SOC'Y REV. 627, 627-30 (1992) (summarizing studies of the effects of lawyers); H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS 193-98* (1970) (finding that insurance claimants with lawyers received far higher settlements than those without, even after controlling for "merit" and injury).

<sup>161</sup> Only about a third of inmates are sufficiently literate to "make literal or synonymous matches between the text and information given in the task, or to make . . . low-level inferences." See NAT'L CTR. FOR EDUC. STATISTICS, PUB. NO. 1994-102, *LITERACY BEHIND PRISON WALLS* 19 tbl.2.3 (Oct. 1994), available at <http://nces.ed.gov/pubs94/94102.pdf> (setting out literacy scores and defining the assessed levels of competence).

<sup>162</sup> The point is one acknowledged even by Seventh Circuit Judge Richard Posner, hardly a usual ally of inmate litigants. See *Billman v. Ind. Dep't of Corr.*, 56 F.3d 785, 790 (7th Cir. 1995) ("[I]t is far more difficult for a prisoner to write a detailed complaint than for a free person to do so, and again this is not because the prisoner does not know the law but because he is not able to investigate before filing suit.").

<sup>163</sup> For example, the victim of an attack by a cellmate would want to obtain information about the cellmate's prior history both in and out of prison. But prisons are always especially loath to allow inmates to see each other's files because of privacy and security concerns.

<sup>164</sup> In counseled litigation, as Marc Galanter explains:

[t]he contingency fee lawyer is not only the client's advocate but the banker who finances his case. Since many clients are unable to pay expenses as they go, the lawyer not only provides his own services on credit, but advances the out-of-pocket expenses of investigators, expert witnesses, transcripts, and so forth.

Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457, 475 (1998).

the PLRA to take inmate cases brought under § 1983 sometimes funded that choice (and occasionally made their entire livelihood) from the “reasonable attorney’s fee[s]”<sup>165</sup> available if they prevailed. Given how expensive inmate cases are to litigate if their natural lack of jury appeal is to be overcome, these lawyers had every incentive to screen their cases carefully to maximize the chance of victory (though prior to the PLRA they had far less incentive to screen for high damages<sup>166</sup>). Public interest lawyers, too, did similar screening; they wanted cases in which they could be effective, whether or not they cared about fees. And courts did some screening as well — in some districts, courts implemented plans for finding counsel in those few cases in which a judge deemed representation especially useful.<sup>167</sup> In districts with such methods in operation, appointment of counsel is probably especially common in cases headed for trial, so the judge need not deal at trial with a pro se inmate.<sup>168</sup> In general, however, counsel appointments have been quite rare, which makes sense given that courts can neither compel counsel to serve nor compensate them for their service.<sup>169</sup>

Even if lawyers are good screeners of cases, however, they can only screen cases they hear about. And prison, if not jail, plaintiffs can’t shop their cases around the personal injury bar, both because prisons are so disproportionately located in nonmetropolitan areas (areas, that is, without large numbers of lawyers)<sup>170</sup> and because incarcerated people can’t just go

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<sup>165</sup> 42 U.S.C. § 1988(b) (2000).

<sup>166</sup> See *City of Riverside v. Rivera*, 477 U.S. 561, 565–67 (1986) (upholding an award of \$245,456 in attorneys’ fees based on prevailing lawyers’ hourly rates, in a case in which damages awarded on the federal claim were only \$13,300).

<sup>167</sup> For some discussion of “pro bono panels,” see DAVID RAUMA & DONNA STIENSTRA, FED. JUDICIAL CTR., *THE CIVIL JUSTICE REFORM ACT DELAY AND EXPENSE REDUCTION PLANS: A SOURCEBOOK* 241–52 tbl.10 (1995), available at [www.fjc.gov/public/pdf.nsf/lookup/Sourcebk.pdf/\\$File/Sourcebk.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Sourcebk.pdf/$File/Sourcebk.pdf). This report lists a number of district courts’ local rules that set out pro bono panel or other § 1915(e)(1) procedures.

<sup>168</sup> See, e.g., *Hughes v. Joliet Corr. Ctr.*, 931 F.2d 425, 429 (7th Cir. 1991) (noting that “[t]he district judge denied Hughes’s motion [for appointment of counsel] because her policy is not to appoint counsel for an indigent prisoner until and unless she decides that an evidentiary hearing is warranted,” and disapproving the denial in the particular instance); THOMAS, *PRISONER LITIGATION*, *supra* note 15, at 170 (quoting a federal judge on why counsel is needed at trial).

<sup>169</sup> See 28 U.S.C. § 1915(e)(1) (2000) (codified at 28 U.S.C. § 1915(d) prior to 1996) (“The court may request an attorney to represent any person unable to afford counsel.”); *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 301–06 (1989) (holding that a court may appoint counsel for inmates who appear in forma pauperis, but may not require counsel to serve). Occasionally, an individual judge will go outside ordinary “pro bono panel” procedures and solicit counsel for cases she deems particularly worthwhile — a solicitation that lawyers feel quite a bit of pressure to accept. But my impression is that this is more common in districts with relatively few prisoner cases, where the number of such solicitations can stay low. More generally, while the Administrative Office pro se variable distinguishes only between counseled and uncounseled plaintiffs and does not code whether counsel was appointed or not, it is interesting to note that the overall rate of representation by district in inmate civil rights cases, in 2000 at least, decreased as both the number of total cases terminated and the inmate proportion of those cases increased. Schlanger, *Technical Appendix*, *supra* note 3.

<sup>170</sup> I once tried to find a trial lawyer for an inmate with a serious injury from an assault by his cellmate. I represented the assault victim on appeal, and the Court of Appeals reversed a grant of summary

around looking for, or even calling lawyers, even if they can figure out whom to ask.<sup>171</sup> In addition, even before the PLRA further restricted access to counsel, some of the factors discussed below that depress settlement and trial victories for inmate cases applied to counseled as well as pro se cases, making the cases less attractive to lawyers for reasons that had nothing to do with legal merit.

In short, without data<sup>172</sup> there is really no way to know which effect dominates — the depression of success rates because lawyers are not available, or the absence of lawyers because the cases are not very good cases.<sup>173</sup> What is clear is that both effects operate and, accordingly, that the absence of lawyers cannot itself substantiate the claim that inmate cases lack merit. Rather, the absence of lawyers is at least a partial explanation of plaintiffs' poor success rate.

4. *Obstacles to Settlement.* — The great majority of plaintiffs' successes in every area of federal litigation are achieved not by litigated out-

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judgment for the prison, sending the case back to district court for trial. I was unable to find anyone willing to take on the case, not because of its "quality" but because of the prison's location — far away from the court where the case would be tried. The prisoner himself was even farther away: he had been transferred by the Department of Corrections. Even Judge Posner, an advocate for market forces in provision of counsel, acknowledges the problem:

[I]t would be unrealistic to suppose that many prisoners could, by dangling the lure of a contingent fee or an award of damages under 42 U.S.C. § 1988, entice a lawyer to conduct the necessary investigation before the filing of a complaint (lawyers are, and with reason, terribly skeptical about the merits of prisoners' civil rights suits, most of which are indeed hoked up and frivolous, and prisons generally are located far from cities having large numbers of lawyers).

*Billman v. Ind. Dep't of Corr.*, 56 F.3d 785, 790 (7th Cir. 1995).

<sup>171</sup> See Jennifer Gerarda Brown, *Posner, Prisoners, and Pragmatism*, 66 TUL. L. REV. 1117, 1140–44 (1992) [hereinafter Brown, *Posner, Prisoners, and Pragmatism*].

<sup>172</sup> Schwab and Eisenberg argued in 1988 that their data about inmate cases filed in 1981 in three district courts strongly supported the "added-value" hypothesis (though they did not put their claim in quite these terms). Their factual finding was that in two large districts in which the court often appointed counsel to represent inmates, appointed and non-appointed counsel achieved nearly identical success rates. This of course is consistent with either a screening effect or an added-value effect. However, they emphasized that appointments were made far more often in one of the districts (the Eastern District of Pennsylvania) than in the other (the Northern District of Georgia), resulting in a much higher rate of inmate representation in the former (32%) than in the latter (11%). Yet the success rates for counseled-inmate cases in these two districts were very similar. It was most plausible, they argued, to conclude that many "meritorious" cases (by which they seemed to mean cases *capable* of achieving success if competently litigated, rather than ones that actually achieve success) were going forward without lawyers, and losing as a result. Schwab & Eisenberg, *Explaining Constitutional Tort Litigation*, *supra* note 15, at 772–74.

<sup>173</sup> This quite specific debate has not shown up in relation to the PLRA. Elsewhere, however, it has caused significant controversy. For example, in the Seventh Circuit, Judge Posner has repeatedly argued for market testing of inmate cases, until 1992 in dissent or dicta. See *McKeever v. Israel*, 689 F.2d 1315, 1324–25 (7th Cir. 1982) (Posner, J., dissenting); *Merritt v. Faulkner*, 697 F.2d 761, 769–71 (7th Cir. 1983) (Posner, J., concurring in part and dissenting in part); *Merritt v. Faulkner*, 823 F.2d 1150, 1157–58 (7th Cir. 1987) (Posner, J., dissenting); *Hughes*, 931 F.2d at 429–30; *Billman*, 56 F.3d at 790 (Posner, J.). Jennifer Gerarda Brown presents some of the evidence and arguments against Posner in Brown, *Posner, Prisoners, and Pragmatism*, *supra* note 171, at 1138–54.

come but by settlement. Tables II.A and II.B demonstrate that this is true for inmates as for other kinds of plaintiffs: nearly all of plaintiffs' successes in those tables are by settlement. Inmate civil rights cases are unusual, however, in both the low proportion of the docket that settles and the correspondingly high proportion of the post-motion docket that goes to trial. Indeed, even though eighty-two percent of inmate cases terminated in 1995 were pretrial victories for the defendants, there were so few settlements of the inmate cases that did manage to survive pretrial litigation that fifteen percent of all federal civil trials held that year were in inmate civil rights cases.<sup>174</sup> In noninmate litigation categories, among cases that lasted until a defendant filed an answer to the plaintiff's complaint, for every case that went to trial, between four and twelve other cases settled. But for inmate civil rights cases, there was just one post-answer settlement for every trial — notwithstanding that inmate cases have an unusually large amount of pre-answer litigation, which depresses the number of cases that reach the post-answer stage.<sup>175</sup> So to understand why inmates did so poorly in litigation prior to the PLRA, the priority is to analyze why inmate settlements are so infrequent.

(a) *The Impact of the Low Quality of the Docket.* — The reason for low settlement rates offered by inmate litigation's critics prior to the PLRA — the low quality of the inmate docket — was not in itself much of an explanation at all, although it contributed to an explanation. It was not that the premise was wrong; it wasn't. Prior to the PLRA, as already discussed, it was only to be expected that a high proportion of the cases filed by inmates lacked merit. And even after the summary judgment screen, the disconnect between summary judgment standards and trial standards meant that the low-probability tilt in the docket was far from gone. Cases that get through pretrial, of course, do so on the assumption that facts are as stated by the plaintiff, where there is some evidentiary support.<sup>176</sup> But especially because inmates are unable to run investigations of their cases in order to get documentary or testimonial support for their claims, oftentimes at trial the best an inmate can do is turn the case into a swearing contest. And it only makes sense that inmates — especially pro se inmates — most often lose swearing contests; both judges and juries tend to find convicted criminals unappealing and unbelievable witnesses.<sup>177</sup>

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<sup>174</sup> See *supra* note 5.

<sup>175</sup> Although this one-to-one ratio of trials to post-answer settlements is by far the lowest proportion of settlements in any major case category in the federal district courts, it is still quite a high number — far higher than one would think from most of the literature about inmate cases, which does not distinguish between pre- and post-summary-judgment settlements. (The exception is THOMAS, PRISONER LITIGATION, *supra* note 15, at 176–77.)

<sup>176</sup> See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

<sup>177</sup> There is no empirical research actually testing this commonplace observation with respect to civil trial outcomes. But there are quite a few studies that find that, all else equal, jurors are more likely to convict a defendant if they know that he has a prior conviction. See Dennis J. Devine, Laura D. Clay-

But the fact that inmate cases had a low expected value, objectively speaking, does not fully explain why those cases were unlikely to settle. In some types of litigation, such cases frequently settle for low, “nuisance value” amounts. More precisely, all other things being equal, the prevalence in a litigation docket of low-stakes cases, at least, ought to *increase* settlement rates. Assuming that the parties can agree that the cases are indeed low-stakes, settlement ought to be readily seen as far cheaper and more certain for the plaintiffs than the alternative, litigation.<sup>178</sup> And even a high proportion of low-probability cases is not inconsistent with a high rate of settlement, albeit probably at a significant discount from the total stakes.<sup>179</sup> So inmate cases’ low settlement rate requires more explanation than their admittedly low-value tilt.

(b) *Asymmetric Information.* — In corrections litigation, the defendant, as the repeat player and the “have,”<sup>180</sup> has a relatively accurate understanding of the likelihood of plaintiff victory. By contrast, the pro se plaintiff, the single-shot “have-not,” does not. Indeed, pro se inmates are woefully ill-informed about the values of their cases. This may sometimes allow defendants to get off cheap; as one writ-writer put it to me, pro se inmate plaintiffs “settle big-money cases for peanuts.”<sup>181</sup> But big-money cases (in this rather essentialized vision of what that means) are relatively uncommon, so more often errors run the other way: inmates are particularly disinclined to settle for small amounts, even where a small sum is very reasonable in light of the expected outcome at trial. As litigation theorists have long recognized, information asymmetry decreases the likelihood of a perceived mutually beneficial bargaining range, making settlement far less likely.<sup>182</sup> And when cases are low-probability (rather than low-stakes), the room for disagreement between the parties is particularly large. Accordingly, some portion of the large number of inmate plaintiffs

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ton, Benjamin B. Dunford, Rasmus Seyer & Jennifer Pryce, *Jury Decisionmaking: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL’Y & L. 622, 678–79 (2001) [hereinafter Devine et al., *Jury Decisionmaking*] (summarizing studies).

<sup>178</sup> See Priest & Klein, *supra* note 116, at 20. For a general treatment modeling settlement dynamics, see ROBERT H. MNOOKIN, SCOTT R. PEPPE & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 97–126 (2000) [hereinafter MNOOKIN ET AL., BEYOND WINNING]; on this particular point, see *id.* at 119–20.

<sup>179</sup> As Priest and Klein explain in their classic article on settlement and trial decisions, “in the limit, litigation probabilities [i.e., the chance of a litigated versus a settled outcome] and [litigation] success rates will converge to a function given by the error terms and not by the distribution of disputes.” Priest & Klein, *supra* note 116, at 19 n.42.

<sup>180</sup> See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95–124 (1974) (analyzing many reasons why “haves” most often beat “have-nots” in litigation).

<sup>181</sup> Wright Interview, *supra* note 21.

<sup>182</sup> See Amy Farmer & Paul Pecorino, *Issues of Informational Asymmetry in Legal Bargaining*, in DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP 79, 80–81 (David A. Anderson ed., 1996) [hereinafter Farmer & Pecorino, *Informational Asymmetry*] (summarizing prior literature).

with low-probability cases are often unwilling to settle for nuisance value, insisting on larger awards.

Moreover, I would surmise that, especially for inmates, this effect is heightened after summary judgment. Inmates encouraged by a denial of defendants' summary judgment motions often fail to realize that they will nonetheless lose at trial unless they prove not only that a wrong has been committed or a rule violated, but also that they experienced harm. A corrections lawyer in Virginia, for example, explained a number of years ago that the reason inmate cases do not settle is that "the demands of prisoners are unrealistic. They think that they are entitled to millions of dollars if they prove that a wrong had been inflicted upon them, even though they have suffered no damages."<sup>183</sup> Of course, this kind of "self-serving bias" is hardly unusual in litigation psychology,<sup>184</sup> but it is likely to be particularly acute for inmates without counsel, because pro se litigants cannot be "debiased" by their attorneys, who have less emotional attachment to the claim and enough experience to know better.

(c) *Low Litigation Costs.* — An equally important obstacle to settlement is the low cost of additional (that is, post-filing) litigation, already discussed as one of the reasons inmates file low-merit cases.<sup>185</sup> After all, whatever filing fee the plaintiff owed, that cost is sunk and therefore logically irrelevant to the subsequent decision whether or not to settle. For inmates, refusing to settle does not impose any transaction costs to speak of (once again, I except the possibility of assessed defendants' costs) at any point in the litigation.

Moreover, correctional defendants also have extremely low litigation costs, at least prior to summary judgment, largely because pro se inmate plaintiffs are unable to make litigation expensive. It is the high cost of responding to discovery, after all, that pushes so many defendants in other types of cases to settle prior to dispositive motion adjudication. But those costs are not, generally speaking, incurred in any but the most unusual individual inmate case.<sup>186</sup> As for other litigation costs, for defendants who have full-time legal staff (all prisons, and some jails), the marginal pretrial litigation cost of a typical case is minuscule. Not only is an in-house legal

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<sup>183</sup> Robert G. Doumar, *Prisoners' Civil Rights Suits: A Pompous Delusion*, 11 GEO. MASON L. REV. 1, 17 (1988) (reporting the opinion of "[a]n attorney[] who has handled over the last decade perhaps as many prisoner cases as anyone in the state of Virginia").

<sup>184</sup> See, e.g., Farmer & Pecorino, *Informational Asymmetry*, *supra* note 182, at 79–80 (summarizing prior discussions of "excessive optimism by one or both parties"); Samuel Issacharoff, Charles Silver & Kent D. Syverud, *Bargaining Impediments and Settlement Behavior*, in DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP, *supra* note 182, at 51, 55–60 (discussing the role of "self-serving bias" in blocking settlements).

<sup>185</sup> See Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404, 409 (1984) [hereinafter Bebchuk, *Imperfect Information*].

<sup>186</sup> For inmates with experienced counsel, however, the threat of broad discovery into embarrassing oversight failures can be particularly potent; pre-discovery settlement can buy political as well as litigation peace. Campbell Interview, *supra* note 21.

staff less expensive than outside counsel, but experienced corrections defense counsel have a variety of methods for minimizing their time outlay in low-probability cases, such as form or quasi-form pleadings and affidavits, and established relationships with correctional personnel so that one phone call can suffice for an investigation.<sup>187</sup> Note, however, that trials are obviously more expensive and may even involve outside counsel, so this point loses a good deal of its traction for cases that survive summary judgment (which may contribute to their higher settlement rate).

In short, the low cost of *not* settling, for both plaintiffs and defendants, operates to depress the settlement rate in individual inmate litigation.

(d) *Perceived High External Settlement Costs.* — The explanation most often proffered by corrections officials for low settlement rates is not the low cost of *not* settling, but the high cost of settling. Corrections administrators and other observers agree that settling with inmate plaintiffs encourages more filings. After all, inmates talk to one another.<sup>188</sup> Put in economic terms, inmate litigation's defendants feel that settlements have expensive external effects and therefore cost far more than the direct outlay of funds involved. (And of course, high settlement costs are even more influential when coupled with low litigation costs.<sup>189</sup>)

The point is not theoretically controversial; numerous commentators have observed that defendants' repeat player status can lead them toward litigation and away from settlement because of settlement's costly external effects. A reputation for settling cases ("being a pushover") can have very broad impact.<sup>190</sup> And settlement is a certain loss, whereas when a defendant goes to trial there is only a *risk* of an adverse outcome. Nonetheless,

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<sup>187</sup> See BRANHAM, *PRO SE INMATE LITIGATION*, *supra* note 58, at 229–30; Collins Interview, *supra* note 21; DeLand Interview, *supra* note 21.

<sup>188</sup> See, e.g., THOMAS, *PRISONER LITIGATION*, *supra* note 15, at 138 ("News of settlements and monetary awards spreads quickly through a prison, and, hoping for similar success, other prisoners file similar suits on the theory that 'if it worked for him, it will work for me.'"); *id.* at 181 ("We're more likely to settle a suit if the prisoner who has brought the suit is not in the institution anymore. If he's, say, been released, we're more likely [to] settle it than if he's back there, because the one thing you don't want happening in the prison setting is a guy going back saying, 'Yeh, they took my toothbrush,' or whatever the thing might have been, 'and I sued them, and I got \$100, or \$200.'" (quoting an anonymous state official)).

<sup>189</sup> As Priest and Klein state, "To take extreme cases, where litigation costs are lower than settlement costs . . . all or most disputes will be litigated." Priest & Klein, *supra* note 116, at 20.

<sup>190</sup> See, e.g., MNOOKIN ET AL., *BEYOND WINNING*, *supra* note 178, at 225; Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 241 (1982). What I take as a more formal statement of the same point is presented in Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 INT'L REV. L. & ECON. 3, 5 (1990), which develops a litigation model in which "the plaintiff's decision to bring suit both depends upon and influences the defendant's settlement strategy," and is accordingly an endogenous variable. For additional discussion of the issue, see Rosenberg & Shavell, *Nuisance Value*, *supra* note 116, at 10 n.3. See also Bruce H. Kobayashi, *Case Selection, External Effects, and the Trial/Settlement Decision*, in *DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP*, *supra* note 182, at 17, 29–30 (surveying literature on asymmetric stakes); Kent D. Syverud, *The Duty To Settle*, 76 VA. L. REV. 1113, 1160 & n.118 (1990).

other theorists have reached quite the opposite conclusion: Priest and Klein, and many subsequent elaborators, argued that when defendants' litigation stakes are higher than plaintiffs' — for example, when defendants are repeat players but plaintiffs are one-shot players — the result is, in general, to encourage settlement.<sup>191</sup> The idea is that trial is particularly costly for such defendants because of the risk of preclusion, bad precedent, and negative reputational effects if they lose. Thus settlements become relatively cheaper. Because this is a relative, not an absolute point, it holds, though less strongly, even if the trial risks are low. It seems to me that the choice between the two effects cannot be made in the abstract; it rather depends on very specific social facts in a given context.<sup>192</sup> In the context of inmate litigation, it is clear that defendants are very often strategically unwilling to settle. Lawyers with experience as counsel to inmates agree that in prison litigation, even nominal settlements are rare or non-existent in low-probability cases. And many corrections department heads and attorneys general have told interviewers that they have “no-settlement” policies, even if they have to fight with other state officials to maintain them. For example, Richard Stalder, head of the Louisiana prison system, told me:

I argue with risk management people on this [settlement issue]. They say, “Just give the guy the pair of tennis shoes,” or the \$100 or whatever. That's the traditional risk management approach. But I say, once you start paying on a nuisance basis, you're going to have an exponential increase in the number of cases filed.<sup>193</sup>

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<sup>191</sup> Priest & Klein, *supra* note 116, at 25–26.

<sup>192</sup> See, e.g., Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLAL. REV. 1, 52–53 (1996) (giving examples of how strategic incentives of repeat player defendants might vary, producing different settlement strategies); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 322 (1991) (“Pretrial bargaining and the selection of cases for trial cannot be understood in the abstract. To explain the settlement negotiations and the outcomes in these cases, it is necessary to consider the social and economic context of the litigation.”). Gross and Syverud make a point structurally similar to the one in the text, but about medical malpractice claims. They disagree with prior work hypothesizing that doctor defendants, whose reputational interests give them higher stakes than their plaintiffs, are therefore more likely to settle. To the contrary, they argue that doctors' reputational interests make them less likely to settle; rather than “avoiding trials they fear they will lose,” doctors “seek[] trials when they expect to win.” *Id.* at 366 (emphasis removed). As Gross and Syverud point out, “[t]his analysis is consistent with Priest and Klein's general model for the effect of asymmetric stakes”; it differs in the way those stakes are analyzed. *Id.* at 366 n.113 (citing Priest and Klein, *supra* note 116, and George L. Priest, *Measuring Legal Change*, 3 J.L. ECON. & ORG. 193, 208–09 (1987)).

<sup>193</sup> Stalder Interview, *supra* note 21. I do not mean to say that such policies are universal. For example, Branham reports a quite different outlook on the part of at least one private prison corporation, Corrections Corporation of America (CCA):

During an interview, CCA's vice-president of legal affairs stated: “If a prisoner establishes that due to our negligence, his tennis shoes were lost, we will spend \$40 to buy him a new pair of tennis shoes. And we *should* because it was our fault. By contrast, an attorney who represents a Department of Corrections will spend \$4000 of the taxpayers' money to avoid

Even at the post-summary judgment stage, no-settlement polices are still common, if not quite as rigid. Lynn Branham summarized the comments of five district court judges who described to her what they felt were inappropriate state no-settlement polices: “This recalcitrant attitude towards settlement, it was noted, exists even when prisoners raise legitimate concerns about prison conditions or operations and even when a lawsuit could be resolved for a relatively small sum of money.”<sup>194</sup> My interviews confirm Branham’s findings. For example, Missouri’s corrections head explained to me that “[o]ur Attorney General has as his philosophy that he does not settle cases: we’re always prepared to take cases to trial.”<sup>195</sup> Still, some prison officials who deny *ever* settling cases for nuisance value do say that they occasionally settle cases they consider meritorious, presumably most often after summary judgment.<sup>196</sup> Attitudinal objections to settlement are bound to have waning influence as a case gets closer to trial. And the outcome data presented in section A demonstrate that inmate cases do, in fact, settle in substantial numbers each year.

(e) *Corrections Culture*. — Even apart from their intuitions about the likely result on future filings of known settlements, many corrections officials simply hate to settle cases. The former head of corrections in Utah (who now travels the country consulting on jail and prison litigation) says that he encouraged his staff and lawyers “to be warriors” — that is, to fight all litigation tooth and nail. He is proud, he says, that “in Utah, we treated litigation like a blood sport — got rid of all the lawyers who were the least bit afraid and hired warriors.”<sup>197</sup> Inmates and their keepers live, obviously, in a uniquely antagonistic milieu.<sup>198</sup> It makes sense that correctional officers and those who are socialized into the attitudes of correctional officers would think of settling a case as “capitulating to an inmate” — an outcome that undermines a prison’s symbolic and perhaps actual or-

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paying the prisoner \$40.” The CCA attorney added the obduracy of some correctional attorneys working in the public sector towards settlement was upsetting. “We’re all taxpayers,” she noted. “And it’s our money being wasted.”

BRANHAM, *PRO SE INMATE LITIGATION*, *supra* note 58, at 233. Branham repeats the story in Lynn S. Branham, *The Prison Litigation Reform Act’s Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It*, 86 CORNELL L. REV. 483, 521–22 (2001) [hereinafter Branham, *Enigmatic Exhaustion*]. One corrections department head told me that his agency will occasionally settle nuisance cases “just to get them out of our hair — for \$500 or whatever.” Wilkinson Interview, *supra* note 21.

<sup>194</sup> BRANHAM, *PRO SE INMATE LITIGATION*, *supra* note 58, at 232.

<sup>195</sup> Schriro Interview, *supra* note 21.

<sup>196</sup> Louisiana corrections head Richard Stalder told me: “I settle cases in a fair and equitable way on real claims. But for both small and large claims, either I or my principal deputy have to see every settlement.” Stalder Interview, *supra* note 21.

<sup>197</sup> DeLand Interview, *supra* note 21.

<sup>198</sup> This is not to deny that accommodating strategies exist, *see, e.g.*, GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 48–58 (1958) [hereinafter SYKES, *SOCIETY OF CAPTIVES*], but merely to state the obvious background fact.

der.<sup>199</sup> Some of the lawyers in the offices of attorneys general are somewhat removed from this mindset,<sup>200</sup> but not entirely. It is this context that probably led one federal district judge to tell Lynn Branham that more appropriate litigation decisions would be made in inmate civil rights cases if some of the state's lawyers would "take a less adversarial and more administrative posture in the case."<sup>201</sup> And, although I think it's a lesser influence on the low settlement rate, inmates, too, are participants in the oppositional culture of their prison or jail. If, for example, the goal of a lawsuit is to harass correctional personnel (as some repeat defendants claim is common),<sup>202</sup> why settle?

Regardless of who is to blame, it is clear that dialogue between pro se inmate plaintiffs and government officials is both difficult and rare. As William Bennett Turner, lead plaintiffs' counsel for the trial in the *Ruiz* case in Texas, wrote in 1979, "[r]elatively few prison cases can be settled, primarily because meaningful negotiations between prisoners acting pro se and states' attorneys are practically impossible."<sup>203</sup>

For all these reasons, then — asymmetric information, low litigation costs, the felt incentive effects of settlement, and the antagonism endemic to correctional culture — what is astounding is that *any* pro se inmate cases settle — not that so few do.

5. *Trial Win Rates.* — In recent years, inmates have won only fifteen percent or fewer of their federal civil rights trials, a very low rate even by comparison to the other underdogs of the federal litigation docket, employment discrimination plaintiffs (and, as Table II.B shows, employment plaintiffs also settle at a much higher rate).

Perhaps the only thing that can be said for certain about plaintiffs' win rate of eight to fifteen percent of their trials is that it is entirely consistent with the bad-case hypothesis (or, to say the same thing differently, the argument that judges and juries have set the doctrinal/persuasive standard for liability in inmate cases too high). But it is equally consistent with the hypothesis that many cases fail for lack of lawyers. Presumably, both are somewhat true. As for the impact that obstacles to settlement have on trial win rates, I will content myself here with pointing out that the various ob-

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<sup>199</sup> See Schriro Interview, *supra* note 21 (attributing this view to some correctional administrators, though disagreeing with it).

<sup>200</sup> On the cultural divide between attorneys general's office lawyers and those who work in-house in departments of corrections, see WILLIAM C. COLLINS, AM. CORRECTIONAL ASS'N, THE ROLE OF HOUSE COUNSEL IN CORRECTIONS: A JOB TASK ANALYSIS 7 (1981).

<sup>201</sup> BRANHAM, *PRO SE INMATE LITIGATION*, *supra* note 58, at 236.

<sup>202</sup> Jim Thomas — hardly a critic of inmate litigation — concedes that harassment is a common motivation for the lawsuits. THOMAS, *PRISONER LITIGATION*, *supra* note 15, at 136–38. But what Thomas means by harassment is not quite the same as what the critics mean. Thomas means cases filed less to win than to put a particular officer on notice that future misbehavior will receive scrutiny — lawsuits, that is, with particularized deterrence goals. *Id.*

<sup>203</sup> Turner, *When Prisoners Sue*, *supra* note 15, at 637.

stacles I have identified cut in different directions with respect to the pressure they put on trial outcomes. Plaintiffs' trial success rates ought to be low because of the combination of the low-probability tilt of even the post-summary judgment docket and the high proportion of cases that go to trial.<sup>204</sup> But success rates should be *high* based on the hard bargaining posture of defendants (correctional officials' unwillingness to settle even good cases means some such cases go to trial), and on plaintiffs' overestimation of case values (if plaintiffs refuse to settle good cases because they feel settlement offers are too low, one would expect their trial win rate to be high, although the *amount* they win might be lower than the rejected offer).

6. *Low Damage Awards.* — Table II.C sets out information on the low amount of damages awarded to inmate plaintiffs in their rare litigated victories. The first question for this section is, why such low damages? The most obvious hypothesis is that inmate damages are small because the harm involved is trivial. But I have read too many descriptions of grievous harm suffered by inmates coupled with small verdicts to believe it. What is far more likely is that the ordinary rules of tort damages are limiting compensation. Because injured inmates who remain incarcerated after the injury have no (or very low) lost wages and no medical expenses, it is simply not surprising that damages are low even in cases involving very serious injury. The oft-repeated rule that general damages (that is, noneconomic damages) typically end up equal to “three times specials” (that is, three times economic damages) — or even, as some scholars have found is more typical in noninmate settings, a pattern of general damages approximately *equal* to specials<sup>205</sup> — would net most inmates virtually nothing<sup>206</sup> in even extremely serious cases. Indeed, the high incidence of punitive damage awards in cases involving only low compensatory damages illustrated by Figure II.A may evidence jury discontent with entirely normal damages in cases with proven bad conduct.

It is not only the doctrine of damages that depresses verdict amounts. In many cases one would expect juries to lowball prisoners' nonwage damages as an expression of disregard for them — even when liability is clear

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<sup>204</sup> Priest and Klein recognized this, commenting that “where the slope of the distribution at the decision standard is extreme, plaintiff victories in litigation may diverge markedly from 50 percent.” Priest & Klein, *supra* note 116, at 22.

<sup>205</sup> On the folklore of the “three times specials” rule of thumb and its lack of empirical support, see Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 L. & SOC. INQUIRY 795, 817 (1998).

<sup>206</sup> One of the few lawyers who actually takes inmate cases on contingency fee credits the large verdicts lawyers in her firm have won to their efforts to get juries to step outside traditional damages: “You can’t take a traditional approach to presenting damages in these cases, because there just aren’t any. The plaintiffs have low if any earnings potential; they weren’t supporting anyone. So we look instead to show the jury how outrageous the defendants’ conduct was.” Koob Interview, *supra* note 21.

clear or even egregious. For pro se cases (as I suggest above), an inmate who is together enough to succeed in persuading a judge or jury on liability faces all the more skepticism about the magnitude of the harm he experienced.<sup>207</sup> Lawyers who handle these inmate cases report that these obstacles to large recovery are not completely insurmountable. For example, in cases in which the plaintiffs are the bereaved relatives of dead or comatose inmates, a big verdict is possible if the lawyer is able to focus the jury's attention entirely on the outrageousness of the alleged misconduct, rather than on the small economic losses.<sup>208</sup> But these kinds of cases are not typical, and it takes a good deal of expertise to try them in a way that neutralizes the ordinary reactions of jurors.<sup>209</sup>

The low damages in inmate cases raise an entirely separate question of transactional efficiency. Table II.C includes the sum of litigated plaintiffs judgments in 1993 and shows that the entire set of 100 plaintiffs' litigated victories led to about \$8.3 million changing hands — \$1.9 million if one super-sized verdict is excluded.<sup>210</sup> Of course, there are also settlements. Because these are far more numerous — in 1993, there were about 1950 judgments coded as settlements and another 2350 coded as voluntary dismissals — they certainly add up to far more money. While there is no way to know how much more, it is certainly possible to come up with some defensible outer limit estimate. If settlements averaged, say, twice as high as litigated judgments (after taking out the one outlier award of \$6.5 million, which otherwise dominates the calculations), settlements in 1993 would have totaled over \$75 million. Voluntary dismissals could add to that figure. All of a sudden, this begins to look like real money. (Of course, it is more plausible that settlements and especially voluntary dismissals are mostly for far less money.<sup>211</sup>)

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<sup>207</sup> In 2000, the first year with reliable data on the presence of counsel, *see supra* note 152, eighty-five percent of cases terminated by a trial verdict were litigated pro se. *See* Schlanger, *Technical Appendix*, *supra* note 3.

<sup>208</sup> *Id.*

<sup>209</sup> Elizabeth Koob told me about settling a case in which an inmate died from an inappropriate restraint. The defendant, the New York Department of Corrections, offered her client, the decedent's mother, several hundred thousand dollars, and the district judge was stunned when Koob refused the offer. The judge told her that juries typically awarded only a few thousand dollars in such cases. But Koob was confident that she could do better, and the prospect was apparently scary enough to the defendants that the eventual settlement was a million dollars. *Id.*

<sup>210</sup> The numbers are bound to be at least a little low, because they necessarily exclude information from the small portion of the docket for which information is unavailable. For a description of the composition of the sample, *see supra* note 132.

<sup>211</sup> Howard Eisenberg discovered from his file review of inmate cases that “[i]n a number of cases the prisoner actually obtains substantially the relief he seeks, not through the order of the court, but simply because some responsive person has seen the complaint after litigation was filed. Often the ‘relief’ is seemingly trivial: a phone call to a family member, retaining a book in the cell, or the right to wear a small item of jewelry — but that is all the inmate wanted to begin with.” Howard Eisenberg, *Rethinking Prisoner Cases*, *supra* note 15, at 439. Eisenberg suggests that voluntary dismissals are the formal disposition in some such cases. *Id.* at 439 n.93.

But in fact, even though \$75 million is real money, it is dwarfed by the costs of running the litigation system. Litigation imposes very substantial transaction costs on plaintiffs and their lawyers, on courts, and on defendants. I will not treat the first, because the cost of litigation to inmates and their lawyers is bound to be relatively small, given that nearly all inmate civil rights cases are filed *pro se*.<sup>212</sup> Besides, some of plaintiffs' attorneys' fees are undoubtedly included in state costs, since the state usually pays such fees when it is the losing party.<sup>213</sup>

Costs to courts, by contrast, are substantial. They include the compensation and overhead costs of district and appellate judges and their chambers staff (law clerks and secretaries), as well as magistrate judges, *pro se* law clerks and staff attorneys at both the district and appellate level, and court clerks. The infrastructure of the federal court system, including court security, the Administrative Office, and the Federal Judicial Center, adds to these costs. Each year, the Administrative Office develops a formula for estimating the budgetary impact of new federal initiatives that might increase case filings. Under the Administrative Office's formula for 1995, the total lifetime cost of 100 new cases with a "case weight" of 1.0 (a more or less average case, which requires three hours of judge time) was \$454,316 (\$4543 per case).<sup>214</sup> Of course, inmate cases are not average cases. Their assigned case weight is far lower — 0.28 usually and 0.48 if the case is coded as having a federal defendant.<sup>215</sup> But the formula can easily be adjusted to account for different case weights by computing the total "weighted filings" (the number of filings multiplied by the case weights) in the inmate civil rights category, and then multiplying these by the formula's average per-case cost.<sup>216</sup> This produces the estimate that inmate cases filed in 1995 cost courts about \$51 million.<sup>217</sup> Service of

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<sup>212</sup> See *infra* Table II.D. Prisons and jails do, however, need to pay for the law libraries or other legal assistance that allow inmates to proceed *pro se*, and I have not included these costs. Note, however, that they are as much or more attributable to the habeas docket as to the civil rights docket.

<sup>213</sup> See 42 U.S.C. § 1988 (2000).

<sup>214</sup> The formula is discussed *infra* at note 217, and its components are set out *infra* at Table IV.A.

<sup>215</sup> See *supra* note 96.

<sup>216</sup> It is less simple to figure out whether the resulting figure accurately reflects the cost of inmate cases. The problem is that the case weights came from a *judicial* time study, and therefore reflect different amounts of judge time, but not other kinds of differences among case categories. For example, even adjusting to account for the small amount of judge time per case, inmate cases probably used more magistrate judge and *pro se* law clerk time but less appellate time than the formula assumes. Still, Administrative Office staff (who are clearly in the best position to evaluate the question) believe that using the general formula is nonetheless a fairly good method for estimating costs — certainly better than any other available algorithm. Jaffe Interview, *supra* note 21.

<sup>217</sup> Schlanger, *Technical Appendix*, *supra* note 3. My estimate is consistent with the one submitted to Congress by the Administrative Office: nearly \$50 million for cases filed in fiscal year 1994. See JUDICIAL IMPACT OFFICE, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL IMPACT STATEMENT: VIOLENT CRIMINAL INCARCERATION ACT OF 1995, H.R. 667, at 3 (June 21, 1995). The first part of Table IV.A, *infra*, sets out the components of the Administrative Office's formula; the bottom two rows

process in these cases (which is provided without charge by the United States Marshals Service) probably costs another several hundred thousand dollars.<sup>218</sup>

As for defendants' costs, the National Association of Attorneys General (NAAG) estimated in 1995 that they were even higher than court costs. NAAG surveyed the states and received cost estimates from thirty-five of them. Extrapolating from those responses, it estimated that the states spent about \$80 million each year on inmate litigation.<sup>219</sup> No precise information on the survey's method or results is available. But as an estimate of litigation transaction costs, this seems perfectly plausible.<sup>220</sup> Eighty million dollars pays for 1066 employees at \$75,000 each (including salaries, benefits, and overhead). In 1995, that would have worked out to one employee for every 927 state inmates.<sup>221</sup> These employees would have included not just legal staff (lawyers, paralegals, secretaries), but also various prison personnel ("litigation officers" and other correctional employees who work on litigation), as well as other employees who participate in depositions, review records, or handle other litigation-related tasks. Of course some, and probably a large portion, of these state costs are actually incurred in dealing with the large, court order cases, rather than the individual cases that I am discussing here. And much of the rest is probably spent on cases that have lawyers or go to trial, though these are quite rare.<sup>222</sup>

No real data on the federal prisons' litigation costs are available, but a ballpark estimate is that such costs were at least several million dollars more.<sup>223</sup> As an even rougher estimate, it seems reasonable to guess that

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are what I have added. The head of the Administrative Office's Judicial Impact Office kindly shared the Administrative Office's formulas with me. Jaffe Interview, *supra* note 21.

<sup>218</sup> The Marshals Service only started keeping records on numbers of items served in fiscal year 2002. But in every case in which the court does not dismiss the complaint prior to service, at least one, and usually several, defendants must be served. In 1995, the Marshals Service charged eight dollars per item served by mail (the ordinary method). See 28 U.S.C. § 1921 (2000); 28 C.F.R. § 0.114(a)(2) (2002). (Recordkeeping information is from an e-mail to the author from Joe Lazar, Associate General Counsel, United States Marshals Service (May 8, 2002).)

<sup>219</sup> Letter from the National Association of Attorneys General to Senate Majority Leader Bob Dole (Sept. 19, 1995), reprinted in 141 CONG. REC. S14,413, S14,417-18 (daily ed. Sept. 27, 1995).

<sup>220</sup> See Hanson, *supra* note 94, at 225. Hanson estimates at least \$100 million dollars in litigation expenses, but without any discussion of sources or methods.

<sup>221</sup> See *supra* Table I.A. In 1993, for example, California had fifty-two lawyers assigned to defend the state against lawsuits filed by its 130,000 state prisoners (this works out to be one lawyer for every 2500 inmates). See Legislative Counsel of California, Bill Analysis of SB 1445 (Aug. 9, 1994), available at [http://www.leginfo.ca.gov/pub/93-94/bill/sen/sb\\_1401-1450/sb\\_1445\\_cfa\\_940809\\_143023\\_sen\\_floor](http://www.leginfo.ca.gov/pub/93-94/bill/sen/sb_1401-1450/sb_1445_cfa_940809_143023_sen_floor) (last visited Mar. 16, 2003).

<sup>222</sup> For example, Branham reports that in Illinois, state lawyers working on nonhabeas inmate cases in 1995 spent forty percent of their time on cases in which prisoners were represented by attorneys. BRANHAM, *PRO SE INMATE LITIGATION*, *supra* note 58, at 34.

<sup>223</sup> If thirty federal lawyers work full time on inmate litigation at \$100,000 each, that would cost around \$3 million per year. It is hard to know how many staff hours are spent on litigation, because trial work is handled by assistant U.S. Attorneys, or by lawyers in the Civil Division of the Justice De-

the nation's jails probably spent something less than half as much as state prisons on inmate litigation: jails house half as many inmates as prisons do on any given day, and while they were sued proportionately less than prisons, they had fewer economies of scale to minimize the cost of responding.

To total these figures, leading up to 1996, inmate litigation had transaction costs of about \$175 million per year — with a substantial but unknowable portion (and certainly not all) of that cost dedicated to the kinds of cases in which I am interested here.

In sum, whatever plausible assumptions are used to estimate either half of the comparison, annual federal litigation costs prior to the PLRA were vastly higher than the amount of compensation actually paid out through the litigation system.<sup>224</sup> If litigation is conceived of simply as a compensation mechanism, it combines poor performance with high costs. If, however, litigation is actually a process that has beneficial noncompensatory effects, its costs begin to look less outrageous. Even \$200 million — a very high cost estimate for 1995 — works out to just \$126 per inmate that year.<sup>225</sup> That is the cost of just a few weeks of meals in prison.<sup>226</sup> Thus, the overall cost, though large, is not nearly so large as to pretermitt inquiry into whether this was money well spent.

### C. Conclusion

At the end of the analysis, the evidence establishes that as of 1995, before the PLRA was enacted, plaintiffs were successful in only a small minority of inmate cases filed, and even the successful cases usually garnered quite small damages. A good deal of the low success rate was attributable to inmates' tendency to file bad cases — bad because of the high (some would say unduly high, but that normative judgment is not the point here) legal and persuasive standard of liability, because of the lack of disincentives to file, and because inmates are not very good lawyers. Of less interest to the PLRA's supporters but of definite import to me, it seems equally clear that the adjudication (or, as Marc Galanter has put it, the "litigotia-

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partment, who also do many other things, as do the BOP's own lawyers, who work with the litigation counsel. Pybas Interview, *supra* note 21.

<sup>224</sup> Charles Silver labels the comparison of expenditures to compensation via litigation the "Compensation Ratio" and criticizes it as a measure of litigation efficiency and effectiveness. See Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2078-82 (2002).

<sup>225</sup> See Table I.A, *supra*, for prison and jail population figures.

<sup>226</sup> See, e.g., Wayne County Sheriff's Office, Detention Center, at <http://www.esn.net/sheriff/detention.html> (last visited Mar. 16, 2003) (reporting that a food services contractor "provides three meals each day to all inmates at a cost [that] . . . ranges from approximately \$0.98 to \$1.65 per meal"); Missouri Dep't of Corr., *A Monthly Fact Sheet* (Apr. 2000), available at <http://www.corrections.state.mo.us/director/Apt00.pdf> ("The average cost to serve one inmate breakfast, lunch and dinner was \$2.10 per day.").

tion”<sup>227</sup>) process was seriously flawed, so that the system led to serious undercompensation for a very large portion of such victims. The ordinary processes of lawyer screening, discovery, and settlement were ineffective when the parties were indigent prisoners and public corrections agencies. And in the absence of discovery and lawyers, motions and trials were likely an unreliable method of determining appropriate case outcomes. Yet litigation was nonetheless quite expensive for defendants. In sum, litigation was both burdensome for defendants and courts and ineffective as far as achieving individually correct outcomes that compensated victims of misconduct.

### III. SEA CHANGE: THE PLRA (AND OTHER 1996 CHANGES)

The PLRA did not change much of the substantive law underlying inmate litigation — mostly it could not, because inmates’ federal cases are nearly all premised on constitutional violations over whose definition Congress has no control. But the 1996 statute rewrote both the law of procedure and the law of remedies in individual inmate cases in federal court, with the following provisions:<sup>228</sup>

#### A. Exhaustion

Before the PLRA’s passage, inmate plaintiff “exhaustion” of grievance procedures was required only if the district court deemed exhaustion “appropriate and in the interests of justice,” and the relevant procedures had been certified as “plain, speedy, and effective” by the federal Department of Justice (specifically, by the Federal Bureau of Prisons) or by a district court,<sup>229</sup> a certification process seldom used.<sup>230</sup> Moreover, a plaintiff’s failure to exhaust under the original stan-

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<sup>227</sup> Marc Galanter, *Worlds of Deals: Using Negotiation To Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984) (arguing that litigation and negotiation are best conceptualized as one “litigation process”).

<sup>228</sup> The best guide to the PLRA and how courts have interpreted it is by John Boston, Executive Director of Prison Legal Services, part of the Legal Aid Society of New York. Boston’s guide has not been published in full, but an edited version is available as a book chapter, see John Boston, *The Prison Litigation Reform Act*, in A JAILHOUSE LAWYER’S MANUAL 339 (5th ed. 2000) [hereinafter Boston, *Jailhouse Lawyer’s Chapter*], and as a PLI article, see John Boston, *The Prison Litigation Reform Act*, in 16TH ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION 687 (PLI Litig. & Admin. Practice Course, Handbook Series No. H0-007S, 2000), available at WL 640 PLI/Lit 687 [hereinafter Boston, *PLI*]. Boston’s tract on administrative exhaustion is a separate, unpublished document. See John Boston, *Exhaustion of Administrative Remedies Under the Prison Litigation Reform Act* (Nov. 12, 2001) (unpublished manuscript, on file with author) [hereinafter Boston, *Exhaustion*]. Another good PLRA treatise is MICHAEL B. MUSHLIN, 3 RIGHTS OF PRISONERS 73 (3d ed. 2003).

<sup>229</sup> Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e(a)(1) (1988) (since amended); see also Donald P. Lay, *Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act*, 71 IOWA L. REV. 935, 939-42 (1986).

<sup>230</sup> JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 49 (1990) (explaining that “few states have sought and obtained certification under this

dards resulted only in a stay of a district court proceeding, not its dismissal.<sup>231</sup> But now, under the PLRA, prior to filing any federal-law “action . . . with respect to prison conditions”<sup>232</sup> — which means “all inmate suits about prison [or jail] life”<sup>233</sup> — inmates must make their complaints using whatever administrative grievance procedures exist. Exhaustion is required if the grievance system is “available”<sup>234</sup> to deal with a particular topic of complaint, even if that system lacks authority to grant the remedy sought (most frequently, money damages).<sup>235</sup> The exhaustion requirement has teeth because many courts have held that an inmate’s failure to comply with the grievance system’s rules (time limits, form, and so on) usually justifies disqualification of the inmate’s lawsuit.<sup>236</sup>

### B. Filing Fees

The PLRA requires indigent inmates, unlike other indigent plaintiffs in federal court, to pay filing fees in nonhabeas civil actions if they have any money in their prison accounts; inmates still can proceed in forma pauperis, but that status no longer exempts them from the obligation to pay a \$150 filing fee.<sup>237</sup> Instead, it allows them to pay the filing fee in installments, at the rate of twenty percent of income to their prison accounts each month.<sup>238</sup> Indigent inmate litigants remain entitled to free service of process and are excused from some costs on appeal.<sup>239</sup>

Inmates who have had three prior actions or appeals dismissed as frivolous or malicious, or for failing to state a claim upon which relief may be granted, now face an even more stringent limit: they may not proceed in forma pauperis at all unless they face “imminent danger of serious physical injury.”<sup>240</sup>

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statute”); Note, *Resolving Prisoners’ Grievances Out of Court: 42 U.S.C. § 1997e*, 104 HARV. L. REV. 1309, 1310–11 (1991) (discussing certification procedure and the Federal Courts Study Committee’s recommendations for revision).

<sup>231</sup> See 42 U.S.C. § 1997e(a)(1) (1988) (since amended).

<sup>232</sup> 42 U.S.C. § 1997e(a) (2000).

<sup>233</sup> *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

<sup>234</sup> 42 U.S.C. § 1997e(a).

<sup>235</sup> See *Booth v. Churner*, 532 U.S. 731, 734, 741 (2001).

<sup>236</sup> See *infra* pp. 1650–54.

<sup>237</sup> 28 U.S.C. § 1915(b)(1)–(2) (2000) (no filing fee exemption for inmates); *id.* § 1914(a) (filing fee is \$150).

<sup>238</sup> *Id.* § 1915(b)(1)–(2). The courts of appeals disagree about whether the assessments for multiple fees (district court and appellate filing fees in the same case, for example) are to be assessed sequentially or simultaneously. Compare *Whitfield v. Scully*, 241 F.3d 264, 276–77 (2d Cir. 2001) (sequentially), with *Newlin v. Helman*, 123 F.3d 429, 436 (7th Cir. 1997) (simultaneously), *overruled in other part* by *Walker v. O’Brien*, 216 F.3d 626, 628–29 & n.1 (7th Cir. 2000), and by *Lee v. Clinton*, 209 F.3d 1025, 1026–27 (7th Cir. 2000).

<sup>239</sup> See 28 U.S.C. § 1915(c)–(d) (2000).

<sup>240</sup> *Id.* § 1915(g).

### C. Costs

Even before the PLRA, inmates who lost their cases could be assessed their defendants' "costs," used here in a specialized sense that includes transcription fees and not much else.<sup>241</sup> Such liability, if assessed, is not insignificant: depositions can cost thousands of dollars to transcribe. But although costs are "allowed as of course" by the terms of Rule 54(d)(1), prior to the PLRA, district courts were fully authorized to deny defendants their costs due to a plaintiff's indigence, or to assess costs and then give the plaintiff some kind of equitable relief from their collection.<sup>242</sup> The PLRA altered these dispensation rules, stating: "If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered."<sup>243</sup> Courts have disagreed as to the precise effect of the new costs standard, but it's clear that the new standard is less favorable for plaintiffs than was the prior regime.<sup>244</sup>

### D. Judicial Screening

The PLRA requires that district courts review all inmate complaints against government entities or officers "before docketing, if feasible or, in any event, as soon as practicable after docketing."<sup>245</sup> In practice, this very often means that courts review complaints prior to service of process. Courts must dismiss a complaint if it is "frivolous, malicious, or fails to state a claim upon which relief may be granted; or . . . seeks monetary relief from a defendant who is immune from such relief."<sup>246</sup> Dismissal may

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<sup>241</sup> See FED. R. CIV. P. 54(d)(1) ("[C]osts other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs . . ."); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 440–42 (1987) (holding that Rule 54(d) costs include only those mentioned in 28 U.S.C. § 1920; the major items are stenographic transcripts, printing costs, and witness fees).

<sup>242</sup> See, e.g., *Weaver v. Toombs*, 948 F.2d 1004, 1013–14 (6th Cir. 1991) (reviewing case law suggesting that while plaintiffs' indigence weighs in favor of denying costs to a prevailing defendant, a court retains the authority to assess reasonable costs against unsuccessful *in forma pauperis* plaintiffs, who may then move for relief from such costs award).

<sup>243</sup> 28 U.S.C. § 1915(f)(2)(A) (2000). Again, the collection is limited to twenty percent of an inmate's monthly income. *Id.* § 1915(b)(2).

<sup>244</sup> Courts have differing interpretations of the result of the new statute. See, e.g., *Singleton v. Smith*, 241 F.3d 534, 541 (6th Cir. 2001) ("We do not appear to have forbidden partial remittance of costs as part of a district court's discretion, despite a presumption for taxation of full costs."); *Whitfield v. Scully*, 241 F.3d 264, 273 (2d Cir. 2001) ("[Section] 1915(f)(2)(A) restricts our authority to modify a district court's discretionary award of costs against a prisoner proceeding *in forma pauperis* on the ground that the prisoner is unable to pay.").

<sup>245</sup> 28 U.S.C. § 1915A(a) (2000).

<sup>246</sup> *Id.* § 1915A(b)(1)–(2); see also *id.* § 1915(e)(2) (requiring the same substantive standard to be applied "at any time" in all *in forma pauperis* cases, not just those brought by prisoners); 42 U.S.C. § 1997e(c)(1) (2000) (providing that the same substantive standard is applicable on the court's own motion or on a motion by a party to any "prison conditions" case brought in federal court by a prisoner).

be (and often is) without motion, notice to the plaintiff, or opportunity to respond.<sup>247</sup>

#### *E. No Obligation To Respond*

Defendants may now choose not to file a response to filed inmate complaints without the failure to answer being deemed an admission to the allegations in the complaint. Courts may order response only if “the plaintiff has a reasonable opportunity to prevail on the merits.”<sup>248</sup>

#### *F. Telephonic Hearings*

Where courts need or allow inmate participation in pretrial hearings or other proceedings, the PLRA requires judges to obtain such participation without removing the inmate from jail or prison by using a “telephone, video conference, or other telecommunications technology.”<sup>249</sup>

#### *G. Limitation on Damages*

Under the PLRA, inmates may not receive court-awarded damages for “mental or emotional injury suffered while in custody without a prior showing of physical injury.”<sup>250</sup> Read most broadly, this provision could rule out damages for anything — say, violation of religious freedom — that does not cause “physical injury.” So far, courts seem to be reading the provision somewhat more narrowly: while they have disallowed damage claims based on threats or poor conditions unless actual physical injury occurred, they have allowed cases charging constitutional violations of free speech, freedom of religion, and race discrimination to proceed.<sup>251</sup>

#### *H. Diversion of Damages*

When an inmate does win a damage award, the PLRA requires that it be “paid directly to satisfy any outstanding restitution orders pending against the [inmate].”<sup>252</sup> The inmate gets only the remainder.

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<sup>247</sup> See, e.g., *Plunk v. Givens*, 234 F.3d 1128, 1129 (10th Cir. 2000); *Carr v. Dvorin*, 171 F.3d 115, 116 (2d Cir. 1999) (per curiam). However, the plaintiff may get an opportunity to amend the complaint to cure certain defects. See, e.g., *Lopez v. Smith*, 203 F.3d 1122, 1127–31 (9th Cir. 2000) (en banc).

<sup>248</sup> 42 U.S.C. § 1997e(g)(2) (2000).

<sup>249</sup> *Id.* § 1997e(f)(1).

<sup>250</sup> *Id.* § 1997e(e); 28 U.S.C. § 1346(b)(2) (2000).

<sup>251</sup> See Boston, *Jailhouse Lawyer’s Chapter*, *supra* note 228, at 361–63 (summarizing cases). Boston is less sanguine in John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 434–37 (2001) [hereinafter Boston, *Court Stripping*].

<sup>252</sup> Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 807, 110 Stat. 1321-75 to -76, reprinted in 18 U.S.C. § 3626 (note) (2000).

### I. Limitation on Attorneys' Fees

When an inmate has a lawyer and wins a case, he, like any other civil rights plaintiff, is usually authorized to recover a "reasonable attorney's fee,"<sup>253</sup> at least in cases involving nonfederal defendants. In areas of litigation not covered by the PLRA, such fees are, generally speaking, calculated by multiplying the number of hours reasonably expended on the case by a reasonable hourly rate.<sup>254</sup> But the PLRA strictly limits fees in money damages cases to 150 percent of the total judgment.<sup>255</sup> In addition, the PLRA limits attorneys' hourly pay, otherwise based on market rates, to 150 percent of the rates authorized for court-appointed criminal counsel (currently, a maximum of \$169.50 per hour).<sup>256</sup>

### J. Coverage

Except where otherwise stated, the PLRA provisions set out above each apply only to civil, nonhabeas<sup>257</sup> cases "brought" by "prisoners."<sup>258</sup> Former inmates are not covered; nor are dead inmates or inmates' families.

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<sup>253</sup> 42 U.S.C. § 1988(b) (2000) authorizes fees in actions brought under § 1983. Fees are apparently unavailable for *Bivens* actions brought by federal inmates, see *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971), because the Equal Access to Justice Act allows fees to be awarded against the federal government only when some other substantive statute authorizes them, see 42 U.S.C. § 2412(b), or when a case is against the United States directly or an officer in his or her official capacity. See 28 U.S.C. §§ 2412(d)(1)(A), (d)(2)(C) (2000). What little case law I have found on this subject suggests that neither condition holds for *Bivens* actions for damages, which are brought directly under the Constitution against officers in their individual capacities. See, e.g., *Kreines v. United States*, 33 F.3d 1105, 1108-09 (9th Cir. 1994).

<sup>254</sup> *City of Riverside v. Rivera*, 477 U.S. 561, 572-73 (1986).

<sup>255</sup> 42 U.S.C. § 1997e(d)(2) (2000).

<sup>256</sup> See *id.* § 1997e(d)(3) (referencing the rate established under the Criminal Justice Act, 18 U.S.C. § 3006A (2000)). The Criminal Justice Act set rates of \$60 per hour for in-court time and \$40 per hour for out-of-court time, but authorized the Judicial Conference of the United States to raise the maximum rates. 18 U.S.C. § 3006A(d)(1). The Judicial Conference did so most recently in September 2000, when it authorized a rate of \$113 per hour (150% of which is \$169.50), JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 50 (2000), although Congress's appropriations for federal criminal defendants' counsel currently permit only \$90 per hour. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-77, 115 Stat. 748, 781 (2001) (allocating funding for federally funded defense counsel in fiscal year 2002); H.R. Rep. No. 107-139, at 99 (2001) (accompanying H.R. 2500, Pub. L. No. 107-77) (stating that the committee "[p]rovide[d] sufficient funding to increase panel attorney rates to \$90 per hour"); H.R. Conf. Rep. No. 107-278, at 142, reprinted in 2002 U.S.C.C.A.N. 793, 855 ("The conference agreement adopts, by reference, the House report language."). There is some disagreement in the federal courts of appeals about which rate is relevant for PLRA purposes. Compare *Webb v. Ada County*, 285 F.3d 829, 838-39 (9th Cir. 2002) (holding that the PLRA fee-cap must be set with reference to the rate approved by the Judicial Conference rather than the lower implemented rate), with *Hernandez v. Kalinowski*, 146 F.3d 196, 201 (3d Cir. 1998) (reaching the opposite conclusion).

<sup>257</sup> So far, all the courts of appeals seem to agree that the PLRA does not apply to properly filed actions under 28 U.S.C. §§ 2241, 2254, or 2255. See, e.g., *Walker v. O'Brien*, 216 F.3d 626, 633-37 (7th Cir. 2000) (citing and discussing uniform case law).

<sup>258</sup> See 42 U.S.C. § 1997e(a), (d)(1), (e); 28 U.S.C. § 1915(h) (2000).

There has been a fair amount of litigation around the margins of the definitions.<sup>259</sup>

### K. Other Legal Changes Concurrent with the PLRA

In the same 1996 appropriations bill that included the PLRA, Congress also imposed new constraints on the recipients of federal legal services funding. Among other limits, those offices were required to cease representing inmates.<sup>260</sup> Even though legal services offices used to handle vastly more inmate litigation than in more recent years, the new restriction was by no means merely symbolic. In 1995, recipient offices recorded more than 10,000 inmate matters — around a tenth of which involved representation that ended with a settlement or an agency or court decision.<sup>261</sup> (The other nine-tenths involved less time-consuming representation — advice, referrals, and the like.)

In addition, just two days before enacting the PLRA, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA),<sup>262</sup> which has severely limited the availability of habeas relief for both state and federal prisoners, essentially requiring prisoners to file any petition for habeas review in the first year following their conviction and limiting prisoners to one round of federal habeas review.<sup>263</sup> Finally, two months after the PLRA was enacted, the Supreme Court added its own limitations on inmate litigation in *Lewis v. Casey*.<sup>264</sup> Most relevant here, *Lewis* cut back the scope of inmates' right of access to law libraries. Emphasizing that the Constitution does not create "an abstract, freestanding right to a law library or legal assistance,"<sup>265</sup> the Court insisted that federal courts are authorized to interfere in prison officials' decisions about law library services only when the lack of such services caused "actual injury" to the plaintiff — that is, when it demonstrably "hindered his efforts to pursue a legal

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<sup>259</sup> See Boston, *PLI*, *supra* note 228, at 695–700.

<sup>260</sup> See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(15), 110 Stat. 1321, 1321-55.

<sup>261</sup> See LEGAL SERVS. CORP., PRISONERS RIGHTS CASES, 1990–2001 (May 3, 2002) (spreadsheet on file with author). Data in the spreadsheet are from the Legal Services Corporation Office of Information Management Case Service Reports (annual reports, 1990–2000). While legal services funding recipients handled a great many cases prior to mid-1996, their role since 1978 has been far smaller than in the early 1970s. See Jacobs, *Prisoners' Rights Movement*, *supra* note 2, at 39–40 (emphasizing the role of the Office of Economic Opportunity (OEO) Legal Services providers, but explaining that "[f]ederal funding for prisoner legal services has lately become more difficult to obtain, in part because of the displacement of OEO Legal Services by the Legal Services Corporation"). On the role of federally funded legal services providers in inmate litigation, both under the Legal Services Corporation and prior to its formation, see Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2019 (1999) (book review).

<sup>262</sup> Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending 28 U.S.C. §§ 2244, 2253–2255 and adding new sections, 28 U.S.C. §§ 2261–2266).

<sup>263</sup> See 28 U.S.C. § 2244 (2000).

<sup>264</sup> 518 U.S. 343 (1996).

<sup>265</sup> *Id.* at 351.

claim.”<sup>266</sup> Moreover, said the Court, a systematic remedy can be justified only by demonstration of widespread, systematic injury of this kind.<sup>267</sup> The result has been a marked contraction in the availability of law libraries and other legal services to prison inmates.<sup>268</sup>

#### IV. LITIGATION EFFECTS OF THE PLRA

“Beyond doubt,” the Supreme Court recently explained, “Congress enacted [the PLRA] to reduce the quantity and improve the quality of prisoner suits.”<sup>269</sup> The statute’s primary goal, as far as individual cases are concerned, was to reduce litigation, but with the avowed constraint that meritorious cases should remain viable. As Senator Hatch phrased it in one version of this point made repeatedly in floor speeches in support of the various PLRA versions, “I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised. The legislation will, however, go far in preventing inmates from abusing the Federal judicial system.”<sup>270</sup>

The constraint may have been entirely rhetorical. But even taken at face value, it was clearly secondary; claims of litigation abuse by inmates were dominant. Still, it seems appropriate to evaluate the PLRA in the

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<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 349, 359–60.

<sup>268</sup> See, e.g., Associated Press, *Iowa Prisons’ Law Libraries Are Targeted*, OMAHA WORLD-HERALD, Feb. 16, 1999, at 9, available at 1999 WL 4488527 (describing the planned phase-out of Iowa prison law libraries); Keith Bagwell, *State Prisons’ Paralegal Faces Charges of Fraud*, ARIZ. DAILY STAR, Aug. 13, 1998, at 1A, available at 1998 WL 6205126 (describing the implementation of Arizona’s decision to shut thirty-four of thirty-five prison law libraries and replace them with paralegal screening of inmates’ legal complaints); Angela Galloway, *Locke Signs State Budget*, SEATTLE POST-INTELLIGENCER, June 27, 2001, at A1, available at 2001 WL 3561869 (reporting on a Washington state budget cut of \$1.2 million achieved by “reducing inmate access to legal services and by closing prison law libraries”); *Legal Clinic at Graterford Prison To Close*, PA. L. WKLY., June 10, 2002, at 12, available at WL 25 PLW 644 (announcing shutdown of an inmate-run law clinic at a Pennsylvania prison); Betsy Z. Russell, *State To Try To Sell Prisons’ Old Law Libraries*, SPOKESMAN REV. (Spokane, Wash.), Apr. 26, 2002, at B1, available at 2002 WL 6439793 (reporting on Idaho’s decision to close its prison law libraries and put the books up for sale on eBay); Telephone Interview with Teresa Jones, Idaho Department of Correction, Public Information Officer (Nov. 6, 2002) (confirming the eBay sale of several prison libraries to a private person for about \$100 plus shipping costs). Utah shut down its prison law library prior to the *Lewis* decision. See *Carper v. DeLand*, 54 F.3d 613, 615 (10th Cir. 1995).

<sup>269</sup> *Porter v. Nussle*, 534 U.S. 516, 525 (2002). The Court was describing the exhaustion provision of the PLRA, 42 U.S.C. § 1997e (2000), rather than the whole Act. But the description accurately captures the entire presentation of the PLRA’s supporters on the topic of individual inmate litigation.

<sup>270</sup> 141 CONG. REC. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch); see also 141 CONG. REC. S18,136 (daily ed. Dec. 7, 1995) (statement of Sen. Hatch); 141 CONG. REC. H1480 (daily ed. Feb. 9, 1995) (statement of Rep. Canady) (“These reasonable requirements will not impede meritorious claims by inmates but will greatly discourage claims that are without merit.”); 141 CONG. REC. S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl) (“The filing fee is small enough not to deter a prisoner with a meritorious claim, yet large enough to deter frivolous claims and multiple filings. . . . [P]risoners with meritorious claims will not be shut out from court for lack of sufficient money to pay even the partial fee.”).

terms its supporters used. So is the PLRA realizing the paired goal and constraint of stemming the tide of bad inmate cases while allowing recovery for good ones? Yes to the first; probably no to the second.

### A. *The Shrinking Inmate Docket*

The most dramatic effect of the PLRA on individual inmate cases has been the decrease in district court filings coded by the Administrative Office as inmate civil rights cases. As Table I.A shows, the decrease between 1995 and 1997 was thirty-three percent, and it occurred notwithstanding a ten percent *increase* in the incarcerated population. This would seem to be unambiguous evidence that the PLRA has accomplished its litigation-reduction purpose. A little more analysis is needed to be sure, however: while the large decline in inmate filings illustrated in Table I.A demonstrates a significant reduction in inmate litigation in the relevant Administrative Office category, Table I.A and the data on which it is based cannot rule out simultaneous *increases* in similar but differently labeled litigation. In this section, I explore the possibility that the PLRA has led to differently labeled rather than fewer inmate filings. I conclude that there has clearly been a migration of cases from the federal district court inmate civil rights docket to federal habeas and state court dockets. That shift is likely quite small, however, compared to the tremendous demonstrable decline in inmate civil rights filings. Thus the PLRA seems to have achieved its major goal of shrinking the number of civil rights filings by inmates.

1. *State Court.* — Are inmate cases that used to be filed in federal court migrating to state court instead? Information on state court filings is extremely hard to come by, but at least two things are clear. First, state attorneys general and departments of corrections expected to see some movement from federal to state court. Indeed, the National Association of Attorneys General pushed hard for state PLRAs, both before and after Congress passed the federal statute.<sup>271</sup> Largely as a result of this push, all but a few states now have some kind of system that specially regulates inmate access to *state* court.<sup>272</sup> Second, notwithstanding state legislative ef-

<sup>271</sup> See National Association of Attorneys General, Resolution: Proposed Model State Legislation Providing Disincentives to Filing of Frivolous Lawsuits by Prisoners (adopted Mar. 20–22, 1994) (on file with author). NAAG's members were not the only state-level players. Louisiana's corrections department head, for example, told me: "Four years ago, the editor of the *Correctional Law Reporter*, Bill Collins, said that the impact of the PLRA would be to shift cases into state court. So I thought, 'Aha, we have to nip this in the bud.' So I got a state PLRA passed, and we've seen reductions in filings in both courts." Stalder Interview, *supra* note 21.

<sup>272</sup> The relevant state statutes are:

Alabama	[none]
Alaska	ALASKA STAT. §§ 09.19.010–.200 (Michie 2000)
Arizona	ARIZ. REV. STAT. ANN. §§ 41-1604.07(I), 41-1604.10(E), 12-302(E), 31-238 (West 2002)

Arkansas	ARK. CODE ANN. §§ 12-29-601 to -602 (Lexis 1999); <i>id.</i> §§ 16-63-220, 16-106-201 to -204, 16-106-301 to -302, 16-68-601 to -607 (Michie Supp. 2001)
California	CAL. PENAL CODE §§ 2085.5, 2932.5 (West 2000); CAL. GOV'T CODE § 68511.3(e) (West 1997); <i>see also</i> CAL. CIV. PROC. §§ 391 to 391.7 (West 1973 & Supp. 2003) (vexatious litigants)
Colorado	COLO. REV. STAT §§ 13-17.5-101 to -108, 17-20-114.5, 17-26-110.5 (2002)
Connecticut	[none]
Delaware	DEL. CODE ANN. tit. 10, §§ 8804, 8805 (Michie 1999)
District of Columbia	[none]
Florida	FLA. STAT ANN. § 57.085 (West Supp. 2002), 944.279, 944.28 (West 2001); <i>see also</i> FLA. STAT chs. 68.093 (2002) (vexatious litigants)
Georgia	GA. CODE ANN. § 9-10-14 (Supp. 2001); GA. CODE ANN. §§ 42-12-1 to -9 (Michie 1997 & Supp. 2001)
Hawaii	HAW. REV. STAT § 353-22.5 (Supp. 1999); <i>see also</i> HAW. REV. STAT § 634J-1 to -7 (1993) (vexatious litigants)
Idaho	IDAHO CODE §§ 19-4201 to -4226, 20-209E (Michie 1997 & Supp. 2002)
Illinois	705 ILL. COMP. STAT ANN. §§ 105/27.9, 505/21 (West 1999); 730 ILL. COMP. STAT ANN. §§ 5/3-6-3(d), 5/3-7-6 (West 1997), 735 ILL. COMP. STAT ANN. § 5/22-105 (West Supp. 2002)
Indiana	IND. CODE § 33-19-3-2.5 (1998)
Iowa	IOWA CODE ANN. §§ 610A.1-4, 903A.3, 904.702 (West Supp. 2002)
Kansas	KAN. CIV. PROC. CODE ANN. § 60-2001(b) (West Supp. 2002), KAN. STAT ANN. § 75-52,138 (1997)
Kentucky	KY. REV. STAT ANN. §§ 454.400 to 454.415 (Banks-Baldwin 1999 & Supp. 2002)
Louisiana	LA. REV. STAT ANN. §§ 15:1172-:1179, 15:1181-:1189 (West Supp. 2002)
Maine	ME. REV. STAT ANN. tit. 4, § 1058 (West Supp. 2001)
Maryland	MD. CODE ANN., CTS. & JUD. PROC. §§ 5-1001 to -1007 (1998 & Supp. 2001)
Massachusetts	MASS. GEN. LAWS ANN. ch. 231, § 6F (West 2000)
Michigan	MICH. COMP. LAWS ANN. §§ 600.2963, 600.5501-.5531 (West 2001)
Minnesota	MINN. STAT ANN. §§ 243.23, subd. 3(8), 243.241, 244.035, 563.02 (2000 & West Supp. 2002)
Mississippi	MISS. CODE ANN. §§ 47-5-138(3), 47-5-76 (2000)
Missouri	MO. ANN. STAT §§ 217.262 (1996); 510.125; <i>id.</i> §§ 506.360-.390 (West Supp. 2002)
Montana	MONT CODE ANN. §§ 25-10-109, 25-10-404, 46-18-237 (2001)
Nebraska	[none]
Nevada	NEV. REV. STAT 41.0322 (2002); <i>id.</i> 176.278, 209.3825, 209.451(1)(d) (2001)
New Hampshire	N.H. REV. STAT ANN. §§ 623-B:1 to 623-B:3 (Supp. 2002)
New Jersey	N.J. STAT ANN. §§ 30:4-16.2-.5 (West 1997 & Supp. 2002)
New Mexico	N.M. STAT ANN. §§ 33-2-11 (Michie 1978 & Supp. 1998); 41-4-16.1 (Michie 1978 & Supp. 1996)
New York	N.Y. C.P.L.R. 1101(f) (McKinney Supp. 2002); N.Y. COMP. CODES R. & REGS. tit. 22, §§ 140.1-.6 (2000)
North Carolina	N.C. GEN. STAT §§ 1-110(b), 148-118.1-.8 (2002)
North Dakota	[none]
Ohio	OHIO REV. CODE ANN. §§ 2323.51, 2969.21-.27 (West Supp. 2002); <i>see also</i> OHIO REV. CODE ANN. § 2323.52 (West 1994 & Supp. 2002) (vexatious litigators)
Oklahoma	OKLA. STAT tit. 12, § 2003.1, tit. 57, §§ 564-566.4 (2001)
Oregon	OR. REV. STAT §§ 30.642 to 30.650 (2001)

forts, inmate filings have increased substantially in some, though clearly not all, state courts.<sup>273</sup>

2. *Habeas*. — And has the PLRA induced inmates to file some federal court cases as habeas petitions rather than nonhabeas civil actions? There is no way to answer this question precisely, even though, as always, there is far more information about federal than state cases. Federal prison officials do report that they have been monitoring filings to assess this question, and have seen a marked movement into the habeas docket of federal inmate cases that would once have been filed as *Bivens* actions.<sup>274</sup> One state corrections official identified a similar tendency in response to a free-form question in my survey about effects of the PLRA. Clearly, some degree of migration pressure exists for both federal and state inmates. After all, the filing fee due for habeas petitions is just five dollars (if due at all; the PLRA has not eliminated prisoners' eligibility for waiver of this small

Pennsylvania	18 PA. CONS. STAT ANN. § 1108 (West 1998)
Rhode Island	[none]
South Carolina	S.C. CODE ANN. §§ 24-27-100 to 24-27-150, 24-27-200 to -220, 24-27-300, 24-27-400 (Law. Co-op 1989 & West Supp. 2002)
South Dakota	S.D. CODIFIED LAWS § 24-2-29.1 (Michie 1998)
Tennessee	TENN. CODE ANN. §§ 42-21-801 to -818 (Supp. 2001)
Texas	TEX. CIV. PRAC. & REM. CODE ANN. §§ 14.001-.014 (Vernon Supp. 2002); TEX. GOV'T CODE ANN. §§ 498.0045, 501.008, 501.019 (Vernon Supp. 2002); <i>see also</i> TEX. CIV. PRAC. & REM. CODE ANN. §§ 11.001-.104 (Vernon Supp. 2002) (vexatious litigants)
Utah	UTAH CODE ANN. §§ 78-7-36, 78-7-38, 78-7-39, 78-7-42 (Lexis Supp. 2002)
Vermont	[none]
Virginia	VA. CODE ANN. §§ 8.01-66.9:1, 8.01-195.3 item 7 (Lexis Supp. 2002)
Washington	WASH. REV. CODE § 72.09.111 (Supp. 2002)
West Virginia	W.VA. CODE §§ 25-1A-1 to 25-1A-8 (2001)
Wisconsin	WIS. STAT §§ 301.328, 801.02(7), 804.015, 806.025, 807.15, 809.103, 813.02(c), 813.40, 814.25, 814.29, 893.82 (1999-2000 & Supp. 2001)
Wyoming	[none]

<sup>273</sup> Seven respondents to my survey (five of the twenty-seven prison responses and two of the seventy-five jail responses) actually volunteered this information when asked to describe the effects of the PLRA. Another survey as well as interviews confirm the trend. *See* Christopher E. Smith & Christopher E. Nelson, *Perceptions of the Consequences of the Prison Litigation Reform Act: A Comparison of State Attorneys General and Federal District Judges*, 23 JUST. SYS. J. 295, 309 (2002) (stating that nineteen of twenty-nine state attorneys general office respondents reported an increase in state court prisoner litigation as a result of the federal PLRA). *See, e.g.*, Interview by Elizabeth Mellen Harrison, Harvard Law School student, with Christine Lasky, New York

Attorney General's Office (2000) (reporting that New York's inmate filings in state court went up from 997 in 1995-1996 to 1983 in 1999-2000). *But see* Office of the Attorney General, State of Texas, *New Inmate Lawsuits in Texas Courts* (Sept. 2000) (unpublished memorandum, on file with author) (reporting the decline of state filings by inmates from their peak in 1995). Texas enacted its version of the PLRA in 1995. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 14.001-.014 (Vernon 2002); TEX. GOV'T CODE ANN. § 498.0045 (Vernon Supp. 2002); *id.* § 501.008, 501.019 (Vernon 1998 & Supp. 2002).

<sup>274</sup> Pybas Interview, *supra* note 21.

filing fee) rather than the \$150 all other civil actions cost. An inmate unable to understand this area of law, which confuses even experienced lawyers, might simply file his action where it is cheapest. (This includes the substantial number of inmates who, prior to the PLRA, filed ordinary civil actions that might more appropriately have been denominated habeas petitions.<sup>275</sup>) Even for more sophisticated litigants, filing under habeas is far from crazy in many cases. Although it's clear that a prisoner may not seek to alter the fact or duration of his confinement in a nonhabeas suit,<sup>276</sup> the reverse — whether habeas actions may challenge the conditions of confinement as well as its fact or duration — is less settled.<sup>277</sup> And even if the case law were completely uniform in disallowing habeas actions relating to conditions of confinement, there are obviously cases that are hard to classify — for example, a suit seeking some change in the conditions of confinement that might lessen the term of confinement (say, access to drug rehabilitation for inmates in protective custody).<sup>278</sup>

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<sup>275</sup> See *supra* note 49.

<sup>276</sup> See *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) (“[W]hen a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.”); see also *Heck v. Humphrey*, 512 U.S. 477, 487 (1994) (“[W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.”). The complications of this doctrinal approach are explored in RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1442–52 (5th ed. 2003).

<sup>277</sup> The Supreme Court has expressly reserved this question. See *Bell v. Wolfish*, 441 U.S. 520, 527 n.6 (1979) (“Thus, we leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself.”); *Preiser*, 411 U.S. at 499 (“This is not to say that habeas corpus may not also be available to challenge such prison conditions. . . . When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal.”) (citing *Developments in the Law—Habeas Corpus*, 83 HARV. L. REV. 1038, 1084 (1970)). Moreover, the issue is very much confused by the shift over time in the consequences of typing an allegation of illegality as a habeas petition. Prior to the PLRA, habeas was generally less attractive to inmate plaintiffs than § 1983 or *Bivens* for two reasons. First, habeas law required exhaustion of state remedies, but the law governing § 1983 and *Bivens* actions did not. Second, for inmates represented by counsel, victory in a § 1983 case led to attorneys’ fee awards, but victory in a habeas case did not. Inmates accordingly were typically quite happy to characterize their suits as arising not under habeas but rather under § 1983 or a *Bivens* cause of action, and the case law on the appropriate scope of habeas review remained extremely underdeveloped. Now that the PLRA has reversed the prior valences, creating major advantages to bringing a lawsuit under habeas rather than § 1983 or *Bivens*, it seems plausible that courts will solidify the borders around the habeas remedy. If this happens, I would expect courts to be more hospitable to the habeas characterization for cases with some relationship to the duration of custody.

<sup>278</sup> See, e.g., *Bostic v. Carlson*, 884 F.2d 1267, 1269 (9th Cir. 1989) (holding that habeas review is available in suits seeking “release not from prison but just from a more to a less confining form of incarceration” as well as in suits seeking relief likely “to accelerate . . . release from prison”); *Del Raine v. Carlson*, 826 F.2d 698, 702 (7th Cir. 1987) (same); *Brennan v. Cunningham*, 813 F.2d 1, 4–5 (1st Cir. 1987) (same); *Boudin v. Thomas*, 732 F.2d 1107, 1111–12 (2d Cir. 1984) (holding an action seeking

So, how large is the migration into the federal habeas docket of cases that would once have been filed as civil rights cases? The quantitative data are not clear. It's certainly true that, for both state and federal prisoners, federal habeas actions have increased enormously from mid-1996 on. The number of habeas petitions filed in federal district court by state inmates has grown by fifty percent (from about 12,800 in 1995 to 19,100 in 2001), even though the state prison population has increased by only twenty percent over the same time period. Federal inmates' habeas filings under 28 U.S.C. § 2241 have *more* than doubled.<sup>279</sup> The difficulty lies in assessing how much of the enormous increase in habeas filings consists of "migrated" cases (those that prior to the PLRA would have been filed as ordinary civil actions and classified as inmate civil rights cases), and how much stems from other causes. The most important confounding issue is that the Antiterrorism and Effective Death Penalty Act,<sup>280</sup> passed just two days before the PLRA, effected its own sea change of habeas trends.<sup>281</sup> In addition, the Illegal Immigration Reform and Immigrant Responsibility Act also greatly increased the number of habeas filings by criminal offenders

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transfer from a more to a less restrictive prison environment properly cognizable under habeas, not *Bivens*).

<sup>279</sup> Prior to 2001, however, federal inmates' motions to vacate sentence under 28 U.S.C. § 2255 did not increase in number except for a very large filings spike in April 1997, discussed *infra* note 281. See Schlanger, *Technical Appendix*, *supra* note 3.

<sup>280</sup> Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending 28 U.S.C. §§ 2244, 2253–2255; and adding new sections, 28 U.S.C. §§ 2261–2266).

<sup>281</sup> For example, it stands to reason that the "use it or lose it" rule in the Antiterrorism and Effective Death Penalty Act (AEDPA), under which § 2254 habeas petitions by state inmates, and their federal-inmate analogues, § 2255 motions to vacate sentence, must be filed within one year of conviction, *see* 28 U.S.C. §§ 2244(d)(1), 2255 (Supp. V 2000), would encourage filings that under the prior regime would never have been made. Inmates who find themselves facing a deadline may simply be unwilling to forgo forever their one chance for collateral review. Indeed, this effect seems likely to be some part of the cause of a transitional spike observed in habeas filings by state inmates and motions to vacate sentence by federal inmates, after courts "grandfathered" in the AEDPA deadline by setting it at one year after the statute's effective date for cases concluded prior to passage — that is, in April 1997. *See, e.g., United States v. Cicero*, 214 F.3d 199, 202 (D.C. Cir. 2000) (citing unanimous precedent on this point). That month saw over 3700 habeas filings by state inmates, about triple the typical monthly filing rate. The effect was even more marked in federal motions to vacate sentence — well over 4000 were filed, about *seven times* the typical monthly filing rate. Schlanger, *Technical Appendix*, *supra* note 3. Confidence in the existence of a "use-it-or-lose-it" effect is undercut, however, by the fact that an increase in AEDPA-regulated filings has materialized only on the state side — although habeas petitions by state inmates skyrocketed, motions by federal inmates to vacate sentence did not. *Id.*

Moreover, quite a contrary effect is equally logical. Some (and perhaps a very large portion) of the observed filings spike in 1997 necessarily consists not of petitions that never would have been filed without AEDPA, but of petitions that would indeed have been filed, though months or years later, if not for AEDPA's deadline pressure. So AEDPA's provisions could logically cause a *decrease* in filings for several years following the spike. With the impact of AEDPA so complex, there is simply no way to know how much of the observed increase in § 2254 cases is attributable to "migrated" cases that once would have been filed as part of the inmate civil rights docket.

facing deportation.<sup>282</sup> The existence of these two statutes does not diminish the likelihood that some of the increase in habeas numbers is caused by the restyling of cases that have been filed under § 1983 or *Bivens* under the prior legal regime. But the simultaneity of the three legal-regime changes means that there is no way to know the magnitude of this effect.

Given the impossibility of quantitative precision as to both the state court and habeas migration effects, anecdote (more precisely, the relative absence of anecdote) actually provides more solid insight. The state authorities who succeeded in getting the PLRA passed continue to be just as organized and influential, if not more so. They have done some writing about the successes of the PLRA. For example, Todd Marti, of the Ohio Attorney General's office, recently wrote: "Has PLRA worked? The [overall] number of prisoner cases [is] way down . . . . [T]he courts, correctional defendants, and their counsel have been spared the wasteful burden of responding to thousands of meritless lawsuits. The answer is decidedly YES!"<sup>283</sup>

Members of the National Association of Attorneys General (NAAG), in particular, have not been shy about coming back to Congress to get amendments to the PLRA where it serves their purposes.<sup>284</sup> And as state defendants' counsel, members of NAAG are bound to know about nearly all of the prison portion of the inmate docket, wherever and under whatever label the cases are filed.<sup>285</sup> Their public silence about remaining loopholes is powerful evidence that any loopholes are small indeed. I conclude that the decrease in civil rights filings since the PLRA is a true shift in the frequency of inmate litigation.

Moreover, so far, the filing decrease looks more significant than even a large one-time shift downward in the litigation rate. Although early observers expected the PLRA-driven decrease in litigation numbers to be followed by gradual filings growth commensurate with the continuing in-

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<sup>282</sup> This statute eliminated aliens' right to appeal a deportation order to a federal court of appeals. Instead, they may obtain limited federal judicial review by way of a habeas petition (under § 2241) in district court. *INS v. St. Cyr*, 533 U.S. 289, 314 (2001). In 2001, even before the recent increase in federal use of immigrant detention, the pace of these immigration-related habeas petitions was about 100 per month. See Hussey Interview, *supra* note 21. Many, but by no means all, of these detained aliens are housed in federal facilities (and accordingly are suing federal wardens). So a good deal of the observed increase in § 2241 habeas petitions by federal inmates, and perhaps some of the increase in § 2254 petitions by nonfederal inmates, is caused by the new regime for criminal offenders who face deportation. Note, however, that this *St. Cyr* effect is quite recent. The detainee habeas numbers were certainly lower in prior years, though I have no specific information from before 2001.

<sup>283</sup> Todd R. Marti, *From the Government's Perspective: Has PLRA Worked? Yes!*, 13 CORRECTIONAL L. REP. 69, 78 (2002).

<sup>284</sup> See, e.g., Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 123, 111 Stat. 2440, 2470-71 (amending 18 U.S.C. § 3626(a), (b), (e) (1994)).

<sup>285</sup> Even cases dismissed prior to service, *see supra* pp. 1629-30, are made known to departments of corrections so that the plaintiffs' prison accounts can be debited for the filing fee.

creases in incarcerated population,<sup>286</sup> that is not what has happened. Rather, the number of filings categorized by the Administrative Office as inmate civil rights cases continued to decline between 1997 and 2001, even as the incarcerated population continued to grow.<sup>287</sup> As Table I.A demonstrates, nearly one-quarter of the forty-three percent decrease in filings since 1995 occurred *after* 1997; the filing *rate* has decreased by nearly twenty-five percent since 1997. It's impossible to say without additional research whether the continuing decline in litigation rates is related to the PLRA. On the one hand, perhaps direct and indirect experience with post-PLRA litigation (and particularly its filing-fee garnishment system) is persuading inmates not to file. On the other hand, Table I.A also shows that inmate litigation rates were declining slightly just before the PLRA's passage (after peaking in 1994) for reasons that are currently unclear. So perhaps the pre-PLRA slight decline in filing rates has simply continued, augmented but not really altered by the PLRA-fostered dramatic shift downward between 1995 and 1997.

3. *Jail and Prison Filings.* — With the notable exception of the provision allowing sua sponte dismissal of in forma pauperis filings,<sup>288</sup> the PLRA's provisions generally apply only to nonhabeas civil actions "brought" by "prisoners"<sup>289</sup> — that is, not by former inmates or by inmates' families or estates. I have not seen any commentary on what would seem to be the biggest impact of this coverage: that *jail* lawsuits should be far less affected than prison lawsuits by the individual case provisions of the PLRA. The vast majority of jail inmates are released without going to prison,<sup>290</sup> usually quickly enough that the statute of limitations on their

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<sup>286</sup> See, e.g., Cheesman et al., *Prisoner Litigation*, *supra* note 87, at 4 ("However, even if the PLRA has long-term success in preventing a segment of potential lawsuits from entering the federal courts, we expect that the decline in Section 1983 lawsuits has already 'bottomed-out.' Assuming that the proportion of prisoners able to meet the new filing requirements remains relatively constant over time, the number of Section 1983 lawsuits will once again increase simply because the population of state prisoners continues to rise. . . . Unless the U.S. Congress (or the federal courts) can break the fundamental connection between the expanding pool of potential litigators and the rate at which they actually litigate, any procedural changes will induce only short-lived decreases in the number of habeas petitions and Section 1983 lawsuits."); see also Cheesman, et al., *Tale of Two Laws*, *supra* note 87, at 99–100 (expressing, though with somewhat less certainty, the view that "the future course of these filings is still driven by state prisoner population").

<sup>287</sup> For descriptions of the current slow growth in incarcerated population, see BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISON AND JAIL INMATES AT MIDYEAR 2001 (Apr. 2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim01.pdf>; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISONS IN 2001 (July 2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p01.pdf>.

<sup>288</sup> 28 U.S.C. § 1915(e)(2) (2000).

<sup>289</sup> See 42 U.S.C. § 1997e(a), (d)(1), (e); 28 U.S.C. § 1915(h) (2000).

<sup>290</sup> See O'Toole, *Jails and Prisons*, *supra* note 76 (reporting that up to eighty-five percent of the inmates admitted to a jail are released within four or five days); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: PROFILE OF JAIL INMATES 1996, at 2, 7 (1998) (noting that in 1996, 35% of jail inmates were pretrial, 43% had received jail sentences, 12% had received prison sen-

cases has not come close to running.<sup>291</sup> It is certainly possible that jail cases are disproportionately litigated by the subset of former jail inmates who end up in prison and are therefore still covered by the PLRA. But even if this were the case, a significant portion of jail cases would remain uncovered. So the PLRA's various incentives discouraging individual litigation do not apply in many jail cases; no filing fees for indigents, no exhaustion required, and no limitations on attorneys' fees. Thus, one would expect the filings decrease to be relatively smaller for jail cases and, correspondingly, the proportion of the individual inmate case docket that concerns jail conditions ought to increase. Determining whether this change has actually occurred, and if not, why not, is a worthwhile project for future research. Unquestionably, with respect to the counseled portion of the inmate docket, the PLRA's coverage rules are having a real impact on lawyers' decisions about which cases to take. A number of prominent prisoners' advocates report that the PLRA has caused them and lawyers they know to look for cases involving persons no longer incarcerated or the families of dead inmates. These cases have two advantages for lawyers: they can take them without needing to litigate endlessly about exhaustion and can continue to earn market-rate fees if they win.<sup>292</sup>

4. *The Impact on Courts of Filing Declines.* — In any event, the amount of inmate litigation overall is down. So has this lessened pressure on the federal courts? Has it, that is, changed whatever feeling of deluge existed? Of course, that's a harder question. It is clear that courts are losers as well as winners, because while the PLRA reduced filings, it concurrently imposed significant new burdens on courts. Some perspective on the impact of the filing decline arises from application of the Administrative Office's formula for costs, discussed in Part II. Table IV.A shows the various components of court costs, as figured by the Administrative Office.

TABLE IV.A: FORMULA AND RESULTING ESTIMATE OF FEDERAL DISTRICT COURT COSTS OF INMATE CIVIL RIGHTS CASES

Cost category	Formula for 100 cases, each weighted 1.0			
	Fiscal year 1995		Fiscal year 2000	
	Full-time employees	Estimated costs	Full-time employees	Estimated costs

tences, and 10% were not yet sentenced; the median sentence of those with jail sentences was under six months).

<sup>291</sup> Section 1983 suits borrow their limitations period from the personal injury law of the state in which the cause of action arose. *See* *Wilson v. Garcia*, 471 U.S. 261, 276 (1985).

<sup>292</sup> *See* Campbell Interview, *supra* note 21; Wright Interview, *supra* note 21; Alphonse A. Gerhardstein, *PLRA Can Affect Private Practitioner's Ability To Represent Inmates*, 13 CORRECTIONAL L. REP. 68, 80 n.5 (2002) [hereinafter Gerhardstein, *PLRA and Private Practitioners*]. One jail official respondent to my survey reported that the PLRA is causing inmates to delay filing their lawsuits until after their release. No other respondent mentioned this effect.

Judges	2.82	\$304,954	2.44	\$289,289
Support	1.56	\$82,347	1.47	\$90,601
Juror fees		\$12,907		\$6294
AO	0.16	\$12,897	0.12	\$12,851
Security	0.06	\$41,211	0.04	\$56,337
A. Total		\$454,316		\$455,372
B. Weighted inmate civil rights filings		11,194		6844
Total lifetime federal court costs of new in- mate filings (A x B/100)		\$50,854,524		\$31,166,178

The formula yields only a rough estimate, but its result — nearly \$20 million less spent by the federal court system on inmate civil rights filings since 1995 — is very striking. Moreover, trials have declined even more than filings, perhaps because of the exhaustion requirement. Filings are down about forty percent — but trials are down fifty percent, from about 1000 per year in 1994, 1995, and 1996 to fewer than 500 in 2001.<sup>293</sup>

At the same time, however, the PLRA's cumbersome fee collection process, which applies to nearly every case filed by an inmate, is an important, new, and time-consuming administrative chore for the courts. Prior to the PLRA, district courts could simply dismiss a case and be done with it; now they have to collect, say, a few dollars per month from a plaintiff's prison account for years on end.<sup>294</sup> As a result it takes a fair amount more time and effort to close up the cases that used to be the easiest for courts. Moreover, the PLRA has imposed large and long-lasting, if transitional, burdens on judges; it has required a good deal of extra law-making as they figure out how to deal with its complications.<sup>295</sup>

Data on disposition time clarify how these two competing forces are playing out. Since the PLRA, federal district courts have simultaneously slowed their processing of inmate cases that last only a relatively short time and accelerated their processing of the longer-term cases. For example, whereas it took the district courts just five days to close ten percent of

<sup>293</sup> See Schlanger, *Technical Appendix*, *supra* note 3.

<sup>294</sup> Fees are collected monthly at a rate of twenty percent of income. 28 U.S.C. § 1915(b)(2) (2000). For an example of the resulting accounting issues, see *Losee v. Maschner*, 113 F. Supp. 2d 1343 (S.D. Iowa 1998).

<sup>295</sup> For judicial reaction to the PLRA's reduction of judicial burdens, see, for example, *Hyché v. Christensen*, 170 F.3d 769, 771 (7th Cir. 1999) (Evans, J., concurring) (“[W]hen an experienced district judge . . . is reversed three times in the same case on a little point like this, something is rotten in Denmark. I always thought the PLRA was supposed to make the handling of prisoner litigation more efficient. If that's its goal, and this sort of thing is its result, Congress should go back to the drawing board.”).

the inmate nonhabeas cases filed in 1995 and 1996, about double that time elapsed before courts resolved the same proportion of cases filed each year since, even though filings were down each year. The slow-down continues through the first third of the inmate civil rights docket. At the complex end of the docket, though, the PLRA imposes few new duties on courts. Indeed, whether or not as a result of the PLRA, courts are now processing the reduced caseload somewhat more quickly than before. For example, whereas it took 153 days for federal district courts to dispose of fifty percent of the inmate civil rights cases filed in 1995, they reached the same disposition level of 1999 cases in thirty-four fewer days.<sup>296</sup>

And has the filing reduction solved the babies-and-bathwater problem? That is hard to say, but, I would suggest, it is implausible. There is little reason to think that a reduction in inmate filings is inducing judges and judicial personnel — who have longstanding procedures and practices for processing inmate cases<sup>297</sup> — to increase the care with which they do that job. The point may be path-dependent, really — that is, if inmate filings had always been fewer in number, perhaps judges would not have gotten in the habit of hurrying through them. But that habit is long established.

#### B. Plaintiffs' Declining Success

Part A demonstrates that the PLRA has kept its supporters' first promise — reduced filings. But what about the asserted constraint? The statute's goal was, after all, not supposed to be simply litigation reduction but litigation *improvement*. The meritorious cases, the statute's sponsors said, would still be filed and would still succeed, because the PLRA's disincentives would be targeted, disproportionately inducing inmates to refrain from filing the worst of the cases. I argue in this section that the statute has not lived up to these promises. Its incentive scheme has most likely dissuaded potential litigants in relatively blunderbuss fashion, with only a weak relation to the merits of their cases. Moreover, the PLRA, combined with the changes in legal services funding requirements, has significantly undermined the already sharply limited ability of inmates to obtain counsel and so has increased the extent to which unsuccessful outcomes are the result of plaintiffs' litigation disabilities rather than any weakness of their cases. Furthermore, the PLRA's new decision standards have imposed new

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<sup>296</sup> Schlanger, *Technical Appendix*, *supra* note 3. It is not clear that the speed-up in the more complex half of the docket stems from the PLRA, for two reasons. First, the trend seems to have started in the early 1990s, though it clearly has continued in recent years. Second, since 1997, the noninmate docket, too, has shown some limited acceleration in resolution of the more complex half of the docket. It is easier to be certain that the slow-down in resolution of the less complex half of the docket is indeed PLRA-related because it peaked in 1997, the first year in which all filed inmate cases were affected, and because no analogous trend is apparent in either the habeas or the noninmate docket.

<sup>297</sup> See generally ALDISERT REPORT, *supra* note 14; FJC, PLRA RESOURCE GUIDE, *supra* note 14.

and very high hurdles so that even constitutionally meritorious cases are often thrown out of court.

Barring some systematic independent qualitative assessment,<sup>298</sup> the only way to gain insight into changes in case quality over time is to examine outcomes; that is, even if the relationship between docket quality and success rate is obscure, all other things being equal, *changes* in success rate ought to correlate with changes in docket quality. But now two new problems arise. First, assessing changes in case outcomes over time is difficult technically. The source of this problem is recency: the filed case-cohorts since the PLRA still have a good many cases yet to be resolved. Because dismissals tend to be quite speedy, the as-yet-unresolved cases are disproportionately those that go to trial and/or settle. Therefore, one cannot appropriately draw conclusions about the important minority of cases yet to be finished based on the majority. The source of the second, more conceptual problem is simultaneity: the PLRA's changes in filing incentives were accompanied by its adjustment to decision standards, to plaintiffs' litigating ability, and perhaps by attitudinal shifts as well. Therefore, it is difficult to use outcomes to infer even the valence of the impacts of those simultaneous changes, let alone their relative weight. The technical problem renders it difficult to use the available data to understand *how* the cases are coming out; the conceptual problem renders it difficult to understand *why*. So instead of starting with quantitative data, in this section I start with theory and anecdote; the data are good only for a falsification check.

*1. The Statute and Its Expected Effects.* — In general, changes in a docket's overall outcome rates might be caused by (most importantly) changes in the composition of the docket, changes in litigating ability of the parties, or changes in decision standards. Five PLRA provisions in particular seem logically to have a major impact on these three items: the requirement that all prisoners pay filing fees for all actions, the requirement that inmate "frequent filers" pay their full filing fees in advance, the exhaustion rules, the limitations on attorneys' fees recoverable from defendants, and the coverage provisions. Some observations about the likely effects of these changes follow:

(a) *Imposition of a Filing Fee, Payable over Time, for All Civil Actions by Inmates.* — Economic theory says that a filing fee, like any other litigation cost, should serve as a targeted incentive. Plaintiffs, that is, should cease filing cases with an expected value lower than the fee, but continue to file cases with an expected value higher than the fee, where

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<sup>298</sup> Such assessments have, for example, been very useful in understanding medical malpractice. See, e.g., Frederick W. Cheney, Karen Posner, Robert A. Caplan & Richard J. Ward, *Standard of Care and Anesthesia Liability*, 261 JAMA 1599 (1989) (reporting the results of an independent medical review of the validity of malpractice claims); Henry S. Farber & Michelle J. White, *Medical Malpractice: An Empirical Examination of the Litigation Process*, 22 RAND J. ECON. 199 (1990) (same).

expected value is the product of a case's chance of success and the expected damages if successful.<sup>299</sup> So it might seem that the PLRA's filing fee provision, which requires even indigent inmates to pay a filing fee, over time<sup>300</sup> would tend to improve the quality of the docket by discouraging the filing of low-expected-value cases while leaving in place higher-expected-value cases. This account, however, does not sufficiently appreciate the particularities of *inmate* litigation, in particular the effects of the prevalence of low-stakes cases. In light of those particularities, I argue here that the impact of the filing fee requirement on plaintiffs' probability of recovery in cases that are nonetheless filed is indeterminate.

Among inmates who act as rational cost-minimizers, the PLRA's filing fee provision should sharply discourage the filing of lawsuits. A hundred and fifty dollars is a lot of money in prison — months or more of wages for those whose money comes from prison employment.<sup>301</sup> While inmates may have less need for income than noninmates (room and board are, after all, free), many reasons remain to want money — extra food, hygiene supplies, postage and writing supplies, and many other licit and illicit wants. The filing fee is therefore far from nominal.

Yet many of the cases are worth far more in expected value than \$150. In fact, prior to the PLRA, the *average* value of the lawsuits — even taking into account the low success rate — was probably well over \$150.<sup>302</sup> Moreover, the observation that money is especially valuable works both ways; the prospect of even a small money judgment is worth more in prison than on the outside. So if the economics theory applied in the prison or jail setting, one would expect to see two effects from the PLRA's filing fee provision. First, inmates would simply stop filing “low-stakes”

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<sup>299</sup> More recently, a number of theorists have complicated the model, elaborating a variety of situations in which plaintiffs may succeed in extracting settlement offers from defendants even though the expected payoff of the suit is negative — when, for example, the defendant does not know that the expected value is negative, see Lucian Arye Bebchuk, *Suing Solely To Extract a Settlement Offer*, 17 J. LEGAL STUD. 437, 437–39 (1988); Katz, *supra* note 190, at 5, or when the defendant's cost of responding to the plaintiff is substantial and is incurred before plaintiff's own substantial costs, see Rosenberg & Shavell, *Nuisance Value*, *supra* note 116, at 5, or when the plaintiff's lawyer values a reputation for bull-headedness, see Amy Farmer & Paul Pecorino, *A Reputation for Being a Nuisance: Frivolous Lawsuits and Fee Shifting in a Repeated Play Game*, 18 INT'L REV. L. & ECON. 147 (1998). I do not think any of these factors has major applicability in the correctional setting.

<sup>300</sup> See 28 U.S.C. § 1915(b)(1)–(2) (2000).

<sup>301</sup> For example, the 2000 *Corrections Yearbook* reports that daily inmate wages vary from lows of under a dollar to highs of a few dollars per day worked. CAMILLE GRAHAM CAMP & GEORGE M. CAMP, CRIMINAL JUSTICE INST., THE CORRECTIONS YEARBOOK 2000: ADULT CORRECTIONS 111 (2000).

<sup>302</sup> As reported above, see *supra* Table II.C & pp. 1600–03, in 1993 the average value of the ninety-nine cases that resulted in a litigated damage award for plaintiff was \$18,800 (after excluding one very large award). In addition, some 1950 settled and another 2350 were voluntarily dismissed. Even if the voluntary dismissals were worth nothing and settlements averaged only one-tenth the value of the cases litigated to victory, a very low estimate, the entire docket would have an average value of \$178. Because more than half of the cases were dismissed, see *supra* Table II.A, the median value was zero.

cases (those whose expected damages are low), regardless of the probability of success. A case complaining about a destroyed radio is probably not worth \$150 even if the claim is obviously meritorious — say, if a correctional officer intentionally broke the radio to punish an inmate for writing a letter to a newspaper. Closing off a federal forum for low-stakes cases may be good in and of itself. Inmate litigation's critics have argued for many years that it is not an efficient use of society's resources to open an expensive federal courthouse for litigation over tiny amounts of money, regardless of the merits of the claim. Some scholars of litigation have agreed with this basic point,<sup>303</sup> and I don't disagree. But in terms of the main issue here — the quality of the remaining docket — the impact of purging low-stakes cases from the inmate civil rights docket is indeterminate because it depends on an unknown factor: whether the average chance of success of the squeezed-out low-stakes cases would have been higher or lower than that of the remaining pool of cases. (Note that low-stakes cases are cheap to settle and may, therefore, settle relatively often.)

Second, economic theory predicts that as a result of the filing fees, inmates will file many fewer “low-probability” cases (those with a low chance of success). A low-probability case should be filed only if it has the potential for exceptionally high damages. But this prediction assumes that inmates are more or less like the litigants whose behavior is the meat and potatoes of economic litigation theory — litigants who, either themselves or through their lawyers, have at least some ability to understand the expected value of their lawsuits.<sup>304</sup> For pro se inmates, however, “informational asymmetry” or “imperfect information” is hugely significant. Like other plaintiffs prior to discovery, an inmate plaintiff may know less than his defendants do about the factual setting of his case — for example, whether there were any prior episodes similar to the one that harmed him. But in addition, unlike other plaintiffs who mostly find lawyers or forego bringing suit, inmates also know very little else; they hardly ever have the

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<sup>303</sup> The legal theorist who has devoted the most attention to the issue of socially optimal filing rates is Steven Shavell. See Steven Shavell, *The Social Versus the Private Incentive To Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982); Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive To Use the Legal System*, 26 J. LEGAL STUD. 575 (1997); Steven Shavell, *The Level of Litigation: Private Versus Social Optimality of Suit and of Settlement*, 19 INT'L REV. L. & ECON. 99, 102–03 (1999); see also Louis Kaplow, *Private Versus Social Costs in Bringing Suit*, 15 J. LEGAL STUD. 371 (1986). These pieces emphasize the public costs and benefits of litigation; Shavell proposes regulatory use of fees and subsidies to line up private litigation incentives with “social optimality,” somewhat in the way the PLRA takes advantage of what is usually the nominal filing fee. (I do not mean to imply that Shavell actually addresses the PLRA — he does not.)

<sup>304</sup> The first generation of economic analysis of litigation largely assumed perfect, or at least symmetric, information by defendants and plaintiffs. Subsequent waves of analysis have relaxed that assumption but have continued to assume that all litigants have some nonrandom information and exercise operative rationality — an assumption that depends on at least a minimal ability to evaluate expected value. See, e.g., Bebchuk, *Imperfect Information*, *supra* note 185, at 406 (implicitly assuming these conditions).

skills to evaluate either the strength of their legal theories or, except in inescapably low-stakes cases, the compensable amount of damages they incurred. And whereas the market for settlement is often thought to transmit at least some information about case strength to the relatively uninformed party,<sup>305</sup> this is highly unlikely in a pro se inmate case, because the settlement market is dominated by the anti-settlement influences discussed above.<sup>306</sup>

So the expectations for the effect of the PLRA's fee provisions on the average merit of the inmate docket need to be adjusted. The PLRA should indeed work to cut back the number of low-stakes cases filed, but with indeterminate effect on the outcome probabilities of the remaining docket. In higher-stakes cases, I would expect the PLRA filing fee provisions to decrease the number of these cases with at best a slight correlation between merit and filing. As far as the observable impact on outcome trends in the post-PLRA docket, no prediction is possible.

(b) *The Frequent Filer Provisions.* — The PLRA's special hurdle for frequent filers — that they almost always must pay the entire filing fee in advance, regardless of their indigence<sup>307</sup> — was one step of the plan to put an end to the social practice of inmate “writ-writing.”<sup>308</sup> And it does seem plausible that frequent filing, if not inmate legal assistance to other inmates, may become a thing of the past. What is unclear is how that might affect the average probability of success in the remaining docket. It may well be that the most frequent filers file not only a very large number of cases, but an especially high proportion of meritless cases — though there are no good data to confirm this impression.<sup>309</sup> At the same time, how-

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<sup>305</sup> See Farmer & Pecorino, *Informational Asymmetry*, *supra* note 182, at 90–93 (surveying theoretical literature on “signaling models of litigation”).

<sup>306</sup> See section II.B.4, *supra* pp. 1614–21.

<sup>307</sup> See 28 U.S.C. § 1915(g) (2000). There is a special exception for situations in which a would-be plaintiff faces “imminent danger of serious physical injury.” *Id.*

<sup>308</sup> Senator Dole in particular emphasized in his speeches about the PLRA that “prisons should be just that — prisons, not law firms.” 141 CONG. REC. S14,413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole). Writ-writers, said others among the PLRA's supporters in Congress, have both too much fun and too much power — “[t]hey have tied up the courts with their jailhouse lawyer antics for too long[,] . . . making a mockery of our criminal justice system.” *Id.* at S14,628 (daily ed. Sept. 29, 1995) (statement of Sen. Thurmond); see also *id.* at S14,626 (daily ed. Sept. 29, 1995) (statement of Sen. Dole) (“This amendment [an early version of the PLRA] will help put an end to the inmate litigation fun-and-games.”).

<sup>309</sup> Jim Thomas's study of inmate civil rights filings in the Northern District of Illinois from 1977 to 1986 found that 1% of inmate filers had filed 17% of the total lawsuits. THOMAS, PRISONER LITIGATION, *supra* note 15, at 122. In Hawaii, “76% of the claims contesting conditions of confinement filed in federal or state courts in 1994 were brought by nine prisoners.” BRANHAM, PRO SE INMATE LITIGATION, *supra* note 58, at 28 (citing MICHAEL L. CARTER, PRISONER LITIGATION IN HAWAII: A REPORT TO THE ATTORNEY GENERAL OF HAWAII 3–4 (1994)). For catalogues of the most famous frequent filers and some of their cases, see Blaze, *supra* note 94, at 937 n.12, 938 n.13; Gail L. Bakaitis DeWolf, *Protecting the Courts from the Barrage of Frivolous Prisoner Litigation: A Look at Judicial Remedies and Ohio's Proposed Legislative Remedy*, 57 OHIO ST. L.J. 257, 257–58 (1996);

ever, at least some of the very frequent filers are actually skilled litigators whose filings are particularly likely to *have* merit. (It's possible, of course, that some such skilled writ-writers will not be affected by the "three-strikes" provision, because cases will not count as strikes if they lose on summary judgment or at trial — only if they fail to state a claim or are declared frivolous.<sup>310</sup> But surely most truly frequent filers have lost at least a couple of cases on the pleadings.) In any event, this PLRA provision is by no means limited to truly frequent filers. Just two cases dismissed by district courts for failure to state a claim and one dismissal by an appellate court suffice to foreclose forever the ability to file a suit without prepayment of the filing fee. So the three-strikes provision is highly likely to eliminate nearly all litigation by repeat players — and this seems highly likely in turn to decrease at least the absolute number of meritorious cases filed. In sum, the frequent filer provisions will lower the absolute number of both bad and good cases, but in what proportion is, once again, indeterminate. Again, no prediction about observable outcome trends is possible.

(c) *Exhaustion*. — The PLRA's exhaustion requirement has emerged as the highest hurdle the statute presents to individual inmate plaintiffs. The statute reads: "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."<sup>311</sup> Though it does not look like a classic "jurisdiction stripping" provision<sup>312</sup> — it does not men-

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Eugene J. Kuzinski, Note, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L. REV. 361, 365–66 (1998).

<sup>310</sup> Paul Wright, Editor of *Prison Legal News*, is one such writ-writer. He told me that he has filed a dozen or fifteen § 1983 cases. When he has lost, he said, it has been on summary judgment, not on a motion to dismiss. Wright Interview, *supra* note 21.

<sup>311</sup> 42 U.S.C. § 1997e(a) (2000).

<sup>312</sup> On jurisdiction stripping in general, see Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority To Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981). The trio of Contract with America statutes passed in 1996 — the PLRA, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (amending 28 U.S.C. §§ 2244, 2253–2255 and adding new sections, 28 U.S.C. §§ 2261–2266 (2000)), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified in scattered sections of 8, 18, and 28 U.S.C.) — have managed at long last to shift the academic conversation about jurisdiction stripping "away from the questions of 'when and where' to the question of 'how'" federal courts will exercise their jurisdiction. Evan Caminker, *Allocating the Judicial Power in a "Unified Judiciary"*, 78 TEX. L. REV. 1513, 1514 (2000). As Vicki Jackson commented, "[t]his spate of congressional jurisdiction-stripping imposes what may be the most significant limitations on federal jurisdiction since those enacted in connection with World War II price controls and draft legislation." Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts — Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2446 (1998). But the PLRA provisions that have excited the most concern on this front have been the provision requiring immediate termination of many long-standing injunctive orders, 18 U.S.C. § 3626(b) (2000), and especially the automatic stay provision, under which such orders are "stayed" pending resolution of a request for termination, 18 U.S.C. § 3626(e). See *Miller v. French*,

tion the jurisdiction of district courts at all — the exhaustion section functions to deprive federal courts of the ability to correct unconstitutional conduct whenever plaintiffs have failed to follow to their end administrative avenues for correction or other remediation.<sup>313</sup>

An exhaustion requirement sounds pretty minor, and the PLRA's exhaustion provisions did not attract much attention at first, even from prisoners' advocates.<sup>314</sup> But seven years of experience with the statute have led those advocates to identify the PLRA's exhaustion rule as the statute's most damaging component.<sup>315</sup> The problem for inmates is twofold. First, unlike the exhaustion rule in effect until 1996 — which authorized federal district judges to require § 1983 inmate plaintiffs to exhaust administrative remedies only after a prison or jail grievance process was certified “plain, speedy, and effective”<sup>316</sup> — the PLRA imposes no constraints on the structure or rules of any grievance processing regime. The administrative review scheme can, for example, have as short a deadline for inmates and as many layers of review (to each of which the inmate must apply) as the incarcerating authority chooses.<sup>317</sup> Essentially, then, the sky's the limit for the procedural complexity or difficulty of the exhaustion regime. All that the statute requires is that administrative remedies be “available”; under the recent Supreme Court decision in *Booth v. Churner*, a correctional grievance process meets that requirement “regardless of the fit between a prisoner's prayer for relief and the administrative remedies possible.”<sup>318</sup>

The potential complexity or even unfairness of a given administrative grievance process would not matter at all if the rule were a comity-serving ripeness rule — that is, if it concerned the timing rather than the availability of judicial review. The PLRA's language, taken alone, is entirely con-

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530 U.S. 327, 350 (2000) (upholding an automatic stay provision against a separation of powers challenge). The exhaustion provision had not, until very recently, received any scholarly attention at all.

<sup>313</sup> John Boston similarly describes the PLRA (although not specifically its exhaustion provision) as “the new face of court stripping.” See Boston, *Court Stripping*, *supra* note 251, at 429.

<sup>314</sup> Most of what has been written about the exhaustion provision is focused on the issue — resolved against inmate plaintiffs in *Booth v. Churner*, 532 U.S. 731, 741 (2001) — whether exhaustion is required when a plaintiff seeks money damages. See, e.g., Branham, *Enigmatic Exhaustion*, *supra* note 193, at 498–520.

<sup>315</sup> See Alexander Interview, *supra* note 21; Fathi Interview, *supra* note 21. Similarly, law review articles about the provision's negative effects are beginning to appear. See Amy Petré Hill, *Death Through Administrative Indifference: The Prison Litigation Reform Act Allows Women To Die in California's Substandard Prison Health Care System*, 13 HASTINGS WOMEN'S L.J. 223, 237–42 (2002) (arguing that the PLRA exhaustion requirement effectively forecloses judicial review of failure to treat emergency medical needs, because the California grievance system has no time limit on grievance processing by correctional officials); James E. Robertson, *The PLRA and the New Right-Remedy Gap in Institutional Reform Litigation*, 38 CRIM. L. BULL. 427 (2002).

<sup>316</sup> 42 U.S.C. § 1997e(a)(1) (1994) (since amended).

<sup>317</sup> For a description of state inmate grievance systems with short deadlines and many layers of appeal, see Brief of Amici Curiae American Civil Liberties Union et al. at 12–16, *Booth v. Churner*, 532 U.S. 731 (2001) (No. 99-1964).

<sup>318</sup> *Booth*, 532 U.S. at 739.

sistent with such an interpretation, which would merely delay the commencement of federal suit until after no further administrative avenue exists. Under this approach, an inmate's procedural error — say, sending an appeal form to the wrong person and therefore missing the deadline for getting it to the right person — would not foreclose federal court review. So long as no further administrative process existed, the federal lawsuit could proceed.<sup>319</sup>

But the statutory language is also consistent with a more stringent, administrative-law-influenced interpretation of the requirement, under which failure to comply with administrative procedural rules would typically result in the dismissal of a subsequent federal court case.<sup>320</sup> This approach does indeed make sense, given that the PLRA's is in fact an *administrative* exhaustion requirement, and that it is implausible that Congress would have bothered to require exhaustion if an inmate could simply bypass administrative remedies by waiting out the clock, and then go directly to federal court.<sup>321</sup>

In administrative law, exhaustion doctrine frequently penalizes litigants who fail to pursue administrative remedies. But this result is by no means uniformly applied. In administrative law, whether exhaustion requirements apply at all is influenced not only by the statutory scheme in question but by judicial recourse to such factors as

- (1) the extent of injury to petitioner from requiring exhaustion of administrative remedies, (2) the degree of difficulty of merits issue the court is asked to resolve, (3) the extent to which judicial resolution of merits issue will be aided by agency factfinding or application of expertise, and (4) the extent to which the agency has already completed its factfinding or applied its expertise.<sup>322</sup>

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<sup>319</sup> This approach finds support in habeas doctrine. To the extent the habeas doctrine of exhaustion can be separated from its Siamese twin, procedural default, it requires only that federal courts refrain from deciding habeas petitions of state prisoners if there *still*, at the time of the petition's filing, remains an available avenue of state court review. *See* Engle v. Isaac, 456 U.S. 107, 125 n.28 (1982). Note, however, that any slack available to prisoners under this loose exhaustion doctrine is entirely taken away by habeas procedural default rules, which hold that prisoners waive their right to federal review by any failure to comply with state court procedural requirements. *See, e.g.,* O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999) (discussing the distinctions between the two doctrines); Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 3–35 (2002).

<sup>320</sup> *See, e.g.,* Heckler v. Ringer, 466 U.S. 602, 614, 617, 622 (1984); Yakus v. United States, 321 U.S. 414, 434 (1944).

<sup>321</sup> *See* Wright v. Morris, 111 F.3d 414, 417 n.3 (6th Cir. 1997); STAFF OF HOUSE COMM. ON THE JUDICIARY, 104TH CONG., REPORT ON THE VIOLENT CRIMINAL INCARCERATION ACT 32 (Comm. Print 1995) (“Section 701 of this bill strengthens the administrative exhaustion rule in this context — and brings it more into [line] with administrative exhaustion rules that apply in other contexts — by generally prohibiting prisoners section 1983 lawsuits until administrative remedies are exhausted.”). Note that the version of H.R. 667 discussed in this committee report was less stringent than the PLRA, requiring inmate administrative exhaustion only when administrative remedies were “plain, speedy, and effective.” *Id.* at 50 (setting out the statutory text as it would have been amended by H.R. 667).

<sup>322</sup> 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.2, at 976–77 (4th ed. 2002).

The Supreme Court has emphasized that “application of the [administrative law] exhaustion doctrine is ‘intensely practical.’”<sup>323</sup> Moreover, administrative law’s exhaustion doctrine is full of more definite exceptions, most particularly the “futility” doctrine.<sup>324</sup>

Yet although courts have read the PLRA to call for administrative-law-style exhaustion, they have not imported the corresponding exceptions. Courts implementing the PLRA seem instead to be looking to the extraordinarily harsh doctrinal framework of habeas “procedural default,”<sup>325</sup> which gives federal courts almost no discretion to excuse even the most technical of procedural errors.<sup>326</sup> Thus, an inmate’s failure to comply with any applicable grievance rules — time limits, form, appropriate recipients, and other requirements — may well disqualify an eventual federal lawsuit no matter how constitutionally meritorious.<sup>327</sup>

One would expect the exhaustion requirement as so interpreted to have two analytically distinct kinds of impacts on outcomes: a conflict-resolution effect and a decision-standard effect. With respect to conflict resolution, the exhaustion requirement should decrease filings because at least some inmates will actually get some part of what they want in an administrative process and decide they no longer want to file a lawsuit.<sup>328</sup> As a secondary consequence, the success rate of the cases that do get filed should go down, as a disproportionate number of the meritorious cases get

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<sup>323</sup> *Bowen v. City of New York*, 476 U.S. 467, 484 (1986) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976)); see also *McKart v. United States*, 395 U.S. 185, 197–99 (1969) (explaining the purposes of exhaustion doctrine at length, but refusing to require exhaustion in a case about military draft exemption in which “resolution . . . does not require any particular expertise on the part of the appeal board”).

<sup>324</sup> See, e.g., *Communications Workers of Am. v. AT&T*, 40 F.3d 426, 432 (D.C. Cir. 1994).

<sup>325</sup> See *supra* note 319.

<sup>326</sup> See, e.g., *Coleman v. Thompson*, 501 U.S. 722 (1991) (holding that a death-sentenced inmate’s right to federal review of his constitutional claims had been procedurally defaulted when his lawyer missed a state appellate deadline by three days).

<sup>327</sup> As is often the case, the Seventh Circuit has been both the strictest and most explicit on this point. See *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002) (Easterbrook, J.) (“[A] prisoner who does not properly take each step within the administrative process has failed to exhaust state remedies, and thus is foreclosed by § 1997e(a) from litigating. Failure to do what the state requires bars, and does not just postpone, suit under § 1983.”). Some other courts have been a little more forgiving. See, e.g., *Camp v. Brennan*, 219 F.3d 279, 281 (3d Cir. 2000) (refusing to dismiss a suit for failure to exhaust administrative remedies under a prison grievance system when the prisoner had instead sent a complaint to the state Office of Professional Responsibility that nonetheless led to a Department of Corrections investigation); *Graham v. Perez*, 121 F. Supp. 2d 317, 322 (S.D.N.Y. 2000) (holding that the court must decide whether mitigating circumstances excuse non-exhaustion, even if the grievance body decided they did not).

<sup>328</sup> Inmates do sometimes succeed in their grievances, although it is entirely unclear what relief they typically get as a result. See, e.g., Letter from Cheryl Jorgensen-Martinez, Chief Inspector, Ohio Department of Rehabilitation and Correction, to Betty D. Montgomery, Ohio Attorney General (Jan. 10, 2001), reproduced in Brief of Amici Curiae 50 States and Territories at A2, *Booth v. Churner*, 532 U.S. 731 (2001) (No. 99-1964) (stating that 24.1% of inmate grievances in Ohio in 2000 were resolved in the inmate’s favor).

filtered out because they succeed in the grievance process. These results, however, are both apt to be extremely small. People with experience in inmate grievance systems emphasize that only a well-designed system can satisfy its users well enough to substitute for litigation,<sup>329</sup> and there is little reason to think that the PLRA is encouraging jail and prison administrators to implement effective grievance systems. (In particular, the typical unavailability of monetary compensation under most correctional grievance systems is a significant barrier to extra-litigation conflict resolution.)

Decision-standard effects of the new exhaustion requirement are likely much larger. The exhaustion rule is most evidently a new and substantial obstacle to success on the merits. Not only are the various grievance systems complicated and difficult for inmates to navigate, but exhaustion law itself is a highly technical growth area — and one in which most courts seem to be finding ways for inmates to lose.<sup>330</sup> Inmates who filed only the first level of grievance,<sup>331</sup> or who failed to comply with a stringent time limit (sometimes even because they were hospitalized for the injury motivating the lawsuit),<sup>332</sup> or who simply wrote a letter to prison authorities rather than filling out the requisite form,<sup>333</sup> are seeing their constitutional cases dismissed for failure to exhaust. Exceptions are few and far between.<sup>334</sup> I would expect, then, that many cases that would have succeeded in federal court prior to the PLRA will now lose because of failures to exhaust. There is, however, one small, final ripple. Some inmates may conclude that the existence of stringent exhaustion rules means that their

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<sup>329</sup> See Schriro Interview, *supra* note 21 (describing how the Missouri grievance system reduced inmate filings but arguing that the PLRA is not likely to promote similarly effective systems).

<sup>330</sup> John Boston, Director of the Prisoners' Rights Project of the Legal Aid Society of New York, is the leading plaintiff-side authority on the PLRA. His summary of the exhaustion case law, written in November 2001, runs to fifty-two pages and cites well over 200 judicial decisions addressing various exhaustion issues. See Boston, Exhaustion, *supra* note 228. So far, there have been two Supreme Court cases about exhaustion; in both, the inmate's complaint was dismissed for failure to exhaust. See *Porter v. Nussle*, 534 U.S. 516, 520 (2002); *Booth*, 532 U.S. at 731.

<sup>331</sup> See, e.g., *Jones v. Thor*, 2001 WL 678388, at \*1 (N.D. Cal. June 8, 2001).

<sup>332</sup> See, e.g., *Steele v. N.Y. State Dep't of Corr. Servs.*, 2000 WL 777931, at \*1 (S.D.N.Y. June 19, 2000) (dismissing the case of a prisoner who was hospitalized during the entire grievance filing period although he could not file prior to the deadline, and characterizing his failure to file later as a "deliberate bypass" because prison regulations stated that the deadline was discretionary in "extreme circumstances"); *Coronado v. Goord*, 2000 WL 52488, at \*2 (S.D.N.Y. Jan. 24, 2000) (dismissing a case for failure to exhaust, notwithstanding that the grievance would miss the applicable deadlines, though suggesting that the prison should grant a deadline extension).

<sup>333</sup> See, e.g., *Laureano v. Pataki*, 2000 WL 1458807, at \*2 (S.D.N.Y. Sept. 29, 2000).

<sup>334</sup> In one rare example, the plaintiff missed a fourteen-day deadline for filing a grievance because he had been rendered unconscious and hospitalized as a result of allegedly deficient medical care. When he filed a federal lawsuit, the district court attempted to take advantage of state regulations allowing court referrals to the prison's internal grievance program, but the prison system refused to consider the grievance because it was time-barred. Only then did the court excuse the plaintiff's failure to exhaust, holding administrative remedies not "available" for that plaintiff. *Cruz v. Jordan*, 80 F. Supp. 2d 109, 111–12 (S.D.N.Y. 1999), *overruled on other grounds* by *Neal v. Goord*, 267 F.3d 116, 117–18, 126–27 (2d Cir. 2001).

federal cases are losers and therefore decide not to file. Given inmates' general inability to assess their litigation chances, this effect is bound to be quite inconsequential compared to the first-order decision-standard impact of the change.<sup>335</sup>

For exhaustion, then, it is quite possible to make a prediction about observable outcome trends. The proportion of successful cases will likely decrease as courts dismiss cases for failure to exhaust.

(d) *Limitations on Attorneys' Fees.* — The restrictions the PLRA places on attorneys' fees in inmate cases are quite severe. The statute limits attorneys' fees assessed against losing defendants in inmate cases to the lesser of 150% of any money judgment or 150% of the amount "established" for payment of appointed criminal defense lawyers (an hourly amount known as the "CJA rate" because it is paid under the Criminal Justice Act).<sup>336</sup> The provision has only the most generic legislative history,<sup>337</sup> but one self-evident purpose was to discourage attorney representation of inmates, and it is undoubtedly having that effect. Some portion of the cases that once would have been counseled are now either not being filed at all or, more likely, are litigated pro se.<sup>338</sup> To the extent the former is happening, it is likely *decreasing* the average merits of cases on the docket, because the cases not filed for this reason probably were higher probability, on average, than other cases. The latter decreases not the cases' merits in some kind of objective sense, but their ability to succeed in the litigation system. Interviews confirm this view. For example, as one jail supervisor sums up the PLRA's effect:

The PLRA hasn't had much of a chilling effect on the inmates, because they're mostly pro se, though it has decreased the numbers a little. The bigger impact is that the PLRA has shifted cases that would have had attorneys to the pro se docket, which has helped us with the potential damages and made them easier to defend.<sup>339</sup>

I argued above that, for a variety of reasons, inmates prior to the PLRA found it quite difficult to obtain legal counsel.<sup>340</sup> The PLRA greatly exac-

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<sup>335</sup> Former Attorney General Richard Thornburgh highlighted one more potential effect in a letter to Congressman Frank LoBiondo, in which he said that "an exhaustion requirement would aid in deterring frivolous claims: by raising the cost, in time/money terms, of pursuing a *Bivens* action, only those claims with a greater probability/magnitude of success would, presumably, proceed." 141 CONG. REC. H14,105 (daily ed. Dec. 6, 1995) (written statement of Rep. LoBiondo, quoting letter). But this seems implausible, because exhaustion does not cost money, and time is cheap in prison.

<sup>336</sup> 42 U.S.C. § 1997e(d) (2000) (referencing 18 U.S.C. § 3006A (2000)).

<sup>337</sup> See 141 CONG. REC. S14,317 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham).

<sup>338</sup> Because the Administrative Office did not include a "pro se" variable in its dataset until 1996, and clerks did not consistently fill it in for terminated cases until 2000, it is still too early to use the Administrative Office dataset to confirm or disprove this observation. It is not yet possible even to estimate the pro se rate among cases filed in 1999, let alone 2000, because reliable counsel information is not available for the still-large number of pending cases. See *supra* note 152.

<sup>339</sup> Horgan Interview, *supra* note 21.

<sup>340</sup> See section II.B.3, *supra* pp. 1609–14.

erbates this effect: under the PLRA, given the low damages usually expected in inmate cases (described in Table II.C), the expected value to a lawyer of even a very high-probability damages action is rarely enough to fund the litigation. The PLRA's fee limit thus leaves lawyers unable to afford to take almost any inmate case except as a more-or-less pro bono activity.

This is a strong statement and its accuracy may appear to be undermined by the very origin of the PLRA's rate ceiling. After all, there are lawyers who take CJA cases, notwithstanding the low rates. Doesn't this prove that there is a market of lawyers willing to work for CJA wages, let alone for 150% of those wages? The answer is no, for two reasons: First, unlike publicly funded criminal defense lawyers, who receive their CJA pay without risk, inmates' counsel receive their attorneys' fees only if they win — indeed, only if they win a significant damage award, since they can't be paid more than 150% of the award. Second, CJA lawyers use their fees to fund only their own time; investigators and experts, if any, are separately funded.<sup>341</sup> Inmate case litigators cannot win their cases without experts, who do not come cheap. And unlike in criminal cases, experts were, prior to the PLRA, effectively paid from attorneys' fees awards.<sup>342</sup>

Yet, why can't inmate litigation be funded by contingency fee, like other plaintiffs' litigation?<sup>343</sup> After all, even expert-intensive personal injury litigation is frequently financed under contingency-fee agreements. But ordinary contingency-fee economics do not work very well for inmates, at least for prison inmates. First, inmates typically receive low damages even for serious injuries, for the reasons already discussed. (This is likely to be less true for jail inmates, who can have lost wages, actual medical costs, and higher status in the community.) In addition, contingency-fee lawyers usually count on a good portion of their cases settling;<sup>344</sup> if every case went to trial, plaintiffs' lawyers would require far higher fees, at least for low-damages cases.<sup>345</sup> As already discussed, set-

<sup>341</sup> 18 U.S.C. § 3006A(e) (2000).

<sup>342</sup> Al Gerhardstein, a leading inmate civil rights litigator, recently estimated his costs at about \$80 per hour. At the time he wrote, 150% of the CJA rate in his district was \$96. Like many other lawyers who used to do injunctive prison cases, Gerhardstein explains that he can no longer afford to take them on. Now, he takes cases on behalf of inmates who have been released from prison. Gerhardstein, *PLRA and Private Practitioners*, *supra* note 292.

<sup>343</sup> The most prominent proponent of contingency funding for prisoner litigation has been Seventh Circuit Court of Appeals Judge Richard Posner. *See* sources cited *supra* note 173.

<sup>344</sup> *See, e.g.*, Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 L. & SOC. INQUIRY 795, 801 (1998) ("While it is useful for a lawyer to have a reputation as willing to try cases (and for winning those he or she does try), the economics of the contingency fee means that it is most advantageous for the lawyer to avoid trial in most cases.").

<sup>345</sup> Zittrain Interview, *supra* note 21; *see also* Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 759 (2002) (noting that many contingency-fee lawyers structure their fees to increase in the event of a trial); *id.* at 781 (observing that lawyers' effective returns

tlement rates are very much depressed for prison if not for jail cases. Although this effect is mitigated slightly in counseled versus pro se cases, lawyers report that settlements remain rare in counseled cases, too. So lawyers calculating the expected value of an inmate case taken on contingency need to assume that it has a high chance of going to trial and therefore will likely be very costly for them. Herbert Kritzer, a leading observer of contingency-fee practice, notes that the risks of nonrecovery are less important for contingent-fee lawyers than “are the uncertainties over the amount of the recovery and amount of investment by the lawyer that will be necessary to obtain the recovery.”<sup>346</sup> Lawyers considering inmate cases can be nearly certain that their required investment will be high.

The end result is that the PLRA discourages the counseled filing of even high-merit cases unless they are also extremely high-value.<sup>347</sup> As far as one can predict outcome trends, the impact should be to produce proportionately fewer successes for inmate plaintiffs.

(e) *Coverage*. — In section V.B.3, I canvass the reasons to think that jail cases tend to be more successful than prison cases for their plaintiffs. If this is so, and if I am correct that the PLRA dampens jail filings less than prison filings, promoting a relative shift in the docket toward jail cases,<sup>348</sup> the impact of the change might also have an effect on observed inmate plaintiffs’ success rates, driving them up somewhat.

(f) *Summary of Expected Outcome Effects*. — To summarize, close scrutiny of the PLRA’s provisions supports the following predictions about the statute’s effect on the individual inmate civil rights docket: After the PLRA, there should be many fewer cases, with the decline disproportionately occurring among low-stakes cases (regardless of their probability of success), those brought by frequent filers, and those brought by prison rather than jail inmates. Because of the PLRA’s exhaustion provision, some cases will be filtered out by successful conflict-resolution in the ad-

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“tend to be lowest for cases that go to trial”). A plaintiffs’ lawyer whose motives are economic is unlikely to take on a case that has no chance of settling unless the case doesn’t require much outlay and the lawyer doesn’t have many other clients, or the case has a very high expected value. See generally JEROME E. CARLIN, *LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO* (1962); see also Kritzer, *supra*, at 762 (“[I]n situations where a lawyer has otherwise unused time, the lawyer may be willing to accept cases where the lawyer expects the compensation to be less than what the lawyer would like to believe is the value of the time involved.”).

<sup>346</sup> Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 271 (1998).

<sup>347</sup> It is possible, however, that there is a very minor countervailing effect. Lawyers who used to handle a few large injunctive cases and who cannot fund that litigation on fees of 150% of the CJA rate may shift their efforts to damage actions not covered by the PLRA — cases in which the inmate has been released from prison or has died. Although it is certain that this effect is real, see Alexander Interview, *supra* note 21; Gerhardstein, *PLRA and Private Practitioners*, *supra* note 292, it is implausible that the impact is very large. There just were not that many injunctive lawyers to start with, and many of them are still taking on primarily injunctive cases.

<sup>348</sup> See *supra* p. 1641.

ministrative grievance process, and some by their would-be plaintiffs' realization that failure to exhaust dooms cases to failure. There should also be fewer counseled cases, and many of the suits that once would have had lawyers will be filed pro se instead. And, among counseled cases in particular, more should involve former inmates or the families of dead inmates. It is very difficult to predict how observable outcomes — and particularly success rates — will change. But there is very little reason to expect outcomes in the shrunken inmate civil rights docket to shift in plaintiffs' favor, and much reason to think that plaintiffs will succeed in relatively fewer cases than they did prior to the statutory change. That effect is not because of some incentivized alteration in the intrinsic constitutional merit of the filed cases, but because the exhaustion requirement means that plaintiffs will lose cases they would previously have won (or settled) and because the counsel restrictions mean that cases will be pro se that would previously have had counsel.

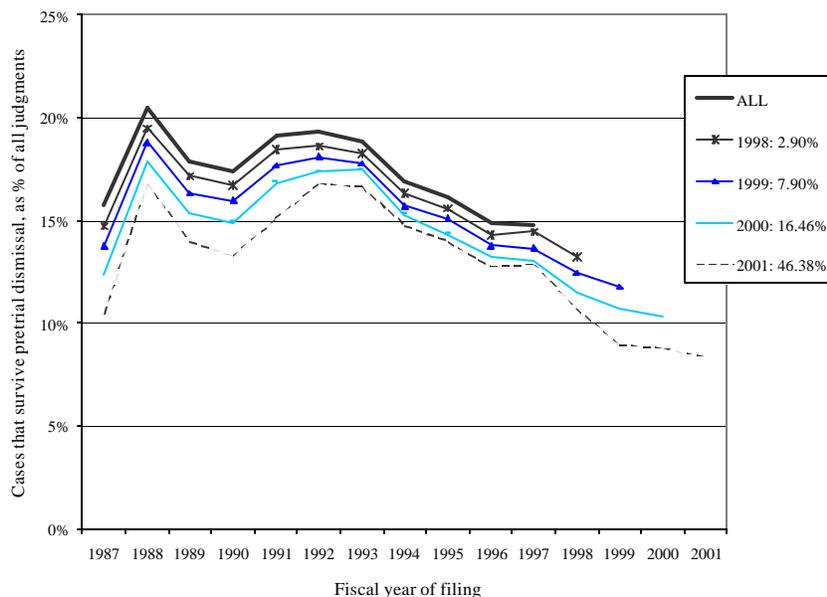
2. *Observed Trends.* — I have said that it is technically difficult to evaluate litigation outcomes for recent case-cohorts. While it is completely clear that filings have decreased considerably, what is happening to the cases that have continued to be filed is murkier. The problem is that outcome data are available only through fiscal year 2001. So for each year of case filings from 1998 on, some significant portion of the total inmate docket remains to be resolved. And, because dismissals in particular occur quickly, the unresolved cases are more likely than those with recorded outcomes to be plaintiffs' victories or settlements. Estimates about trends, then, must be based on some method of comparing resolved cases, by filing year, to earlier case-cohorts. The method I have chosen is to look at trends by leaving out late-resolved cases from earlier filing years in order to match similar cases' unavoidable omission from later years.<sup>349</sup> The key assumption underlying my method is reasonable — but because it is certainly arguable, I want to lay it out explicitly: my analysis depends on the assumption that *among cases that terminate in a later fiscal year than the one in which they were filed, the relative disposition time for cases resulting in either plaintiff trial victories or settlements, compared to other cases, has not changed very much over the last few years.* I've tested this assumption by looking at cases up to 1999, and it holds true for them. That is, the relationship between the earlier- and later-resolved cases in years prior to 2000 is a predictable one: plaintiffs win and settle more as

<sup>349</sup> The analysis that follows compares filed cohorts by percentage of the docket. For example, 2.9% of cases filed in 1998 have yet to be resolved. So to examine the trend up to 1998, I compared the 97.1% of cases filed in 1998 that have been resolved to the first 97.1% of cases resolved from earlier years' filings. I have also done the same analysis looking at dates rather than the percentage of the docket. For example, I compared the three years' worth of available resolutions for cases filed in 1998 with the first three years' worth of resolutions of earlier-filed cohorts. My results were practically identical using either method. Notice, however, the slight oddity that cases filed early in a given year have longer to be resolved, under either method, than cases filed later the same year. I cannot think of any reason this would matter, but if I'm wrong about that, the method may be flawed.

prior to 2000 is a predictable one: plaintiffs win and settle more as time passes, but the longitudinal trends hold.

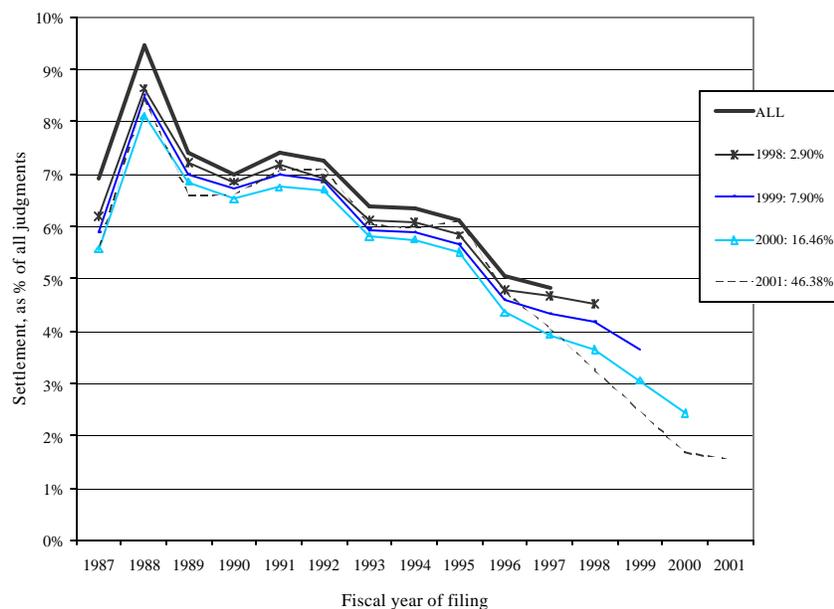
With this assumption in place, my assessment of the preliminary evidence is that since the PLRA, inmate civil rights plaintiffs have continued to fare proportionately worse even as filings have declined. The rate of pretrial defendants' judgments has continued the increase that has characterized outcomes for cases filed beginning in 1992. And indications are that the increase in dismissal rates is continuing at a similar rate for subsequent cohorts of filings. Figure IV.A presents full data. Like the other graphs that follow, its purpose is to illustrate emerging, rather than completely certain, trends. It is a little complicated to read, but not conceptually difficult. It examines case outcomes by filing cohort, grouping cases by the fiscal year in which they were commenced. Each graph shows a specified outcome — in Figure IV.A, the cases that plaintiffs do not lose pretrial as a percentage of the entire set of resolved cases. Each line on the graph represents a different sub-portion of the cohort of cases filed in the years on the x-axis. The top line (labeled "All") is the entire set of cases (those cases plaintiffs do not lose pretrial), but it ends in 1997 because filing cohorts after that have significant numbers of cases not yet resolved (or resolved later than the available data, in any event). If the "All" line continued, it would misrepresent outcomes, because it would conflate changes over time in resolution and the disproportionately low success rate of relatively early-resolved cases. The lines below the "All" line cover only a part of the filed docket, but they can extend further in time. Thus for each filing cohort since 1987, the next line, labeled "1998: 2.90%," shows the non-dismissal rate of the first 97.1% of cases — the fraction of cases filed in 1998 that have so far been resolved. For the years prior to 1998, this line simply echoes the "All" line, though lower (because the later resolved cases, which are excluded, tend to do better for plaintiffs than the earlier ones). The point of this line is what it shows about outcomes in 1998: inmates are doing worse than in analogous segments of earlier case cohorts. And the succeeding lines show that the trend of declining plaintiffs' success appears to be continuing. The final point in the bottom line, labeled "2001: 46.38%," illustrates resolutions, in 2001, of cases filed that same year. It, too, is trending down: inmates with cases in the first half of the 2001 filed case-cohort are doing quite a bit worse, pre-trial, than inmates in the first half of prior case-cohorts did. Less than half of the cases filed in 2001 have available outcome data, so whether the remainder of the docket will follow the same trend is somewhat speculative, of course. But tracing the line back to prior years demonstrates that what happens in the first half of the docket is highly consonant with what happens overall.

Figure IV.A: Pretrial Outcomes by Filing Year,  
Cases That *SURVIVE* Pretrial Dismissal  
(Trend Lines To Match Non-Pending Cases by Filing Year)



With fewer cases surviving pretrial adjudication in defendants’ favor, it is unsurprising that the portion of the docket that settles has continued to decline. Of the cases filed in 1998, for example, just 4.5% have settled so far, whereas 5.8% of the analogous 1995 cohort and 6.9% of the 1990 cohort settled. Again, indications are that this steady decrease is continuing. Figure IV.B sets out the data.

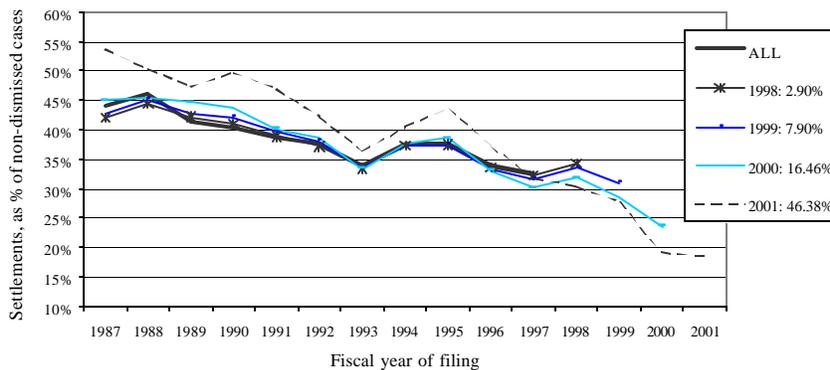
Figure IV.B: Settlements by Filing Year  
(Trend Lines To Match Non-Pending Cases, by Filing Year)



Moreover, because each outcome proportion is on a base of far fewer cases since the passage of the PLRA, the reduction in the absolute number of plaintiffs' successes has fallen very far indeed. Looking, for example, at cohorts to match the portion of cases filed in 2000 that have so far been resolved, by the time 84% of the cases filed in 1995 had been resolved, 5.5% (1750) had settled. Of that same portion of the 2000 docket, 2.4% (463) have settled. In sum, vastly fewer cases are leading to negotiated outcomes.

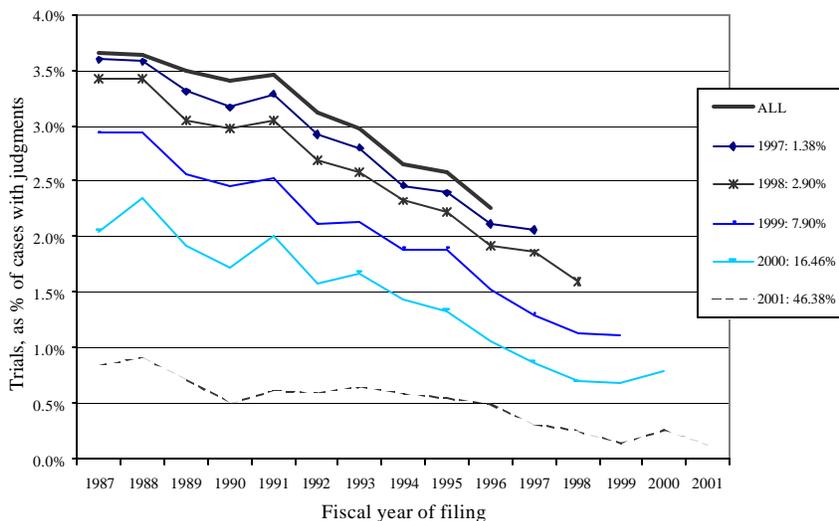
But are settlements simply going down because there are fewer cases left to settle, given that dismissals are going up? Or does the trend run deeper, with settlements declining even among the most settlement-prone part of the docket, those cases that survive pretrial motions practice? Figure IV.C answers this question, combining the information in Figures IV.A and IV.B to show settlements as a percentage of the cases that do not get resolved pretrial in defendants' favor (roughly speaking, those that survive summary judgment). It shows that even though fewer cases are surviving pretrial adjudication, settlements are falling faster still.

Figure IV.C: Settlements, as a Percentage of Cases That Survive Pretrial Dismissal (Trend Lines To Match Non-Pending Cases, by Filing Year)



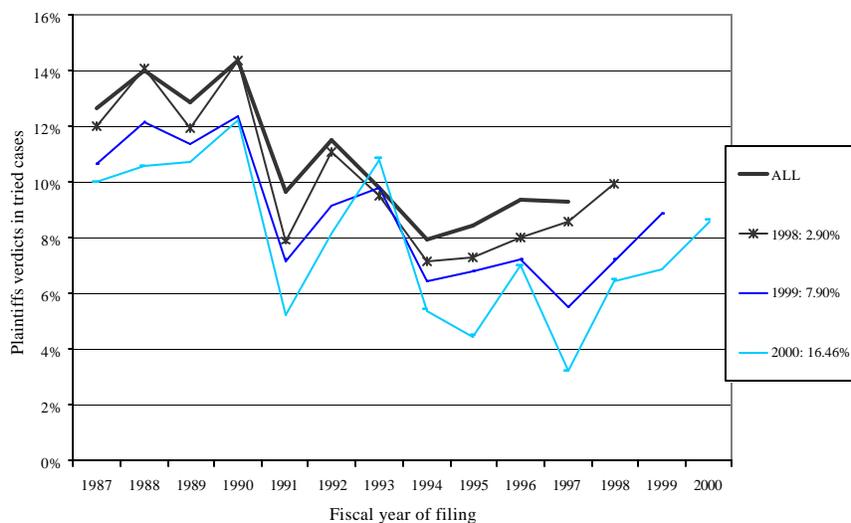
As Figure IV.D demonstrates, the proportion of cases going to trial is also continuing the decline that has been going on since 1991. This time, looking at cohorts to match the cases filed in 1998, the trial rate in 1990 was 3.0%; by 1995, it was down a quarter, to 2.2%. By 1997, it was down to 1.9%.

Figure IV.D: Trials by Filing Year (Trend Lines To Match Non-Pending Cases, by Filing Year)



The final question — who wins at trial — is the only one without an unambiguously anti-plaintiff answer. As Figure IV.E shows, plaintiffs seem to be winning as large a portion of trials, or maybe even a little larger, since the PLRA's enactment. (The numbers are extremely small, and therefore should not be given too much weight.) Of trials in the first 97.1% of the docket, inmate plaintiffs who filed in 1998 have won about 10%, compared to 7–8% in corresponding portions of the 1994 and 1995 filed cohorts. And the improvement in plaintiffs' trial results seems to be holding, although there are still too many unresolved cases to be sure. Note, however, that the reduction in number of trials is greatly outweighing the increase in victories: plaintiffs may be winning slightly more often, proportionately, but they are winning less often absolutely.

Figure IV.E: Plaintiffs' Trial Victories by Filing Year  
(Trend Lines To Match Non-Pending Cases, by Filing Year)



In the end, comparing cases filed in 1997 and later with those filed prior to the PLRA's passage, the trend seems to be that plaintiffs are filing vastly fewer cases, at a lower rate per incarcerated person. Defendants are winning, pretrial, in more of that shrunken docket. Of the (already smaller) portion of the docket in which defendants do *not* win pretrial, plaintiffs are settling fewer cases. Once at trial, they seem to be winning slightly more often — but not nearly enough to make up for the reduction in settlements.

In short, the average likelihood of plaintiffs' success is lower, not higher, on the post-PLRA docket. There is no definitive proof that the PLRA actually caused these changes. Indeed, the visually evident fact that some of the trends started prior to the PLRA's passage makes causation more questionable. Yet it can be said that this set of longitudinal changes is entirely consistent with careful predictions of the impact of the PLRA, so those predictions stand unfalsified. Thus, although the PLRA has achieved its major goal regarding individual inmate lawsuits, sharply reducing the quantity of inmate litigation, it remains the most plausible conclusion, based on careful reading of the statute in light of the particularities of inmate litigation, that Congress breached the constraint that the Act's proponents purported to follow. Rather than improving the quality of the inmate docket, the PLRA has both placed affirmative roadblocks (the filing fee and the lawyers' limits) in the way of high-quality cases and added a very high exhaustion hurdle for successful litigation of any constitutionally meritorious cases that are nonetheless filed.

#### V. BROADENING THE FIELD OF VIEW

So far, this Article has proceeded on the premise that litigation is about compensation for injured parties. I've deemed cases seeking damages "successful" for plaintiffs only — and whenever — they lead to money changing hands. But of course compensation is not the only, or even the primary, function of a litigation system. For inmate litigation, case outcomes (even taken en masse) have been less important than the administrative, psychological, symbolic, and political effects of the litigation system. As Jim Jacobs wrote twenty-five years ago about the effect of lawsuits on Illinois's Stateville prison:

While the impact of the federal courts on the prison has been profound, the means by which this impact has been made are subtle and indirect. It has been the threat of lawsuits, the dislike for court appearances, the fear of personal liability, and the requirement of rational rules rather than revolutionary judicial decisions that have led to the greatest change in the Stateville organization. While the precise holdings of the court decisions have often been quite modest and even conservative, the indirect ramifications of judicial intervention into the prison have been far-reaching.<sup>350</sup>

In this Part, I examine some of the ways in which the litigation system prior to the PLRA's enactment affected jail and prison officials' decisions and decisionmaking process.

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<sup>350</sup> JACOBS, STATEVILLE, *supra* note 80, at 106–07; see also Jacobs, *Prisoners' Rights Movement*, *supra* note 2, at 33. See generally Richard A.L. Gambitta, *Litigation, Judicial Deference, and Policy Change*, in GOVERNING THROUGH COURTS 259–82 (Richard A.L. Gambitta et al. eds., 1981) (arguing that the impact of cases can be evaluated only after comprehensive and nuanced analysis).

I begin with the observation, informed by the data presented above, that the most pressing feature of individual inmate litigation for jail and prison administrators is not the risk of large payouts. Even small payouts are quite infrequent, and large payouts are rare indeed. What is more salient for correctional officials is that the court filings require response. This leads me to an analytic distinction between litigation responses intended to make dealing with the litigation process more efficient and less stressful for the agencies that get sued and those meant to reduce liability exposure. In this Part, I evaluate both categories of response separately (although in practice they may blur somewhat), building on sociolegal scholarship that explores the complex ways in which liability rules get translated into organizational behavior. In section A, I suggest that, like other public and private organizations, corrections agencies confronted with a sufficient volume of court filings tend to create a compliance infrastructure with both personnel and policy components. But in the correctional setting, the compliance infrastructure is geared as much or more toward litigation efficiency as liability reduction. That is, litigation has most notably spurred administrators to bring into their facilities the employees, policies, and protocols needed for routinization of response. And policies intended to routinize response to litigation have had a far broader bureaucratizing impact, as staff assigned to litigation tasks have functioned not only as litigation point persons, but as law transmitters and filters, educating their colleagues as to what the law requires. What is new in my account is not the connection between corrections litigation and bureaucratization, but the account of the mechanism by which that connection is drawn.

Of course, corrections agencies also take some operational steps to try to reduce liability exposure. The idea is familiar — a major purpose of litigation is supposed to be to “deter” tortious conduct.<sup>351</sup> In organizational settings, however, deterrence is far from simple. A variety of scholars looking at government organizations in particular have argued that lawsuit-promoted deterrence of government misconduct is often dangerously imprecise, causing undue “chilling” of official activity, and perhaps even encouraging tortious misconduct. But I contend in section B that these arguments are, at the very least, inapposite to correctional litigation. In large part because of all the obstacles to their success analyzed above, inmate cases certainly have not functioned as full deterrents. But it is implausible

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<sup>351</sup> The deterrence function is an essential premise of a good deal of law and economics scholarship. See, e.g., Louis Kaplow, *Private Versus Social Costs in Bringing Suit*, 15 J. LEGAL STUD. 371 & n.2 (1986) (“Private benefits [from bringing suit] are simply the damage award, whereas social benefits consist of the reduction in accident costs resulting from the deterrence effect of private suits.”). For discussions of deterrence by civil rights litigation against government agencies, see generally Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) [hereinafter Levinson, *Making Government Pay*], and sources cited in *id.* at 351 n.14.

that inmates' damage actions have either "overdeterred," or functioned, perversely, to *increase* the amount of official misconduct. (The one exception is for some very small minority of elected sheriffs who occasionally take advantage of litigation's attendant publicity to solidify their reputation for toughness — it may be that for inmates subject to the control of these few actors, litigation has indeed played some kind of perverse role.) Mostly, I suggest, individual inmate litigation prior to the PLRA had a real, though undeniably partial, tendency to pressure jail and prison authorities to comply with the (quite minimal) constitutional law of corrections. However, the method by which the deterrent effect worked was very different for prison and jail agencies. For prisons, professional and constitutional norms developed concurrently and symbiotically. For jails, the traditional story of how monetary incentives work was more accurate.

Although only a quite limited amount of scholarship has assessed rigorously how liability pressure actually affects actors in organizational contexts, that work consistently counsels great care and attention to detail and context, which is what I aim at in this Part. For example, I emphasize the crucial distinction between jails and prisons. I should make clear, however, that I am making no attempt to deal comprehensively with litigation's impact on corrections. Several omissions deserve explicit mention. First, I am not discussing the ways in which litigation affects inmates' own choices and resulting life experiences, although inmate litigators are an interesting topic of study in themselves and much more could be written about them.<sup>352</sup> Second, I am not attempting here to present a normative case for inmate litigation, although I do believe that it can serve a valuable dignitary function, opposing the denaturalization and infantilization<sup>353</sup> currently inherent in American corrections, by creating a limited space in which inmates may act as citizens and adults entitled, at least, to explanations. (I would argue that quite apart from whether inmate plaintiffs win or lose in court, and whether they are able to trade on any victories in the

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<sup>352</sup> Among the limited set of sources available, the most comprehensive is Jim Thomas's book, *PRISONER LITIGATION: THE PARADOX OF THE JAILHOUSE LAWYER*, *supra* note 15. Other treatments include LLOYD C. ANDERSON, *VOICES FROM A SOUTHERN PRISON* (2000); MARTIN & EKLAND-OLSON, *TEXAS PRISONS*, *supra* note 16, at 50–58; Dragan Milovanovic, *Jailhouse Lawyers and Jailhouse Lawyering*, 16 INT'L J. SOC. L. 455, 462 (1988).

<sup>353</sup> As Sykes argued over fifty years ago: "[T]he frustration of the prisoner's ability to make choices and the frequent refusals to provide an explanation for the regulations and commands descending from the bureaucratic staff involve a profound threat to the prisoner's self image because they reduce the prisoner to the weak, helpless, dependent status of childhood." SYKES, *SOCIETY OF CAPTIVES*, *supra* note 198, at 75. Although it was not Sykes's major interest, he equated this infantilization with something more political — prisoners' forfeiture of "the status of a full-fledged, trusted member of society . . . similar to what Marshall has called the status of citizenship." *Id.* at 66–67 (referencing T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* (1950) (available in *CONTEMPORARY POLITICAL PHILOSOPHY: AN ANTHOLOGY* 291 (Robert E. Goodin & Philip Pettit eds., 1997))); see also DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 178, 181 (2001).

political arena,<sup>354</sup> they achieve a significant victory just by appearing in the position of claimant rather than mendicant, community member rather than outcast.) Third, especially in this Part, it is crucial to remember that this Article is limited to individual inmate litigation rather than court order litigation. For a large number of prison and jail systems, the basic deterrent impact of litigation has been the *specific* deterrence of a court order, reached by litigation or negotiation, and enforceable by contempt or other judicial action if need be.<sup>355</sup> Such orders also cast a marked general deterrent shadow on systems hoping to avoid them. And they have a mimetic impact, as other systems imitate them not out of fear but rather out of a more positive interest.<sup>356</sup> I am not talking here about any of these phenomena, but am tracing only the general deterrent effect from individual damages actions.

Finally, even in this partial account of litigation deterrence, I need to make clear one additional limit. The law governing jails and prisons is quite restricted in its substantive reach. The boundary between those areas of incarcerated life that are governed by constitutional standards and those that are not is by no means a divide between the important and unimportant. Rather, the case law purports to divide the judicially enforceable “minimal civilized measure of life’s necessities”<sup>357</sup> and the unlawful intentional infliction of extrajudicial punishment from the permissible constraints on prisoners that are motivated by legitimate security or other penological concerns. So most of what goes on in prisons and jails — or, more to the point, what doesn’t go on — is not something for which anyone could answer in damages. The presence or absence of education, employment, and rehabilitative programming; general decisions about custody

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<sup>354</sup> For discussions of how litigation and litigation victories can be converted into useful political currency, see MICHAEL McCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS* (1974); Neal Milner, *The Dilemmas of Legal Mobilization: Ideologies and Strategies of Mental Patient Liberation Groups*, 8 L. & POL’Y 105 (1986); and Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons from School Finance Litigation in Kentucky, 1984–1995*, 26 L. & SOC. INQUIRY 631 (2001).

<sup>355</sup> At last count, the Bureau of Justice Statistics censuses report that such orders govern 23% of the nation’s state prisons (housing 39% of state inmates) and 13% of the nation’s local jails (housing 31% of jail inmates). These figures are derived from BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 2000* (forthcoming; data kindly provided by the Bureau of Justice Statistics) [hereinafter BUREAU OF JUSTICE STATISTICS, 2000 PRISON CENSUS]; BUREAU OF JUSTICE STATISTICS, 1999 JAIL CENSUS, *supra* note 82. For the code yielding the figures presented, see Schlanger, *Technical Appendix*, *supra* note 3.

<sup>356</sup> Cf. Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, in *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 63, 69–70 (Walter W. Powell & Paul J. DiMaggio eds., 1991) (originally published at 48 AM. SOC. REV. 147, 151 (1983)) [hereinafter DiMaggio & Powell, *Iron Cage Revisited*] (distinguishing several kinds of institutional imitation, including a “mimetic” or “modeling” process that occurs “when organizational technologies are poorly understood, when goals are ambiguous, or when the environment creates symbolic uncertainty”).

<sup>357</sup> *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

level or security restrictions; the decision about where an inmate should be housed — all are beyond the narrow concerns of current constitutional law (and, at least mostly, of other law as well). Due process requirements, too, currently reach only a limited set of prison and jail actions. As commonly held views of criminal offenders shift, so that they are viewed as more and more wild and threatening, the recharacterization of harsh measures as “security” rather than summary punishment has moved much of penal administration beyond the scope of constitutional oversight. *Sandin v. Connor*,<sup>358</sup> in which the Supreme Court in large part undid much of the penal due process revolution of the 1970s, was merely the most dramatic confirmation of this ongoing change.<sup>359</sup> The narrow scopes of substantive and procedural constitutional law both come into play, for example, in the most important new issue in large-scale inmate litigation: whether the Constitution has anything special to say about conditions in (or prerequisites for classification to) “supermax” facilities.<sup>360</sup> Examination of the current constitutional doctrine governing jails and prisons is not my point here. But the limited discussion above establishes, I think, that even if individual inmate actions do, as I argue, have a deterrent effect, that effect’s reach is limited — perhaps not precisely to the reach of the substantive law, but in a correlated fashion.

#### A. *Minimizing Litigation’s Burden*

The data presented in Part I on filings and in Part II on outcomes demonstrate that the litigation environment jail and prison administrators face is one of regular (and, in some institutions, many) court filings accompanied by only a possibility of occasional small and rare large payouts. The administrators’ responses are best understood once divided into two categories. Though in practice the categories may blur somewhat, some litigation responses are aimed at litigation efficiency; others are intended to minimize liability exposure. In this section, I evaluate the former.

Nearly regardless of its merits, and wholly apart from any deterrent effect it may have, litigation requires response. Faced with large numbers of lawsuits that made it through pre-service screening,<sup>361</sup> prison and, to a

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<sup>358</sup> 515 U.S. 472 (1995).

<sup>359</sup> *Sandin* held that a prison need not provide any procedural protections against disciplinary consequences if those consequences are not “atypical” for prisoners. In the many systems in which “disciplinary segregation” has custodial conditions similar to “administrative segregation” (for example, protective custody or segregation pending internal investigation of an incident), *Sandin* means that prisons can impose the disciplinary version more or less at will. *See id.* at 486–87.

<sup>360</sup> *See, e.g.*, *Austin v. Wilkinson*, 204 F. Supp. 2d 1024, 1026 (N.D. Ohio 2002) (finding a due process violation in the method by which the state assigned inmates to supermax custody).

<sup>361</sup> Such screening has long been the practice in many districts, *see* FJC, PLRA Resource Guide, *supra* note 14, at 25 & n.73 (citing case law), and the PLRA encourages it, though it does not quite create an actual requirement. *See* 28 U.S.C. § 1915A (2000) (requiring courts to screen cases “before docketing if feasible or, in any event, as soon as practicable after docketing”).

more limited extent, jail systems developed a set of institutional strategies for facilitating processing and response. The most obvious institutional move was to dedicate staff to the problem. States vary in their precise allocation of staff for this function, but all have both low- and high-level personnel who spend significant portions of their time dealing with inmate litigation. There are lawyers and paralegals in corrections departments and in offices of attorneys general; there are litigation officers, compliance officers, risk assessment personnel, and others.<sup>362</sup> Jails, however, present a different picture. Most jails are far smaller than most prisons, let alone prison systems, and small jails in particular are far less likely to employ readily available lawyers with expertise in inmate litigation.<sup>363</sup> But jails, too, often institutionalize some lower-priced staffing arrangement to deal with inmate cases. For example, in many jails, an officer will be assigned to be the “litigation officer” (in addition to other tasks) in charge of coordinating responses to filed cases.

The consequences of having dedicated staff are manifold. Hired to respond to litigation, the assigned staff also act as law transmitters.<sup>364</sup> This is by no means simply a technical assignment. Rather, it involves a kind

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<sup>362</sup> Lawyers for prison systems either work for their department or for the state attorney general’s office. Nearly all, and perhaps all, the states employ lawyers who specialize in prison-related litigation. Such lawyers even have their own professional networks; for example, the National Association of Attorneys General hosts an annual “corrections seminar” for lawyers who defend prisons. See NAAG NEWS, Spring 2002, at 5, available at [http://www.naag.org/publications/pdf/newsletter\\_spr2002.pdf](http://www.naag.org/publications/pdf/newsletter_spr2002.pdf).

<sup>363</sup> Of the approximately 3000 jail jurisdictions in 1999 (which, combined, housed over 600,000 inmates on an average day), more than two-thirds had an average daily population of fewer than 100 inmates. If it takes about 1000 inmates to justify employment of one lawyer in a correctional system, see *supra* p. 1625, it is telling that more than half of jail inmates in 1999 were housed in a jail system that typically held fewer. About half as many state prisons held about twice as many people, and their population distribution was much more even. So fewer than one-third of prison inmates in 2000 were housed in prisons holding fewer than 1000 inmates. Moreover, *all* the prisons are part of systems big enough to justify full-time-employee lawyers and other compliance personnel. See BUREAU OF JUSTICE STATISTICS, 2000 PRISON CENSUS, *supra* note 355; BUREAU OF JUSTICE STATISTICS, 1999 JAIL CENSUS, *supra* note 82. For code, see Schlanger, *Technical Appendix*, *supra* note 3.

I don’t mean to overstate this difference between jails and prisons, however. Even though only very large jails are big enough to justify employment of attorneys dedicated in whole or in part to inmate litigation, such jails are so large that they house about half of jail inmates. Indeed, the very largest jail systems — Los Angeles County (1999 average daily population = 20,683); New York City (1999 average daily population = 17,562); Cook County (Ill.) (1999 average daily population = 9430) — *each* house more inmates than many medium-size state prison systems and have a full complement of litigation-processing staff. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, BULLETIN: PRISON AND JAIL INMATES AT MIDYEAR 2000 at 8 tbl.10, 3 tbl.2 (Mar. 2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim00.pdf>.

<sup>364</sup> See, e.g., Lauren B. Edelman, Stephen E. Abraham & Howard S. Erlanger, *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 L. & SOC’Y REV. 47, 48–49 (1992) [hereinafter Edelman et al., *Professional Construction*] (arguing that because legal systems have no systematic method of disseminating information about law, professionals within organizations assigned to deal with issues of legal compliance typically take on the task of transmitting the law into that organization).

of filtering process; given the nearly omnipresent ambiguity of legal requirements, staff inevitably must partially construct the law in order to create a coherent account of its regulatory demands.<sup>365</sup> The content of that account is as much about organizational and interorganizational politics as it is about what courts or legislatures say. I lean here on the work of Lauren Edelman with various coauthors: in the realm of corporate employment practices, she has emphasized that compliance officers gain power in their organizations by claiming expertise about compliance requirements, but that “[h]ow professionals use that power depends in part on their professional interests and expectations.”<sup>366</sup> While I have not matched Edelman’s intense field inquiry, it appears to me that many of her points apply equally well in the corrections setting. Some correctional compliance personnel may exaggerate the “magnitude of the threat posed by law and the litigiousness of the legal environment” in order to underscore their own vital role within the organization and enhance their professional standing.<sup>367</sup> Indeed, sometimes this inflation effect (combined with the predictable fact that jobs attract people who think the job is important) means that officials assigned to ensure compliance with legal norms may “tend to become internal advocates for the values that the practices symbolize.”<sup>368</sup>

Where prisons and jails seem to me to depart from Edelman’s particular account (though not from her theoretical one) is that in the deeply oppositional world of corrections, “compliance” personnel may become jaded to the constitutional values they are designated to implement, instead developing a finely honed derision for inmate complaints — in part to ensure that they are not too deeply identified with the inmates by their colleagues. It was, for example, prison compliance personnel who, at the behest of the National Association of Attorneys General, put together the lists of “Top Ten Frivolous Prisoner Lawsuits” that circulated in support of the PLRA.<sup>369</sup> It may be, moreover, that compliance personnel consciously or unconsciously try to discourage complaints rather than address their causes. So I am not arguing that prison and jail professionalization and/or specialization of compliance functions are inevitably good for inmates. But my general impression (more precise information will have to await further research) is that jail and prison compliance personnel are on balance apt to have a pro-inmate influence in their organizations.

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<sup>365</sup> See *id.*; Lauren B. Edelman, Stephen Petterson, Elizabeth Chambliss & Howard S. Erlanger, *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers’ Dilemma*, 13 L. & POL’Y 73 (1991) [hereinafter Edelman et al., *Legal Ambiguity*] (arguing that affirmative action officers’ interpretations of the law have important implications on the degree of organizational compliance with the law).

<sup>366</sup> Edelman et al., *Legal Ambiguity*, *supra* note 365, at 77.

<sup>367</sup> Edelman et al., *Professional Construction*, *supra* note 364, at 49.

<sup>368</sup> Lauren B. Edelman & Mark C. Suchman, *When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law*, 33 L. & SOC’Y REV. 941, 963 (1999).

<sup>369</sup> See *supra* pp. 1568–69 & nn. 36–37.

The need to respond to litigation does not impact only staffing. Just as important, systems that know they will be sued dozens or even hundreds of times each year develop practices that make responding to those lawsuits easier and more routine. In correctional facilities, they write incident reports, videotape cell extractions, keep easily copied shift logs and the like. And they develop written policies and procedures easier to present in pleadings and testimony. As Jacobs observed, they bureaucratize.<sup>370</sup> And, as Jacobs and many others have argued, the impact of the resulting bureaucratization is by no means limited to litigation. It can entirely transform the agency in question.<sup>371</sup> (Again, size is a crucial variable here. For small facilities, including most jails but also many prisons, the reminder from lawsuits to maintain the bureaucratic ability to respond can be quite infrequent.)

Bureaucratization is hardly an unqualified good. Jerry Frug has emphasized that in many contexts, bureaucracy crowds out a more participatory form of democratic self-governance.<sup>372</sup> This critique has not, however, had much application in corrections, where pre-bureaucratic regimes rather, to quote John DiIulio, “bounced between the poles of anarchy and tyranny; between the Hobbesian state of inmate predators and the autocratic, arbitrary regime of iron-fisted wardens.”<sup>373</sup> Still, even putting aside participatory democracy in a prison or jail as either an unachievable pipe-dream or simply an inappropriate goal, it is easy to imagine nonbureaucratic prisons and jails that are more humane, more responsive places than bureaucratic ones. And such places certainly exist. More generally, however, it seems that prison and jail inmates are better off when their incarcerating facilities have, for example, written policies, stated rules of conduct for their staff, and the variety of practices and procedures that allow supervisors to monitor line officers.<sup>374</sup> My point here is the by now familiar one that inmate litigation has encouraged use of these minimal bureaucratic features. What is new in my account is the observation that the need to respond to litigation, rather than anything substantive about the litigation, has served as the impetus for these changes.

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<sup>370</sup> Jacobs, *Prisoners' Rights Movement*, *supra* note 2, at 54–55.

<sup>371</sup> *Id.*; see also Feeley & Hanson, *Judicial Impact on Prisons*, *supra* note 16, at 25–28.

<sup>372</sup> Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1295–96 (1984).

<sup>373</sup> JOHN J. DI IULIO, JR., *GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT* 236 (1987).

<sup>374</sup> The most prominent and unambivalent supporter of correctional bureaucratization is John DiIulio. See *id.* at 236–41.

*B. Reducing Liability Exposure: Overdeterrence, Antideterrence, Underdeterrence*

According to the usual accounts of civil rights litigation, one major purpose of the damage-awarding system is supposed to be to “deter government, to some socially optimal extent, from violating constitutional rights by forcing government agencies to internalize the costs of their constitutionally problematic conduct.”<sup>375</sup> In this section, I analyze how deterrence works in a correctional setting for both line officers and the agencies themselves. I argue first that claims that overdeterrence is a pervasive possibility are inapposite to jail and prison litigation. Second, antideterrence claims — arguments that litigation can actually backfire and cause *more* unlawful conduct — are equally implausible in large part. Rather, the traditional account is, in this setting, correct: the litigation system has a beneficial, if limited, tendency to encourage jail and prison agencies to comply with constitutional norms.

1. *Overdeterrence.* — When jail and prison officials feel the deterrent spur, they, like all government agencies or agents, can reduce their exposure to adverse court judgments and court-influenced settlements, and the attendant negative publicity, in three theoretically distinct ways (although in many situations the three merge somewhat). The first method of liability minimization is to try to comply with court-announced norms in carrying out chosen activities — for example, to follow procedural constraints on the imposition of disciplinary sanctions. This is deterrence.<sup>376</sup> The second method of liability minimization is to avoid conflict altogether — for example, to discipline inmates less often. This is what commentators have called overdeterrence.<sup>377</sup> The third method is to do *more* than is constitutionally required — for example, to provide inmates with lawyers for disciplinary hearings.<sup>378</sup> Where agents or agencies choose this response out of fear of liability, rather than because of an affirmative commitment to the policy choice, it too might be considered “overdeterrence.”<sup>379</sup>

<sup>375</sup> Levinson, *Making Government Pay*, *supra* note 351, at 345.

<sup>376</sup> Sometimes government agencies will prefer to pay awards instead of forgoing conduct that reaps political benefits. This is underdeterrence, of course, and while it is important, it is not very interesting if the damage remedy still pushes the agency in the right direction.

<sup>377</sup> See PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 68–77 (1983) [hereinafter SCHUCK, *SUING GOVERNMENT*]; John Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 73–75 (1998) [hereinafter Jeffries, *Eleventh Amendment and Section 1983*]; Jerry L. Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 L. & CONTEMP. PROBS. 8, 26–29 (1978) [hereinafter Mashaw, *Civil Liability of Government Officers*]; Richard Posner, *Excessive Sanctions for Government Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 640 (1982).

<sup>378</sup> See *Wolff v. McDonnell*, 418 U.S. 539, 569–70 (1974) (holding that the state need not allow inmates to be represented by counsel in disciplinary hearings).

<sup>379</sup> If this last is even a problem, it is not the issue on which courts and scholars have focused in their use of the term “overdeterrence” in the constitutional tort context. It is, however, roughly analogous to what economically minded private tort scholars mean by overdeterrence, except that the hypo-

The fear of overdeterrence, and in particular of the conflict-avoidance kind of overdeterrence, is the major challenge offered by scholars to the “deterrence” defense of civil rights litigation. The underlying premise of the argument is the imbalance that results from the existence of disincentives for action and no such disincentives for inaction. Perhaps its best-known scholarly exposition is in the work of Peter Schuck; he describes “society’s interest in encouraging officials to act promptly, decisively, and without excessive self-regard or calculation,” and elaborates the conflict between this kind of “[v]igorous decisionmaking and deterrence, official enterprise and official transgression.”<sup>380</sup> Scholars are not the only ones to have expressed overdeterrence concerns; it was the worry about “unwarranted timidity” by government officials that motivated the Supreme Court to invent and enforce the “qualified immunity” of individual officials from money damages when their conduct (while unlawful) was not objectively unreasonable.<sup>381</sup>

In corrections, for a time, an oft-repeated observation about inmate litigation was that it fostered more dangerous prisons.<sup>382</sup> Not only were inmates emboldened by the possibility of litigation, so the story went,<sup>383</sup> but line officers were “chilled” — deterred from acting to enforce order where the result would be a due process hearing and possibly a lawsuit. The supposed consequence of this was widespread officer demoralization and

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thetically too-high level of care chosen is too high because it exceeds the constitutional floor, rather than because it is inefficient. (Measures that go beyond what is constitutionally compelled may or may not be efficient, which means, in this usage, costing the government less than the benefit to the inmates.)

<sup>380</sup> SCHUCK, *SUING GOVERNMENT*, *supra* note 377, at 21, 22.

<sup>381</sup> *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *see also* *Richardson v. McKnight*, 521 U.S. 399, 408 (1997) (canvassing case law on “unwarranted timidity,” though rejecting qualified immunity for private prison staff).

<sup>382</sup> The argument was most influentially elaborated in a 1984 article, Kathleen Engel & Stanley Rothman, *The Paradox of Prison Reform: Rehabilitation, Prisoners’ Rights, and Violence*, 7 HARV. J.L. & PUB. POL’Y 413 (1984) [hereinafter Engel & Rothman, *Paradox of Prison Reform*].

<sup>383</sup> For example, Justice White, dissenting from the Court’s opinion in *Johnson v. Avery*, 393 U.S. 483 (1969) (in which the Court insisted that prisons either allow inmates to assist each other with litigation or “provide[] some reasonable alternative,” *id.* at 490), wrote of problems caused when a “jailhouse lawyer . . . succeeds in establishing his own power structure, quite apart from the formal system of wardens, guards, and trustees which the prison seeks to maintain.” *Id.* at 500 (White, J., dissenting). Even in the years immediately following *Johnson*, opinions were by no means uniform on this point, however. *See* Anthony Champagne & Kenneth C. Hass, *The Impact of Johnson v. Avery on Prison Administration*, 43 TENN. L. REV. 275, 284 (1976) (reporting the results of a survey asking wardens if they agreed with the statement “*Johnson* has made discipline more difficult to maintain”; 43% agreed “strongly” or “somewhat,” 47% disagreed strongly or somewhat). Nonetheless, after thirty years under *Johnson*, some prison and jail officials continue to argue that writ-writers in particular undermine order and discipline. Lynn Branham reports a typical expression of this complaint, by two correctional officers who told her that “jailhouse lawyers give inmates ‘so much power’ that they become more bold in confronting staff.” BRANHAM, *PRO SE INMATE LITIGATION*, *supra* note 58, at 106. Of course, if this effect exists, whether it weighs in favor or against inmate litigation is nearly entirely an ideological question.

withdrawal, producing a dangerous power vacuum promptly filled by misbehaving inmates.<sup>384</sup>

Nonetheless, I think that overdeterrence is simply not much of a risk in the corrections setting. The reasons for this conclusion are somewhat different for agencies than for line officers. Taking agencies first, the idea that correctional agencies try to reduce their liability exposure through conflict avoidance is implausible. The reason is that conflict avoidance (even if successful, which is somewhat unlikely in a prison or jail) just wouldn't reduce liability exposure very much. Police or welfare agencies may be able to avoid constitutional liability by doing less, because their constitutional duties are negative. That is, doing nothing may be bad policing or may provide bad child protection, but it's not unconstitutional.<sup>385</sup> But that is not the case in corrections. Rather, many of the expensive kinds of constitutional tort liability in corrections stem from failure to act (to provide appropriate medical care or protection from harm, say<sup>386</sup>). The point is not that the "deliberate indifference" liability standard is easy for inmates to meet. But in the correctional setting, making out a constitutional case is no harder for omissions than for acts. Other reasons compound the improbability of the overdeterrence claim as applied to corrections agencies. In particular, the security orientation of modern corrections prioritizes control and order as the primary goals of correctional practice.<sup>387</sup> It would be almost bizarre if fear of liability got in the way of efforts to achieve these goals, given the rarity of serious judgments against corrections agencies or officers.

The idea that jail and prison line officers frequently react to litigation incentives by passivity and withdrawal is equally unbelievable. I do not question that jail and prison officers are often demoralized. But I doubt that litigation as a practice has much to do with it. (Here I mean to distinguish between litigation itself and the *substance* of the rights enforced by litigation. Enough contemporary observers noted correctional officers' discomfort with the due process rights enunciated by courts in inmate law-

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<sup>384</sup> Engel & Rothman, *Paradox of Prison Reform*, *supra* note 382, at 431-33. Another argument about violence arising from litigation has far more force, but much narrower reach (and is not really relevant to my argument here). In Texas and states like it that depended on (often armed) inmates deputized as "trusties" to keep other inmates in order, when court-order litigation compelled the end of the system, it took the resistant authorities quite some time before they reinstated order. This story is about the difficulty of transitions; it does not expose any inherent difficulties with the use of litigation as a mode of regulation.

<sup>385</sup> See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 191 (1989) (refusing to hold government liable under the Due Process Clause for failure to intervene to save an abused child from his abusers); cf. Mashaw, *Civil Liability of Government Officers*, *supra* note 377, at 26-29.

<sup>386</sup> See *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (holding that failure to protect from foreseen harm by other inmates may rise to the level of cruel and unusual punishment); *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976) (same, for failure to provide medical care).

<sup>387</sup> See Malcolm Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 *CRIMINOLOGY* 449 (1992).

suits in the 1970s that I'm not tempted to disagree.<sup>388</sup>) My point is not that being sued doesn't cause anxiety; by all reports, officers don't like it.<sup>389</sup> But for individual officers, litigation is mostly a minor inconvenience because, although lawsuits name them as defendants, officers do not have to pay for either their defense or any resulting settlement or judgment.<sup>390</sup> Instead, in nearly all inmate litigation, it is the correctional agency that pays both litigation costs and any judgments or settlements, even though individual officers are the nominal defendants.<sup>391</sup> So the

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<sup>388</sup> For example, the head of the Federal Bureau of Prisons, James Bennett, reported in 1974 that recently imposed due process requirements "have not only watered down measurably the authority of the wardens but have imposed burdens almost impossible to implement within present appropriations and available legal talent. . . . The erosion of official authority and need for speedy trial and action could have unforeseeable consequences if efforts to achieve full due process are pressed too far[,] but be prepared." James V. Bennett, *Who Wants To Be a Warden?*, 1 *NEW ENG. J. PRISON L.* 69, 72 (1974); see also James B. Jacobs & Norma Crotty, *The Guard's World*, in JAMES JACOBS, *NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT* 133, 140 (1983) (reprinted with modifications from JAMES B. JACOBS & NORMA MEACHAM CROTTY, *GUARD UNIONS AND THE FUTURE OF THE PRISONS* (1978)) (reporting that correctional officer unionism was in part encouraged by guards' unhappiness about "the increasing intervention of the federal courts on behalf of prisoners' rights").

<sup>389</sup> For correctional officers, probably the most significant consequence of being sued is the need to give explanations to would-be creditors. See John W. Palmer, *Inmate Litigation Trends and Constitutional Issues*, in *THE U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE* 206 (Dean Champion ed., 1989) ("Banks view unfavorably the prospect of making loans to those with potential civil tort liabilities climbing into six figures."). When the Federal Bureau of Prisons settles a case brought under *Bivens*, the BOP's lawyers typically obtain agreement for the claim (which runs against individual officers) to be withdrawn and the case to be reclassified as a Federal Tort Claims Act case against the United States, if this is possible — so that the officer does not ever need to go through indemnification review or report the judgment on financial disclosure forms. Pybas Interview, *supra* note 21. It is clear, then, that officers do face adverse consequences from being sued, though those consequences are far less than the full cost of defense and liability exposure.

<sup>390</sup> Doctors are an important exception. Medical care is consistently one of the most prominent topics in inmate litigation. And litigation is said to be a major obstacle to recruitment of correctional physicians. Doctors' particular sensitivity makes sense, because a record of lawsuits can make it difficult for them to get malpractice insurance. Bysse Interview, *supra* note 21; see also Legislative Counsel of California, Bill Analysis of AB 1177 (June 27, 1995), [http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab\\_1151-1200/ab\\_1177\\_cfa\\_950619\\_121924\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_1151-1200/ab_1177_cfa_950619_121924_sen_comm.html) (last visited Mar. 16, 2003) (bill subsequently enacted as 1995 Cal. Stat. 749) (explaining that the proposal for statutory indemnification of prison health care workers addresses assertions by some "providers . . . that if they treat any inmates pursuant to a contract with the [California Department of Correction], they are unable to find medical malpractice insurers who will provide any coverage for them at all").

<sup>391</sup> In the federal system, the United States is actually the formal defendant in claims brought under the Federal Tort Claims Act. 28 U.S.C. §§ 1346(b), 2672 (2000); see also Westfall Act, 28 U.S.C. § 2679(d) (2000) (requiring substitution of the United States as the party defendant in any case brought under the Federal Tort Claims Act against a federal employee acting in the scope of his or her employment). In § 1983 or *Bivens* suits, however, inmates are required to sue individual officers; there is no vicarious liability, and the states (though not counties and cities) have been held to be inappropriate defendants. See *FDIC v. Meyer*, 510 U.S. 471, 486 (1994) (refusing to extend the *Bivens* cause of action to agencies or the federal government as a whole); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65–66 (1989) (holding that states are not "persons" subject to liability under § 1983). Nonetheless, the typical arrangement, usually by statute, is that the correctional agency indemnifies its officers unless the act on which a lawsuit is predicated was outside the "scope of employment" or was intentional or malicious. See *SCHUCK, SUING GOVERNMENT*, *supra* note 377, at 85–88. For a recent listing of in-

agency (although it obviously acts through various actual people) is the entity that “feels” any deterrent prod from liability exposure. Moreover, the same doctrinal details that apply to agency incentives undermine the concern about overdeterrence for line officers as well. In prisons and jails, an officer interested in liability reduction would be well advised to take more action, not less. For example, an officer who uses force may be at less risk of liability than an officer who refrains from using force.<sup>392</sup> Thus, when officers are reluctant to take contentious action (obviously, many are far from reluctant), the culprits are far more likely some combination of physical danger, ethical scruple, and ordinary inertia<sup>393</sup> than fear of lawsuits.

In short, litigation-created overdeterrence, notwithstanding its scholarly pedigree, is unlikely to be a major problem in prisons or jails, either for line officers or for agencies. This conclusion is buttressed by my interviews and conversations with jail and prison administrators; even those who complain about litigation do not report that it forces them to cede control to inmates. It’s not that the tropes of overdeterrence are unavailable to local governments; actually, they are commonplace (for example, when school officials complain that fear of liability is forcing them to eliminate athletic teams). But in what seems to be a major change from the 1970s, *correctional* officials no longer talk the talk of overdeterrence.

2. *Antideterrence*. — A quite different quarrel with constitutional tort litigation for damages, made by Daryl Levinson in a much-remarked recent article, is that it is perverse, actually encouraging the conduct it is intended to deter. Levinson argues that damages may sometimes “buy[] off the subgroups” that suffer the consequences of misconduct, undercutting

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demnification statutes, see Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 30 n.52 (2000). Although, as Schuck emphasizes, indemnification arrangements vary in formal coverage, SCHUCK, *SUING GOVERNMENT*, *supra* note 377, at 85–86, the best evidence available suggests that the law in action is quite different from the law on the books. Agency-provided defense and near-universal indemnification are the rule in practice. See Eisenberg & Schwab, *Constitutional Tort Litigation*, *supra* note 15, at 686 (reporting the results of their examination of constitutional tort case files in the Central District of California in which a money judgment was granted, and concluding that “no case . . . showed that an individual official had borne the cost of an adverse constitutional tort judgment”); Jeffries, *Eleventh Amendment and Section 1983*, *supra* note 377, at 49–50 (stating that, “[s]o far as can be assessed,” governments both defend their employees in constitutional tort cases and indemnify them for adverse judgments).

<sup>392</sup> Compare *Hudson v. McMillian*, 503 U.S. 1, 6–7 (1992) (“[W]henver prison officials stand accused of using excessive physical force . . . the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.”), with *Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (holding that prison officials are liable in damages if they “know[] that inmates face a substantial risk of serious harm and disregard[] that risk by failing to take reasonable measures to abate it”).

<sup>393</sup> For a recent account of the characteristic mixture of boredom and conflict inherent in line corrections jobs, see TED CONOVER, *NEWJACK: GUARDING SING SING* (2000) [hereinafter CONOVER, *NEWJACK*].

the incentive for political (and more effective) mobilization.<sup>394</sup> This is essentially a rephrasing, in the language of public-choice theory, of the challenge to litigation posed most influentially by Stuart Scheingold in *The Politics of Rights*. Scheingold, a political scientist, warned lawyers and activists that rights “won” in court had also to be won in politics, although he acknowledged rights as powerful political currency.<sup>395</sup> But as rephrased by Levinson, the critique loses its ring of truth; I think it’s structurally clever but silly. I certainly agree (with Scheingold and his successors<sup>396</sup>) that rights discourse may be limiting and the lawyer-centric realm of litigation potentially debilitating for reform movements. But this effect is not at all the same as the victims being “bought off” by damages. Whatever the effect litigation strategy has in other arenas, it seems to me that in the actual political realms of constitutional tort litigation (primarily police and prison cases, but other civil rights cases, too<sup>397</sup>) receiving damages almost invariably strengthens rather than weakens victims’ cases before the larger community. Furthermore, litigation payouts and attorneys’ fees are used by some groups to fund their political actions and gain greater publicity.

Still, unintended consequences are always interesting to look for, and I agree with Levinson that they do occasionally occur. Where I would point, however, is to defendants’ desire for publicity rather than to plaintiffs’ desire for money. Publicity about bad conditions or bad acts in a jail or prison can be very useful to politicians and other officials. Publicized failings can create a useful backdrop for a would-be reformer — as, for example, in Arkansas in the 1970s, when corrections head Tom Murton (later portrayed by Robert Redford in the movie *Brubaker*) welcomed the nation’s first comprehensive prison court-order lawsuit.<sup>398</sup> “The key thing in

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<sup>394</sup> Levinson, *Making Government Pay*, *supra* note 351, at 379.

<sup>395</sup> SCHEINGOLD, *THE POLITICS OF RIGHTS*, *supra* note 354, at 131–48.

<sup>396</sup> See, e.g., sources cited *supra* note 354. Some versions of the Critical Legal Studies critique of rights sound themes similar to Scheingold’s, arguing that the conversion of grievances into claims about “rights” is much more often than not sterilizing rather than empowering. See, e.g., DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* 300–04, 315–37 (1997) (setting out an intellectual history of the critique of rights); Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 296 (1988) (describing the rights discourse employed in the development of antidiscrimination law as “a process of containing and stabilizing the aspirations of the oppressed”).

<sup>397</sup> On the various substantive components of the federal civil rights docket, see, for example, Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 808–09 n.132 (1997). See generally Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL RTS. J. 427 (1997) [hereinafter Kreimer, *Dark Matter*].

<sup>398</sup> See FEELEY & RUBIN, *JUDICIAL POLICY MAKING*, *supra* note 16, at 58–59, 68. The publicity value of litigation has long been recognized: “The process of litigation is an important source of publicity and pressure, regardless of the final outcome. Newspapers, radio, and TV describe the conditions and treatment which a lawsuit challenges. Prison authorities are interviewed and asked to explain their actions.” ERIK OLIN WRIGHT, *THE POLITICS OF PUNISHMENT: A CRITICAL ANALYSIS OF PRISONS IN AMERICA* 308 (1973).

jail litigation,” one jail official said to me recently, “is to pick your plaintiff well.”<sup>399</sup> Litigation, that is, may be not a headache but an opportunity — one for which it is worth paying out money damages.

While the publicity and other collateral effects of litigation might well cause jail and prison officials to encourage *lawsuits*, it seems less likely that they would have the more serious antideterrent effect of encouraging the primary (mis)conduct that is the subject of suits. Yet in certain situations litigation may actually do just that. The publicity surrounding court complaints can become a badge of honor, a signal to the electorate that promised toughness on crime and criminals is real as well as rhetorical. Such an effect is far more likely when publicity is about jails rather than prisons. The reason is political. Prison systems are headed by high-level state officials. The precise organization varies: state corrections departments are sometimes freestanding and sometimes just one division of a broader department (usually a department of public safety). Either way, a member of the governor’s cabinet leads the enterprise. And (in part because of the prisoners’ rights movement<sup>400</sup>) the highest correctional official in the state has usually made his or her career in corrections.<sup>401</sup> Thus, although the bulk of these officials’ jobs are political,<sup>402</sup> their claims on office are premised on specialized expertise in the profession of corrections rather than on campaign promises. By contrast, it is elected sheriffs who typically top county jail organization charts.<sup>403</sup> Sometimes, sheriffs are more or less career politicians; when this is not the case, their backgrounds tend to be in law enforcement rather than corrections. Either way, their route to office is more often tough-on-crime rhetoric and promises of pub-

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<sup>399</sup> Interview with Massachusetts jail official (2001).

<sup>400</sup> See Jacobs, *Prisoners’ Rights Movement*, *supra* note 2, at 131.

<sup>401</sup> The state departments of corrections all have websites, and nearly all include biographies of their department heads. For an index of these websites, see <http://www.corrections.com/links/state.html> (last visited Mar. 16, 2003). For a discussion of the professionalization of high-level corrections officials, see Kevin N. Wright, *The Evolution of Decisionmaking Among Prison Executives, 1975–2000*, in 3 CRIMINAL JUSTICE 2000: POLICIES, PROCESSES, AND DECISIONS OF THE CRIMINAL JUSTICE SYSTEM 177, 186–87 (Nat’l Inst. of Justice ed., 2000).

<sup>402</sup> Wright, *supra* note 401, at 197–98. (“According to the prison officials with whom I spoke, the chief executive of a correctional system . . . will spend about 70 percent of his or her time away from direct correctional practice, involved in the political processes of interacting with the legislative and executive branches of government, the press, and concerned citizens.”).

<sup>403</sup> Note, however, that regional jails are often run by appointed jail superintendents. City jails, which accounted for eight percent of the nation’s jails and housed eight percent of the nation’s jail inmates in 1999, answer to city mayors, sometimes via a city chief of police. These are nearly all quite small facilities — eighty-five percent of them have an average daily population under 100. On any given day, nearly half the population housed in city jails nationally is in the enormous systems in New York City and Philadelphia. BUREAU OF JUSTICE STATISTICS, 1999 JAIL CENSUS, *supra* note 82 (analysis included in Schlanger, *Technical Appendix*, *supra* note 3). I have not studied city or regional as compared to county jails, but I think that much of what I say in the text about the impact of publicity is less applicable to jails with appointed rather than elected heads. But in other ways, regional and city jails are quite typical.

lic order than a professional identification with detention or corrections policy.<sup>404</sup> One salient current example of a jail official who seems to go looking for litigation is Joe Arpaio, who bills himself as the “toughest sheriff in America.” The frequent lawsuits his department provokes substantiate this claim.<sup>405</sup> Many states have their own Joe Arpaio (in Massachusetts, we have Bristol County Sheriff Thomas Hodgson, who has singlehandedly brought the chain gang to the state).<sup>406</sup> But my firm impression is that such sheriffs are exceptional. So the perverse consequences of individual inmate civil rights litigation seem to me very limited overall.

3. *Deterrence/Underdeterrence.* — More substantial than either the argument about overdeterrence or the argument about antideterrence is a more obvious possibility: *underdeterrence*. The rarity of substantial judgments, or even substantial settlements, poses a major challenge to any defense of inmate litigation based on its deterrent effect. Inmate litigation payouts are clearly dwarfed by the amount of harm caused by unconstitutional conduct in jails and prisons. As Seth Kreimer has written:

The most optimistic interpretation of this outcome [of low litigated success rate] is to hope that the prospect of ultimate review in a damage action by a judge outside of the closed institutional culture of corrections provides a mediating influence on the decision to apply or sanction brutality or physical abuse.

The pessimistic version is that the largely symbolic availability of a toothless remedy allows judges to legitimate brutal prison regimes.<sup>407</sup>

It seems to me that the optimistic interpretation is more correct. True, higher and more frequent payouts probably would be a stronger deterrent — but the near certainty of lawsuits (and consequent need to produce an accounting), coupled with even rare awards of damages, sufficiently publicized, keeps the *threat* of court sanction real and salient.

Of course, that threat works only minimally against line officers: the same indemnification setup that prevents individual officers from being *overdeterred* by litigation blocks optimal deterrence as well. Inmates' judgments or settlements can educate officers about what kind of conduct

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<sup>404</sup> Note, however, that there are some recent signs that elected sheriffs (threatened by an up-tick in political efforts to restrict their sphere of authority) alter their method of selection, or eliminate the office altogether may themselves be pursuing more professionalism. See sources cited in Donald Lee Boswell, *Virginia Sheriffs v. Police Chiefs and Jail Superintendents: An Empirical Evaluation of Local Law Enforcement Services* 44 (1997) (unpublished Ph.D. dissertation, Virginia Commonwealth University) (on file with author) [hereinafter Boswell, *Virginia Sheriffs*]; see also Sheriff Johnny Mack Brown, *Accreditation Breeds Professionalism*, SHERIFF MAG., Sept.–Oct. 1995, at 12; Sheriff Aaron D. Kenard, *Law Enforcement: The Struggle To Break the Professional Barrier*, SHERIFF MAG., Sept.–Oct. 1995, at 10–11, 57.

<sup>405</sup> See Barry Graham, *Star of Justice: On the Job with America's Toughest Sheriff*, HARPER'S MAG., Apr. 2001, at 61.

<sup>406</sup> See Ric Kahn, *Not Welcome Sign Is Out for Sheriff's Chain Gangs*, BOSTON GLOBE, June 19, 1999, at B4.

<sup>407</sup> Kreimer, *Dark Matter*, *supra* note 397, at 490.

the broader world deems unacceptable, if an agency undertakes to inform officers about them. But education, while important, can only do so much. More coercive line-officer deterrence depends on agency commitment to staff training and discipline, and on the variety of control techniques agencies commonly use to bring “street-level bureaucrats” into line with agency objectives.<sup>408</sup>

Does the risk of liability in individual inmate cases help goad agencies to undertake these kinds of supervisory efforts, along with the myriad other non-supervisory steps required to run a constitutional prison or jail (provision of medical care, adequate nutrition, and so on)? It’s possible, after all, that government agencies, which are not profit-driven in the same way private firms are, simply don’t care about monetary payouts.<sup>409</sup> But I think the evidence clearly shows that, in general, government agencies seek to avoid fines, which are extremely disruptive to the normal operation of any bureaucracy — especially if the money must be diverted from other, already budgeted, priorities.<sup>410</sup> Fear of major money judgments or settlements is why liability reduction is a major theme in many areas of corrections — for example, it is one of the chief selling points for those promoting accreditation<sup>411</sup> and various kinds of goods<sup>412</sup> and contracting arrangements.<sup>413</sup>

Moreover, anyone who reads the newspaper or watches television news knows that inmate litigation can trigger bad publicity about correctional institutions and officials. Even news organizations that don’t do investigative reporting can use filed complaints to expose corruption, sex, drugs, and death in jails or prisons — all the ingredients for good local, and

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<sup>408</sup> See MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* 162–69 (1980) (discussing management methods to hold workers to agency objectives); SCHUCK, *SUING GOVERNMENT*, *supra* note 377, at 125–46 (discussing how agencies can “[m]obiliz[e] [o]rganizational [c]hange”).

<sup>409</sup> See, e.g., Levinson, *Making Government Pay*, *supra* note 351, at 357 (“Government does not . . . attach any intrinsic disutility to financial outflows.”).

<sup>410</sup> The classic account of bureaucratic interest in maximizing budgets is WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 36–42 (1971).

<sup>411</sup> The American Correctional Association website listing of the “benefits of accreditation” includes: “Defense against lawsuits. Accredited agencies have a stronger defense against litigation through documentation and the demonstration of a ‘good faith’ effort to improve conditions of confinement” and pay “[r]educed liability insurance costs.” See American Correctional Association, *Accreditation and Standards: Benefits of Accreditation*, at <http://www.corrections.com/aca/standards/benefits.htm> (last visited Mar. 16, 2003).

<sup>412</sup> As Thomas observes, “Even the private sector has found the threat of litigation a convenient stage from which to hawk insurance or such prison amenities as better lighting.” THOMAS, *PRISONER LITIGATION*, *supra* note 15, at 252 (citing Joseph Claffy, *Lighting the Way to Less Litigation*, *CORRECTIONS TODAY*, Apr. 1984, at 90).

<sup>413</sup> For example, the Corrections Corporation of America website tells prospective customers (that is, governments thinking about privatizing jails or prisons) that “[t]he considerable legal liability costs associated with operating jails and prisons can be substantially reduced by privatization.” See Corrections Corporation of America, *Frequently Asked Questions*, at <http://www.correctionscorp.com/overview/faq.html> (last visited Mar. 16, 2003).

sometimes even national, stories. So even for an agency that doesn't care about payouts (perhaps because those payouts come from some general fund rather than the agency's own budget), media coverage of abuses or administrative failures can trigger embarrassing political inquiry and even firings, resignations, or election losses. (I'm speaking of course about the effects on the more typical, non-Joe Arpaio types.) Note, finally, that this positive as well as the earlier-mentioned negative effect of publicity is likely to be particularly important for jails. For one thing, every local newspaper in the country could conceivably be interested in conditions in and damage awards against its own local jail, whereas small awards against state prisons are not nearly as likely to be of interest to the press. Moreover, the election-year consequences are tilted as well: the local sheriff is a good deal more closely associated with problems in a county jail than the governor is with problems in a state prison. As Vince Nathan, a frequent special master in jail and prison cases, said to me:

Sure, a \$4 million settlement for the Lucasville riot [a prison case] gets a lot of press. But while a \$30,000 award against the state is not a big deal, it can be more embarrassing when it's against the county. It could be used against the Sheriff in his election — but against a Governor? No.<sup>414</sup>

Thus I conclude that correctional agencies at least often feel and care about the threat of litigation. Finally, then, we get to the most interesting question: What do they do about it? This is hard to answer, because prison administrators, if not jail administrators, tend to deny just about any effect of litigation — deterrence, overdeterrence, whatever. Prison administrators have something of a mantra that they worry more about good professional practice than about litigation. For example, according to the head of the National Institute of Corrections prisons division, at national meetings of state corrections department directors, deputy directors, and wardens, "They don't talk about lawsuits; they talk about good correctional policy. People aren't running around afraid of lawsuits — that's at most a tertiary motive."<sup>415</sup> Pushed a little on specifics, correctional policymakers admit to occasionally changing policies because of litigation, but only when the litigation educates them on good professional practice in a previously un-dereexamined area, or alerts them to a previously hidden organizational variance from good professional practice. This occasionally happens, they say, with court-order cases. But for individual litigation, they describe this effect as extremely rare.<sup>416</sup>

More detailed inquiry into particular policy changes at particular agencies suggests, however, that changes in prison policy to fend off or respond to the possibility of damage actions are less unusual than my interview

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<sup>414</sup> Nathan Interview, *supra* note 21.

<sup>415</sup> Hunter Interview, *supra* note 21.

<sup>416</sup> See, e.g., Wilkinson Interview, *supra* note 21.

subjects were willing to admit. For example, several large damage verdicts against the Federal Bureau of Prisons relating to inmate suicides prompted high-level policy review of suicide prevention policies and practices.<sup>417</sup> And observers not as highly placed in prison hierarchies regularly attribute policy changes to fear of liability, as when a journalist who spent a year undercover as a line officer in New York's Sing Sing prison attributed the state's increased willingness to protect inmates from each other to fear of liability. The frequency of inmate rape at Sing Sing has gone down, the author says, because "[i]nmates who ask for protection but fail to get it can make expensive claims."<sup>418</sup>

It is possible, then, that the denials of deterrent impact I have heard from corrections officials are simply disingenuous. I don't think so, however. Rather, while they are clearly not telling the entire story, I am inclined to take seriously what many prison officials have said to me — that they do not feel, phenomenologically, that they accede to litigation's pressure by straying from good correctional practice, but are instead influenced by litigation's incentives only when liability reduction coincides with professional norms.

This is not to say, however, that litigation has not been influential. The very reason that overlap of court-announced constitutional norms and professional norms is common is that the evolution of good professional practice in corrections has been greatly influenced by court cases, and vice versa. As organizational theorists propose more generally: "Organizations and rule environments rarely encounter each other autonomously and confrontationally. Rather, both are constituted *together*, as part of a larger process of institutional 'structuration.'"<sup>419</sup> This insight certainly holds true in the area of corrections. Perhaps most generally, constitutional doctrine governing prisons and jails, as in so many areas, requires the kind of means-ends rationality that is most consistent with (if it does not actually require) bureaucratic organization, with some degree of top-down command and control. And, sure enough, this is the most basic requirement of current professional practice as well. Indeed, the American Correctional Association's jail and prison accreditation standards focus heavily on written policies, a feature that critics complain causes standards to lack substantive bite.<sup>420</sup>

By comparison with prison administrators, I have found jail administrators far less reluctant to admit that they frequently have changed policies

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<sup>417</sup> Saylor Interview, *supra* note 21; Zoldak Interview, *supra* note 21.

<sup>418</sup> CONOVER, NEWJACK, *supra* note 393, at 263.

<sup>419</sup> Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 L. & SOC. INQUIRY 903, 922 (1996) (reviewing THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul J. DiMaggio eds., 1991)).

<sup>420</sup> See Elizabeth Alexander, *What's Wrong with the ACA?*, 15 NAT'L PRISON PROJECT J. 1 (2001).

and practices nearly entirely because of individual lawsuits. Jail administrators concede their own concern about damages exposure and admit that this anxiety has led them with some regularity to alter their jails' operations, even when they don't agree with the change as a matter of policy. As one jail director said to me, "We're not doing things out of beneficence. If we're, say, serving inmates special meals, that's because we've been sued."<sup>421</sup> Many sources seem to confirm jail administrators' tendency to worry about damage actions. For example, the National Institute of Justice's Large Jail Network's<sup>422</sup> newsletter and conferences frequently canvas topics related to damage liability,<sup>423</sup> and the American Jail Association features legal training at all of its conferences.<sup>424</sup> I am not aware of similar discussions in prison fora,<sup>425</sup> and the American Correctional Association offers very little training focusing explicitly on civil rights liability reduction.<sup>426</sup> In my interviews and other encounters with jail officials, they frequently complain about the law's impact on jail operations. It's a typical kind of comment from jail administrators that "the law" doesn't understand their circumstances, and especially that "the law" allows inmates to manipulate jail officers. As one official said to me, "An inmate who really wants to mess with us will threaten suicide. Then he knows we have to put him on a 24-hour watch. We know he's faking, and he knows we know — but the law is far too rigid and it makes us spend the extra money."<sup>427</sup> Of course, this is illogical — if an officer is sure that the inmate is faking, then there's no litigation risk in ignoring him. It's precisely when officers are *not* sure that they feel pressure to institute precautionary measures.

Why is there a greater feeling of coercion and more expressed resentment of litigation among jail officials? I do not think that these sentiments simply reflect a lack of public relations polish, although that is certainly in play. Rather, I see several deeper distinctions that may cause this difference: First, the common wisdom is that jails are far less professionalized

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<sup>421</sup> Bradley Interview, *supra* note 21.

<sup>422</sup> The Large Jail Network is a group of about 100 jails and jail systems with typical daily populations over 1000 inmates, organized by the federal National Institute of Corrections. See National Institute of Corrections, Practitioner Networks: Large Jail Network, at <http://www.nicic.org/services/networks/ljn-about.htm> (last visited Mar. 16, 2003).

<sup>423</sup> See, e.g., National Institute of Corrections, Meeting Highlights: Large Jail Network Meeting, Jan. 6–8, 2001, at 32–36, available at <http://www.nicic.org/pubs/2001/016687.pdf>.

<sup>424</sup> See, e.g., American Jail Association, AJA's 22nd Annual Training Conference: Tentative Schedule of Events, at <http://www.corrections.com/aja/conferences/tentativeconferenceschedule.html> (last visited Mar. 16, 2003).

<sup>425</sup> Those I have asked say they are rare. E.g., Wilkinson Interview, *supra* note 21.

<sup>426</sup> See, e.g., American Correctional Association, Session Schedule for Summer Conference, 2003 (on file with author); American Correctional Association, Session Schedule for Winter Conference, 2003 (on file with author).

<sup>427</sup> Interview with anonymous jail official (2001).

than are prisons. This starts at the top, as already described, but it extends down the hierarchy as well. As Mays and Thompson summarize:

In simplest terms, jail line officers are too few in number, untrained or poorly trained, and vastly undercompensated. Local jail officers often find themselves in one of two positions: either they are sheriff's deputies assigned jail duty for disciplinary reasons or awaiting transfer to road patrol, or they are permanent correctional officers with little chance for advancement or job enhancement.<sup>428</sup>

This point was repeated to me during numerous interviews by people who have made their careers doing training and consulting for jails.<sup>429</sup> One would expect, then, a less thorough identification by jail administrators with coevolving standards of professional corrections practice and legal compliance.<sup>430</sup>

Second, when steps that can minimize liability exposure cost real money, jails and prisons are very differently situated. Prisons, which get their money from state legislatures, have the usual kinds of public agency budgetary limits. But sheriffs are even more limited financially, because their budgets are set by a competing, and more fiscally constrained, governmental entity — their county commissions.<sup>431</sup> In addition, sheriffs generally would prefer to spend their limited budgets on street services rather than on jails, because that is where expenditures are visible to the constituents on whose votes they depend for reelection.<sup>432</sup>

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<sup>428</sup> G Larry Mays & Joel A. Thompson, *The Political and Organizational Context of American Jails*, in *AMERICAN JAILS*, *supra* note 52, at 3, 5 (citation omitted); *see also* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *JAILS: INTERGOVERNMENTAL DIMENSIONS OF A LOCAL PROBLEM* 172–73 (1984) (observing that training is poor to nonexistent).

<sup>429</sup> *E.g.*, Collins Interview, *supra* note 21; Katsaris Interview, *supra* note 21.

<sup>430</sup> In a classic article, DiMaggio and Powell hypothesize that “[t]he greater the extent of professionalization in a field, the greater the amount of institutional isomorphic change. Professionalization may be measured by the universality of credential requirements, the robustness of graduate training programs, or the vitality of professional and trade associations.” DiMaggio & Powell, *Iron Cage Revisited*, *supra* note 356, at 77.

<sup>431</sup> State legislatures have a variety of methods of raising revenue and a very large resource base (although there is, of course, fierce political competition for budgetary support). But legal constraints leave county commissions with far fewer ways to raise revenue. *See, e.g.*, MARK BALDASSARE, MICHAEL SHIRES, CHRISTOPHER HOENE & AARON KOFFMAN, *PUB. POLICY INST. OF CAL., RISKY BUSINESS: PROVIDING LOCAL PUBLIC SERVICES IN LOS ANGELES COUNTY* xv–xvi (2000) (pointing out that Los Angeles County has “little control over its revenues,” and “little control over its expenditures”); Beverly A. Cigler, *Revenue Diversification Among American Counties*, in *THE AMERICAN COUNTY: FRONTIERS OF KNOWLEDGE* 166, 166–81 (Donald C. Menzel ed., 1996) (setting out the limited set of revenue-generation options available to counties). Moreover, there is often a serious power struggle between county sheriffs, who spend an enormous amount of their counties’ money, and county commissioners, who must come up with the money but have little control over how it is spent.

<sup>432</sup> As one former sheriff put it, “[m]ore patrol cars get votes: more jail cells do not.” Boswell, *Virginia Sheriffs*, *supra* note 404, at 30. (Boswell was a sheriff in Virginia until he lost reelection.) *See also* LINDA L. ZUPAN, *JAILS: REFORM AND THE NEW GENERATION PHILOSOPHY* 48 (1991) (“The background, education, training and interests of most sheriffs are in law enforcement. Few have the expertise, training or incentive to spend inordinate amounts of time on jail concerns. . . . Nor is it politically expedient for sheriffs to devote time and energy to the jail. More often than not, sheriffs are

The final reason that jail administrators feel more threatened by litigation is that they *are* more threatened by it, because jail litigation is likely to pose a larger risk in terms of both probability and magnitude of liability. Although jails face fewer cases in relation to their daily population,<sup>433</sup> there are abundant reasons to think that jail cases are more serious, on average, than prison cases are, and that jails pay out more money, proportionately, than prisons do. First, jails are more dangerous than prisons,<sup>434</sup> in large part because of the primary operational difference between the two types of facilities: prisons take and hold inmates while jails take and release them.<sup>435</sup> This extremely fast turnover makes jails inherently more chaotic. More generally comparing jails to prisons, classification of jail inmates is more haphazard, jail routines are less regular, jail time is more idle, and jail inmates are more likely to be in some kind of crisis.<sup>436</sup> Jail inmates are also more likely to be vulnerable to harm in many ways —

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elected on the basis of their crime control and law enforcement abilities, not their skills as jail administrators. It is certainly more glamorous and attractive to be a crime-fighter than a jail keeper.”); Joel A. Thompson & G. Larry Mays, *The Policy Environment of the American Jail*, in *AMERICAN JAILS*, *supra* note 52, at 1, 2 (“[W]ithin the sheriff’s department jails must compete with more politically salient programs — patrol, crime prevention, and drug interdiction.”). Boswell’s dissertation about Virginia jails is the only research of which I am aware that compares the effect of having jails run by elected officials with the effect of having jails run by appointed officials. Controlling for many features, Boswell finds that counties with elected sheriffs score lower in periodic state jail inspections than do counties with appointed jail superintendents. Boswell, *Virginia Sheriffs*, *supra* note 404, at 131, 138.

<sup>433</sup> See *supra* pp. 1581–82.

<sup>434</sup> There is a long tradition of professional excoriation of jail conditions. See, e.g., NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT REPORT ON PENAL INSTITUTIONS PROBATION AND PAROLE 273–74 (photo. reprint 1987) (1931) (stating that the American jail is the “most notorious correctional institution in the world”); *The Scandalous U.S. Jails*, *NEWSWEEK*, Aug. 18, 1980, at 74, 74 (“The jails are much worse than prisons. They are the worst blight in American corrections.” (quoting criminologist Daniel Fogel)). And inmates often comment that jails are more dangerous than prisons. The following message, posted on a corrections listserv, is typical:

I can only speak for myself as an ex offender, jail was much more violent than prison, even though I was incarcerated in one of the toughest prisons in Georgia at that time. I witnessed more rapes and fights in jail than prison. People were more seriously hurt for the most part in the jail.

Posting of Jackie Thompson to [correx@www.nicic.org](mailto:correx@www.nicic.org) (Feb. 25, 2000) (on file with author).

<sup>435</sup> Michael O’Toole, the head of the National Institute of Corrections Jail Division, has explained: Probably the most significant difference between jail and prison populations is admission rates. In general, [annual] prison commitments, which include new court commitments and individuals returned to custody, are about 50 percent of the average daily population (ADP). In rounded figures, the ADP of the nation’s prisons in 1995 was about 1 million. Total admissions for that year were about 500,000. In contrast, the ADP of the nation’s jails was about 500,000 in 1995, but the admissions to jail for that year were estimated to be between 10 million and 13 million. Stated another way, it takes two years for the nation’s prison population to turn over once, while the jail population turns over 20 to 25 times each [year].

O’Toole, *Jails and Prisons*, *supra* note 76. So, O’Toole observes, it is typical in a jail for “up to 85 percent of new admissions [to] be released within four or five days.” *Id.* At the same time, however, the inmates who do not get out right away can remain in jail for months or even years, either unable to make bail and awaiting trial or serving out their (relatively short) sentences.

<sup>436</sup> See, e.g., Campbell Interview, *supra* note 21; Katsaris Interview, *supra* note 21.

mentally ill,<sup>437</sup> inexperienced with incarceration, drunk or high, or suicidal.<sup>438</sup> In sum, one reason that jail officials seem more concerned about litigation than do prison officials is that the jails are worse places than prisons. A second source of jail officials' anxiety is an extra dollop of litigation exposure: jail inmates can suffer vastly greater economic harm than prison inmates, if they are employed or employable and lose wages because of an injury inflicted in jail, or if they need to pay for medical care. Third, jail inmates are potentially more sympathetic figures to decision-makers, because they are not necessarily convicted criminals, and because their offenses, even if eventually proven, may be quite minor. Fourth, jail inmates have somewhat less trouble finding lawyers, since they often can look after they get out.<sup>439</sup> In some (though by no means all) large urban centers, lawyers in the personal injury bar regularly take on jail cases, or even specialize in jail and police cases. Fifth, observers report that jail lawyers are often less experienced and less expert litigators than are prison lawyers, in part because the job of county counsel has traditionally been a patronage reward for supporters of county powerbrokers. "In jails," says Bill Collins, the editor of the *Correctional Law Reporter*, who frequently trains jail officials on legal issues, "there's lots of learning the hard way."<sup>440</sup> Finally, demographic differences between jails and prisons can augment the differential levels of liability exposure. Whereas prison in-

<sup>437</sup> Jeffrey L. Metzner, Fred Cohen, Linda S. Grossman & Robert M. Wettstein, *Treatment in Jails and Prisons*, in TREATMENT OF OFFENDERS WITH MENTAL DISORDERS 211, 230 (Robert M. Wettstein ed., 1998) ("Generally, rates of serious mental disorders are greater for inmates in jail than in prison. By the time an inmate has been convicted of a criminal offense and incarcerated in a prison, many severely mentally ill inmates will have already been hospitalized or treated on a pretrial basis, diverted to the mental health system, adjudicated NGRI, had their charges dismissed, or placed on probation."). Also see the comprehensive table on "The Prevalence of Mentally Disordered Persons in Jails," summarizing twenty-three studies, in Linda A. Teplin & Ecford S. Voit, *Criminalizing the Seriously Mentally Ill: Putting the Problem in Perspective*, in MENTAL HEALTH AND LAW: RESEARCH, POLICY AND SERVICES 283, 294-95 (Bruce D. Sales & Saleem A. Shah eds., 1996). Teplin and Voit conclude both that "the jails have a significantly higher rate of severe mental disorder than the general population," *id.* at 292, and that "the rate of mental disorder among prison detainees is actually lower than that in the general population . . . because seriously ill offenders are diverted to mental health facilities at some point during the adjudication process," *id.* at 292 n.1 (citation omitted). Note, however, that most of the research they cite is now more than fourteen years old. *See id.* at 292 & n.1, 294-95.

<sup>438</sup> The annual suicide rate in the general population is about twelve per 100,000; in prisons it is about fifty percent higher. *See* NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, PRISON SUICIDE: AN OVERVIEW AND GUIDE TO PREVENTION 27 (1995). But in jails, it is widely reported that suicide is nine times greater than in the general population. *See* LINDSAY M. HAYES & JOSEPH R. ROWAN, NAT'L CTR. ON INSTS. & ALTERNATIVES, NATIONAL STUDY OF JAIL SUICIDES: SEVEN YEARS LATER xi (1988). Note, however, that because this jail suicide rate is calculated by dividing the annual number of suicides by the average daily population (rather than a measure that accounts at least somewhat for total population flow), some have argued it is misleading. *See, e.g.,* O'Toole, *Jails and Prisons*, *supra* note 76.

<sup>439</sup> As one sheriff's counsel said to me, "[y]ou've got all those lawyers on the outside, the inmate-chasers." Griner Interview, *supra* note 21.

<sup>440</sup> Collins Interview, *supra* note 21; *see also* DeLand Interview, *supra* note 21; Farber Interview, *supra* note 21.

mates are disproportionately housed in rural areas,<sup>441</sup> large jails, which house most of the inmates<sup>442</sup> (and probably defend most of the lawsuits), are in urban areas.<sup>443</sup> Urban juries may be more openhanded to plaintiffs than rural juries are and, in any event, are widely *believed* to be so, which increases settlement pressure regardless of the true state of affairs.<sup>444</sup>

For all these reasons, it seems very likely that jail damage actions generally pose a larger risk of liability — and of high damages — than prison cases do, and experienced participants in the litigation system think that this is in fact the situation.<sup>445</sup> Unfortunately, there are no systematic data available with which to do a thorough comparison. But my checks of all damage awards from cases filed in 1993 show that one-third are from jail

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<sup>441</sup> No firm figures exist on how many prisoners are incarcerated in the counties labeled “nonmetro” by the Census Bureau (which have under twenty percent of the nation’s population), but it’s probably about half. See Calvin L. Beale, *Rural Prisons: An Update*, RURAL DEV. PERSP., Feb. 1996, at 25–27 (documenting the shift towards nonmetro prisons); Calvin L. Beale, *Prisons, Population, and Jobs in Nonmetro America*, RURAL DEV. PERSP., Mar. 1993, at 16 (stating that the 390 prisons in nonmetro areas in 1991 housed forty-four percent of all state and federal prisoners); Calvin Beale, *Cellular Rural Development: New Prisons in Rural and Small Town Areas in the 1990s* (Paper Presented at the Annual Meeting of the Rural Sociological Society, Aug. 18, 2001) (on file with author) (same); E-mail from Calvin Beale, Senior Demographer, U.S. Dep’t of Agriculture, to the author (May 21, 2002) (on file with author); see also, e.g., WILLIAM G. NAGEL, *THE NEW RED BARN: A CRITICAL LOOK AT THE MODERN AMERICAN PRISON* 46–52 (1973) (analyzing reasons for prison site selection in rural areas); Daniel L. Feldman, *20 Years of Prison Expansion: A Failing National Strategy*, 53 PUB. ADMIN. REV. 561, 561–62 (1993) (observing that in 1992, in New York state, “low-density, Republican districts . . . housed over 89 percent of state inmates”).

<sup>442</sup> See *supra* note 363.

<sup>443</sup> This is a phenomenon that has racial consequences as well. Outside the South, rural counties are nearly always much whiter, demographically, than urban areas. See JESSE MCKINNON, U.S. CENSUS BUREAU, *THE BLACK POPULATION: 2000*, at 5 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf> (reporting that Southern counties with populations that are more than fifty percent black are “generally” nonmetropolitan; “[c]oncentrations of Blacks in the Midwest and West tended to be either in counties located within metropolitan areas or in counties containing universities or military bases or both”; and in the Northeast, blacks are concentrated along the coast from Philadelphia to Providence and along the Hudson River Valley northward from New York City). So whereas non-Southern prison inmates disproportionately serve their time surrounded by communities that are nearly all white, jail inmates do not.

<sup>444</sup> See Theodore Eisenberg & Martin T. Wells, *Trial Outcomes and Demographics: Is There a Bronx Effect?*, 80 TEX. L. REV. 1839, 1840–43 (2002) (summarizing common perceptions about demographic predictors of jury decisionmaking); *id.* at 1850–70 (summarizing results of regression analysis of jury results and county demography and “find[ing] little robust evidence that a trial locale’s population demographics help explain jury trial outcomes”). But see Michael J. Saks, *Trial Outcomes and Demographics: Easy Assumptions Versus Hard Evidence*, 80 TEX. L. REV. 1877 (2002) (critiquing the Eisenberg and Wells study). In addition, except in the South, urban juries are far more likely than rural ones to include African-Americans and Latinos, which might independently affect jury outcomes. See Devine et al., *Jury Decisionmaking*, *supra* note 177, at 673 (“The notable finding in this area is that jury demographic factors interact with [criminal] defendant characteristics to produce a bias in favor of defendants who are similar to the jury in some salient respect.”). Note, however, that a significant percentage of inmate litigation trials occur before judges. See Schlanger, *Technical Appendix*, *supra* note 3.

<sup>445</sup> Collins Interview, *supra* note 21; DeLand Interview, *supra* note 21.

cases, which is probably quite disproportionate to the portion of cases filed by jail inmates.<sup>446</sup>

Larger liability risk obviously puts pressure on jails to settle. Moreover, recalling the reasons for the low settlement rate in inmate litigation in general, one would expect jails to settle proportionally more cases for more money than prisons do. Regarding the former issue, small- and medium-sized jails do have full-time lawyers, so they pay a far higher marginal cost to litigate. (In small, medium, and even pretty large counties, most sheriff's departments largely rely on county counsel for their general legal needs, but if a case grows intense — if, for example, it goes to trial — they typically hire an outside lawyer, paid by the hour, to handle the litigation.) Jail inmates mostly get out — so they do not necessarily tell each other about settlements, which lowers the cost of settling for jail administrators. Jail defense counsel, whether employed by their counties more generally or private lawyers on retainer, are less socialized into the world of corrections, so their ideas about settlements are less oppositional.<sup>447</sup> And, finally, jail plaintiffs' readier access to lawyers means not only that the cases are more serious, but also that the plaintiffs are more likely to understand the actual value of their cases.<sup>448</sup>

At the end of the day, then, both jail and prison systems do indeed respond to the salient threat of serious liability. If prison administrators are to be believed, litigation's deterrence of unconstitutional conduct by prison agencies is effective mostly around the edges. I have argued, however, that this understates the role of litigation, in part because prison administrators are not admitting all that goes on, and in part because the "good professional practice" prison administrators espouse is itself partially a product of the litigation system. In any event, in jails the liability threat has been sharper, and the identification with professional norms weaker.

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<sup>446</sup> My results are consistent with what little evidence exists elsewhere. For example, when Darrell Ross looked at over 3200 reported decisions from 1970 to 1994, pulled from the *Detention and Corrections Case Law Catalog*, he found that forty-two percent of his sample were about jails. See Darrell L. Ross, *Emerging Trends in Correctional Civil Liability Cases: A Content Analysis of Federal Court Decisions of Title 42 United States Code Section 1983: 1970-1994*, 25 J. CRIM. JUST. 501, 506 (1997). He also found that inmates prevailed in forty-three percent of the cases he examined, *id.* at 508, so obviously his sample was drastically skewed towards the significant cases — thus it is not useful for evaluation of the entire docket. But it is telling that this skew produced a significant overrepresentation of jails. Moreover, a study of inmate cases filed in 1994 in the District of Arizona found that jail cases stayed on the court's docket for sixty percent longer and were half as likely to be dismissed as frivolous. Fradella, *In Search of Meritorious Claims*, *supra* note 47, at 31, 40. (Fradella does not report success rates by type of facility.)

<sup>447</sup> County counsels work for their counties, either full-time or (more typically, I think) on retainer; they handle a great many kinds of matters for their clients, with only a very small portion of the job devoted to detention-related issues. Collins Interview, *supra* note 21; Nathan Interview, *supra* note 21.

<sup>448</sup> See, e.g., NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, PROCEEDINGS OF THE THIRD MEETING OF THE LARGE JAIL NETWORK 3 (Carolyn MacPhail ed., 1991), available at <http://www.nicic.org/pubs/1991/009670.pdf> (providing a Nassau County, New York administrator's account of frequent case settlements, by consent decree or by payment of damages).

The felt coercive effect of litigation, prior to the PLRA, was therefore stronger.

### *C. Operational Effects of the PLRA*

How has the PLRA changed litigation pressures on jail and prison personnel? I think there has been a real — but not earth-shattering — loosening of lawsuit incentives. In my survey, about sixty percent of those respondents who answered the question whether the PLRA had increased, decreased, or left unchanged the “burden” posed by individual inmate lawsuits said that the PLRA had decreased the burden.<sup>449</sup> All but one of the remaining respondents reported that the PLRA had left the burden unchanged. The people who filled out the survey were typically the staff members most involved in their agency’s litigation, so they likely feel the impact of the PLRA more strongly than anyone else. (I would think, that is, that less-involved personnel would feel both less burden from litigation and a more muted alteration to that burden.) But even so, the survey results are imprecise.

I cannot, however, do more than speculate about the details, for two reasons. First, because we are only just emerging from a transition period, it’s too early to observe long-term cultural changes. Second, because it’s hard to get a conceptual handle on how to measure deterrence, it’s similarly hard to know how to measure changes in deterrent pressure. A Gallup-poll-style inquiry, with the same questions asked every month or two of a large and randomly selected group of affected officials, would obviously mitigate these uncertainties — but so would telepathy, which seems about as plausible in the real world. It seems to me that the best method in the realm of the realistically possible is intense and wide-ranging engagement in the field through phone and field interviews, professional reading, and conference attendance. I have done some of this work, and thus my speculation, although hardly definitive, is well-informed.

I argued above that pre-PLRA inmate litigation pressured jail and prison personnel in two quite distinct ways — to facilitate the litigation process itself and to reduce liability exposure. The PLRA likely has dampened the procedural pressures quite a lot, especially for small agencies, as filings have decreased and as the courts have done more pre-service screening. But the distinction here between jails and prisons may be crucial; since released jail inmates are not covered by the PLRA, it may be that prison administrators are the ones reaping the vast benefit of the recent filings decreases, and that jail administrators are experiencing only

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<sup>449</sup> There were thirty-eight responses to this question. Sixty percent is a bit lower than the proportion of respondents who reported that the PLRA had decreased the number of lawsuits filed against them.

the benefit of the extra, pre-service judicial screening. But again, this is very difficult to pin down.

I would guess that the PLRA's impact on the ordinary deterrent pressures on jail and prison officials is probably less than the tightening of procedural incentives. The statute's effect is bound to be negative, as some actors, confident that they can beat pro se lawsuits with exhaustion motions, worry less about liability. But the statute is probably not having devastating effects on this front. After all, given the rarity of any (and especially of large) judgments, individual inmate litigation's deterrent pressure exists only because of risk aversion, not strict cost-benefit analysis. What officials are afraid of is the *possibility* of a large judgment and its attendant fallout. Even if the PLRA makes a large judgment only half as likely as before, it is implausible to me that the probabilistic reduction changes behavior by even close to a commensurate amount. It simply belies common sense to think that even so significant a reduction in probabilities matters much psychologically, where the probability was already so small.<sup>450</sup> Thus, litigation's deterrence function, while already compromised pre-PLRA, should operate only somewhat less effectively after enactment than it did before.

## VI. CONCLUSION

Critics of inmate litigation succeeded in 1996 in enacting a sweeping topic-specific federal tort reform. Their portrayal of inmate litigation resonated in Congress and apparently (based on the press reception of the many "top-ten" lists of frivolous cases<sup>451</sup>) beyond the Beltway as well. On examination, some of the story they told turns out to be correct. Inmates do indeed file a large number of cases compared to other federal litigants, and in 1996, those numbers had been increasing sharply.<sup>452</sup> Those cases did indeed mostly fail.<sup>453</sup> The system probably cost more to administer

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<sup>450</sup> In a recent article, Cass Sunstein declares this effect a kind of irrationality; he labels it "probability neglect," and describes the robust empirical data indicating that, especially "when intense emotions are engaged, people tend to focus on the adverse outcome, not on its likelihood." Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 *YALE L.J.* 61, 62 (2002). My argument is a little different, in part because I am focusing on the responses not of individuals, but of the entire population of regulated actors. It seems clear that those who responded to litigation pressures prior to the PLRA's passage must have been quite risk-averse; I am arguing that it's implausible to think that they were all marginal cases, such that any small change in the probability of consequences would change their compliance behavior. Rather, it is far more likely that many of them were sufficiently risk-averse that a small change in probabilities would still leave them preferring to avoid litigation risks. For a general treatment of deterrence under enforcement uncertainty, see, for example, Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 *J.L. ECON. & ORG.* 279 (1986).

<sup>451</sup> See *supra* note 38.

<sup>452</sup> See *supra* p. 1575; *supra* Figure I.A.

<sup>453</sup> See *supra* Table II.A.

than the total amount of compensation it provided victims of tortious injury.<sup>454</sup>

At the same time, quite a number of the elements of the critics' account were misleading. Even though the *federal* litigation rate per prisoner was unusually high, once state cases are also included, it turns out that inmates brought suits at rates comparable to those of noninmates.<sup>455</sup> Increases in raw numbers of filings since 1981 seem to be largely driven by the vast increases in the incarcerated population.<sup>456</sup> As for outcomes, even if inmate plaintiffs' success rates were low in comparison to other federal case categories, they were far from miniscule. In an average year from 1990 to 1995, fifteen percent of cases brought by inmates ended in some kind of negotiated disposition or in litigated victory for the plaintiff.<sup>457</sup>

Moreover, the most basic element of the critics' account — that the reason so few inmate plaintiffs were successful was that their cases were simply frivolous (and not just legally frivolous but actually laughable) — is not true. Numerous researchers who have conducted systematic reviews of case records have concluded that a large portion of inmates “present serious claims that are supported factually,” and that even “most ‘frivolous’ cases are neither fanciful, ridiculous, nor vexing.”<sup>458</sup> And careful analysis underscores the tremendous obstacles faced by inmate litigants, among them a jaded or at least very hurried judiciary;<sup>459</sup> an extremely high decision standard or persuasive burden<sup>460</sup> (so high that over twenty percent of cases that meet it are actually egregious enough to prompt the award of punitive damages);<sup>461</sup> and the absence of counsel, which tends to depress litigants' success rate.<sup>462</sup> In addition, numerous additional factors decreased the rate of settlement, which for inmates, as in most case categories, is the chief route to plaintiff success:<sup>463</sup> plaintiffs' poor information;<sup>464</sup> both parties' low litigation costs;<sup>465</sup> defendants' strong perception that settling tends to have the externality of promoting additional filings;<sup>466</sup> and the antagonistic milieu of corrections, which discourages “capitulating to inmates.”<sup>467</sup> Even

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<sup>454</sup> See *supra* pp. 1623–26.

<sup>455</sup> See *supra* notes 61–63 and accompanying text.

<sup>456</sup> See *supra* note 87 and accompanying text.

<sup>457</sup> See *supra* Table II.A.

<sup>458</sup> Howard Eisenberg, *Rethinking Prisoner Cases*, *supra* note 15, at 440; see *supra* p. 1573.

<sup>459</sup> See *supra* pp. 1588–90.

<sup>460</sup> See *supra* pp. 1605–06.

<sup>461</sup> See *supra* Table II.C; *supra* p. 1607.

<sup>462</sup> See *supra* pp. 1609–14.

<sup>463</sup> See *supra* Table II.B.

<sup>464</sup> See *supra* p. 1616.

<sup>465</sup> See *supra* p. 1617.

<sup>466</sup> See *supra* pp. 1618–19.

<sup>467</sup> See *supra* pp. 1620–21.

once a plaintiff — usually pro se — succeeded in winning a liability judgment, damages tended to be extremely low, due in large part to the ordinary rules of tort damages, which better compensate the kinds of economic losses not typically incurred by inmates, and perhaps also to the more idiosyncratic problem faced by pro se plaintiffs trying simultaneously to act as effective litigators and demonstrate devastating injury.<sup>468</sup>

What a close look uncovers then is a very different inmate litigation problem than that animating the PLRA's supporters' account. Looking just at the courthouse, it was clear that the system was indeed in need of repair. Inmates were filing many bad cases, and adjudication did not filter them well. The ordinary processes of lawyer screening, discovery, and settlement were inoperative when the parties were indigent prisoners and public corrections agencies. Litigation was both burdensome for defendants and unable to fulfill even its simple compensation role. (However, these problems probably applied somewhat less to the jail docket, because jail inmates sued less and were more likely to file after release from incarceration and with counsel.)

Outside the courthouse, the effects of the litigation system were less problematic. Correctional agencies' need to respond to so many lawsuits promoted bureaucratization,<sup>469</sup> which joined with more ordinary deterrent effects to play a positive, if limited, role in the governance of prisons and jails. Claims of overdeterrence — that litigation chilled vigorous decisionmaking by correctional officials, and in fact encouraged inaction — are undermined by the basic structure of constitutional rights in a corrections setting, which affords no more protection to inaction than it does to actions taken.<sup>470</sup> And claims of antideterrence — that litigation actually encouraged the very conduct subject to challenge — are implausible in at least the correctional context, except in the quite rare circumstance of an administrator overwhelmingly interested in demonstrating toughness.<sup>471</sup>

Any reform effort thus faced a very difficult challenge: how to limit the number of bad cases, or at least the resulting transactional burden, while protecting and even strengthening both litigation's already compromised compensation function and the positive effects of the litigation system on correctional practice. The preliminary evidence indicates that the PLRA failed this challenge. The statute has been highly successful in reducing litigation, triggering a forty-three percent decline over five years, notwithstanding the simultaneous twenty-three percent increase in the incarcerated population.<sup>472</sup> But far from succeeding more often (as would have hap-

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<sup>468</sup> See *supra* pp. 1622–24.

<sup>469</sup> See *supra* pp. 1669–72.

<sup>470</sup> See *supra* pp. 1674–75, 1677.

<sup>471</sup> See *supra* pp. 1679–80.

<sup>472</sup> See *supra* Table I.A; *supra* section IV.A.

pened if the statute's disincentives applied disproportionately to bad cases), the cases remaining after that decline are succeeding less than before.<sup>473</sup> This outcome ought not be a surprise. The provisions of the PLRA are not, in fact, well calculated to affect low-probability filings disproportionately. In particular, the new filing fee makes it uneconomical for inmates to pursue low-stakes cases even when such cases are high in merit,<sup>474</sup> and the new attorneys' fee limits further increase the difficulty for even those inmates with good cases to find counsel and actually litigate successfully.<sup>475</sup> Moreover, the PLRA's exhaustion provision has effected a major liability-reducing change in the legal standards: inmates who experience even grievous loss because of unconstitutional misbehavior by prison and jail authorities will nonetheless lose cases they once would have won, if they fail to comply with technicalities of administrative exhaustion.<sup>476</sup> The statute's effects on jail and prison operations are less certain, and probably subtler. Outside the courthouse, the PLRA has not caused the sky to fall, although it likely has reduced the positive pressure created by litigation, to the detriment of inmates and correctional practice.<sup>477</sup>

Could Congress have done better? Absolutely, if inmate litigation reform had been less about anti-litigation, anti-inmate symbolic politics and more about calibrated regulation. There are a number of available approaches that would better serve the project of minimizing litigation burdens, particularly the burdens posed by bad cases, while allowing good cases to go forward. The goal ought to be to abate the absolute number of inmate lawsuits and the resulting transactional burden of such suits, while respecting — or even bolstering — the beneficial functions of inmate litigation. A softened PLRA might include something like the following provisions:

*Filing Fees.* The current filing fee requirement makes it irrational for an inmate to file a low-stakes case, which seems to me inappropriate as a matter of policy and perhaps even constitutional law.<sup>478</sup> Yet federal court is far from the ideal forum for what are essentially constitutional small claims. One solution would be for Congress to institute a filing fee applicable only in states in which some kind of small claims adjudication of constitutional claims is made available for jail and prison inmates. This would be a very useful change — burden-reducing for federal courts (though admittedly not for defendants), and simultaneously helpful to in-

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<sup>473</sup> See *supra* section IV.B.

<sup>474</sup> See *supra* pp. 1646–47.

<sup>475</sup> See *supra* pp. 1654–57.

<sup>476</sup> See *supra* pp. 1649–54.

<sup>477</sup> See *supra* pp. 1690–91.

<sup>478</sup> See Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 137–39 (1981) (arguing that the Constitution may require effective remedies for constitutional wrongs).

mates with real constitutional grievances who could litigate those grievances in a more appropriate, less formal, forum. Of course, I argue above that a filing fee in fact discourages not only low-stakes cases, but also others. But I find this an acceptable compromise. Inmates, like most other litigants, can appropriately be asked to bear some of the costs of their litigation.

As for frequent filers, it makes sense to want to get rid of the most abusive inmate filings — the hundreds of lawsuits filed by the Clovis Greens of the world.<sup>479</sup> The PLRA's frequent filer provision is far, far broader than this quite limited problem, but that is not to say that the problem is not worth solving. A provision disallowing in forma pauperis filings by anyone with more than, say, ten (rather than three) district court cases (rather than district court cases or appeals) dismissed as frivolous (rather than for failure to state a claim) would avoid the draconian nature of the current regime but still regularize court response to inmate hyperlitigiousness when hyperlitigiousness is actually present.

*Exhaustion.* More important, the exhaustion provision should be reconfigured to encourage agencies to create internal compliance mechanisms, rather than pleading traps.<sup>480</sup> The basic idea is a well-worn one. The Civil Rights of Institutionalized Persons Act (CRIPA), before amended by the PLRA, was not far from a good model: it required exhaustion only where a given administrative remedy system had been certified "plain, speedy, and effective."<sup>481</sup> CRIPA's particular strictures on how to construct an administrative remedy system were too narrow<sup>482</sup> — but its essential premise remains a good one. A good administrative remedy system can serve simultaneously to educate upper level officials about what is happening on the agency front lines and to resolve some disputes.<sup>483</sup> Federal law should use the carrot of a district court exhaustion

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<sup>479</sup> See *In re Green*, 669 F.2d 779, 781–85 (D.C. Cir. 1981) (detailing the litigation history of Rev. Clovis Green).

<sup>480</sup> See Branham, *Enigmatic Exhaustion*, *supra* note 193; cf. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764–65 (1998) (encouraging creation of an internal compliance mechanism relating to workplace sexual harassment by allowing employers to assert as part of an affirmative defense that the employer took "reasonable care to prevent and correct promptly any sexually harassing behavior"); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806–08 (1998) (same). See generally Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 463 (2001) (discussing an approach to employment discrimination in which "compliance is achieved through, and evaluated in relation to, improving institutional capacity to identify, prevent, and redress exclusion, bias, and abuse").

<sup>481</sup> 42 U.S.C.A. § 1997e(b)(1) (West Supp. 1994) (since amended).

<sup>482</sup> Exhaustion was required only if an administrative remedy system was in "substantial compliance" with "minimum standards" set by the Attorney General, *id.* § 1997e(c)(1), among which was the unpopular requirement that both staff and inmates play an advisory role in the formulation, implementation, and operation of any grievance process. *Id.* at § 1997e(b)(2)(A).

<sup>483</sup> See, e.g., Dora Schriro, *Correcting Corrections: Missouri's Parallel Universe*, in SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY (U.S. Dep't of Justice, Papers from the Executive

requirement for inmate plaintiffs to encourage states to implement such a system.

*Screening.* Justice Jackson had it right in *Brown v. Allen*; judges and other court personnel often prove not to be good screeners of inmate cases, because they lose interest in the buried needles.<sup>484</sup> To state a related point economically, screeners — judges, magistrate judges, pro se clerks, and law clerks — find each false positive (or “Type I error”) costly, reputationally or otherwise, when the should-have-been-screened-out case takes many other people time and effort to deal with. But false negatives (“Type II errors”) are less costly for screeners; they essentially disappear forever.<sup>485</sup> The result is an institutional tilt against inmate cases. The problem is, however, a solvable one.<sup>486</sup> If, for example, the screening process were done in two stages and by two different people, the first screener would likely be less nervous about mistakes made in “screening in” cases. And the second screener would have a far more evenly divided pool, which would be cognitively easier to manage.<sup>487</sup>

*Attorneys’ Fees.* Attorneys are ordinarily good screeners of cases, but not in inmate cases, because there are so few chances for inmates to access lawyers. It would be good to harness this screening ability, but it’s difficult to see how, absent federal funding for inmates’ lawyers, or mandatory liquidated damages in inmate cases, or some other such implausible scheme. It is far easier to think of how to harness lawyers’ other contribution — the value they add to litigation. Whether by legislation or by other court policy, it would be a very useful change to have many more lawyers in the component of the inmate docket that survives summary judgment. This would tend to increase the settlement rate (reducing the litigation burden) and also make the trials far more accurate adjudicatory events.

The current political climate makes it unlikely that Congress will revisit the PLRA and solve its problems. But it should. Inmate litigation’s most evident problem — too many bad cases — is not the creation of tough-on-crime politicians or tort reformers. But the litigation’s contribution to appropriate governance and oversight of correctional policy and practice should be strengthened, not abandoned. More generally, unless policymakers both intend and justify substantive intervention, purported *litigation* reform should be far more careful than the PLRA to have the primary effect of reducing the transactional burden of litigation, not the li-

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Sessions on Sentencing and Corrections, May 2000), available at <http://www.ncjrs.org/pdffiles1/nij/181414.pdf>.

<sup>484</sup> See *supra* p. 1588.

<sup>485</sup> Appeal, much less appellate victory for inmate plaintiffs, is too rare to have much impact. See Clermont & Eisenberg, *Plaintiphobia*, *supra* note 15, at 966–96.

<sup>486</sup> Solutions might be more appropriately judicial than legislative.

<sup>487</sup> See William J. Stuntz, *Looking for Needles in Haystacks* (Mar. 7, 2003) (unpublished manuscript, on file with author).

ability exposure of defendants. I began this Article suggesting that close scrutiny of the PLRA is important because the statute may very well serve Congress as a model for future litigation reform. I close with two thoughts: First, litigation reform requires extreme attention to context, which counsels against trans-substantive one-size-fits-all measures. Second, the PLRA is currently sufficiently flawed, even in its own context, that any borrowing from its provisions should proceed with care and skepticism.

## DATA APPENDIX

The one way to take a nationwide, systematic, and reasonably unbiased look at inmate litigation case filings and outcomes — albeit only those in federal court — is to use the dataset compiled by the Administrative Office of the U.S. Courts (AO) and cleaned up by the Federal Judicial Center (FJC), respectively the administrative and research arms of the federal court system. The dataset includes each and every case “terminated” (that is, ended, at least provisionally) by the federal district courts since 1970. The FJC 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>.<sup>488</sup> The data are published in a machine readable file, with SPSS and SAS “data definition statements” that enable import of the data into either of those formats. Codebooks are available online as part of the study.

*A. Putting Together the Dataset*

The largest obstacle to use of the AO data is that the AO groups it by “termination” year. That is, each of the computer files includes only records for cases “terminated” in a given year; pending cases are in their own file. In order to group cases by filing year rather than termination year, I merged all the data into one file, an operation that is far trickier than it sounds due to the AO’s changing codes over the years.<sup>489</sup> Next, I regularized the data — introducing a consistent statistical year for both filing and termination and dealing with a variety of coding changes. I then tried to ensure that in any given analysis I counted each case only once. (The AO’s published tables double count a good number of cases.) I coded as duplicates all the cases with perfect matches in docket number, district, and office. I then coded as “subsequent filings” all but the first of such duplicate cases, and introduced a new variable for “original date of filing” — the filing date of the first known record for each case. Finally, from the first of the duplicates, and all the nonduplicates, I coded as “original filings” only the records whose “origin” code was not inconsistent with this status (that is, I excluded records coded specifically as transfers, reopenings, and the like). For analysis of filings in this Article, I have used only the records thus coded as original filings. And for analysis of outcomes, I have used only the last record I have for any case, though whenever I discuss outcomes based on filing dates, the date I have used is the original date of filing.

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<sup>488</sup> *Federal Court Cases Database, 1970–2000*, *supra* note 3; *Federal Court Cases Database, 2001*, *supra* note 3.

<sup>489</sup> I did my work in the program SPSS and have posted the code I used to perform the merger. See Schlanger, *Technical Appendix*, *supra* note 3.

*B. Accuracy of the Data*

Staff in the court clerks' offices fill in a computerized query screen for each case upon filing, and again on termination. Case coding is done by a court clerk, following guidelines offered by the AO. I have generally found the AO's data very accurate.<sup>490</sup> I have not done a comprehensive systematic audit, however. An audit would be possible (if time consuming and expensive) using the federal courts' Public Access to Court Electronic Records (PACER) system.<sup>491</sup> Nearly every district participates in PACER;<sup>492</sup> it makes available, online, dockets and occasionally pleadings themselves, for a fee of \$.07/page. Since dockets are far more complete and very accurate sources for information about a case's progress and outcome, they can be used to check particular variables.

Without doing a true audit, I have taken some serious steps to check the data's accuracy. Specifically, I have looked at several hundred docket sheets for cases in the dataset, comparing what the AO record says about a case to what the docket reveals. There are a number of areas where the AO's accuracy fails:

1. *Nature of Suit Codes.* — One of the required fields is a code for "nature of suit." One such code, 550, has long been attached to "prisoner: civil rights" cases. An additional code, 555, for "prison conditions" cases, was added in 1997. The idea of the 555 classification was to track the language of the PLRA, which, for example, requires exhaustion in "prison conditions" cases. But the AO's directions to district court clerks about how to choose between 550 and 555 are extremely sketchy. The operative memo states only: "prison condition cases are defined as civil actions seeking relief from the conditions of a prisoner's confinement or the treatment of the prisoner in the course of that confinement."<sup>493</sup> The Supreme Court has since made it clear that the PLRA's reference to "prison conditions" is not very selective — it includes "all inmate suits about prison life."<sup>494</sup> The only kind of inmate civil rights litigation that does *not* fit this definition of "prison conditions" suits are cases brought by inmates about civil rights violations *outside* prison — and there is no reason to think that this

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<sup>490</sup> On the general reliability of the Administrative Office database, see Eisenberg & Schlanger, *Reliability of AO Database*, *supra* note 129.

<sup>491</sup> See Public Access to Court Electronic Records ("PACER"), at <http://pacer.psc.uscourts.gov> (Mar. 16, 2003).

<sup>492</sup> The PACER website lists all districts as participants except: Southern District of New York, District of Alaska, District of Idaho, District of Montana, District of New Mexico, Eastern District of Oklahoma, District of the Northern Mariana Islands, District for the Virgin Islands. See *id.* These districts see only six percent of the federal district court docket. See Schlanger, *Technical Appendix*, *supra* note 3.

<sup>493</sup> Leonidas Ralph Mecham, Director, Administrative Office of the U.S. Courts, Collection of Statistical Information on Pro Se Prison Condition Cases 2 (Dec. 18, 1996) (unpublished memorandum, on file with author).

<sup>494</sup> *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

is what district court clerks intend when they code a case 550 rather than 555. In any event, I have been unable to discern any systematic difference between cases with these two codes, and I refer to them together as constituting the set of inmate litigation cases.

Generally speaking, district court clerks include in these code categories all nonhabeas civil actions brought by inmates, regardless of their nominal cause of action. As stated in the text, however, there may be a number of systematic biases relating to what is included and what is not. The data probably do not include all the cases brought by former inmates relating to the conditions they used to live under, or by the families of dead inmates. Cases brought under the Federal Tort Claims Act or the very few diversity cases brought under state law relating to prison or jail conditions are certainly not included. Moreover, some observers suspect (though none of the district audits done by researchers seems to have confirmed this) that in some districts the AO's classification excludes at least some of the cases filed by non-indigent inmates and also cases filed by lawyers on behalf of inmates. Such cases may instead be categorized under the AO's catch-all code 440 ("other civil rights").<sup>495</sup> For purposes of understanding outcomes, these distinctions may be quite important. But for purposes of understanding filings, they are not — the very great mass of federal district court cases filed relating to prison or jail conditions or by inmates are coded as 550 or 555.

2. *Subsequent Activity*. — Of course the AO's data go only so far into a case's history. After cases leave the district courts, new things can happen: An appeal can reverse the district court's judgment. Or, especially when a plaintiff has won a damage award, the parties can settle on a lesser amount in exchange for the defendant's foregoing an appeal. Money awarded may never be paid. And so on. This is a very real limit on the ability of the AO district court data to show the actual results of cases. I don't mean to overstate this limit, however. Many subsequent actions are, indeed, reflected in the AO data. Vacatur by an appellate court should usually be detected in the dataset, for example, because it requires that the case be reopened and reprocessed in the district court.

3. *Federal vs. Nonfederal Inmates*. — Calculating inmates' filing rates requires separating cases filed by federal inmates from others. The AO codes allow this, with some caveats. One of the variables in the AO's case termination data is the complaint's alleged basis for federal court jurisdiction. Of the six codes allowed, only two are relevant: federal question<sup>496</sup>

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<sup>495</sup> Jim Thomas makes this point in PRISONER LITIGATION, *supra* note 15, at 20.

<sup>496</sup> See 28 U.S.C. § 1331 (2000) (establishing district court jurisdiction for cases "arising under the Constitution, laws, or treaties of the United States").

and federal defendant.<sup>497</sup> State inmates filing civil rights lawsuits nearly always sue state or local officials to enforce federal rights — so for them, federal question jurisdiction is the only applicable answer to the “jurisdictional basis” question. But cases brought by *federal* inmates might appropriately be coded either as federal question or as federal defendant cases. The AO directs court clerks to follow a hierarchy in filling out this field, so that any case in which a federal defendant appears should be classified this way, regardless of the applicability of other codes.<sup>498</sup> Prior researchers have relied on this assertion and used the “federal defendant” category in the inmate civil rights cases as coextensive with the filings of federal inmates.

But a closer look at the data reveals that any confidence in this variable is misplaced. Each year there are thousands upon thousands of cases in the inmate civil rights docket classified as federal question cases (that is, as nonfederal defendant cases) that are, quite to the contrary, filed against federal defendants. To try to get a more accurate count, I wrote code to do the following: First, I listed all the entries in the “defendant” field for all cases actually coded as “federal defendant” cases. Then I went through them, one by one, and categorized them as “certainly federal” and “ambiguous.” For example, I classified the defendant field “U.S. Attorney General” as the former, but the defendant “Attorney General” as the latter. I was very conservative in this classification, not wanting to inflate my federal defendant count with nonfederal cases. Next, I wrote code to flag cases coded as “federal question” if their defendant field was identical to one of the several hundred I had labeled “certainly federal.” This operation flagged quite a few habeas cases, adding less than 1% to the federal inmate habeas docket each year in the early 1970s; 1–3% each year from 1976 to 1985; and 3–9% (6% on average) each year from 1986 to present. The effect was far greater for civil rights cases. The recoding increased the federal defendant inmate civil rights docket tally by 1–4% each year in the early seventies, by 4–8% from 1976 to 1985, and by 16–34% (25% on average) from 1986 to the present. It seems more than likely that even so, the results undercount federal inmate cases because many of those cases were likely against individual wardens, officers, or other defendants who were not self-evidently federal.

4. “*Judgment for*”. — The database includes a variable usually referred to as “judgment for.” Five options are available: plaintiff (1); defendant (2); both (3); unknown (4); and not-applicable (-8). Before I dis-

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<sup>497</sup> See *id.* § 1346 (establishing district court jurisdiction where the United States is a defendant); *id.* § 1442 (establishing district court removal jurisdiction where a federal agency or officer is a defendant).

<sup>498</sup> See Technology Training and Support Division, Administrative Office of the U.S. Courts, CIVIL Statistical Reporting Guide 3:6 (Version 2.1, July 1999) (unpublished training document on file with author) [hereinafter CIVIL Statistical Reporting Guide].

cuss this data element's accuracy, I should mention two quirks. First, it's not at all clear what the difference is between a recorded judgment for plaintiff and a recorded judgment for both. Having read many dockets and finding no plausible operative distinction, I use the simplifying assumption that these two categories are the same and accordingly count them both as plaintiffs' victories. Second, "not applicable" does not mean that there was no victor in the case; unfortunately, the code is more idiosyncratic. The AO consistently classifies certain kinds of outcomes as "dismissals" and other kinds of outcomes as "judgments."<sup>499</sup> The "judgment for" variable is supposed to be filled in only in cases in which the disposition is considered a judgment. The point is that for a number of large "dismissal" categories — dismissals for "want of prosecution" and for "lack of jurisdiction" — the defendant is necessarily the victor. And it seems very likely that the "other" category is similar (I've looked at a number of cases so coded; they were all defendants' victories of various kinds). Thus, when I discuss outcomes, I supplement the coding included in "judgment for" with assumptions that any cases with one of these three disposition codes is also a defense victory.

Moreover, there are apparently some accuracy problems in the "judgment for" code. An audit of 1993 cases reveals that those coded, anomalously, as plaintiffs' victories but with damages coded as equal to zero are frequently but not always defendants' victories.<sup>500</sup> This is not a large category, however, and leaving these cases out does not change the analysis in any significant way.

5. *Damages.* — Analyzing damages from the AO data is perilous. The AO asks court clerks to code damages in thousands — so \$2000 is to be coded as "2" — and to round — so "2" is \$1500 to \$2499. (The code "1" is a bit peculiar — it has variously been intended to mean \$1 to \$1499, or \$500 to \$1499.<sup>501</sup>) The problem is that, especially in small-damage cases,

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<sup>499</sup> See, e.g., *Federal Court Cases Database, 1970–2000*, *supra* note 3, pt. 104 (civil terminations, 1997, codebook) at 14 (describing "disposition" codes); *id.* at 15 (describing "nature of judgment" codes, and specifying that "[t]hese codes should only be present for disposition involving a judgment"). Dismissals are divided into the following outcome codes: "want of prosecution," "lack of jurisdiction," "voluntarily," "settled," and "other." *Id.* at 14. Judgments are divided into categories labeled "default," "consent," "motion before trial," "jury verdict," "directed verdict," "court trial," and a few other inapplicable headings. *Id.* at 14–15.

<sup>500</sup> For a full discussion of this coding issue, see Eisenberg & Schlanger, *Reliability of AO Database*, *supra* note 129.

<sup>501</sup> In the training manual instructing court personnel on data entry, the AO directs that any award under \$500 be entered as zero. CIVIL Statistical Reporting Guide, *supra* note 498, at D:2. However, the computer system produces an error report whenever the person entering the data indicates a monetary award for the plaintiff by entering that award as zero. *Id.* at 5:1, 5:4. (It seems likely that clerks avoid the error report by coding awards between \$1 and \$1499 as "1".) Prior to 1987 (when the coding system was overhauled), the clerks apparently were instructed to code any award of less than \$1000 as zero. See *Federal Court Cases Database, 1970–2000*, *supra* note 3, pt. 57, at 49. I am not sure what the instruction was between 1987 and 1999. In any event, interviews, an examination of the 1993 inmate data that produced Table II.C, and a sample of 2000 terminations all suggest that court clerks have

clerks often mistakenly put in the actual amount. For example, they code 5900 for an award of \$5900, though that entry should mean \$5,900,000. AO employees informed me that they do not use this variable because it is not trustworthy for this very reason.

Because this seemed to me quite important, I did conduct an actual audit, though I limited my comprehensive checking to cases terminated in the year 1993 in which the plaintiffs were coded as winning damages. Table App.A presents the results:

TABLE APP.A: ERRORS IN AO AWARD CODING,  
INMATE CIVIL RIGHTS CASES TERMINATED FISCAL YEAR 1993

AO award range (in 1000s)	n	Errors: n (% of sample)	Type of error — n (% of errors)		
			Rounding	Digit	Other
1	52	2 (4%)	0 (0%)	0 (0%)	2 (100%)
2-999	47	17 (36%)	4 (24%)	8 (47%)	5 (29%)
999-9998	17	17 <sup>502</sup> (100%)	3 (18%)	13 (76%)	5 (29%)
9999	5	5 (100%)	-	-	5 (100%)
Total	122	41 (34%)	7 (17%)	21 (51%)	17 (41%)

It may be possible to use the information from my audit and others like it to develop an algorithm for using the coded data without case-by-case docket reviews.<sup>503</sup> But for the purpose of my discussions of damages and case stakes, I simply substituted the more accurate docket-reviewed data for the AO coding.

6. *Class Actions*. — I also have found that the AO's data are singularly unreliable in the coding of class actions. Here, I agree with other observers.<sup>504</sup> There's no way around this one; the data are simply unusable.

### C. Grouping Case Categories

In Tables II.B (plaintiffs' success rates) and II.D (plaintiffs' pro se rates), I deal with the entire federal docket in two different years, 1995 and 2000, grouping the data according to Table App.B into my own categories based upon Administrative Office "nature of suit" codes.

used "1" to indicate any damages amount from \$1 to \$1499, at least since 1993. *See also* Hurley Interview, *supra* note 21.

<sup>502</sup> Some case entries reported in this row have errors of multiple types and are therefore listed more than once.

<sup>503</sup> See Eisenberg & Schlanger, *Reliability of AO Database*, *supra* note 129, for a first attempt to develop such an algorithm.

<sup>504</sup> *See, e.g.*, THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT J. NIEMIC, FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 197-200 (1996).

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TABLE APP.B: CATEGORIZATION OF AO "NATURE OF SUIT" CODES

Category	AO "Nature of Suit" Code and Description	
Contract	110 Contract: Insurance 120 Contract: Marine 130 Contract: Miller Act 140 Contract: Negotiable Instrument	150 Contract: Other Recovery, Enforcement 151 Contract: Medicare Recovery 190 Other Contract
Torts (non-product)	160 Contract: Stockholder Suits 240 Torts to Land 310 Airplane Personal Injury 320 Assault, Libel and Slander 330 Federal Employers Liability 340 Marine Personal Injury 350 Motor Vehicle	360 Other Personal Injury 362 Medical Malpractice 370 Fraud, Truth in Lending 371 Truth in Lending 380 Other Personal Property Damage 470 RICO
Product liability	195 Contract Product Liability 245 Real Property Product Liability 315 Airplane Product Liability 345 Marine Product Liability	355 Motor Vehicle Product Liability 365 Personal Injury Product Liability 368 Asbestos 385 Property Damage Product Liability
Civil rights	440 Civil Rights: Other 441 Civil Rights: Voting	443 Civil Rights: Accommodations 444 Civil Rights: Welfare
Civil rights: employment	442 Civil Rights: Jobs	
Inmate civil rights	550 Civil Rights: Prisoner	555 Prison Conditions
Labor	710 Fair Labor Standards Act 720 Labor Management Relations 730 Labor Management Reporting and Disclosure	740 Railway Labor Act 790 Other Labor Litigation 791 ERISA
Statutory actions	410 Antitrust 430 Banks and Banking 450 Commerce: ICC Rates, etc. 810 Selective Service 820 Copyright 830 Patent 840 Trademark 850 Securities, Commodities Exchange	865 Social Security: RSI 875 Customer Challenge: 12 U.S.C. § 3410 890 Other Statutory Actions 891 Agricultural Acts 892 Economic Stabilization Act 893 Environmental Matters 894 Energy Allocation Act 895 Freedom of Information Act

	861 Social Security-HIA 862 Black Lung (923) 863 Social Security-DIWC	900 Appeal of Fee Determination Under Equal Access to Justice
U.S. plaintiff	152 Recovery of Defaulted Student Loans 153 Recovery of Veterans Benefit Overpayment 210 Land Condemnation 220 Foreclosure 610 Forfeiture and Penalty: Agriculture 620 Forfeiture and Penalty: Food and Drug 625 Drug-Related Property Forfeiture	630 Liquor Laws 640 Forfeiture and Penalty: Railroad and Truck 650 Air Line Regulations 660 Occupational Safety/Health 690 Miscellaneous Forfeiture and Penalty 870 Taxes (U.S. Plaintiff) 871 Internal Revenue Service- Third Party (U.S. Plaintiff)
Other	230 Rent, Lease, and Ejectment 290 All Other Real Property	400 State Reapportionment 950 Constitutionality of State Statutes
Habeas/ quasi-criminal	460 Deportation 510 Vacate Sentence 530 Habeas Corpus	535 Death Penalty Habeas Corpus 540 Mandamus and Other: Prisoner
Omitted	422 Bankruptcy Appeals	423 Withdrawal (Bankruptcy)

In both Tables II.B and II.E, I have left out bankruptcy appeals and withdrawals because either debtors or creditors can bring such actions, so it is hard to know how to think about either success or pro se rates. In addition, in Table II.B I have left out habeas cases and those like them, and deportation cases. These are cases that rarely if ever settle and do not have trials, so the success measures in Table II.B seem unhelpful for understanding them.<sup>505</sup>

<sup>505</sup> I use the code descriptions as they are set out in the CIVIL Statistical Reporting Guide, *supra* note 498, at A:1–A:4; they are also available, each time worded slightly differently, in the Federal Judicial Center’s civil terminations codebooks. *See Federal Court Cases Database, 1970–2000, supra* note 3, pts. 57, 94, 95, 103, 104, 115–117. My case category groupings are not far off from those used by Kevin Clermont and Ted Eisenberg in their article, *Plaintiphobia in the Appellate Courts*. *See* Clermont & Eisenberg, *Plaintiphobia*, *supra* note 15, at 954–55, 967.

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