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# Getting to Yes in a PLRA World

Elizabeth Alexander\*

## I. Some Opening Musings

An ongoing discussion among prisoners' rights advocates, since the passage of the Prison Litigation Reform Act of 1995 (PLRA) restricting the powers of federal courts to provide remedies in conditions of confinement litigation,<sup>1</sup> has been whether such litigation remains a viable means of assuring decent and humane conditions of confinement within the nation's prisons, jails, and juvenile facilities. While I cannot quarrel with the basic premise that prison litigation is by itself not enough to assure decent conditions, we should not be too hasty in abandoning prison litigation as one of the major vehicles for prison reform.

I once had a conversation with opposing counsel in one of my cases that illustrates why prison litigation has survived the passage of the PLRA, as well as an increasingly hostile federal bench, and, in particular, why consent decrees will continue to play a major role in such litigation. As we argued over discovery in connection with a forthcoming court hearing, he asked why we had to have these hearings all the time. Why couldn't the state's employees and our experts just sit around a table and concentrate on fixing what is wrong?<sup>2</sup>

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1. Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (1996).

2. These post-PLRA hearings have been much more intensive than previous hearings, as well as more frequent. PLRA is not solely responsible for this escalation in litigation warfare in conditions-of-confinement cases since 1996; an increasingly conservative federal bench has also imposed heavier evidentiary requirements on prisoner litigants. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (imposing requirement of proof of actual injury in access to courts cases); *Wilson v. Seiter*, 501 U.S. 294, 303-04 (1991) (imposing requirement of proof of "deliberate indifference" by prison officials to show violation of Eighth Amendment in prison conditions of confinement litigation); *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981) (imposing requirement of proof of "unnecessary or wanton pain" or conditions that are

With some amusement I reminded him that we were having the hearing because defendants had filed a motion to terminate injunctive relief pursuant to PLRA,<sup>3</sup> which defendants had lost, and this new hearing would address whether defendants' latest self-correction plan, along with a new injunction, had cured the constitutional violations. In fact, prior to the passage of PLRA, the parties had spent a fair amount of time attempting to negotiate changes in defendants' behavior that would have satisfied the requirements of the consent decree in the case, with court filings occurring only when negotiations did not work.

Under the particular circumstances of the case in question, even under PLRA it was a reasonable strategy for plaintiffs and defendants to substitute negotiations for endless litigation. The frustration that defendants' counsel felt with their own strategy of pursuing termination through PLRA is, I suspect, not a completely isolated event. Obviously, after the enactment of PLRA, prison-conditions litigators lost a huge number of old cases that were in monitoring status, and we learned how difficult it can be to litigate new cases in light of the exhaustion requirement.<sup>4</sup>

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"grossly disproportionate" to the need to punish criminal behavior to show violation of Eighth Amendment in prison conditions of confinement cases). Nonetheless, there is tremendous synergy between PLRA and these evidentiary burdens: evidentiary hearings are both more frequent and require far more preparation by plaintiffs' counsel. As a result, litigating these cases post-PLRA has been exhausting for both sides and I suspect that, in the cases in which termination motions have failed, defendants have often spent more money on attorneys' fees than they would have expended if the litigation had taken place before 1996, despite the restrictions on fees that PLRA imposes. See 42 U.S.C. § 1997e(d) (2006) (limiting hourly fees to no more than 150% of Criminal Justice Act rates (set by 18 U.S.C. § 3006A) for representing indigent criminal defendants in federal prosecutions).

3. 18 U.S.C. § 3626(b) (2006) (allowing defendants in prison conditions of confinement cases to file a motion to terminate an existing court injunctive order if it lacks certain required findings or, if the order does contain the required findings, allowing the filing of a motion for termination at various intervals; in either case relief is not to terminate if relief remains necessary to correct a current and ongoing violation of federal law).

4. See 42 U.S.C. § 1997e(a) (2006) (requiring exhaustion of available administrative remedies before a prisoner can file litigation regarding his or her conditions of confinement). For an excellent discussion of the effects of PLRA on prisoner conditions of confinement litigation, see Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. (2006).

At the same time, in cases in which prison litigators have possessed the facts and the necessary resources, some defendants learned the hard way that filing a termination motion produced never-ending court battles rather than victory. Indeed, in a small minority of cases, PLRA has paradoxically added to the litigation burdens on prison-official defendants, even as in countless ways the Act has given them “get out of court free” cards. For example, some PLRA termination hearings have resulted in courts entering new injunctive orders in old cases.<sup>5</sup> This should come as no surprise. Logically, if plaintiffs show that a constitutional or statutory violation of federal law persists despite an existing court order addressing the issue, then the existing order, having proven ineffective, needs to be modified or replaced to eliminate the violation.

PLRA has also at times had a paradoxical effect on the negotiation of consent decrees. Because prison-conditions litigators can and do win cases, it follows that there are a significant number of circumstances in which it is in the interest of defendants to attempt to settle these cases. While some of those in Congress who voted for PLRA may have thought that it was outlawing consent decrees in prison conditions cases, such agreements have survived precisely because they serve defendants’ interests in some cases. Further, in certain circumstances, by mandating restrictions on the conditions under which a federal court is permitted to enter a consent decree, PLRA has caused defendants to agree to more strenuous terms than would have been the case in the absence of the Act. This article explores some of the ways that parties have continued to negotiate consent decrees post-PLRA, and points out some of the consequences of PLRA in this context.

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5. *See, e.g.*, *Gates v. Barbour*, No. 4:71CV6-JAD (N.D. Miss. June 7, 2004) (ordering that HIV-positive prisoners be integrated in work release programs; order directly resulted from proceedings following defendants’ filing of PLRA termination motion) (on file with author); *Hadix v. Caruso*, No. 4:92-CV-110, 2005 WL 2671289 (W.D. Mich. Oct. 19, 2005) (issuing preliminary injunction requiring defendants to submit a plan to improve the medical care for prisoners in segregation unit and in specialized medical housing units at the prison; injunction resulted directly from proceedings related to pending termination hearing).

## II. The Movement to Bar Consent Decrees in Institutional Litigation

PLRA contains a hodgepodge of provisions, codified in multiple sections of the United States Code, that have as their intended effect restrictions on the ability of prisoners to litigate their claims of constitutional or statutory violations in federal court, or restrictions on the abilities of federal courts to redress these grievances.<sup>6</sup> While there were undoubtedly many sources for the various restrictions, the central organizing theme of the arguments in favor of the Act was that “frivolous” prisoner litigation needed to be stopped. On one level, PLRA constituted symbolic legislation expressing disapproval of prisoner conditions-of-confinement litigation<sup>7</sup> at the same time that it fulfilled a promise made by Republicans in the “Contract with America.”<sup>8</sup>

The provisions appearing to restrict consent decrees drastically, however, have a provenance that extends far beyond prisoner-bashing. Conservatives have long argued that federal courts should not enforce consent decrees made by public officials that go beyond the command of federal law because to do so is inconsistent with democratic principles, inappropriately allows officials to escape the confines of state law by binding their successors, and violates core tenets of federalism.<sup>9</sup>

This is not an argument solely directed at consent decrees regarding prison conditions of confinement, but various versions of this argument have long been used to challenge

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6. See, e.g., Schlanger, *supra* note 4 (discussing effects of various PLRA provisions).

7. See Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 64 (1997) (arguing that PLRA constitutes symbolic litigation).

8. See CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 43-44, 53 (Ed Gillespie & Bob Schelhas eds., 1994) (promising action to address the problem of “frivolous” prison litigation).

9. See, e.g., Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295, 297 (arguing that consent decrees limiting the power of future office holders are anti-democratic).

such consent decrees. In *Duran v. Carruthers*,<sup>10</sup> for example, New Mexico poured considerable resources into an attempt to break the consent decree that its officials signed in the wake of a riot at the New Mexico Penitentiary in which thirty-three prisoners had died.<sup>11</sup> The State argued that the requirements of the decree went far beyond the requirements of federal law, and thus violated the requirements of the Eleventh Amendment.<sup>12</sup>

The court of appeals disagreed. It examined each challenged provision of the decree, and determined that the remedies specified in the decree related to federally protected rights. It noted that New Mexico could have proceeded to trial to test whether the relief provided by the consent decree was actually required by federal law; if such relief was required by federal law, there could be no Eleventh Amendment violation.<sup>13</sup> By agreeing to the consent decree, however, New Mexico waived its right to contest the necessity of the provisions of the consent decree under federal law.<sup>14</sup> Only in the Fifth Circuit did the argument presented in *Duran* gain much traction.<sup>15</sup>

Subsequent to PLRA, the Supreme Court considered a similar argument in the context of Texas' challenge to a consent decree involving federal Medicaid provisions. In *Frew v. Hawkins*,<sup>16</sup> the Court reviewed a case in which the Fifth Circuit had accepted Texas' argument that, in order to enforce a particular provision of a consent decree based on federal law, a federal court first had to determine that a federal right had been violated, and that enforcement of the provision in question would address that violation.<sup>17</sup> The Supreme Court

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10. 885 F.2d 1485 (10th Cir. 1989).

11. *Id.* at 1486.

12. *Id.* at 1487.

13. *Id.* at 1487-91 (citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908) (holding that state defendants are not protected by Eleventh Amendment against litigation seeking injunctive relief for violation of federal law)).

14. *Duran*, 885 F.2d at 1489-91.

15. See *Leltz v. Kavanagh*, 807 F.2d 1243 (5th Cir. 1987) (refusing to enforce a consent decree because the court found that the relief was based on state law); *Saahir v. Estelle*, 47 F.3d 758, 761 (5th Cir. 1995) (refusing to allow enforcement of a consent decree regarding prison conditions because, the court found, the decree was not based on federal law).

16. 540 U.S. 431 (2004).

17. *Frazar v. Gilbert*, 300 F.3d 530, 542 (5th Cir. 2002) (holding that a consent decree is not enforceable against a state except to vindicate a federal

unanimously rejected that argument, reasoning that, given the concession of the state defendants that they were not challenging the entry of the consent decree, there could be no Eleventh Amendment bar to its enforcement.<sup>18</sup> While the decree implemented the federal statute in a highly detailed way, and required the state to take some steps that the statute by its own force did not require, those features did not pose a bar to enforcement of the consent decree:

The same could be said, however, of any effort to implement the [statute at issue] in a particular way. The decree reflects a choice among various ways that a State could implement the Medicaid Act. As a result, enforcing the decree vindicates an agreement that the state officials reached to comply with federal law.<sup>19</sup>

With the decision in *Frew*, the theory that the Eleventh Amendment has a significant role to play in preventing states' agreements to consent decrees has been rejected in its starkest form.<sup>20</sup> While occasional bills continue to be introduced in Congress that would extend the PLRA restrictions on consent decrees to other areas, these efforts have yet to be successful.<sup>21</sup> Accordingly, the only question is the extent to which PLRA actually restricts the ability of federal courts to approve settlement agreements involving prison conditions-of-

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right), *rev'd sub nom.*, *Frew v. Hawkins*, 540 U.S. 431 (2004).

18. *Frew*, 540 U.S. at 439.

19. *Id.*

20. *But see* *Horne v. Flores*, 129 S. Ct. 2579, 2593-94 (2009) (while Fed. R. Civ. P. 60(b)(5) provision allowing relief from injunctive judgment on the ground that it is not equitable may not be used to challenge the legal conclusions on which a prior judgment is based, the Rule does provide a means for modification in light of changed legal or factual circumstances; cautioning that consent decrees binding public officials may improperly bind state and local officials to the policy preferences of their predecessors).

21. *See, e.g.*, S. 489, 109th Cong. § 3 (2005) (providing that, four years after the entry of a consent decree in any federal court in which a state or local government is a party, the governmental party may file a motion seeking to modify or vacate the consent decree, and further providing that the "burden of proof" shall be on the party who originally filed the civil action to demonstrate that the continued enforcement of the decree is "necessary to uphold a federal right").

confinement litigation.

### III. Legal Support for Consent Decrees Governed by PLRA

The relevant provisions of PLRA do not purport to ban consent decrees; they instead mandate that federal courts refuse to approve any consent decree that does not meet the general requirements for approval of relief in a prison conditions-of-confinement case.<sup>22</sup> These familiar requirements are as follows:

Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.<sup>23</sup>

The Act does not prohibit private settlement agreements that do not comply with the PLRA limits on relief if the only remedy provided by the agreement is reinstatement of the litigation.<sup>24</sup> Nor does the Act bar a plaintiff who claims that a settlement agreement has been breached from seeking state court enforcement of a remedy.<sup>25</sup>

The only case that comments on post-PLRA prison condition settlements is *Cason v. Seckinger*,<sup>26</sup> in which the Eleventh Circuit reversed the district court's termination of a pre-PLRA consent decree. The court held that the plaintiffs

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22. See 18 U.S.C. § 3626(c) (2006).

23. 18 U.S.C. § 3626(a)(1)(A) (2006).

24. 18 U.S.C. § 3626(c)(2)(A) (2006).

25. 18 U.S.C. § 3626(c)(2)(B) (2006).

26. 231 F.3d 777 (11th Cir. 2000).

were entitled to an evidentiary hearing prior to a ruling on the termination motion; that the possibility of a future violation of law from existing practices would not prevent termination; and that particularized findings and analysis of the appropriateness of continued injunctive relief were necessary to continue such relief.<sup>27</sup>

Significantly, the court of appeals discussed the need for particularized findings in the context of a defendant's motion for termination. The court recognized that this requirement did not apply to the parties' agreements regarding injunctive relief; to the contrary, the court noted that the parties retain their ability to reach stipulations, and have those stipulations approved by the court, in the context of cases covered by PLRA:

Of course, we do not mean to suggest that the district court must conduct an evidentiary hearing about or enter particularized findings concerning any facts or factors about which there is not dispute. The parties are free to make any concessions or enter into any stipulations they deem appropriate.<sup>28</sup>

This *dictum* in *Cason* is the only published decision I could locate discussing the issue of the parties' freedom to meet the statutory requirements of PLRA through stipulation. It is fully consistent with the language of PLRA, which recognizes that consent decrees will continue to exist.<sup>29</sup>

It is also consistent with general principles of legal analysis. In *Local Number 93, International Association of Firefighters v. City of Cleveland*,<sup>30</sup> the Supreme Court considered a very similar issue. That case involved a section of Title VII of the Civil Rights Act of 1964<sup>31</sup> that prohibits any court from ordering injunctive relief benefitting any employee who had not been the victim of discrimination. The Court

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27. *Id.* at 781-85.

28. *Id.* at 785 n.8.

29. 18 U.S.C. § 3626(c)(1) (2006) (specifying the conditions for entry of a consent decree in a case subject to the restrictions of PLRA). Thus, it cannot be argued that consent decrees are prohibited under PLRA.

30. 478 U.S. 501 (1986).

31. 42 U.S.C. § 2000e-5(g) (2006).

considered whether this provision prohibited court approval of a consent decree utilizing racial preferences that might benefit persons who were not the actual victims of racial discrimination. It rejected that argument, relying on its understanding of the history of the Title VII provision, which it construed as intended to prevent employers from being forced to eliminate racial discrimination through remedies that aided non-victims, but not to preclude employers from voluntarily remedying discrimination in this manner.<sup>32</sup> The Court went on to articulate the principles that govern the scope of consent decrees suitable for approval by federal courts:

Accordingly, a consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction. Furthermore, consistent with this requirement, the consent decree must come within the general scope of the case made by the pleadings and must further the objectives of the law upon which the complaint was based. However, in addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree. Therefore, a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.<sup>33</sup>

Federal law thus recognizes a broad area in which defendants may decide to stipulate to relief without requiring plaintiffs to make an evidentiary showing justifying that relief. Necessarily, this scope is particularly wide with regard to issues in which the existence of a violation of federal law is dependent on proof of particular facts, or where a particular violation might be addressed in various ways.<sup>34</sup>

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32. *City of Cleveland*, 478 U.S. at 520-22.

33. *Id.* at 525 (internal citations, quotation marks, and brackets omitted). *Frew* cited this language with approval. *Frew v. Hawkins*, 540 U.S. 431, 438 (2004).

34. The Court's classic expression of this principle occurs in *Swift & Co. v. United States*:

#### IV. Post-PLRA Consent Decrees

My office has collected a number of examples of post-PLRA consent decrees and related orders.<sup>35</sup> Although this collection includes but a tiny sample of the variety of actual post-PLRA orders, the amount of diversity in form, language and context of these orders is striking. Many of these orders are not called orders; they use a variety of procedural devices, including Federal Rules of Civil Procedure Rule 68 offers of judgment, and some involve relatively minor aspects of a case and are relatively informal while others closely resemble traditional consent decrees.

##### A. *Forms of Orders*

At least in my office's collection, the most common name for these documents is "Settlement Agreement," or some close variant, even when the document clearly contemplates some form of court enforcement.<sup>36</sup> For example, the fifty-seven page "Memorandum of Agreement" in *Doe v. Cook County*<sup>37</sup>

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Here again the defendants ignore the fact that by consenting to the entry of the decree without any findings of fact, they left to the Court the power to construe the pleadings, and, in so doing, to find in them the existence of circumstances of danger which justified compelling the defendants to abandon all participation in these businesses, . . . and to abstain from acquiring any interest hereafter.

276 U.S. 311, 329 (1928) (internal quotation marks omitted).

35. This article does not address agreements that contemplate relief only in state court or relief limited to the reinstatement of the litigation pursuant to 18 U.S.C. § 3626(c)(2) (2006). Further, this article is based on my collection of orders related to PLRA, and that collection is far from complete. I do not necessarily endorse any of the orders discussed in this article as models for future litigation.

36. The term "settlement agreement" is ambiguous because such documents may or may not be enforceable in federal court. In order for settlements in federal cases that have been dismissed to be enforced, the terms of the settlement must be reflected in some form in the order of the court reflecting acceptance of the agreement. See *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 381 (1994).

37. No. 99 C 3945 (N.D. Ill. Feb. 10, 2000) (on file with author).

regulates conditions of confinement at the Cook County, Illinois Juvenile Temporary Detention Center. The Memorandum of Agreement provides that, upon its approval by the court, the case will be dismissed without prejudice, but the court will expressly retain jurisdiction to enter any orders necessary or appropriate to enforce the terms of the agreement.<sup>38</sup>

Other agreements are clearly designated as consent decrees.<sup>39</sup> There is no necessary difference in content between documents labeled “consent decree” and those labeled “settlement agreement” that contemplate court enforcement of the negotiated provisions. While all the consent decrees are signed by the district judge, some settlement agreements contemplating relief enforceable by the court are approved by separate orders while others are simply signed as orders by the judge.<sup>40</sup>

Some orders that were in fact adopted by stipulation of the parties do not give evidence of that fact on their face; they simply appear in the record as orders of the court, reciting the findings required pursuant to 18 U.S.C. § 3626(a) for the entry of relief.<sup>41</sup> In some cases, this form may simply reflect that the order embodies a stipulation for relief that the parties did not consider of great consequence in the course of the litigation. In other cases, this form may be desired by defendants who find it easier to be ordered by a federal court to take some action than to agree openly to such relief.

One order in my office’s files is, in form, a notice of acceptance of offer of judgment. This document is particularly interesting because the attached offer of judgment contains only defendants’ offer of attorneys’ fees along with statements of intent regarding various substantive matters, including an offer to close the local county jail by the date by which plaintiffs were required to accept or reject the offer of judgment. The offer says nothing, however, about stipulating to the required PLRA requirements, or about whether defendants agreed that

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38. *Id.* at 6.

39. *See, e.g.*, Presley v. Epps, No. 405-cv-00148 [proposed] Consent Decree (N.D. Miss. Feb. 20, 2006) (accepted by Minute Order, Apr. 26, 2006) (on file with author).

40. *Cf. Kokkonen*, 511 U.S. 375.

41. *See, e.g.*, Carty v. Turnbull, No. 94-78, Order at 1-2 (D.V.I. Sept. 20, 2000) (on file with author).

the various promises in the offer of judgment could be enforced by the court if plaintiffs accepted the offer.<sup>42</sup>

Notwithstanding the ambiguities in the offer of judgment, the final judgment in the case filed two days later recites that the terms of the judgment meet the requirements of PLRA and comply in all respects with 18 U.S.C. § 3626(a). Further, the final judgment orders the defendants to comply with the provisions set forth in the offer of judgment.<sup>43</sup> Settlement agreements also on occasion utilize more than one method of meeting PLRA's requirements. For example, in a juvenile parole case, the parties stipulated both that the case was not covered by the PLRA, and that the required PLRA findings had been satisfied.<sup>44</sup>

Finally, the parties can stipulate to other PLRA findings, in addition to those required under § 3626(a)(1). For example, 18 U.S.C. § 3626(a)(3) prohibits federal courts from issuing orders releasing prisoners from confinement unless a previous, less intrusive order has failed to cure the violation of law and the defendant has had a reasonable amount of time to comply with previous orders for relief. In addition, such orders can be issued only by three-judge courts.<sup>45</sup> The parties can stipulate to the required findings, with a three-judge court then issuing the release order.<sup>46</sup>

### B. *Language Sufficient to Comply with PLRA*

One traditional advantage of consent decrees for defendants was that in many such decrees providing for injunctive relief, plaintiffs would accept language in which the

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42. *Am. Civil Liberties Union of New Mexico v. Bd. of County Comm'rs of Valencia*, No. 97-1318 LH/WWD, Notice of Acceptance of Offer of Judgment, Exh. 1 (D.N.M. Dec. 8, 1997) (on file with author).

43. *Am. Civil Liberties Union of New Mexico*, No. 97-1318 LH/WWD, Final Judgment at 2 (D.N.M. Dec. 10, 1997).

44. *L.H. v. Schwarzenegger*, No. 2:06-CV-02042-LKK-GGH at 1, 4 (E.D. Cal. Oct. 7, 2008) (on file with author).

45. 18 U.S.C. § 3626(a)(3) (2006).

46. *See Inmates of Occoquan v. Barry*, No. 86-2128 (JLG), Population Consent Order (D.D.C. Jan. 20, 1998) (order reciting various required findings for a prisoner release order is entitled "Population Consent Order" and is signed by three judges, with the parties' consent noted on the order) (order on file with author).

defendants would continue to deny any violation of law. Defendants frequently wanted such provisions, both for political reasons and for the purpose of defending damages actions related to the injunctive claims, while the settling plaintiffs were often willing to agree to the defendants' denial of liability in return for the substantive relief offered in the consent decree.

The requirements for the entry of relief in 18 U.S.C. § 3626(a)(1) may appear in some tension with any attempt by defendants to continue to deny legal liability while agreeing to the entry of the relief sought by plaintiffs. As a consequence, a number of settlement agreements post-PLRA include explicit concessions by defendants that the conditions at issue violate the law and that an injunction is necessary to address that violation.

The language in a consent order involving the Women's Detention Center in Baltimore is typical:

The relief granted by this Consent Order is narrowly drawn and extends no further than necessary to prevent irreparable harm and injury to plaintiffs, and the relief afforded by this injunction is the least intrusive means necessary to prevent irreparable harm as the relief is limited to that which is necessary to prevent an unreasonable risk of harm and injury to the health and safety of plaintiffs.<sup>47</sup>

This consent order is signed by the court. The order also finds, "based upon the unopposed evidence regarding current conditions at WDC" that the relief is appropriate, and it recites that the court has made the findings necessary pursuant to 18 U.S.C. § 3626(a).<sup>48</sup> It is highly unlikely that this explicit concession of liability by the defendants would have appeared but for the existence of PLRA.

At the same time, many post-PLRA agreements contain explicit denials that defendants have conceded the illegality of

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47. *Duvall v. Glendening*, No. JFM-94-2541, Consent Order at 1-2 (D. Md. Aug. 22, 2004) (on file with author).

48. *Id.* at 2.

their conduct, in language similar to such provisions in traditional consent decrees.<sup>49</sup> Another common feature is to allow defendants to stipulate to an “alleged” violation of rights, as follows:

The parties stipulate that the terms of the Settlement Agreement are narrowly drawn, extend no further than necessary to correct the alleged violation of Plaintiffs’ constitutional rights, are the least intrusive means necessary to correct the alleged violation of Plaintiffs’ constitutional rights, and that the Proposed Order submitted to the District Court pursuant [to this Settlement Agreement] will include these findings.<sup>50</sup>

One strategy that some settling parties adopt is to combine a denial of liability with a stipulation that the agreement meets the requirements of PLRA, without specifically setting forth those requirements.<sup>51</sup> As noted above, another strategy is to agree to a form of order in which the court makes the findings.<sup>52</sup> In other cases the court simply makes the required findings.<sup>53</sup> A final strategy is for defendants to waive the right

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49. A typical formulation appears in the settlement agreement in *New Times, Inc. v. Ortiz*, 1:00-cv-00612-PSF-OES, Settlement Agreement at 9 (D. Colo. Aug. 19, 2004) (on file with author): “This Settlement Agreement does not constitute an admission of liability against the interest of any party. It is a compromise of a disputed claim for the sole purpose of avoiding the expense, hardship and uncertainty of litigation.”

50. *Id.* at 8.

51. *See, e.g., McClendon v. City of Albuquerque*, No. CV-95-24-MV/ACT, Stipulated Agreement Between Plaintiff Intervenors and Defendants at 1-2 (D.N.M. June 30, 2005) (on file with author).

52. *See, e.g., Am. Civil Liberties Union of New Mexico v. Bd. of County Comm’rs of Valencia*, No. 97-1318 LH/WWD, Final Judgment at 2 (D.N.M. Dec. 10, 1997) (the requisite PLRA findings all appear in the order accepting the offer of judgment); *Carty v. Turnbull*, No. 94-78, Order (D.V.I. Sept. 20, 2000) (there is no stipulation by the parties, but rather the findings appear in the court’s order, with counsel for both parties signing the order).

53. *Jones’ El v. Berge*, No. 00-C-0421-C, Opinion and Order at 8-9 (W.D. Wis. June 25, 2002) (making required findings in order separate from order accepting the parties’ settlement agreement) (on file with author). The settlement agreement had referred to “alleged” violations and contained defendants’ denial of liability, although defendants also stipulated that the agreement was consistent with all PLRA requirements. *Jones’ El v. Berge*,

to challenge the settlement for a set period. Thus, while defendants in such agreements may not affirmatively concede that the proposed agreement meets the PLRA requirements, they explicitly agree to forego any challenge for a specified period of time.<sup>54</sup>

## V. Conclusion

Whatever the form, court-ordered relief agreed to by the parties persists, despite PLRA, because in a variety of circumstances it remains in defendants' interest to negotiate such agreements. As the Supreme Court has recognized, consent decrees allow the parties to "save themselves the time, expense, and inevitable risk of litigation."<sup>55</sup> The persistence of consent decrees in the post-PLRA world demonstrates not only the truth of this observation by the Supreme Court, but the continued relevance of prison conditions-of-confinement litigation. Given the extent to which PLRA generally places a thumb on the scales of justice in favor of defendants, the fact that so many defendants find it necessary to agree to consent decrees suggests the strength of the evidence that supports plaintiffs' claims.

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No. 00-C-0421-C, Settlement Agreement at 11-12 (Jan. 24, 2002) (on file with author).

54. *Id.* at 11. As noted above, it is not unusual for such settlements to adopt more than one strategy to deter a defendant from challenging an agreement on PLRA grounds after the agreement has been signed.

55. *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971).