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Watching the Watchmen after Termination of Injunctive Relief

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"Watching the Watchmen" After Termination of Injunctive Relief*

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I. Introduction

About four years ago, I attended a conference sponsored by the Council of Europe in which delegates from various European Union countries discussed how to assure decent and humane conditions in their prisons, pursuant to their obligations under the European Convention on Human Rights. I learned that these countries generally use one of two models to satisfy these obligations. One model relies on an agency within the prison authority that is charged with assuring that conditions in the prisons and jails comply with the convention, and a second model relies on some form of an ombudsman outside the direct control of the prison authority.

Both models—the insider model and the ombudsman model—have a potential problem, but it is not the same problem. The potential problem for supervision when the monitor is part of the prison agency itself is a lack of will to assure compliant conditions because of the danger that the monitor will be captured by the prison agency. In contrast, the problem for those countries relying on an ombudsman system is typically not a lack of will but a lack of power, since the ombudsman generally lacks the authority to order changes in the agency.

In the United States, since the 1970's, we have relied almost exclusively on a third possible model for preventing abuse in prisons, and that mechanism is the federal courts. We know that the model of reform through the courts can work because it has worked in the United States.[1] It makes sense that the

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* "Quis custodiet ipsos custodes?" (Who shall watch the watchmen themselves?) JUVENAL, SATIRES, VI, 347.

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1. *See, e.g.*, MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE, HOW THE COURTS REFORMED AMERICA'S PRISONS

model of prison reform through the courts can work and has worked in this country, because the federal courts potentially possess the two characteristics of will and power that are necessary to control prison abuse: they unquestionably have the power, and under the right circumstances they have the will, because they are independent both of the state governments and the federal executive branch.

These observations necessarily lead me to have some serious questions about the efficacy of maintaining prison reform in the aftermath of litigation. It is possible that the former defendants, after termination of court supervision, may have the will to maintain constitutional conditions, and I look forward to Carl Reynolds' remarks about how the Texas Department of Criminal Justice is attempting to maintain accountability in the aftermath of its major state-wide prison conditions litigation; *Ruiz v. Johnson*.[2] At a minimum, however, maintaining accountability by virtue of internal monitoring devices is contingent upon the decision of the head of the agency to maintain internal monitoring and upon the monitoring arm's ability to avoid capture.

II. Leaving Monitoring Mechanisms in Place

The question of how to assure the persistence of reform of prison conditions has taken on added urgency since the 1996 enactment of the Prison Litigation Reform Act (PLRA).[3] One section of PLRA now requires termination of injunctive relief affecting prison conditions, upon a motion by a defendant, unless a "current and ongoing" violation of federal law exists.[4] In other words, the only injunctive orders regarding prison conditions that a federal court may retain are those that have been ineffective to eliminate the constitutional or statutory violation.

(1998); Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639 (1993).

2. 154 F. Supp. 2d 975, 980-84 (S.D. Tex. 2001) (detailing a history of the case). The final termination order is unpublished. *See* Carl Reynolds, *Effective Self-Monitoring of Correctional Conditions*, 24 PACE L. REV. 769 (2004).

3. Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (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).

4. *See* 18 U.S.C. § 3626(b) (2003).

This standard is a substantial departure from previous doctrine regarding the point at which an injunction may be terminated. The Supreme Court provided guidance to lower courts on standards for ending court-ordered injunctive relief in *Board of Education of Oklahoma City v. Dowell*:[5]

> In the present case, a finding by the District Court that the Oklahoma City School District was being operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it was unlikely that the school board would return to its former ways, would be a finding that the purposes of the desegregation litigation had been fully achieved. No additional showing of "grievous wrong evoked by new and unforeseen conditions" is required of the school board.[6]

Congress' elimination, in PLRA, of any requirement that the defendants demonstrate that the constitutional violation is unlikely to return means that plaintiffs in prison conditions cases are likely to see injunctive relief terminated much earlier than it would have been under previous law. Accordingly, it is critical for plaintiffs' counsel to attempt to maintain meaningful checks against abuse after injunctive relief has terminated. Logically there are two kinds of things that plaintiffs' counsel can try. The first category involves setting up mechanisms to limit abuses prior to the end of litigation, and several judges have included requirements for such mechanisms in their orders granting termination.[7]

Sometimes the plaintiffs' counsel can reach agreement with defendants to leave such mechanisms in place. For example, in *Cody v. Hillard*,[8] a South Dakota prison case, the settlement agreement allowed plaintiffs' counsel to monitor conditions for three years after dismissal, required annual fire and life safety surveys by the South Dakota fire marshal and annual work place safety inspections by the South Dakota Office of Risk

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5. 498 U.S. 237 (1991).

6. *Id.* at 247.

7. *See, e.g.*, Hadix v. Johnson, No. 80-CV-73581 (E.D. Mich. June 27, 2001) (order of termination); United States v. Michigan, No. 90-1701 (W.D. Mich. May 1, 1990) (unpublished order). I served as counsel for plaintiffs in *Hadix* and as counsel for *amicus curiae* in *United States v. Michigan*.

8. *See* Cody v. Hillard, 88 F. Supp. 2d 1049 (D.S.D. 2000) (order approving settlement agreement). I served as counsel for plaintiffs in this case.

Management.[9] For medical care, the parties agreed that a specified continuous quality improvement program would be internally maintained. Since these were the three areas where the defendants had previously experienced the most difficulties in compliance, these were the most important areas to provide for a monitoring mechanism.[10]

I am least confident that the monitoring left in place for medical care will be effective, despite the fact that the defendants were accredited by the National Commission on Correctional Health Care (NCCHC). Indeed, I am generally skeptical, based on my experience with accredited facilities, that accreditation by either the American Correctional Association (ACA) or by the NCCHC is of great value. Although these are the two most widely known organizations that inspect and accredit correctional agencies and programs, accreditation by neither body assures the maintenance of constitutional conditions.[11] At least in some jurisdictions, local or state agencies that routinely per-

9. The South Dakota Office of Risk Management performs inspections similar to those conducted by the federal Occupational Safety and Health Administration (OSHA).

10. *See* Plaintiffs' Motion for Preliminary Approval of the Settlement Agreement and Approval of Notice to the Class, Cody v. Hillard, (D.S.D. Mar. 15, 1999) (No. 80-4039).

11. The federal courts have frequently recognized that accreditation by agencies such as the NCCHC does not guarantee the existence of constitutional standards. *See* Ruiz v. Johnson, 37 F. Supp. 2d 855, 924 (S.D. Tex. 1999), *rev'd and remanded on other grounds sub nom.* Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001) ("One of the recurring themes of the evidence presented in the hearing was that constitutional policies do not necessarily ensure constitutional practices. While NCCHC accreditation does bolster defendants' claims that its medical care system is functioning constitutionally, the accreditation simply cannot be dispositive of such a conclusion."); Wyatt *ex rel.* Rawlins v. Poundstone, 985 F. Supp. 1356, 1429 (M.D. Ala. 1997) (stating that accreditation by Joint Commission on Accreditation of Healthcare Organizations (JCAHO) is not equivalent to, or a substitute for, compliance with either the consent decree at issue or with minimal constitutional standards); Robbins v. Budke, 739 F. Supp. 1479, 1481 (D.N.M. 1990) (stating that accreditation by JCAHO "is by no means an assurance that abuse and neglect of patients does not take place in an institution, or that patients' constitutional and statutory rights are being protected"); LaMarca v. Turner, 662 F. Supp. 647, 655 (S.D. Fla. 1987) (stating that accreditation by the American Correctional Association (ACA) has "virtually no significance" to lawsuit because accredited prisons have been found unconstitutional by the courts); Boulies v. Ricketts, 518 F. Supp. 687, 689 (D. Colo. 1981) (rejecting argument that accreditation by ACA entitled defendants to summary judgment on claim of constitutional inadequacy of law library as "simply ludicrous"); Russell v. Johnson, 2003 LEXIS 8576, at *4, 2003 WL 22208029, at *5 (N.D. Miss. May 21, 2003) (stating that ACA

form monitoring in the community, such as the fire department or the health department, may be preferable to national agencies that specialize in corrections because agencies that routinely monitor comparable community activities are more likely to apply reasonable standards to conditions than are national organizations run and funded in substantial part by the correctional agencies they accredit, and staffed by professionals with close ties to corrections agencies.

III. Reopening Cases Under Rule 60(b)(6)

The second category of actions that plaintiffs' counsel can take obviously involves actions subsequent to termination. There are no reported cases in which, following termination of an injunction pursuant to PLRA, plaintiffs have attempted to reopen the judgment because the unconstitutional conditions have returned, but this is a litigation strategy that deserves exploration.

This issue is particularly important because the provisions in PLRA regarding the termination of injunctions have been interpreted by the federal courts to require termination of injunctions whenever there is no current and on-going constitutional or statutory violation, regardless of the likelihood that the violation will return shortly after injunctive relief is terminated.[12] Accordingly, as written, PLRA apparently requires a federal court to terminate an injunction even if the defendants announce their intention to revert to their previous actions as soon as the court has acted. Indeed, a legislative report regarding this provision suggests that Congress intended for injunctive re-

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accreditation neither mooted constitutional challenge to conditions on death row, nor showed that conditions met constitutional standards).

12. *See* Para-Prof'l Law Clinic at SCI-Graterford v. Beard, 334 F.3d 301, 304 (3d Cir. 2003) (holding that under PLRA only a violation of law existing at the time a court hears a defendant's motion to terminate relief will prevent termination, even if a future violation of law is likely); Castillo v. Cameron County, 238 F.3d 339, 353 (5th Cir. 2001) (same); Cason v. Seckinger, 231 F. 3d 777, 783-84 (11th Cir. 2000) (same); *see also* Gilmore v. California, 220 F.3d 987, 1009 n.27 (9th Cir. 2000) (stating that in PLRA Congress intended to require federal courts to terminate injunctive relief even if a constitutional violation is imminent).

lief to terminate even if the defendants were "poised to resume a prior violation of federal rights."[13]

If a constitutional violation returns after a defendants' motion for termination pursuant to PLRA has been granted, the plaintiffs can seek to vacate the judgment of dismissal by filing a motion under Federal Rule of Civil Procedure (Rule) 60(b), which codifies the power of federal courts to modify final judgments in civil cases. Ordinarily motions to modify final injunctive relief are filed pursuant to Rule 60(b)(5). This section, however, envisions relief if "it is no longer equitable that the judgment should have prospective application . . . ."[14] Once an injunction has been terminated, it no longer has prospective application, so this section cannot be used to restore a previously terminated injunction.[15]

Because Rule 60(b)(5) is inapplicable, a plaintiff who seeks to restore an injunction after a PLRA termination motion has been granted will be required to proceed under Rule 60(b)(6), which is the catch-all clause allowing alteration of a judgment based on "any other reason justifying relief from the operation of the judgment."[16] The first requirement for relief under Rule 60(b)(6) is a demonstration that relief is unavailable under any other provision of Rule 60.[17] In light of the unavailability of re-

13. H.R. CONF. REP. No. 105-405, at 133 (1997). The original provision of PLRA had provided that injunctive relief would not terminate if there was a "current or ongoing" violation of law. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 802(b)(3), 110 Stat. 1321 (1998). The 1997 amendments changed this language to mandate termination unless a "current and ongoing" violation of law existed. Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 123(a)(2), 111 Stat. 2440 (1997).

14. FED. R. CIV. P. 60(b)(5).

15. *See* Dowell v. Bd. of Educ. of Okla. City Pub. Sch., 8 F.3d 1501, 1509 (10th Cir. 1993) (observing that Rule 60(b)(5) could not be used to reinstate terminated injunction in school desegregation case; plaintiffs had to meet the higher standard of Rule 60(b)(6)); Lee v. Talladega County Bd. of Educ., 963 F.2d 1426, 1433 (11th Cir. 1992) (holding that an order that implicitly dissolved an injunction was not an order with prospective application, so that Rule 60(b)(5) was inapplicable); Twelve John Does v. District of Columbia, 841 F.2d 1133 (D.C. Cir. 1988) ("[I]t is difficult to see how an unconditional dismissal could ever have prospective application within the meaning of Rule 60(b)(5).").

16. FED. R. CIV. P. 60(b)(6).

17. *See* Liljeberg v. Health Sers. Acquisition Corp., 486 U.S. 847, 863 & n.11 (1988) (stating that Rule 60(b)(6) grants federal courts authority to provide relief

lief under Rule 60(b)(5), discussed above, this demonstration is easy.[18]

The other requirement for relief under Rule 60(b)(6) is a showing of "extraordinary circumstances" justifying relief from the judgment.[19] As it happens, one class of cases in which the federal courts have considered whether "extraordinary circumstances" justify relief under this section has involved claims that the non-moving party failed to carry out duties under a settlement agreement. While there are differences among the circuits regarding the circumstances under which relief may be obtained under the Rule when a settlement agreement is violated after dismissal, none of these cases suggests that reopening is barred if the settlement agreement has been incorporated into a court order, or otherwise made enforceable. Moreover, there are strong suggestions from the Supreme Court that reopening is available under the rule when the settlement agreement has been incorporated into a court order.

Indeed, several circuits have allowed reopening under Rule 60(b)(6) when the district court had not provided for enforcement of the settlement prior to dismissal. In *Keeling v. Sheet*

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from a judgment under Rule 60(b)(6) only when relief is not available under any other provision of Rule 60(b)).

18. The first four sections of Rule 60(b) provide for relief in the following circumstances:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; [or] (4) the judgment is void . . . .

FED. R. CIV. P. 60(b)(1)-(4).

Whether the return of unconstitutional conditions is a surprise or involved misrepresentation by defendants at the time of dismissal of the previous injunction is irrelevant because the predictability of a return of such conditions would have been irrelevant to termination. Nor is the second provision regarding newly discovered evidence relevant, because this section of Rule 60 is designed to provide relief if it is likely that the judgment would have been different based on evidence that existed at the time of trial. *See* United States v. McGaughey, 977 F.2d 1067, 1075 (7th Cir. 1999) (stating requirement that evidence existed at time of trial as one element of test for relief under Rule 60(b)(2)); Jones v. Aero/Chem. Corp., 921 F.2d 875, 878 (9th Cir. 1990) (same). In circumstances in which the constitutional violation returned only after dismissal of injunctive relief, this section will provide no relief. A judgment obtained by defendants pursuant to PLRA is also, of course, neither fraudulent nor void.

19. *See Liljeberg*, 486 U.S. at 863-64.

Metal Workers International Ass'n, Local Union 162,[20] the Ninth Circuit affirmed a district court order granting relief under the rule, reasoning that consistent non-compliance with the terms of the settlement agreement, which had the effect of frustrating the purpose of the agreement, constituted an "exceptional circumstance."[21] *Keeling* is a puzzling decision because it also states that ordinarily, upon repudiation of a settlement agreement, the non-breaching party's recourse is a new suit for breach of contract and that party "may not, as here, reopen the underlying litigation after dismissal."[22] For that proposition, *Keeling* cites an earlier Ninth Circuit case,[23] but nothing in that case supports the proposition that ordinarily non-compliance with a settlement agreement must be addressed through a new breach of contract suit.[24] Moreover, *Keeling* says the following: "Repudiations of a settlement agreement that terminated litigation pending before a court constitutes an extraordinary circumstance, and it justifies vacating the court's prior dismissal order."[25]

The Sixth Circuit, in *Aro Corp. v. Allied Witan Co.*,[26] similarly held that the court below correctly exercised its discretion in vacating an order of dismissal based on a party's attempted repudiation of a settlement. Indeed, the Court of Appeals in dicta indicated that it was the duty of the court to enforce the agreement.[27] The language in *Aro Corp.* is far-reaching; the court endorsed resort to Rule 60(b)(6) without applying the "extraordinary circumstances" test or investigating whether a re-

20. 937 F.2d 408 (9th Cir. 1991).

21. *Id.* at 410.

22. *Id.*

23. TNT Mktg., Inc. v. Agresti, 796 F.2d 276 (9th Cir. 1986), *cited in Keeling*, 937 F.2d at 410.

24. *TNT Mktg., Inc.*, 796 F.2d at 278. This case involved enforcement of a stipulated judgment in a contempt proceeding and it discusses neither reopening under Rule 60 nor breach of contract suits.

25. *Keeling*, 937 F.2d at 410 (citations omitted). Perhaps the court is distinguishing between cases involving general claims that the opposing party breached a settlement agreement and cases in which the party opposing reopening admits a deliberate breach.

26. 531 F.2d 1368 (6th Cir. 1976).

27. *Id.* at 1371. As noted *infra*, these dicta are inconsistent with the Supreme Court's later decision in *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 380-81 (1994), holding that a district court does not have inherent power to enforce a settlement agreement. *See infra* notes 43-45 and accompanying text.

sort to Rule 60 was unnecessary because of the availability of an alternative remedy for breach of contract.[28] The Sixth Circuit specifically rejected the argument that the settlement agreement was a contract between non-diverse parties, so that the district court lacked jurisdiction to enforce it, and thus any breach of the contract should be determined by state courts.[29] Accordingly, the decision sub silentio rejects an argument that the existence of a remedy through an independent breach of contract suit is relevant to the availability of relief under Rule 60(b)(6).

In *Fairfax Countywide Citizens v. Fairfax County*,[30] the Fourth Circuit reviewed a case in which the district court had vacated a dismissal pursuant to Rule 60(b)(6) and enforced a settlement agreement. The Court of Appeals began its opinion by announcing its agreement with the Sixth Circuit in *Aro Corp.* that, upon repudiation of a settlement agreement that had terminated litigation, a district court has the authority under Rule 60(b)(6) to vacate its prior dismissal and restore the case to the docket.[31] The court disagreed, however, with the Sixth Circuit that a district court has a general inherent power to enforce a settlement agreement.[32] Because the settlement agreement at issue had not been incorporated into a court order, and because there was no independent basis for federal jurisdiction over the settlement agreement,[33] the Fourth Circuit affirmed the decision of the district court to vacate the dismissal but reversed its order enforcing the settlement.[34]

In a later case, the Fourth Circuit considered a variant of the problem of enforcing a settlement agreement after dismissal. After a settlement and dismissal in *Vincent v. Reynolds Memorial Hospital, Inc.*,[35] the state courts invalidated the settlement agreement as against public policy. Notwithstanding

28. *See id.*

29. *Id.*

30. 571 F.2d 1299 (4th Cir. 1978).

31. *Id.* at 1302-03.

32. *Id.* at 1303. As indicated in *supra* notes 26-29 and accompanying text, this aspect of the decision in *Fairfax Countywide Citizens* correctly anticipated *Kokkonen*, 511 U.S. at 380-81.

33. *Id.* The reasoning of the Fourth Circuit is also consistent with the Supreme Court's later decision in *Kokkonen*, 511 U.S. at 380-381.

34. *Fairfax Countywide Citizens*, 571 F.2d at 1306.

35. 728 F.2d 250 (4th xCir. 1984).

that fact, the district court refused to vacate the dismissal of the case. The Fourth Circuit reversed, holding that relief should have been granted pursuant to Rule 60(b)(6); since no action for breach of the agreement was available, the moving party should have been allowed to reopen the federal litigation.[36]

In contrast, in *Harman v. Pauley*,[37] the Fourth Circuit, applying a discretionary "interests of justice" standard refused to vacate a dismissal when the movant alleged that only one of the opposing parties had breached the settlement, the movant had already instituted a breach of contract action against that party, and the movant did not suggest any reason why a breach of contract action was an inadequate remedy.[38]

Similarly, in *Sawka v. Healtheast, Inc.*,[39] the Third Circuit stated that the "extraordinary circumstances" required to justify reopening of a judgment could not be shown simply by a showing that the opposing party had breached a settlement agreement, in light of the availability of a new action for breach of contract.[40] At the same time, however, the Third Circuit distinguished its earlier case of *Kelly v. Greer*.[41] In that case, reopening to enforce a settlement had been granted, but the settlement agreement had been read into the record, a circumstance that "evidenc[ed] an intent that the court [would] continue to actively supervise performance."[42] Accordingly, the ground upon which the Third Circuit distinguished *Kelly* suggests that "extraordinary circumstances" can be shown where a settlement that has been incorporated into an order of the court is involved.

In *Kokkonen v. Guardian Life Insurance Co.*,[43] the Supreme Court held that, absent some independent basis for federal jurisdiction, a federal court cannot enforce a settlement agree-

36. *Id.* at 251.

37. 678 F.2d 479 (4th Cir. 1982).

38. *Id.* at 481-82.

39. 989 F.2d 138 (3d Cir. 1993).

40. *Id.* at 140-41.

41. 334 F.2d 434 (3d Cir. 1964).

42. *Sawka*, 989 F.2d at 141 n.3. After the Supreme Court's decision in *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994), *see infra* notes 43-46 and accompanying text, it is clear that reading the settlement agreement into the record did not make the agreement enforceable. *See Kokkonen*, 511 U.S. at 381.

43. 511 U.S. 375 (1994).

ment unless the agreement had been incorporated into a court order, or the court had explicitly retained jurisdiction to enforce the settlement.[44] The decision in *Kokkonen* does not directly address the propriety of reopening a judgment under Rule 60(b)(6) because of a party's failure to comply with a settlement agreement.[45] The logic of the decision in *Kokkonen*, however, supports the argument that when a settlement agreement has been incorporated into a court order, the court can grant relief under Rule 60(b)(6) if the order is breached:

> The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal-either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist.[46]

This reasoning necessarily envisions that, if a court incorporated a settlement agreement into an order and then dismissed the case, enforcement of the settlement would require a reopening of the case and thus recourse to Rule 60(b).

This reading of *Kokkonen* is consistent with the First Circuit's decision in *United States v. Baus*,[47] in which that court reversed a district court's refusal to grant relief and held that the defendants were entitled to a hearing on their allegations that the United States had breached a stipulated judgment. The court characterized as "well-accepted" the principle that material breach of a settlement agreement incorporated into a court judgment entitles the non-breaching party to relief under Rule 60(b)(6) and it emphasized that, absent such relief, "[m]aterial breach of such a solemn obligation presents an extraordinary situation of permitting a party to benefit from a judgment the terms of which it has deliberately disregarded."[48]

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44. *Id.* at 380-81.

45. The Court does note that there is a split of authority among the circuits regarding the propriety of reopening a settlement agreement under the Rule. *See id.* at 378.

46. *Id.* at 381.

47. 834 F.2d 1114 (1st Cir. 1987).

48. *Id.* at 1124.

Baus appears to be the only Court of Appeals case regarding reopening of a dismissal of a commercial settlement agreement that had been incorporated into a court judgment. In consent judgments contemplating complex injunctive relief, including consent judgments providing for injunctive relief in prison cases, the court entering the judgment does not typically dismiss the case.[49] Not surprisingly, then, there are no cases involving an attempt to reopen a case settled through agreement to an enforceable complex injunction when the case had been dismissed immediately subsequent to the settlement.

The only appellate decision involving an attempt to reopen a complex injunction dismissed following a finding of compliance is *Dowell v. Board of Education of Oklahoma City*,[50] in which the Court of Appeals, without describing the plaintiffs' arguments, summarily held that the plaintiffs had failed to demonstrate "extraordinary circumstances" that would justify relief under Rule 60(b)(6).[51]

Differences between the plaintiffs' unsuccessful motion in *Dowell* and motions to reopen injunctions terminated because of PLRA suggest that courts might be significantly more responsive to such motions in PLRA cases. As noted above, absent the PLRA, the law does not require the termination of an injunction simply because the defendants have currently and temporarily achieved compliance.[52] The PLRA requirement that injunctive relief terminate unless the court finds the existence of a current and ongoing constitutional violation suggests that a court would be required to terminate relief even if the court were certain that the day following dismissal the defendants would return to their unconstitutional practices.[53]

In *Gilmore v. California*, the Ninth Circuit considered an argument that this provision of PLRA violated the constitu-

49. *See, e.g.*, Cody v. Hillard, No. 80-4039 (D.S.D. July 8, 1985) (retaining jurisdiction to enforce the consent decree); Hadix v. Johnson, No. 80-73581 (E.D. Mich. Feb. 13, 1985) (consent decree); *see also* Hadix v. Johnson, (E.D. Mich. May 13, 1985) (consent decree providing that the court retains jurisdiction for enforcement accepted by court).

50. 8 F.3d 1501 (10th Cir. 1993). This is a later stage of the litigation in *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991).

51. *Dowell*, 8 F.3d at 1509.

52. *See supra* notes 12-13 and accompanying text.

53. *See infra* notes 54-56, 64-68 and accompanying text.

tional requirement of separation of powers "by preventing the courts from providing the remedy necessary to prevent reversion to past unconstitutional practices."[54] The Court of Appeals characterized the challenge to the provision as "serious"[55] but declined to address the argument on the ground that, because the court was for other reasons remanding the case to the district court, the plaintiffs' claim of a constitutional violation existed could be explored by the district court. By the time of remand, the "imminent" violation alleged by the plaintiffs might have come into existence; if it had not materialized, the plaintiffs' argument would be moot.[56] While superficially appealing, the court's analysis does not dispose of one plausible set of circumstances. It could be that the constitutional violation is "imminent" in the sense that it will return as soon as the injunction is lifted, although it will not return as long as the injunction remains in place.

If a constitutional violation returned after injunctive relief was terminated pursuant to the PLRA, the plaintiffs theoretically would be able to file a new lawsuit seeking relief from the renewed constitutional violation. In practice, however, they could be unable to seek a new injunction from the federal courts for many months because a separate provision of PLRA prohibits federal courts from entertaining suits challenging prison conditions of confinement until the plaintiffs have exhausted available administrative remedies.[57] A prisoner generally must go through several levels of administrative appeals to obtain an administrative decision, and there is no requirement in PLRA that the grievance system provide a final decision in any particular amount of time.[58] Accordingly, the separation of powers

54. Gilmore v. California, 220 F.3d 987, 1009 n.27 (9th Cir. 2000); *see also* 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) (arguing that, when constitutional rights are at stake, Congress must not limit the powers of the federal courts in a manner that leaves them with authority "to grant only plainly inadequate relief").

55. *Gilmore*, 220 F.3d at 1009 n.27.

56. *Id.*

57. This provision of PLRA is codified in 42 U.S.C. § 1997e(a) (1996).

58. *See id.* The Seventh Circuit has held that grievance system determinations that a prisoner has waived filing a grievance are binding on the federal courts, so that a prisoner whose grievance is rejected administratively can never file a federal lawsuit. Pozo v. McCaughtry, 286 F.3d 1022 (7th Cir. 2002), *cert.*

problems posed by application of PLRA stem not simply from the requirement that relief terminate even if a violation is certain to return, but from the prohibition on new litigation for an unspecified period of time that is entirely determined by the prison authority.[59]

The combination of the requirement that federal courts must terminate injunctive relief, even when the resumption of constitutional violations is certain, with the requirement that prisoners can be indefinitely delayed in gaining access to a federal forum to address their federal constitutional claims raises serious constitutional questions because of the severe restrictions that PLRA places on the remedial powers of the federal courts.[60]

These questions can be avoided by recognizing that the return of constitutional violations is an "extraordinary circumstance" that justifies reopening of the dismissal of previous relief pursuant to Rule 60(b)(6). In the absence of the availability of relief under Rule 60(b)(6), the potential constitutional questions would be particularly serious because there is no realistic alternative remedy available to the plaintiffs that will grant them immediate access to a federal forum; a new lawsuit could not be filed until the plaintiffs have succeeded in exhausting available administrative remedies.

Although I have relied on cases involving settlement agreements in support of the argument that Rule 60(b)(6) should be available to reopen relief when constitutional violations return, court-ordered relief subject to termination under PLRA can involve injunctive relief resulting from either litigation or a settlement. The distinction between the two is of little relevance for

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denied, 537 U.S. 949 (2002); *see also* Steele v. New York State Dep't of Corr. Serv., 2000 LEXIS 17031, 2000 WL 777931 (S.D.N.Y. June 19, 2000) (dismissing case for non-exhaustion because prisoner had engaged in "deliberate bypass" by failing to file a grievance, even though he was out of the facility for the entire period in which he could have filed, because the grievance system provided for late filings in "extreme circumstances").

59. *But see* Marvin v. Goord, 255 F.3d 40, 43 (2d Cir. 2001) (stating in dicta that PLRA's exhaustion provision does not preclude courts from exercising their traditional equitable powers to prevent irreparable injury pending exhaustion of administrative remedies); Jackson v. District of Columbia, 254 F.3d 262, 268 (D.C. Cir. 2001) (same).

60. *See supra* notes 4, 13, 54 and accompanying text.

the purposes of determining the applicability of Rule 60(b)(6),[61] because the relevant "extraordinary circumstance" is the defendants' failure to live up to court-ordered responsibilities.

Courts that have considered violation of a settlement not incorporated into a court order to constitute an "extraordinary circumstance" justifying relief can scarcely hold that violation of a court order is a less serious act. Accordingly, existing authority from the courts of appeals regarding reopening of dismissals based on settlement agreements, as well as general considerations regarding Rule 60(b)(6), supports the conclusion that the return of constitutional violations following termination of relief under PLRA can constitute an "extraordinary circumstance" justifying relief under the rule. Indeed, as the First Circuit emphasized in *United States v. Baus*,[62] it is the fact that a party violated a judgment that creates the "extraordinary circumstance."[63]

An example of a case that would present the most compelling arguments for reopening under Rule 60(b) is suggested by the Third Circuit's opinion in *Para-Professional Law Clinic at SCI-Graterford v. Beard*.[64] In that case, the court of appeals affirmed the district court's termination, pursuant to PLRA, of injunctive relief requiring the defendants to maintain a prison law clinic in order to provide prisoners with access to the courts. The plaintiffs offered deposition testimony by the Secretary of Corrections that he intended to close the clinic at some point in the future.[65] Because the plaintiffs nonetheless conceded that while the clinic remained opened, there was no constitutional violation, the court of appeals held that PLRA required termination.[66] At the same time, the court of appeals "encourage[d] defendants in the strongest possible terms to reconsider any plan they may have to close the Clinic,"[67] and noted that closing

61. In either case, in light of the requirements of PLRA, the relief would be enforced only to the extent that its violation produced a current and ongoing constitutional violation.

62. 834 F.2d 1114 (1st Cir. 1987).

63. *Id.* at 1124.

64. 334 F.3d 301 (3d Cir. 2003).

65. *Id.* at 304 n.1.

66. *Id.* at 304-05.

67. *Id.* at 305 (footnote omitted).

the clinic would be likely to result in additional intervention from the federal courts.[68]

If the defendants were nonetheless to close the clinic, allowing the constitutional violation to return, the prisoners should not be stripped of their constitutional rights while they seek to complete exhaustion of administrative remedies. Nor should federal courts be required to stand by helplessly, forced to dismiss an existing injunction and powerless to issue a new one while potential plaintiffs struggle with the vagaries of the prison grievance system. The availability of Rule 60(b) in such circumstances will substantially decrease the incentives for defendants to move to terminate injunctions with the intention of immediately resuming previous unlawful behavior.

Of course, previously cured constitutional violations can return under a variety of circumstances, and courts might be more inclined to find "extraordinary circumstances" justifying reopening when the defendants deliberately allowed the constitutional violation to return than when the defendants inadvertently allowed the constitutional violation to return. The length of elapsed time prior to the return of the violation might also influence the court's willingness to infer that the violation was deliberate and therefore "extraordinary."[69] Regardless of the precise circumstances, however, a court ought to view with concern the claim that, although injunctive relief terminated solely because of the cessation of a constitutional violation has now returned, the plaintiffs have no remedy.[70]

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68. *Id.* at 306.

69. *See supra* note 25 and accompanying text (suggesting that *Keeling v. Sheet Metal Workers Int'l Ass'n, Local Union 162*, 937 F.2d 408, 410 (9th Cir. 1991), implicitly distinguishes between deliberate breaches and other breaches of a settlement agreement, and that it considered only deliberate breaches to constitute "extraordinary circumstances" justifying reopening of a final judgment).

70. In a somewhat comparable context, Congress in PLRA endorsed the concept of reopening a judgment to allow plaintiffs to seek relief from violations of law if such violations return following dismissal. *See* 18 U.S.C. § 3626(c)(2) (1997) (allowing parties to enter into settlement agreements that are not limited to addressing constitutional or statutory violations as long as the agreement is enforceable solely through the reinstatement of the settled case).

IV. Conclusion

It is possible that in the future the United States will develop workable alternatives to prison reform through the federal courts. Right now, however, there are no such obvious alternatives that combine the will and power necessary to reform currently unconstitutional prison systems, or even to maintain conditions in those facilities that have passed through the judicial reform process. For that reason, it is critically necessary to fashion new tools to assure that the federal courts retain the remedial powers they need to enforce constitutional mandates. One of the tools that may fill a gap in the remedial powers of the federal courts is Rule 60(b)(6), and plaintiffs' counsel should carefully consider its possible effectiveness when constitutional violations return following the termination of injunctive relief.