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Bumps in the Road to the Courthouse:  
The Supreme Court and the Prison  
Litigation Reform Act

William C. Collins

## **Bumps in the Road to the Courthouse: The Supreme Court and the Prison Litigation Reform Act**

**William C. Collins\***

It seems a little strange that a lawyer who has spent a professional lifetime in correctional law either representing correctional agencies or what might be called the “correctional middle” as a commentator on legal issues in the field, but who has never represented an inmate in a court of law, would be writing about problems lawyers who do represent inmates face in regard to litigating on behalf of their clients. But I am charged with that task.

Representing offenders probably has never been easy. Inmate “causes” are rarely popular with the public. While some are amiable enough clients with serious claims, others are not. They may exaggerate claims, they may be demanding, and most certainly, they virtually never can pay. Litigation can be hostile. Even when relief is obtained on paper, converting the paper relief into real change in the prison can take years and repeated trips to court.

In the early 1970s, as the “inmate rights” movement was building up steam, a variety of factors made inmate litigation much easier than today. Start with the facts of cases. Prisons and jails were often filthy, dilapidated, poorly run hellholes. Inmates might be given guns and told to supervise other inmates. A 1,000 inmate Arkansas prison ran with eight (count ‘em, eight) guards who were not convicts.<sup>1</sup> Only two worked at

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1. *Hutto v. Finney*, 437 U.S. 678, 682 n.6 (1978).

night.<sup>2</sup> Professionalism among wardens and guards was spotty at best and probably defined differently than today. Training may have consisted of little more than instructions not to let the guys in the striped suits out the door. Force as a control tool (read “beatings”) was commonplace, a recognized control tool.<sup>3</sup> Inmates not only worked in prison medical systems, they might perform minor surgery and other medical tasks.<sup>4</sup>

Not only had prison and jail leaders rarely been called to account for their administrations, they certainly had rarely if ever been called to account before a federal judge. And if the defendants had no experience in court, their lawyers were probably worse. The typical lawyer for the defendants in early prison or jail cases was either fresh out of law school with little or no trial experience and certainly no understanding of how institutions were run or an old-timer in the state attorney general’s office with a comfortable sinecure where the work involved responding to a parade of extraordinarily routine habeas corpus petitions.

Particularly the younger lawyers may have been somewhat appalled by the conditions and practices they were being asked to defend and more sympathetic to the inmate’s claims than the positions of their clients.

So defendants were saddled with horrible facts to defend and were defended by inexperienced lawyers appearing in courts suddenly willing to put the “hand’s off” doctrine behind them and start writing inmate rights law on virtually a blank slate. When a court was asking “why do you treat inmates in this way,” the common “it’s none of your business” defense wasn’t very effective. Does the phrase “sitting ducks” come to mind?

Times have changed and while those representing inmates have no difficulty in finding issues about which to litigate, correctional agencies and staff do not walk around with bulls-eyes on their chest nearly as often as was once the case. Wardens

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2. *Id.*

3. *See, e.g., id.*; *see also* Ruiz v. Johnson, 37 F. Supp. 2d 855, 932-33 (S.D. Tex. 1999).

4. *See, e.g.,* Grubbs v. Bradley, 552 F. Supp. 1052, 1084-85 (D.C. Tenn. 1982); Burks v. Teasdale, 492 F. Supp. 650, 665-66 (W.D. Mo. 1980) (surgery and suturing performed by inmate physicians).

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and other top administrators who have come up through the ranks are better educated and better trained than their predecessors in office.<sup>5</sup> Most administrators have a healthy respect for the threat of court intervention and may actually ascribe greater power to the federal courts than in fact the courts now have. While training for correctional officers still lags far behind training for police, it is still far more than used to be given.<sup>6</sup> Formal policies and procedures have replaced the almost unchanneled and uncontrolled discretion officers and wardens once had.<sup>7</sup> Lawyers for correctional agencies are not now the rookies in the office, marking time until a better job opens. They certainly have more law to work with. Oh, do they have more law to work with.

For while jail and prison conditions and practices are typically much more defensible than in years gone by, the biggest changes in litigating inmate rights cases have come on the legal front, from the Supreme Court and, of all places, Congress in the form of the Prison Litigation Reform Act (PLRA).<sup>8</sup> The legal bar has been set much higher on many issues. For the lawyer whose livelihood depends in whole or in part on the attorney's fees won in litigation, the pot of gold at the end of the legal rainbow has been replaced with a tin cup full of nickels and dimes.

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5. See, e.g., Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17, 25 (2003) (describing "old time" prison wardens as promoted prison guards and prison guards as having rudimentary training); Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 FORDHAM URB. L. REV. 621, 633 (1993) (citing an Address by Warden Lewis E. Lawes, in Osborne Association, Inc., 1937 Annual Report (1938)).

6. See, e.g., *Fisher v. Koehler*, 692 F. Supp. 1519, 1551 (S.D.N.Y. 1988) (describing formal training program but describes as inadequate); Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 687 (1989) (stating that it is imperative that private corrections employees receive adequate training).

7. See, e.g., *Fisher*, 692 F. Supp. at 1551.

8. Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended at 18 U.S.C. § 3626; 28 U.S.C. §§ 1346, 1915; 42 § U.S.C. 1997 and other scattered sections).

## The Supreme Court

*The Quick Start*

In 1974, the Supreme Court's foray into prisoners' rights began in earnest with a mail censorship decision,<sup>9</sup> and an inmate discipline case.<sup>10</sup> The Court saw inmate mail restrictions as impinging on the First Amendment rights of both inmates and non-inmates who were either sending mail to inmates or receiving mail from them.<sup>11</sup> Restrictions on mail had to further a substantial governmental interest such as security, order, or rehabilitation and could be "no greater than is necessary or essential to the protection" of the interest involved.<sup>12</sup> At least some courts saw this as a "least restrictive alternative" test, albeit one tempered by statements in *Procunier* that decisions of prison officials were entitled to certain deference from the courts.<sup>13</sup>

In *Wolff*, the Court said that where state law created a right to good time, subject to being taken away in a disciplinary proceeding, the inmate had an interest of "real substance" that was protected by the Due Process Clause.<sup>14</sup> In a footnote that the Court would later repudiate in *Sandin v. Conner*,<sup>15</sup> the Court indicated that its holding in *Wolff* would also extend to disciplinary proceedings where the inmate faced a sanction of solitary confinement.<sup>16</sup>

While the procedural due process requirements that *Wolff* imposed on disciplinary proceedings appear minimal, remember at the time they were imposed, prison officials were arguing that no procedural protections whatsoever were required for inmate disciplinary proceedings.<sup>17</sup> The entire concept of court oversight still provoked huge controversy in the corrections in-

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9. *Procunier v. Martinez*, 416 U.S. 396 (1974).

10. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

11. *Procunier*, 416 U.S. at 408-09.

12. *Id.* at 413.

13. *Beerheide v. Suthers*, 286 F.3d 1179, 1184 (10th Cir. 2002); *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987); *Turner v. Safley*, 482 U.S. 78, 93 n.\* (1987) (Justice O'Connor, writing the majority opinion, characterized *Procunier* as imposing a least restrictive test).

14. *Wolff*, 418 U.S. at 557.

15. 515 U.S. 472, 485-86 (1996).

16. *Wolff*, 418 U.S. at 571 n.19.

17. *See id.* at 556-57.

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dustry.<sup>18</sup> The legal tests the Court imposed on corrections in some of its early decisions were not overly demanding in an absolute sense. However, they were huge in the sense that they imposed the rule of law and judicial oversight on institutions at a time when the warden's word alone had been law and oversight of any sort was typically lacking.

*The Pace Slows and Stops (?)*

But if the Court broke fast out of the starting gate, its pace slowed relatively quickly. Most notable was its decision in *Bell v. Wolfish*,<sup>19</sup> from District Court to Supreme Court, *Bell* provides a snapshot of the judicial conflict over prisoners' rights. It shows the extent of intervention of liberal lower courts quashed by what would become an increasingly conservative Supreme Court.

The Federal Bureau of Prisons opened a new high rise Metropolitan Correction Center (MCC) in Manhattan that was soon overcrowded. Inmates, pretrial detainees, launched a massive attack on the jail's operations and obtained an injunction from the District Court which "intervened broadly into almost every facet of the institution and enjoined no fewer than 20 MCC practices."<sup>20</sup> The Court of Appeals "largely affirmed."<sup>21</sup> A handful of these issues were carried to the Supreme Court which reversed all of them and rejected the method of legal analysis the lower courts had used to reach many of their conclusions, which put great emphasis on the presumption of innocence that attached to the criminal defendant.<sup>22</sup> The most dramatic result from *Bell* was rejection of the lower courts' conclusions that double celling violated the rights of the detainees.<sup>23</sup> Lower courts were taking the position that putting two inmates in a cell designed for one was unconstitutional.<sup>24</sup> "We disagree with both the District Court and the Court of Appeals that there is some sort of 'one man, one cell' principle lurking in the Due Process Clause of the

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18. For a compelling description of the early days of court intervention, see JAMES JACOBS, *STATEVILLE, THE PENITENTIARY IN MASS SOCIETY* (1977).

19. 441 U.S. 520 (1979).

20. *Id.* at 523 (internal quotation and citation omitted).

21. *Id.*

22. *Id.* at 532.

23. *Id.* at 542-43.

24. *Bell*, 441 U.S. at 542.

Fifth Amendment.”<sup>25</sup> The Court echoed its “double celling is not necessarily unconstitutional” message two years later with regard to the Eighth Amendment and sentenced offenders in *Rhodes v. Chapman*.<sup>26</sup>

With *Rhodes*, the era of evaluating the constitutionality of a prison or jail by counting cells, beds, and bodies was over. It was no longer a question of simply whether the institution was overcrowded. The focus now became the effects of the crowded conditions on the inmates.

Looking at the lower court decisions, there was a feeling among agencies that if the Manhattan MCC couldn't be successfully defended by an agency with the resources of the Federal Bureau of Prisons, almost nothing could be defended. The Court of Appeals decision could be described as the high water mark of the inmate rights movement.<sup>27</sup> But the tide turned with *Bell* both with regard to specific issues and with regard to the psychology of litigation. Even in *Procunier*, the Court had commented about courts giving some deference to judgments of prison officials but that admonition didn't seem to carry much weight.<sup>28</sup> The Court reiterated its position in *Bell*, and now the message began to sink in: lower courts should avoid becoming “enmeshed in the minutiae of prison operations . . . the wide range of ‘judgment calls’ that meet constitutional and statutory requirements are confided to officials outside the Judicial Branch of Government.”<sup>29</sup>

### *The Court Moves Backward*

After breaking from the gate quickly but slowing down the backstretch and coming to a virtual stop at the head of the stretch, the Supreme Court then began a remarkable phase: it started going backward, reviewing issues it had decided years before and “clarifying” what it really meant. In the most notable example, Chief Justice Rehnquist, in 1995, looked at a legal test from a decision that he had written thirteen years earlier<sup>30</sup>

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25. *Id.*

26. 452 U.S. 337 (1981).

27. *Rhem v. Malcolm*, 507 F.2d 333 (2d Cir. 1974).

28. *Procunier v. Martinez*, 416 U.S. 396, 405 (1974).

29. *Bell*, 441 U.S. at 562.

30. *Hewitt v. Helms*, 459 U.S. 460 (1983).

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and abandoned it in favor of an entirely different test now used to determine if the state has created a liberty interest protected by the Due Process Clause.<sup>31</sup> More on *Sandin* later.

*The Least Restrictive Alternative*

One of the first early rulings to be laid aside by the Court was the “least restrictive alternative” interpretation of *Procunier v. Martinez*.<sup>32</sup> Part of this was done implicitly in *Turner v. Safley*, where the Court said that where a prison regulation impinges on constitutionally protected inmate rights, it is valid if reasonably related to a legitimate penological interest.<sup>33</sup> Gone was *Procunier’s* heightened level of scrutiny, at least as far as *inmate* rights were concerned. But recall that *Procunier* also dealt with the First Amendment rights of non-prisoners.<sup>34</sup> The heightened scrutiny/least restrictive test from *Procunier* still survived for them. Or did it?

For two years later, in a case involving censorship of publications, the Court ended any thought that some aspect of the least restrictive alternative approach remained.<sup>35</sup> That inmate First Amendment rights might overlap with the First Amendment rights of non-inmates was a concept that no longer had vitality.<sup>36</sup>

*Conditions of Confinement Cases and the Totality Test*

With its decisions in *Bell* and *Rhodes*, the Court essentially ended the notion of “overcrowding” cases in which the primary focus was on crowding. Replacing the “overcrowding” label was that of “conditions of confinement,” which focused on the nature of conditions in the prison. While crowding could certainly be a primary cause for unconstitutional conditions, it alone was no longer the measure of unconstitutionality. Because it could be a cause, crowding remained a prime target for relief once liability was found. In simple terms, a court might say “Inmates are not being adequately protected (unconstitutional condition) because

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31. *Sandin v. Conner*, 515 U.S. 472, 483-84 (1996).

32. 416 U.S. at 420.

33. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

34. 416 U.S. at 408.

35. *Thornburgh v. Abbott*, 490 U.S. 401, 410-11, 414 (1989).

36. *Id.* at 407.

there are far more inmates than the staff and facilities can handle. Cure the problem by reducing the number of inmates.”

In *Rhodes*, the Court was asked to identify what limits the Eighth Amendment imposes on conditions of confinement to which a state might subject an inmate and what conditions were relevant to that determination.<sup>37</sup> The Court left the distinct impression when deciding if conditions amounted to the “wanton and unnecessary infliction of pain,”<sup>38</sup> one examined all institutional conditions “alone or in combination.”<sup>39</sup> In other words, a “totality of conditions” test. While the Court did not speak of the “totality of conditions” in *Rhodes*, nothing in the decision discouraged courts from evaluating all conditions in a prison cumulatively. The totality approach seemed a little like an overflowing bucket test. Put enough negative information about an institution in a bucket and sooner or later it will overflow. When it overflows, conditions are unconstitutional. There was also nothing in *Rhodes* to suggest that the critical question in a conditions case was anything more than “how bad are the conditions.” Bad conditions = violation of the Eighth Amendment.

But this turned out to be an incorrect reading of *Rhodes* in two respects. In *Wilson v. Seiter*, Justice Scalia’s majority opinion said that, suggestions from *Rhodes* notwithstanding, there was no totality of conditions test.<sup>40</sup> Acknowledging that in some situations, related conditions such as low cell temperatures and a lack of blankets could combine to deprive an inmate of a basic human need for adequate warmth, but “nothing so amorphous as ‘overall conditions’ can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.”<sup>41</sup> Instead of one bucket, now there were several. Poor lighting, poor cooling, noise, a little violence and a variety of other unrelated inadequacies could no longer combine to make an Eighth Amendment violation.

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37. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).

38. *Id.*

39. *Id.* at 347.

40. *Wilson v. Seiter*, 501 U.S. 294, 305 (1991).

41. *Id.*

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*Wilson* also clarified that “how bad are the conditions” was only one of two questions that had to be asked.<sup>42</sup> Justice Scalia said officials’ state of mind was also relevant: were officials deliberately indifferent to the poor conditions.<sup>43</sup>

This created the theoretical possibility of the “pure of heart” defense, where an official could avoid liability despite horrible conditions if the official could show he had done everything in his power to alleviate the conditions, but with no success. The reason for the failure predictably would be that the solutions involved such things as reducing the inmate population or dramatically increasing resources for operations but those were both legislative decisions over which the defendant warden or prison director had no control.

The pure of heart defense exists more in the realm of theory than reality although it has worked at least once in a case involving two detainees who were severely beaten in a jail where beatings were a common occurrence.<sup>44</sup> The defendant-sheriff’s unsuccessful attempts to improve safety after taking over jail operations the year before the beatings were enough to show he was not deliberately indifferent.<sup>45</sup>

### *Use of Force*

The Court has paired two use of force cases, *Whitley v. Albers*,<sup>46</sup> and *Hudson v. McMillian*.<sup>47</sup> Here, the Court did not abandon its holding in *Whitley* but it stretched it from applying only in extreme force situations—riots—to application to everyday incidents.<sup>48</sup>

*Whitley* dealt with use of force in a riot and adopted a standard that gives the maximum amount of leeway to prison administrators.<sup>49</sup> “When the ‘ever-present potential for violent confrontation and conflagration,’ ripens into *actual* unrest and conflict, the admonition that a ‘prison’s internal security is pe-

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42. *Id.* at 298-99.

43. *Id.* at 303.

44. See *Hedrick v. Roberts*, 183 F. Supp. 2d 814, 821-23 (E.D. Va. 2001).

45. *Id.*

46. 475 U.S. 312 (1986).

47. 503 U.S. 1 (1992).

48. *Id.* at 6-7.

49. See *Whitley*, 475 U.S. 312.

cularly a matter normally left to the discretion of prison administrators,' carries special weight."<sup>50</sup>

The Court also spoke of problems of second guessing decisions "made in haste, under pressure, and frequently without the luxury of a second chance,"<sup>51</sup> as justifying a relatively forgiving standard for evaluating uses of force in a riot. "[T]he question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or *maliciously and sadistically* for the very purpose of causing harm.'"<sup>52</sup>

*Whitley* left open what the standard of review for use of force in more mundane, everyday situations would be.<sup>53</sup> *Hudson* allowed the Court to fill in this blank in a case that involved what only can be described as a gratuitous beating without a scintilla of penological purpose. The inmate was in restraints and offering no resistance to being moved in the prison.<sup>54</sup> Three officers escorting him punched him several times while a supervisor admonished the officers "not to have too much fun."<sup>55</sup> There was no haste, no pressure, no violent conflagration.

The Fifth Circuit had overturned a magistrate's award of \$800 in favor of the inmate under a standard that made a showing of a significant injury a sine qua non in an excess force case.<sup>56</sup> Since the inmate's injuries were minor, the Fifth Circuit said he could not prevail no matter how unnecessary the force was.<sup>57</sup>

The ensuing trip to the Supreme Court was successful by one measure: the Court overturned the Fifth Circuit's significant injury requirement, saying that while the seriousness of an injury was relevant in evaluating a use of force case, the lack of

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50. *Id.* at 321 (internal quotations and citations omitted).

51. *Id.* at 320.

52. *Id.* at 320-21 (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (Friendly, J.), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973)) (emphasis added).

53. *See Hudson v. McMillian*, 503 U.S. 1, 7 (1992).

54. *Id.* at 4.

55. *Id.*

56. *See id.* at 4-5.

57. *Id.* at 5-7.

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a serious injury would not necessarily preclude an inmate from prevailing in such a case.<sup>58</sup>

But the decision in *Hudson* also must rate as a loss in another respect because the Court took the use of force test from the *Whitley* riot situation and applied it as the measure of all use of force cases.<sup>59</sup> This was done in what could be seen as one of the worst possible factual situations: a beating. Why should the Court give as much deference and leeway to three officers beating up a shackled inmate as it did to administrators responding to a riot and hostage taking? Justice O'Connor, writing for the Court, ignores this question and begins her analysis by saying that "[m]any of the concerns underlying our holding in *Whitley* arise whenever guards use force to keep order."<sup>60</sup> The guards in *Hudson* weren't using force to keep order, they were thumping an inmate!<sup>61</sup>

In separate concurring opinions, Justices Stevens<sup>62</sup> and Blackmun<sup>63</sup> both express the belief that the "malicious and sadistic" test from *Whitley* should not be used to evaluate the sort of force usage in *Hudson*, but neither make a particularly strong point that the riot test now applies to beatings.

*The Due Process Formula*

The *ne plus ultra*, exhibit A, case in point example of the retreating Court is *Sandin v. Conner*.<sup>64</sup> *Sandin* both abandons a long-standing test for determining the applicability of the Due Process Clause to prison decision making and dramatically reduces the extent of due process protections for inmate disciplinary proceedings.<sup>65</sup>

What makes *Sandin* an even more startling example of the Court's reversal of direction is that Chief Justice Rehnquist's majority opinion jettisons the reasoning of a decision penned in 1983 by then Justice Rehnquist.<sup>66</sup> He overruled himself!

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58. *Hudson*, 503 U.S. at 9-10.

59. *Id.* at 6-7.

60. *Id.* at 6.

61. *Id.* at 4.

62. *Id.* at 12-13 (Stevens, J., concurring).

63. *Hudson*, 503 U.S. at 14-17 (Blackmun, J., concurring).

64. 515 U.S. 472 (1996).

65. *See id.*

66. *Id.* at 482-83.

First, the due process formula. In *Hewitt v. Helms*, the Court crystallized a test for determining when due process protections attached to prison decision making.<sup>67</sup> Recognizing that the Due Process Clause did not offer much in the way of inherent protection for inmates, the Court had come to the conclusion, through several cases, that the state could create liberty interests that enjoyed due process protections.<sup>68</sup> *Hewitt* explained how such state created liberty interests could come into being.<sup>69</sup> In simplified terms, the key was the language of the rule or regulation in question. If officials structured or limited their discretion by writing “shalls” or “musts” into their rules, they created a liberty interest.<sup>70</sup> For example: a rule that said, “in order for decision X to be made, there *must* be a finding that the inmate met one or more of the following conditions . . .” would create a liberty interest, due process protections, and some liability exposure for officials. But if the regulation said “decision X could be made upon the whim of an officer,” there was no limit on discretion, no liberty interest, and no due process protections.

In jettisoning the language-focused state created liberty interest test it had adopted in *Hewitt*, Chief Justice Rehnquist wrote that the *Hewitt* test put too much focus on the language of regulations (a statement with which I agree) and got federal courts into examining relatively trivial decisions looking for due process protected liberty interests.<sup>71</sup> In its place the Court said the question properly is whether the decision X imposes an atypical and significant deprivation on the inmate compared to the normal incidents of prison life.<sup>72</sup>

The Court succeeded in its *Sandin* goal of limiting the number of prison decisions to which due process protections attach. In the several years since *Sandin*, virtually the only cases where courts have struggled in applying the atypical deprivation test have involved inmates being placed in long term ad-

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67. *Hewitt v. Helms*, 459 U.S. 460, 468 (1983).

68. *Id.* at 466-69.

69. *Id.* at 470-72.

70. *Id.* at 471-72.

71. *Sandin*, 515 U.S. at 483.

72. *Id.* at 472, 486.

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ministrative segregation.<sup>73</sup> Even there, the decisions reach mixed results. Despite differences in how courts of appeal interpret *Sandin*, it is safe to say that an inmate can languish in administrative segregation in most jurisdictions for six months to a year, or longer, without triggering whatever protections *Sandin* may offer.<sup>74</sup>

As to placement in disciplinary segregation requiring due process protections, everyone, correctional administrators and their lawyers, inmates and their lawyers, and federal judges, read *Wolff v. McDonnell*<sup>75</sup> as saying that if an inmate faced almost any sort of segregation time as a sanction for violating a disciplinary rule, a due process hearing that met the requirements of *Wolff* was required. In *Sandin*, Chief Justice Rehnquist wrote that the Court had never addressed the question of whether segregation penalties triggered due process protections “in an argued case” and passed off the language in *Wolff* that people had relied upon as simply “dicta.”<sup>76</sup>

Dicta perhaps, but certainly emphatic dicta: “Here [where the inmate was facing solitary confinement] as in the case of good-time, there should be minimum procedural safeguards . . . .”<sup>77</sup> This dicta managed to convince the federal bench for two decades that *Wolff* procedures extended to solitary confinement when imposed as disciplinary.

In saying putting an inmate in segregation for a month (and much longer than that according to most lower court interpretations of *Sandin*) the Chief Justice created a simple blueprint eliminating due process protections altogether for all but the most serious disciplinary infractions.<sup>78</sup> If the prison is

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73. See, e.g., *Colon v. Howard*, 215 F.3d 227 (2d Cir. 2000); *Fraise v. Terhune*, 283 F.3d 506 (3d Cir. 2002).

74. There is a problem that courts really have not discussed about finding that an extended period of time in segregation becomes an atypical deprivation, whereas a shorter period does not. Placements in administrative segregation are, almost by definition, of indeterminate length. While in extreme situations officials may know that an inmate is so dangerous that he is unlikely to ever come out of segregation, in many situations this is not the case. If the placement meets the *Sandin* atypical deprivation test only after an extended period of time has past, what form of process is due and when is it due?

75. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

76. *Sandin*, 515 U.S. at 486.

77. *Wolff*, 418 U.S. at 571 n.19.

78. *Sandin*, 515 U.S. at 487.

satisfied with simply locking someone up for a few months for a disciplinary violation and not tinkering with the inmate's release date, federal due process protections are gone.

Interestingly, I do not think prison administrators have used *Sandin* to rewrite disciplinary processes. This indicates a fundamental change in philosophy from the *Wolff* era. When the Supreme Court said that almost all disciplinary proceedings had to be accompanied by a hearing at which the inmate could call witnesses and might even be able to directly question the actions of an officer,<sup>79</sup> more than one warden saw the lions at the gates. The world as they knew it was crumbling and it was just a matter of time until the inmates ran the prison. Fast forward twenty-plus years. When I talked about *Sandin* with a state corrections director shortly after the decision came out and explained how *Sandin* opened the door for a complete restructuring of inmate disciplinary rules, he looked at me blankly and said "why would we want to do that???" So far as I know, this has been the response of most agencies.

*Sandin* is useful for officials defending litigation over individual disciplinary hearings ("So what if you didn't get a chance to call your witness even though our rules say you could—the Constitution no longer gives you the right to call witnesses") but it has not led to a wholesale abandonment of due process concepts in the inmate disciplinary process. The degree to which the spirit of due process imbues the disciplinary process is, of course, a different question.

#### *Access to the Courts*

Continuing in the "let's go the other way" vein, the Court, in 1996, revisited its flagship right of access to the courts decision, *Bounds v. Smith*.<sup>80</sup> For most prisons, *Bounds* was "the law library decision," and the basis for lower courts demanding extensive law libraries to be accessible to inmates even in the highest security classifications unless other provisions for access to the courts were provided.<sup>81</sup> *Bounds* said that prison officials had the affirmative duty to assist inmates in obtaining

79. *Wolff*, 418 U.S. at 566.

80. 430 U.S. 817 (1977).

81. See generally Karen Westwood, "Meaningful Access to the Courts" and *Law Libraries: Where Are We Now?*, 90 LAW LIB. J. 193, 194-95 (1998).

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meaningful access to the courts through the provision of law libraries or persons trained in the law.<sup>82</sup> However, few agencies felt comfortable with the “persons trained in the law” option (“we should pay lawyers to sue us?!!”) so the great majority of facilities turned to law libraries.

But in *Lewis v. Casey*,<sup>83</sup> the Court re-examined its holding in *Bounds*, again clarifying and limiting the reach of the holding in two important ways. While *Lewis* doesn’t simply reject *Bounds* the way *Sandin* rejected *Hewitt* and the *Wolff* dicta, it specifically limits the right of access to the courts to civil rights and habeas corpus claims (the right, for instance, does not include anything regarding family law issues).<sup>84</sup>

More importantly, *Lewis* says that an inmate must show “actual injury” in some way in order to have standing to even bring an access to the courts claim.<sup>85</sup> It is not enough for a class of inmates to argue “the law library is deficient in some way or another, make them improve it.”<sup>86</sup> The named plaintiffs must show some type of injury because of the deficiency or deficiencies about which they complain and must show the problems are system-wide in order to support injunctive relief.<sup>87</sup> An injunctive order can address the system-wide deficiency that is causing injury, but cannot address other problems that have not been shown to have caused the requisite “injury.”

The effect of the *Lewis* decision is demonstrated in a case from Illinois that straddled the release of *Lewis*. *Walters v. Edgar* was a class action brought by inmates in segregation units in the Illinois Department of Corrections in which they complained about a law clerk “runner” system that supposedly provided them legal materials from institution law libraries.<sup>88</sup> The trial, held before *Lewis*, resulted in a decision that the system violated the inmates’ right of access to the courts.<sup>89</sup> The trial

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82. *Bounds*, 430 U.S. at 828.

83. 518 U.S. 343 (1996).

84. *Id.* at 354.

85. *Id.* at 349.

86. *See id.* at 351.

87. *Id.*

88. *Walters v. Edgar*, 973 F. Supp. 793 (N.D. Ill. 1997) (providing legal materials for inmates in high security segregated units has been one of the most challenging access to the courts problems for prisons).

89. *Id.* at 797.

judge knew *Lewis* was scheduled for decision so postponed a final order.<sup>90</sup> When *Lewis* was released, the judge re-opened the liability phase of the case and dismissed the entire case because none of the named plaintiffs could meet the “actual injury” standing requirement.<sup>91</sup> The court of appeals affirmed.<sup>92</sup>

Nothing had changed about the runner system. It still had whatever problems the court had found. But the law had changed. *Lewis* suggests that “injury” means something like having a case dismissed:

[F]or failure to satisfy some technical requirement which, because of deficiencies in the prison’s legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.<sup>93</sup>

That suggests injury of the first order, something much more than inconvenience or not being able to present a case as well as one might like.

Some lower courts have interpreted an inmate’s ability to simply file pleadings as an indication that he is not being “injured.”<sup>94</sup> Judge Posner, writing for the unanimous panel in the *Walters* case, noted that this “suggest[s] the paradox that ability to litigate a denial of access claim is evidence that the plaintiff has no denial of access claim!”<sup>95</sup> What happened to the adjective “meaningful,” as in “[I]t should be noted that . . . adequate law libraries are one constitutionally acceptable method to assure *meaningful* access to the courts . . .”<sup>96</sup> The majority opinion in *Bounds* is replete with references to “meaningful” access.<sup>97</sup>

Further complicating an access to the courts claim is a statement in *Lewis* that “[w]e think we envisioned, instead, that the new [access to the courts] program would remain in place at

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90. *Id.*

91. *Id.* at 804-05.

92. *Walters v. Edgar*, 163 F.3d 430 (7th Cir. 1998).

93. *Lewis v. Casey*, 518 U.S. 343, 351 (1996).

94. *See, e.g.*, *Benjamin v. Kerik*, 102 F. Supp. 2d 157, 164 (S.D.N.Y. 2000); *Kensu v. Haigh*, 87 F.3d 172, 175 (6th Cir. 1996).

95. *Walters*, 163 F.3d at 436.

96. *Bounds v. Smith*, 430 U.S. 817, 830 (1977) (emphasis added).

97. *See generally* 430 U.S. 817.

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least until some inmate could demonstrate that a *nonfrivolous legal claim* had been frustrated or was being impeded.”<sup>98</sup> The burden then is on the inmate to show that he suffered actual injury with regard to a claim that was nonfrivolous.<sup>99</sup> Access to the courts claims that inmates now bring pro se frequently flounder at the pleading stage because the inmate fails to plead or show in the context of a summary judgment what the injury was or that the injury pertained to a nonfrivolous claim.

## Congress and the Prison Litigation Reform Act

In 1996, Congress was eager to show it could get tough on criminals, especially those who were perceived as flooding the courts with frivolous litigation about crunchy peanut butter.<sup>100</sup> State attorney generals rushed out their “top ten frivolous litigation” lists to support passage of what was to become known as the Prison Litigation Reform Act.<sup>101</sup> California cited one example of an inmate who claimed prison officials had implanted an electronic device in his brain that controlled his thoughts which were then broadcast over the prison PA system.<sup>102</sup> According to then Attorney General Dan Lungren, the Department had to prove it had not performed surgery on the inmate and submit a declaration that the prison did not have the electronic capability of broadcasting thoughts over the PA system.<sup>103</sup>

The ACLU National Prison Project countered with its Top Ten Non-Frivolous Lawsuits list.<sup>104</sup> One example: “dozens of women, some as young as 16, are forced to have sex with prison guards, maintenance workers, and a prison chaplain. Many become pregnant and are coerced by prison staff to have abor-

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98. *Lewis*, 518 U.S. at 352-53 (emphasis added).

99. *Johnson v. Barczak*, 338 F.3d 771, 773 (7th Cir. 2003).

100. See, e.g., Jennifer Puplava, *Peanut Butter and Politics: An Evaluation of the Separation-of-Powers Issues in Section 802 of the Prison Litigation Reform Act*, 73 IND. L.J. 329, 329-33 (1997).

101. *Id.* at 330-31.

102. See Kathryn F. Taylor, *The Prison Litigation Reform Act's Administrative Exhaustion Requirement: Closing the Money Damages Loophole*, 78 WASH. U. L.Q. 955, 955 (2000) (citing *Examples of Prisoner Lawsuits*, TACOMA NEWS TRIB., Oct. 26, 1995, at D10).

103. *AG's ID Frivolous Prisoner Lawsuits*, DETENTION REP., (Comty. Res. Serv., Gettysburg, P.A.) Feb. 1996, at 6.

104. See Nat'l Prison Project, *Top Ten Non-Frivolous Lawsuits Filed By Prisoners*, available at <http://www.prisonwall.org/ten.htm> (last visited Mar. 31, 2004).

tions.”<sup>105</sup> Needless to say, Congress did not find the ACLU’s list persuasive.

Based on over thirty years experience in dealing with inmate litigation in one way or another, I have to agree there are a great many inmate lawsuits that do not have any legal merit. There are also some that have a great deal of merit. Many American prisons and jails would still be stuck in the 1960s but for court intervention or the serious threat of court intervention. When would Arkansas have abandoned the use of inmate guards or Texas the use of inmate “building tenders” without court intervention?

Between the frivolous and the totally meritorious cases are a substantial number of suits that may not reflect any constitutional problem but which show examples of negligent behavior by correctional officials, or failures by officials to follow their own policies, or other failings which may not warrant federal court intervention but which still do not speak well for jails or prisons.

The infamous crunchy peanut butter legend provides an example of why inmates sue over what seems like trivial matters in a “rest of the story” tale that Paul Harvey might even like. Here, I must take full advantage of the liberal rules of writing this article and rely on memory of a document which I can no longer lay hands on. In a letter to the editor of, I believe, the New York Times, a federal judge pointed out something to the effect that the inmate had ordered crunchy peanut butter off the commissary list. When smooth came, he asked that his order be filled correctly. The request was refused and the grievance was denied. He then turned to the federal courts. If the “rest of the story” is true, it shows why some, perhaps many, inmate suits are filed. The prison promises something but refuses to deliver on its promise. Finding no other effective remedy, the inmate turns to federal court. The result is frequently a dismissal in favor of the prison but the inmate still has a legitimate beef. (“Would you like peanut butter on your beef, sir?”).

In addition to striking a blow against frivolous lawsuits (and inmate lawsuits in general), Congress also took the oppor-

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105. *Id.* (citing *Cason v. Seckinger*, 231 F.3d 777 (11th Cir. 2000)).

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tunity to try to limit the powers of the federal courts in ordering relief in inmate cases.<sup>106</sup>

*PLRA Reduces Number Of Cases Filed*

Perhaps the PLRA's most visible features focus on cutting down on pro se inmate litigation in two ways. Courts can no longer waive filing fees for indigent (i.e., almost all) inmates but now can only put the inmate on a monthly payment plan.<sup>107</sup> Payment will be extracted from all funds that show up on an inmate's account.<sup>108</sup> Secondly, the law doesn't even allow the "Filing Fee EZ-Payment Plan" for many frequent filers through a sort of "three-strikes and you're out" scheme. If an inmate has had three cases dismissed as frivolous, malicious or failing to state a claim for relief, the inmate must pay the full filing fee up front.<sup>109</sup>

To the extent that Congress wanted to reduce the number of inmate lawsuits (forget the "frivolous" qualifier), there is no question that the PLRA succeeded in dramatic fashion. According to data from the United States Department of Justice, total prison civil rights filings grew from 2,267 in 1970 to 39,008 in 1995.<sup>110</sup> The magnitude of this increase is tempered when one notes that the total inmate population increased at very close to the same rate over that twenty-five year span.<sup>111</sup> The rate of filings per 1,000 inmates hit about 25.0 per 1,000 in 1979 and varied between a high of 29.3 in 1981 and a low of 20.0 in 1991.<sup>112</sup>

The impact of the PRLA hit in 1997. The number of filings dropped to 26,132.<sup>113</sup> By 2001 it sank to 22,206.<sup>114</sup> The rate per 1,000 dropped even more<sup>115</sup> as total inmate populations keep in-

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106. See 42 § U.S.C. 1997e (1996).

107. See 28 U.S.C. § 1915(b)(1) (2004).

108. § 1915(b)(2).

109. *Id.*

110. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1583 tbl.I.A. (2003). This is a marvelous article, very long, very detailed, very insightful.

111. See *id.* at 1583 tbl.II.D.

112. *Id.* at 1586 fig.I.B.

113. *Id.* at 1583 tbl.I.A.

114. *Id.*

115. See generally Schlanger, *supra* note 114, at 1583 tbl.I.A

creasing.<sup>116</sup> By 2001, inmates filed civil rights cases at a rate of 11.4 per 1,000, the lowest rate since 1973.<sup>117</sup>

It is hard to estimate the effect of the drop in inmate filings on major reform litigation. Nineteen out of twenty inmate civil rights cases terminated in 1995 were brought pro se.<sup>118</sup> The great majority of all inmate cases are dismissed in favor of defendants.<sup>119</sup> Schlanger reports that 82% of all inmate civil rights cases that were decided between 1990 and 1995 ended with a pretrial resolution in favor of defendants.<sup>120</sup> Plaintiffs won a pretrial resolution in less than 1% of the cases.<sup>121</sup> Just under 7% were settled and a similar amount resulted in a voluntary dismissal (which may imply an informal settlement of some sort). Of the cases that went to trial, plaintiffs won 10%.<sup>122</sup> The meaning of settlements and voluntary dismissals can be debated, but the main point is clear: inmates do not win many of the lawsuits they bring.

While most inmate lawsuits result in nothing for the inmate, some of the most significant litigation began as pro se complaints. For example, the almost never-ending *Ruiz* case in Texas that remade the entire Texas correctional system began as pro se complaints.<sup>123</sup>

So it can be presumed that some cases that inmates now don't file have merit at the "reform" level, would lead to the court appointed counsel and eventually result in some form of significant change. However, it also seems reasonable to assume that the number that fit in this category is quite small and that almost all of the cases that are now not being filed would result in no benefit to the inmate if they were filed.

### *Attorney's Fees*

A part of the PLRA that to me, as a non-litigating lawyer with a background in defense of inmate cases, seems to have a

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116. *Id.* at 1586 fig.I.B.

117. *Id.* at 1586 tbl.I.B.

118. *Id.* at 1609 tbl.II.D.

119. *Id.* at 1594-95.

120. Schlanger, *supra* note 114, at 1594 tbl.II.A.

121. *Id.*

122. *Id.* at 1594 tbl.II.A.

123. See STEVE J. MARTIN & SHELDON EKLAND-OLSON, TEXAS PRISONS – THE WALLS CAME TUMBLING DOWN (1987).

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greater impact on inmate reform litigation is the limitation on attorney's fees. Under long-standing federal law, the prevailing party in a civil rights action is entitled to an award of attorney's fees.<sup>124</sup> Traditionally, fees were computed by multiplying the hours the lawyer spent on the winning case times the hourly billing rate lawyers of similar experience and ability receive in the community.<sup>125</sup> This computation gives a "lodestar" figure which the court then might tinker with to some degree but is the presumptive fee.<sup>126</sup> Hourly billing rates for experienced attorneys in major metropolitan areas can easily exceed \$250 – 300 per hour.<sup>127</sup> To Congress, lawyers representing inmates were chasing prison ambulances in the hopes of hitting attorney's fee jackpots so the PLRA amended 42 U.S.C. § 1997e to provide that the lawyer who successfully represents a "prisoner" receives a fee computed on a different schedule.<sup>128</sup> The fee must be "proportionately related to the court ordered relief."<sup>129</sup> A small step for the inmate should not be a giant leap for the lawyer's financial mankind.

But of greater significance is the hourly rate cap that the PLRA imposes. The lawyer can receive no more than 150% of the hourly rate paid appointed criminal counsel.<sup>130</sup> That hourly rate now is \$169.50.<sup>131</sup> Quite a drop from \$250 per hour or more.

I do not share the belief there were hordes of lawyers getting rich from suing prisons and jails. There certainly are ex-

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124. See 42 U.S.C. § 1988(b) (2004).

125. See, e.g., *Burchett v. Bower*, 470 F. Supp. 1170, 1172 (D.C. Ariz. 1979) (holding that the Court in determining attorney fees can consider "the amount of time devoted by the attorney to the litigation; the value of the time in light of billing rates and of the attorney's experience, reputation, and ability; and the attorney's performance, given the novelty and the complexity of the legal issues in the litigation"); *Blum v. Stenson*, 465 U.S. 886, 888 (1984) (holding that the "initial estimate of a reasonable attorney' fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate").

126. *ACLU v. Barnes*, 168 F.3d 423, 427 (11th Cir. 1999).

127. See, e.g., *More Data to Add to your Review of Billing Rates*, LAW OFF. MGMT. & ADMIN. REP. (Inst. of Mgmt. & Admin., New York, N.Y.) Jan. 1, 2004, at 4.

128. 42 U.S.C. § 1997e (2004).

129. § 1997e(d)(1)(B)(i).

130. § 1997e(d)(2).

131. Schlanger, *supra* note 114, at 1631.

amples of very large attorney's fees awards in correctional cases (in some cases many times more than what the inmate received) but I doubt lawyers were lining up at prison gates to represent inmates because of the lure of large attorney's fees. Lawyers who represent inmates in large reform cases are far more motivated by principle than Mammon although I remember one lawyer who frequently represented inmates telling a group of jail administrators that lawyers sue for three reasons: "Money, money, and money." To the extent that money is part of the equation that decides if a suit will be filed (and even the most altruistic lawyer likes to be paid), a fee reduction of \$100 per hour or more must enter into the determination of "can I take this case?"

To the extent that lawyers are not working for independently funded organizations or representing inmates pro bono, the attorney's fee limitation imposes one more barrier to possible reform litigation.

### *Termination of Orders*

Some of the bitterest controversy in inmate litigation arises around the relief phase of the case. To defendants, the case won't go away. Aspects of the order may exceed what the Constitution demands, but they still must be complied with. Consent decrees take on lives of their own. Arguments arise over what is perceived as minutiae. The consent decree runs on forever. Overlooked in these arguments is that a defendant and counsel, sometime "way back when," agreed to the consent decree with all of its minutiae and overlooked including a means of easily amending or terminating the decree.

From plaintiffs' perspective, defendants often ignore the requirements of the decree (consent or otherwise). The court order is the only thing that prevents the problems that led to the suit in the first place from coming back. For change to occur, defendants' feet must be constantly held to the fire.

Regardless of who has the better of the argument over long running court orders, the PLRA addresses the "never ending decree syndrome" by allowing a defendant to move to terminate an order after two years and requiring the court to terminate

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the order unless the court finds there are “current or ongoing” constitutional violations.<sup>132</sup>

While many agencies have used this process to get out from under old court orders, many others have chosen not to. Perhaps the most common example is the jail operating under a population cap. The jail administrator recognizes that but for the cap, the jail would become seriously overcrowded almost overnight. While the PLRA gives standing to any government official or agency even remotely connected with the operation of the jail to seek termination of relief orders that impose caps or order release of prisoners, this section of the statute appears to be little known.<sup>133</sup>

*Other PLRA*

The PLRA attempts to limit the scope of both court orders and consent decrees but it is not clear to me what practical effects these provisions have on relief orders. I am aware of at least one settlement in which the parties and the judge both appeared to simply ignore the relief-power limitations of the Act.<sup>134</sup>

Similarly, the impact of the provisions that forbid judges from imposing “prisoner release orders” (which include population caps) until some “less intrusive” type of relief has been attempted but found insufficient to remedy the constitutional problems has yet to be discussed in a reported decision.<sup>135</sup> What sort of “less intrusive relief” might a judge order, having found that conditions are unconstitutional because there are too many inmates in a facility? Would an order to increase the number of staff or to build and staff a larger building be any less intrusive than a population control order? How long must a less intrusive order remain in place before the now statutorily required three judge court enters a prisoner release order? These sorts of questions have not been explored.

The PLRA specifically exempts from its limitations on relief orders what it calls “private settlement agreements” which can

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132. 18 U.S.C. § 3626(b) (1994).

133. § 3626(a)(3)(F).

134. *Jones ‘El v. Berge*, No. 00-C-421-C, (W.D. Wis. 2001) (settlement agreement).

135. 18 U.S.C. § 3626(a)(3).

be enforced in state court in accordance with any state law remedy that might be available.<sup>136</sup> While some are skeptical about the willingness of state court judges to hold a state or local agency's feet to the judicial fire, I have examined one private settlement agreement which provides that breaches may be remedied by state courts.<sup>137</sup> The agency was very reluctant to consider breaching the agreement (the provisions of which were quite specific) and inviting entanglement in state court litigation.

### Conclusion

The case law doesn't leave room for reform to the extent it did in earlier days. Congress has imposed procedural hurdles that make it financially difficult for most attorneys or law firms to consider taking on major reform litigation and has attempted to limit federal courts powers in ordering and supervising long term relief. Undiscussed are limitations on public or private funds that might support prison reform litigation or the extent to which the federal judiciary is less enthusiastic about inmate rights cases than it once was.

Some will argue that these events simply restore a more appropriate balance. After all, there are still constitutional protections for inmates that did not used to exist. Courts still find constitutional violations and order relief. But it certainly appears that the federal lawsuit as a vehicle for major prison reform is something whose heyday has passed. Is what remains enough to hold correctional institutions and agencies accountable for the care and treatment they provide inmates?

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136. § 3626(d).

137. *Hammer v. King County*, No. C-89-521-R (W.D. Wash. 1998) (consent decree).