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The Constitutionality and Implications of the Prison Litigation Reform Act

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THE CONSTITUTIONALITY AND IMPLICATIONS OF THE PRISON LITIGATION REFORM ACT*

I. INTRODUCTION

"the degree of civilization in a society is revealed by entering its prisons."[1]

Twenty-five years ago, thirty-nine men died in the Attica Prison rebellion when New York State forcefully and unjustifiably took over the institution.[2] The inhumane conditions of the Attica prison which led to this rebellion were reflected in one inmate's statement that "[i]f we cannot live as people, then we will at least try to die as men."[3] In its report on this rebellion, the New York State Special Commission on Attica concluded that "Attica is every prison; and every prison is Attica."[4]

Although this rebellion prompted change in prison conditions, the resulting improvements have been modest at best.[5] America's prisons continue to suffer from severe overcrowding; even Attica houses the same number of inmates it did twenty-five years ago.[6]

In 1994, 1.5 million people were housed in federal, state, and local prisons in this country—almost three times the 1980 prison population.[7]

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* The author would like to thank Professor Michael Perlin for the continuous advice, support, and encouragement he provided, and especially for his dedication to, and belief in, the prospect of publishing this note.

1. Benjamin v. Jacobson, 935 F. Supp. 332, 340 (S.D.N.Y. 1996) (citing F. DOSTOYEVSKY, THE HOUSE OF THE DEAD 76 (C. Garnett trans., 1957)).

2. *See* David C. Leven, *25 Years After Attica*, N.Y.L.J., Sept. 19, 1996, at 2.

3. *Id.* at 2.

4. NEW YORK STATE SPECIAL COMM'N ON ATTICA, ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA xii (1972).

5. *See, e.g.*, Leven, *supra* note 2, at 2.

> The rebellion and the conditions that it exposed created an impetus for change, yet only modest improvements have been made. Our prisons today are even more overcrowded warehouses where many inmates must spend 15 to 23 hours a day in 50 to 60 square-foot cages, euphemistically called cells, and close to a thousand inmates are now double-celled in space that was built, but is hardly adequate, for one inmate.

Id.; *see also* Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971).

6. *See* Leven, *supra* note 2, at 2.

7. *See* Paula Mergenhagen, *The Prison Population Bomb*, *in* AMERICAN DEMOGRAPHICS, Feb. 1996, at 36; U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1995, at 548 (Kathleen Maguire &

Given this increase, it is not surprising that in 1995, the Federal Bureau of Prisons functioned at 26% over capacity, and state prisons were 14% to 25% over capacity.[8] In addition to overcrowded conditions, prisoners are often personally violated, and their safety is habitually at risk.[9] Approximately 300,000 men are sexually assaulted every year in prison, and an estimated 60,000 are raped each day behind bars.[10] Reports also indicate that the statistics of assault victims are even more dramatic in juvenile detention centers.[11] Against this backdrop of constitutional violations, prisoners are now faced with an unprecedented statute that limits their ability to bring civil suits for these violations.[12]

In April 1996, the President signed into law the Prison Litigation Reform Act (PLRA).[13] The Act places restrictions on prisoners' ability to bring civil actions against officials for violations of their constitutional rights by imposing filing fees and requiring a more stringent standard for granting relief.[14] Under the Act, previously adjudicated cases, which were resolved through consent decrees, now face termination of these court-granted judgments.[15]

Congress' intent in passing this legislation was to reduce the number of frivolous lawsuits filed by inmates, and to discourage federal courts from "micro-managing" prisons.[16] These may seem to be legitimate

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Ann L. Pastore eds., 1996).

8. *See* Larry Williams, *Nation's Prisons Bursting at the Seams—Inmate Population More Than Doubled from 1985 - 1995*, SAN DIEGO UNION-TRIBUNE, Aug. 19, 1996, at 2.

9. *See* Stephen Donaldson, *Can We Put an End to Inmate Rape?*, USA TODAY MAG., May 1995, at 40.

10. *See id.*

11. *See id.*

12. *See* 18 U.S.C. § 3626 (1996); 28 U.S.C. § 1915 (1996); 42 U.S.C. § 1997(e) (1996).

13. *See* 18 U.S.C. § 3626; 28 U.S.C. § 1915; 42 U.S.C. § 1997(e).

14. *See* 18 U.S.C. § 3626; 28 U.S.C. § 1915; 42 U.S.C. § 1997(e).

15. *See infra* notes 19-24 and accompanying text.

16. *See* Kathryn Ericson, *Prison Litigation Reform Act Gets Bumpy Start, According to Congressional Testimony*, WEST'S LEGAL NEWS, Oct. 7, 1996; *see also* Benjamin v. Jacobson, 935 F. Supp. 332 (1996);

> The thrust of the criticism which prompted the legislation was that the federal courts had overstepped their authority and were mollycoddling the prisoners in state and local jails. In short, the time had come to let the responsible entities, the municipal and state legislatures, take care of their own correctional facilities.

Id. at 340. "The legislation I am introducing today will return sanity and State control to our prison systems. It will do so by limiting judicial remedies in prison cases and by limiting frivolous prison litigation." 141 CONG. REC. S14316 (daily ed. Sept. 26, 1995)

purposes, however, the problems Congress sought to eradicate through the PLRA may not really exist. For example, the Bureau of Justice Statistics recently reported that fewer than 20% of all § 1983 cases were dismissed as frivolous,[17] and the Prisoners' Legal Services of New York states that, since its inception twenty years ago, not one of its cases has been dismissed as frivolous.[18] Consider further these examples of meritorious cases:

- rapes and sexual assaults on female inmates by prison guards, some of which occurred during medical examinations;[19]

- sexual assaults on teenage girls by prison guards, maintenance staff and a prison chaplin, some of which resulted in pregnancies and forced abortions;[20]

- juvenile inmates being beaten, and drug trafficking by prison staff;[21]

- failure to implement procedures to detect and control tuberculosis where over 400 prisoners were diagnosed with the disease;[22]

- inadequate care for mentally ill inmates, one of whom was locked naked for two years unmedicated, unbathed, and allowed to rub feces on her face, another who died after setting herself on

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(statement of Sen. Abraham). "Interference by the federal courts has put the interest of criminals ahead of the interests of victims and law abiding citizens." *Hearings on Prison Reform Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) (statement of Sen. Kay Bailey Hutchinson).

17. *See* BUREAU OF JUSTICE STATISTICS, CHALLENGING THE CONDITIONS OF PRISONS IN JAILS 20 (1995).

18. *See* Paul J. Curran & John R. Dunne, *Complaints of Prisoner Litigation Abuses Highly Exaggerated*, TIMES UNION, June 26, 1996, at A11.

19. *See* Women Prisoners v. District of Columbia, 899 F. Supp. 659 (1994).

20. *See Top Ten Meritorious Lawsuits Filed by Prisoners That May Be Gutted By Sections 802 and 803(d) of the Prison Litigation Reform Act*, <http://www.erols.com/npporg/10suits. htm> (citing Cason v. Seckinger, Ga. (1994)) [hereinafter *Top Ten*].

21. *See id.* (citing D.B. v. Commonwealth, Penn. (1993)).

22. *See* Autsin v. Department of Corrections, No. 90-7497, 1992 WL 277511 (E.D. Pa. Sept. 29, 1992).

> fire, and a third inmate who, due to inadequate medical care, died from seizures.[23]

Through the PLRA's termination provisions, all of the inmates involved in these cases risk loosing their judicially created rights.[24]

Furthermore, Congress' claim that the federal judiciary is micro-managing our prisons is likewise unfounded. For years, the Supreme Court has repeatedly acknowledged its inability to deal with the difficulties of prison administration and reform, while remaining cognizant of the fact the federal courts have a duty to protect prisoners' constitutional rights.[25] It has averred, in fact, that "[n]o one familiar with litigation in this area could suggest that the courts have been overeager to usurp the task of running prisons, which, as the Court . . . properly notes, is entrusted in the first instance to the 'legislature and prison administration rather than a court.'"[26]

This note will argue that the Prison Litigation Reform Act, which affects Title 18,[27] Title 28,[28] and Title 42[29] of the United States Code, is unconstitutional. The provisions of this Act include: remedies for unconstitutional prison conditions,[30] proceedings for in forma pauperis litigation,[31] and attorney fees for prison litigation,[32] respectively. Part II discusses the provisions of the Act and their departure from the previously applicable statutes. Part III presents the history of prison litigation prior to the PLRA's enactment, and illustrates how the federal court has itself imposed limitations on prisoners' ability to obtain relief for allegations of constitutional violations. Part IV addresses the argument on the finality of consent decrees and statutory interpretation. Part V discusses the separation of powers implications of this act. Part VI argues that the

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23. *See* Coleman v. Wilson, 912 F. Supp. 1282 (E.D. Cal. 1995).

24. *See Top Ten*, *supra* note 20.

25. Courts have recognized that the executive and legislative branches should resolve the problems in American prisons since they have the necessary resources to resolve these complex issues. However, when a regulation violates fundamental constitutional rights, the judiciary has a duty to protect those rights. *See generally* Turner v. Safley, 482 U.S. 78, 85 (1987); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974); Johnson v. Avery, 393 U.S. 483, 486 (1969).

26. Rhodes v. Chapman, 452 U.S. 337, 354 (1981).

27. 18 U.S.C. § 3626 (1996).

28. 28 U.S.C. § 1915 (1996).

29. 42 U.S.C. § 1997(e) (1996).

30. *See* 18 U.S.C. § 3626.

31. *See* 28 U.S.C. § 1915.

32. *See* 42 U.S.C. § 1997(e).

PLRA violates prisoners' due process rights. Part VII addresses concerns surrounding the retroactivity of the filing fees and attorney fee provisions contained in the Act. The note concludes with Part VIII, which discusses how the PLRA is part of a recent trend in Congress' encroachment upon the power of the federal judiciary, and what this means to the security of other individuals' constitutional rights.

II. PROVISIONS OF THE PLRA

The Prison Litigation Reform Act effectively rewrites Title 18 § 3626[33] and Title 28 § 1915[34] of the United States Code.[35] Section 3626 deals with remedies available for prisoners who claim constitutional violations resulting from prison conditions.[36] Previously, courts were allowed to hold that prison overcrowding violated the Eighth Amendment upon showing that the conditions constituted cruel and unusual punishment.[37] Relief in such circumstances was the removal of conditions that caused the violations.[38]

Section 3626(a), as amended, prohibits courts from granting prospective relief unless the court finds that the 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."[39] The court must make these same findings before approving a consent decree.[40] Under § 3626(b)(1), a party or intervener can move to have prospective relief terminated either two years after the "court granted or approved the prospective relief; [one] year after . . . the court has entered an order denying termination of prospective relief . . . or in the case of an order issued on or before [April 26, 1996], two years after . . ." that date.[41]

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33. 18 U.S.C. § 3626 (1996).

34. 28 U.S.C. § 1915 (1996).

35. *See* 18 U.S.C. § 3626 (1996); 28 U.S.C. § 1915 (1996).

36. *See* 18 U.S.C. § 3626 (1996).

37. *See* 18 U.S.C. § 3626(a) (1994). The only other relief provision in the former § 3626 was a provision regarding population ceilings and periodic reopening of consent decrees: "A federal court shall not place a ceiling on the inmate population of any Federal, State, or local detention facility as an equitable remedial measure for conditions that violate the eighth amendment unless crowding is inflicting cruel and unusual punishment on particular identified prisoners." *Id.* § 3626(b)(1).

38. *See id.* § 3626(a).

39. *Id.* § 3626(a)(1) (1996).

40. *See id.* § 3626(c)(1).

41. *Id.* § 3626(b)(1).

The PLRA also provides for "immediate termination of any prospective relief if the relief was approved or granted in the absence of a [court] finding . . . that the 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[s]."[42] Prospective relief is defined as "all relief other than compensatory monetary damages,"[43] and relief means "relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements."[44] The former act did not include any such provisions for terminating relief.[45] It allowed only for consent decrees to be periodically examined for "recommended modification" at the defendant's request.[46]

The automatic stay provision, also absent in the former act,[47] provides that "[a]ny prospective relief subject to a pending motion shall be automatically stayed . . . beginning on the [thirtieth] day after [the] motion is filed."[48] This stay provision is applicable to motions made under the termination and immediate termination of prospective relief provisions,[49] the former of which sets the dates upon which relief can be terminated,[50] and the latter mandates termination of relief absent the finding of a Federal right violation.[51] The automatic stay will end on the date that the court renders a "final order ruling on the motion."[52]

The new Title 28 § 1915 imposes a filing fee requirement on prisoners who bring a "civil action or appeal a judgment in a civil action"[53] in forma pauperis.[54] It further requires a prisoner to "submit a certified copy of [his] trust fund account statement . . . for . . . the [six]-month period immediately preceding the filing of the complaint or notice of appeal."[55] Prior to the PLRA, a person needed only to make an affidavit of poverty

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42. *Id.* § 3626(b)(2).
43. *Id.* § 3626(g)(7).
44. *Id.* § 3626(g)(9).
45. *See* 18 U.S.C. § 3626 (1994).
46. *See id.* § 3626(c).
47. *See id.* § 3626.
48. 18 U.S.C. § 3626(e)(2) (1996).
49. *See id.* § 3626(e)(2).
50. *See id.* § 3626(b)(1).
51. *See id.* § 3626(b)(2).
52. *Id.* § 3626(e)(2).
53. 28 U.S.C. § 1915(a)(2) (1996).
54. *See id.*
55. *Id.*

to file an in forma pauperis claim.[56] A court is now also allowed to dismiss a case if it determines that "the allegation of poverty is untrue, or the action or appeal is frivolous or malicious, . . . or [the action] seeks monetary relief against a defendant who is immune from such relief."[57] Formerly, courts could dismiss a case only upon the first two determinations.[58] Finally, under the new provisions, a prisoner is barred from bringing an in forma pauperis action if he has previously brought three or more complaints or appeals that were dismissed for being frivolous, malicious, or failing to state a claim upon which relief can be granted.[59]

Title 42 § 1997(e) limits the amount of attorney fees that may be granted.[60] It states that authorized attorney fees in prison litigation shall not exceed "150 percent of the hourly rate established under section 3006A of Title 18 [of the United State Code], for payment of court-appointed counsel."[61] The hourly rate under § 3006A for court-appointed counsel is sixty dollars.[62]

When compared to the prior statutes, the PLRA provisions place obvious restrictions on prisoners' ability to bring suits, as well as their ability to retain the vested rights from their previously adjudicated cases. Before discussing these effects on prisoners and their constitutional rights, however, it is important to understand the history of prison litigation, and the increasingly strict standards that the federal judiciary itself has already imposed upon such litigation.

III. HISTORY OF PRISON LITIGATION

The Eighth Amendment was first applied by the United States Supreme Court in 1897 in *Wilkerson v. Utah*.[63] In that case, the Court compared methods of execution to uncivilized means of punishment, and held that "it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the

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56. *See* 28 U.S.C § 1915(a) (1995).

57. 28 U.S.C. § 1915(e)(2) (1996).

58. *See* 28 U.S.C. § 1915(d) (1995).

59. *See* 28 U.S.C. § 1915(g) (1996).

60. *See* 42 U.S.C. § 1997(e) (1996).

61. *Id.*

62. *See* 18 U.S.C. § 3006A (1994).

63. 99 U.S. 130 (1879); *see also* Estelle v. Gamble, 429 U.S. 97, 102 (1976) (stating that the "Court first applied the Eighth Amendment by comparing challenged methods of execution to concededly inhuman techniques of punishment.").

Eighth A]mendment."[64] Yet, until the early 1960s, prisoners were still not considered to have any rights, and the courts took a "hands off" position toward adjudicating prison administration.[65] In early prison litigation, courts required conditions to be "barbarous or shocking to the conscience" to violate the Eighth Amendment.[66] It was not until the mid-1970s that the lower courts began to look at comprehensive prison conditions, and began to examine all aspects of prison life including overcrowding, medical care, prison violence, and sanitation.[67] Two early 1970s cases, *Holt v. Sarver*[68] and *Hamilton v. Love*,[69] exemplify the conditions of prisons at that time, and the courts' early recognition of the need for reform.[70]

In *Holt*, the Commissioner of Corrections and others appealed a District Court decision from the Eastern District of Arkansas in favor of the class of inmates.[71] The inmates protested conditions that led to frequent attacks, rapes, and deaths.[72] These afflictions were largely due to the fact that 99% of the prison's security force were "trusty inmates" or "trusties,"[73] and only eight non-inmate guards were employed by the prison.[74] These "trusties," some serving life or long-term sentences, were entrusted with guarding the estimated 1000 inmate population, and were equipped with guns.[75] As a result of this prison management, there was widespread trafficking of guns, knives, alcohol and drugs, and prisoners were afforded no adequate means of protection from assaults effected by these conditions.[76] In a concurring opinion, Judge Lay stated that the conditions in Arkansas prisons were similar to the condemned conditions

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64. *Wilkerson*, 99 U.S. at 136.

65. *See* Alvin J. Bronstein and Jenni Gainsborough, *History of Prison Litigation*, OVERCROWDED TIMES (June 1996) <http://www.erols.com/npporg/history/htm>.

66. *See, e.g.*, Holt v. Sarver, 442 F.2d 307, 308-09 (8th Cir. 1971).

67. *See, e.g.*, *Estelle*, 429 U.S. at 102 (citing Jackson v. Bishop, 404 F.2d 571, 579 (C.A.8 1968) ("The [Eighth] Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ,'")).

68. 442 F.2d 304 (8th Cir. 1971).

69. 328 F. Supp. 1182 (E.D. Ark. 1971).

70. *See infra* notes 71-96 and accompanying text.

71. *Holt*, 442 F.2d at 304.

72. *See id.* at 308.

73. *Id.*

74. *See id.*

75. *See id.*

76. *See id.*

of eighteenth century England.[77] In addition, the court described the disrepair of the physical facilities as "deplorable."[78]

The District Court found that these conditions constituted Eighth Amendment violations, and instructed the respondents to take necessary steps to remove these constitutional violations, as well as to report their progress to the court.[79] The United States Court of Appeals for the Eighth Circuit, while affirming the judgment below,[80] also found that the respondents had made a good faith effort to remedy the prison conditions.[81] It therefore ordered that, on remand, the lower court should conduct a hearing to ascertain whether further progress has been made to cure the constitutional violations.[82] It then noted, however, that the federal court should not intervene in the supervision of state prison operations any more than is required to "provide reasonable assurance" that the violations will not continue.[83]

Two months later, in *Hamilton v. Love*,[84] the District Court for the Eastern District of Arkansas ruled in favor of a class of pre-trial detainee inmates.[85] These inmates sought a declaratory judgment and injunction on the grounds of cruel and unusual punishment that resulted from the prison conditions.[86] The prison in this case, the Pulaski County jail, detained

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77. *See id.* at 309-10.

> [P]risons were not sanitary or secure; there was no effective supervision of prisoners; there existed 'physical and moral corruption of the common wards and yards'; there were no separate cells for safe sleeping; there was no useful work performed by the prisoners, no education efforts made on their behalf, and no moral or religious instruction to restore them as useful members of society.

Id. at 309-10 n.1; *see also* Benjamin v. Jacobson, 935 F. Supp. 332, 338 (1996).

> John Howard awakened public opinion with a detailed discussion of the inhuman conditions prevalent in most jails and prisons [in England]. The same kinds of problems emerged from Howard's inspection as had plagued the prison business from the beginning. They included poor food or no food; poor ventilation which prompted an increased risk of fire; little or no medical attention and overcrowding.

Id.

78. *Holt*, 442 F.2d at 308.

79. *See id.* at 304.

80. *See id.* at 309.

81. *See id.*

82. *See id.*

83. *Id.*

84. 328 F. Supp. 1182 (E.D. Ark. 1971).

85. *See id.*

86. *See id.* at 1183.

people who were awaiting trial, and who, for the most part, could not afford bail.[87] As pre-trial detainees, they were not convicted of any crime, and were therefore presumed innocent.[88]

In addition to rats, roaches, and poisonous insects, this institution had no ventilation, inadequate washing and toilet facilities, and the cells were overcrowded, insecure, and unsanitary.[89] Like the facility in *Holt*, there were few "free world" guards responsible for the prison's security.[90] In addition, most of the locking mechanisms on the cells were inoperative,[91] and this lack of security resulted in assaults and homosexual attacks on the inmates.[92] The court also heard testimony from former Pulaski County jail inmates who, when they testified, were incarcerated at the Arkansas state penitentiaries.[93] They testified that the conditions in Pulaski County jail were far worse than those in their current institutions, where they were serving time for crimes for which they were convicted.[94]

The *Hamilton* court, disturbed by the conditions of the county jail, stated that "the conditions for pre-trial detention must not only be equal to, but superior to, those permitted for prisoners serving sentences for the crimes they have committed against society."[95] Additionally, the court set guidelines for the county to follow to bring the prison conditions up to constitutional standards, and it ordered the county to submit a proposal to the court describing its plans.[96]

Until the mid-1970s, the courts only used an objective standard[97] in determining Eighth Amendment violations.[98] In 1976, however, the United States Supreme Court added a subjective standard[99] that must also

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87. *See id.* at 1184.

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.* at 1188-89.

92. *See id.*

93. *See id.* at 1191.

94. *See id.*

95. *Id.*

96. *See id.* at 1196.

97. *See, e.g.*, Wilson v. Seiter, 501 U.S. 294, 298 (1991) ("[T]he objective component of an Eighth Amendment prison claim [is:] [w]as the deprivation sufficiently serious?").

98. *See* Estelle v. Gamble, 429 U.S. 97 (1976) (holding that "[d]eliberate indifference by prison personnel to a prisoner's serious illness or injury constitutes cruel and unusual punishment contravening the Eighth Amendment").

99. *See Wilson*, 501 U.S. at 298 ("Did the officials act with a sufficiently culpable state of mind?").

be met in order to reach a federal constitutional violation.[100] In *Estelle v. Gamble*,[101] the Supreme Court held that a prisoner must show that the injurious acts or omissions alleged were caused by an official's "deliberate indifference to serious medical needs."[102] By setting this new standard, a prisoner would not have a valid Eighth Amendment claim if, for example, a doctor negligently misdiagnosed or mistreated him.[103] The court based this standard on an analogous Supreme Court determination that it would not be unconstitutional to require a prisoner to endure a second electrocution after a mechanical malfunction caused the first one to fail.[104]

The prisoner in *Estelle* filed a pro se[105] complaint alleging that the inadequate medical treatment he received violated his Eighth Amendment rights.[106] While on work duty at the prison, a bale of cotton fell on him.[107] Several hours later, he was released from work and was allowed to go to the unit hospital,[108] where a medical assistant examined him for a hernia, and then directed him back to his cell.[109] Two hours later, intensified and severe pain forced Gamble to return to the hospital for pain relievers and a medical examination.[110] The next day, a Dr. Astone examined Gamble and diagnosed that he had a lower back strain.[111] He prescribed some medication and gave Gamble a cell-pass, that allowed Gamble to remain in his cell virtually all day.[112] Dr. Astone also ordered the prison officials to move Gamble from an upper to a lower bunk, but the officials never complied.[113] For nearly a month, Dr. Astone prescribed various medications and muscle relaxants for Gamble, and kept him on

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100. *See Estelle*, 429 U.S. 97 (1976).

101. *Id.*

102. *Id.* at 104-05 (*Estelle* focused solely on prisoners' medical needs, and did not address other types of Eighth Amendment violations.).

103. *See id.* at 105.

104. *See id.* (citing *Louisiana ex rel Francis v. Resweber*, 329 U.S. 459 (1947), as an example).

105. "[O]ne who does not retain a lawyer and appears for himself in court." BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

106. *See Estelle*, 429 U.S. at 98.

107. *See id.* at 99.

108. *See id.*

109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.*

113. *See id.*

cell-pass.[114] Gamble's pain, however, continued to be as intense as it was on the first day.[115] Despite his pain, the doctor eventually discontinued Gamble's cell-pass, and allowed him to be assigned light work.[116]

When he refused to work due to his pain, he was brought before the disciplinary committee to whom he explained his situation.[117] One of Gamble's doctors, however, testified to the committee that Gamble's medical condition was "first class."[118] Thereafter, and without any further inquiry, the committee ordered Gamble to be placed in solitary confinement.[119] Several days later, after complaining of chest pains and "blank outs," he was re-examined.[120] This time, his condition warranted hospitalization.[121] Although the Court recognized that it is the public's duty to provide medical care for prisoners who cannot obtain it otherwise,[122] it concluded that Gamble's claim of inadequate medical care was not an Eighth Amendment violation because it did not meet the deliberate indifference standard.[123]

The issue concerning conditions of confinement was first considered by the Supreme Court in *Rhodes v. Chapman*.[124] In *Rhodes*, inmates of the Southern Ohio Correctional Facility (SOCF) alleged that double celling in units that measured sixty-three square feet violated their constitutional rights under the Eighth Amendment.[125] In reaching its decision in favor of the prisoners, the District Court considered that the SOCF was operating at 38% above its housing capacity.[126]

In addressing the constitutionality of overcrowding, the Supreme Court recounted the Court's precedent of standards defining cruel and unusual

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114. *See id.*

115. *See id.* at 100.

116. *See id.*

117. *See id.* at 101.

118. *See id.*

119. *See id.*

120. *See id.*

121. *See id.*

122. *See id.* at 103.

123. *See id.* at 107-08. ("Gamble was seen by medical personnel on 17 occasions spanning a three month period . . . . A medical decision not to order an x-ray . . . does not represent cruel and unusual punishment.").

124. 452 U.S. 337 (1981).

125. *See id.* at 340-41.

126. *See id.* at 343. The court also considered that inmates were serving long terms, that studies recommended each person has 50 to 55 feet of living space, that most time was spent in the cell with the cellmate, and that this was not a temporary condition. *Id.*

punishment.[127] It maintained that there is no fixed test to use to determine whether conditions of confinement violate constitutional rights, because the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[128] The Court added that "[c]onditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime."[129] It concluded that conditions of confinement should be measured by these principles, which are likewise applied to other Eighth Amendment violations.[130]

Although the Court admitted that courts have a duty to protect prisoners' constitutional rights against cruel and unusual conditions of confinement, it reiterated its reluctance to interfere with the management of prisons.[131] The Court explained that, by carrying out their duty, "courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution . . . ."[132] Justice Brennan, in his concurring opinion, agreed with this statement, however, he also stated that "sad experience has shown that sometimes [politicians and officials] can *in fact* be insensitive to [constitutional] requirements," and that this attitude actually contributes to the unconstitutional prison conditions.[133] Ultimately, the Court held that double celling was not a constitutional violation,[134] and thereby set a new precedent in prison litigation.[135]

Prison overcrowding continued to rise through the 1970s and 1980s, which incremented the incidents of cruel and unusual conditions of confinement.[136] The *Rhodes* Court held that conditions of confinement did not constitute *conduct* by the prison officials, and therefore, they were not

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127. See *id.* at 345-48.

128. *Id.* at 346 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

129. *Id.* at 347.

130. *See id.*

131. *See id.* at 352.

132. *Id.*

133. *Id.* at 358 n.7 (emphasis added).

134. *See id.* at 352.

135. *See* Estelle v. Gamble, 429 U.S. 97 (1976).

136. Russell W. Gray, Wilson v. Seiter: *Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law*, 41 AM. U. L. REV. 1339, 1339-42 (1992).

within the ruling of *Estelle*.[137] Instead, conditions of confinement were part of an inmate's penalty for the crime he committed.[138]

In 1991, however, the Supreme Court extended *Estelle's* subjective standard to conditions of confinement in *Wilson v. Seiter*.[139] The issue in *Wilson* was whether an inmate alleging cruel and unusual conditions of confinement was required to show prison officials' culpable state of mind, and if so, what the culpable mental state should be.[140] The Court determined the first issue by concluding that the word punishment implied an intent requirement.[141] The Court explained that "[i]f the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify" as cruel and unusual punishment.[142]

The Court went on to say that the alleged conduct "must be *wanton*."[143] Wantonness, however, does not have a single meaning, and its meaning depends upon the type of conduct being challenged.[144] For example, in *Whitley v. Albers*,[145] the Court noted that in situations where the conduct in question was made in an emergency context, "wantonness consisted of acting 'maliciously and sadistically for the very purpose of causing harm.'"[146] That not being the case in *Wilson*, the Court adopted *Estelle's* deliberate indifference standard for wantonness.[147] Deliberate indifference, therefore, became the culpable mental state required to show an Eighth Amendment violation for conditions of confinement.[148]

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137. *Rhodes*, 452 U.S. 337, 347 (1981).

138. *See id.* (stating that "[t]o the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society").

139. 501 U.S. 294 (1991).

140. *See id.* at 296.

141. *See id.* at 300 ("'The infliction of punishment is a deliberate act intended to chastise or deter . . . . [I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word . . . .'" (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (C.A.7 1985) *cert. denied*, 479 U.S. 816 (1986)).

142. *Wilson*, 501 U.S. at 300.

143. *Id.* at 302.

144. *See id.* (citing Whitley v. Albers, 475 U.S. 312, 320 (1986)).

145. 475 U.S. 312 (stating that a correction officer shooting an inmate in the leg during a prison riot amounted to cruel and unusual punishment).

146. *Wilson*, 501 U.S. at 302 (quoting *Whitley*, 475 U.S. at 320-21).

147. *See Wilson*, 501 U.S. at 302.

148. *See id.* at 303.

The *Wilson* Court also held that the challenged conditions must cause the "deprivation of a single, identifiable human need."[149] This was a departure from the established "totality of circumstances" test[150] previously used.[151] Instead, the *Wilson* Court determined that, although aggregate conditions can establish a constitutional violation, while individually they would not, this can only occur if together they deprive someone of an "identifiable human need,"[152] such as food, warmth, or exercise.[153]

It was not until 1994, however, that the Supreme Court defined "deliberate indifference."[154] In *Farmer v. Brennan*,[155] the Court determined that "deliberate indifference" required plaintiffs to show that the responsible official "was subjectively aware of the risk."[156]

The petitioner in this case, Dee Farmer, was incarcerated at the Federal Correction Institute in Oxford, Wisconsin (FCI-Oxford), and he brought this suit alleging that officials were deliberately indifferent to his safety.[157] The FCI-Oxford had a practice of segregating transsexuals with inmates of the same biological sex.[158] Farmer was a transsexual and had been segregated many times, both for disciplinary and safety reasons.[159] In 1989, he was transferred from FCI-Oxford to the United States Penitentiary in Terre Haute, Indiana, and placed in the general population section.[160] As the Court noted, federal penitentiaries are characteristically

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149. *Id.* at 304.

150. *Rhodes*, 452 U.S. at 363 (stating that the test for "totality" is such that "[e]ven if no single condition of confinement would be unconstitutional in itself, 'exposure to the cumulative effect of prison conditions may subject inmates to cruel and unusual punishment'" (quoting Laaman v. Helgemoe, 437 F. Supp. 269, 322-23 (N.H. 1977)).

151. *See Wilson*, 501 U.S at 305 (stating that the test for "totality" is such that "[n]othing 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").

152. *Id.* at 304. ("*Some* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise . . . .").

153. *See id.*

154. Farmer v. Brennan, 511 U.S. 825 (1994). "This case requires us to define the term 'deliberate indifference,' as we do by requiring a showing that the official was subjectively aware of the risk." *Id.* at 829.

155. 511 U.S. 825.

156. *Id.* at 829.

157. *See id.*

158. *See id.*

159. *See id.* at 830.

160. *See id.*

higher security institutions than correctional facilities because they house more dangerous inmates.[161] Within two weeks, an inmate beat and raped Farmer in his cell, and it took the officials several days to return Farmer to segregation.[162]

Farmer's complaint alleged that the officials placed him in the penitentiary's general population knowing that it had a history of inmate violence, and knowing that he was a transsexual who would be a more vulnerable target for sexual assaults.[163] Farmer alleged that this conduct constituted deliberate indifference to his safety, and was therefore a violation of his Eighth Amendment rights.[164]

In interpreting deliberate indifference, the Court first acknowledged that the United States Court of Appeals defined it as "recklessness."[165] Recklessness, however, is defined differently in civil law than it is in criminal law.[166] The civil law definition of recklessness is acting, or failing to act when there is a duty to act "in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known."[167] The more narrow criminal law definition of recklessness, however, requires only that a person is aware of a risk of harm and disregards it.[168] The Court found that the objective criminal definition corresponded best with the Eighth Amendment, based on how its cases have interpreted its text.[169] In adopting this definition, the Court held that violations resulting from an official's failure to alleviate a substantial risk that he *should* have known about would not constitute cruel and unusual punishment.[170]

To survive a motion for summary judgment alleging an Eighth Amendment violation, an inmate must show that: 1) the officials had the requisite state of mind at the time the suit was filed; 2) that the officials are disregarding the risk at the time of the summary judgment; *and* 3) that

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161. *See id.*

162. *See id.*

163. *See id.* at 830-31.

164. *See id.* at 831.

165. *See id.* at 836.

166. *See id.* at 836-37.

167. *Id.* at 836.

168. *See id.* at 836-37. (citing R. PERKINS & R. BOYCE, CRIMINAL LAW 850-51 (3d ed. 1982); J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 115-16, 120, 128 (2d ed. 1960); American Law Institute, MODEL PENAL CODE § 2.02(2)(c) and Comment 3 (1985)).

169. *See Farmer*, 511 U.S. at 837; *see also* Commonwealth v. Pierce, 138 Mass. 165, 175-78 (1884) (giving this case as an example).

170. *See Farmer*, 511 U.S. at 838.

they will continue to disregard the risk.[171] Once the prisoner's claim survives a summary judgment motion, in order to obtain an injunction, the inmate must establish that the officials' disregard of the risk will continue throughout the litigation and thereafter.[172] The Court bolstered these requirements by warning District Courts against granting unnecessary injunctions,[173] and instructing them to allow officials an opportunity to alleviate the risk before issuing an injunction.[174]

As these cases illustrate, the courts themselves have continued to narrow the requirements for obtaining relief for Eighth Amendment violations.[175] In addition, their reluctance to become involved in micro-managing prison administration has continued.[176]

IV. FINALITY OF JUDGMENTS: ARE CONSENT DECREES FINAL JUDGMENTS?

A. *The Precedent for the Debate*

Many civil actions brought by inmates challenging federal violations of prison conditions have been settled by consent decrees.[177] Consent decrees are court approved, binding agreements made by the parties in which the defendant agrees to terminate the challenged violations.[178] They effectuate an agreement by the parties that is an equitable resolution of their rights.[179] Prisons in forty United States jurisdictions, including the District of Columbia, the Virgin Islands, and Puerto Rico, are currently under consent decrees or court orders to alleviate overcrowding or substandard conditions in either some or all of these institutions.[180] Another six jurisdictions have this type of litigation pending.[181]

Section 3626(c)(1) of the PLRA forbids a court from approving consent decrees unless it finds that the decree is "narrowly drawn, extends

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171. *See id.* at 845-46.

172. *See id* at 846.

173. *See id.* at 846-47 (citing *Bell v. Wolfish*, 441 U.S. 520, 562 (1979), which warned "courts against becoming 'emeshed in the minutiae of prison conditions'").

174. *See Farmer*, 511 U.S. at 847.

175. *See supra* notes 70-181 and accompanying text.

176. *See supra* notes 90, 138-39 and accompanying text.

177. *See* NATIONAL PRISON PROJECT, STATUS REPORT: STATE PRISON AND THE COURTS, Jan. 1, 1996 [hereinafter STATUS REPORT].

178. *See* BLACK'S LAW DICTIONARY 305 (6th ed. 1990).

179. *See id.*

180. STATUS REPORT, *supra* note 177, at 1.

181. *See id.*

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."[182] In regard to existing consent decrees, § 3626(b)(2) allows courts to terminate consent decrees upon a motion by a "defendant or intervener" if the decrees were made absent a court finding that they were "narrowly drawn, extend[ ] no further than necessary to correct the violation of the Federal right, and [are] the least intrusive means necessary to correct the violation of the Federal right."[183]

Since the PLRA was passed in April 1996, federal courts have expressed different opinions on the constitutionality and interpretation of the PLRA's provisions, particularly those regarding consent decrees and similar forms of relief.[184] The debate centers around varying interpretations of precedent used to determine what constitutes a final judgment by a court.[185] The subsequent debated issue is whether or not consent decrees apply to that determination, and are therefore within Congress' power to terminate.[186] Among the leading cases in this debate are *Benjamin v. Jacobson*,[187] *Plyler v. Moore*,[188] *Hadix v. Johnson* from the Western District of Michigan (*Hadix I*),[189] *Hadix v. Johnson* from the Eastern District of Michigan (*Hadix II*),[190] *Gavin v. Ray*,[191] and *Inmates of Suffolk County Jail v. Sheriff of Suffolk County*.[192] The divergence in these opinions stems from the courts' differing interpretations of Supreme Court cases spanning more than a century:[193] *Pennsylvania v. Wheeling &*

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182. 18 U.S.C. § 3626(c)(1) (1996); § 3626(a)(1) (1996).

183. 18 U.S.C. § 3626(b)(2) (1996).

184. *See* Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997); Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996); Inmates of Suffolk County Jail v. Sheriff of Suffolk County, 952 F. Supp. 869 (D. Mass. 1997); Hadix v. Johnson, 947 F. Supp. 1100 (E.D. Mich. 1996); Hadix v. Johnson, 933 F. Supp. 1362 (W.D. Mich. 1996); Benjamin v. Jacobson, 935 F. Supp. 332 (S.D.N.Y. 1996); Gavin v. Ray, No. 4-78-CV-70062, 1996 WL 622556 (S.D. Iowa Sept. 18, 1996).

185. See *Gavin*, 1996 WL 622556, at *3-4.

186. *See id.*

187. 124 F.3d at 162.

188. 100 F.3d at 365.

189. 933 F. Supp. at 1362.

190. 947 F. Supp. at 1100.

191. 1996 WL 622556.

192. *Inmates*, 952 F. Supp. at 332.

193. *See Gavin*, 1996 WL 622556.

Belmont Bridge Co.,[194] *Plaut v. Spendthrift Farm, Inc.*,[195] and *Rufo v. Inmates of Suffolk County Jail*.[196]

Pennsylvania v. Wheeling & Belmont Bridge Co. involved the validity of an injunction ordering the defendant to either remove or raise a bridge that crossed the Ohio River.[197] In 1852, the Supreme Court issued a decree ordering the Wheeling & Belmont Bridge Co. to remove a bridge it had constructed across the Ohio River, because it obstructed free navigation.[198] Subsequent to this decree, Congress passed a statute authorizing this and other similarly situated bridges to remain at their current positions and heights.[199] In 1854, the bridge was destroyed by a violent storm, and Pennsylvania subsequently filed a motion to enjoin the bridge's reconstruction.[200] The State argued that the statute was unconstitutional, and that Congress could not annul a judgment made by the court.[201] In denying the State's motion, the Supreme Court concluded that the statute was based on a *public* right of navigation, and was therefore within Congress' power to enact.[202] The Court, however, conceded that Congress cannot interfere with a previous judgment "as it respects adjudication upon the *private* rights of parties."[203] As discussed below, this "public/private rights" distinction plays a significant role in courts' interpretations of the PLRA's constitutionality as it pertains to the separation of powers doctrine.

Plaut v. Spendthrift Farms, Inc. also involved an act of Congress that required courts to reopen court-made judgments.[204] In 1987, the petitioners, Plaut and others, filed a claim in federal court against the respondents alleging that the respondents had violated § 10(b) of the Securities Exchange Act of 1934 through fraudulent and deceitful stock sales.[205] While this case was delayed in district court pre-trial proceedings, the Supreme Court, in a 1991 case, held that litigation stemming from § 10(b) violations must begin within one year after the

194. 59 U.S. 421 (1855).

195. 514 U.S. 211 (1995).

196. 502 U.S. 367 (1992).

197. *See* 59 U.S. at 421.

198. *See id.* at 429.

199. *See id.*

200. *See id.* at 422-23.

201. *See id.* at 431.

202. *See id.*

203. *Id.*

204. 514 U.S. 211, 213 (1995).

205. *See id.* at 213.

violation is discovered, and within three years of the actual violation.[206] Because the *Plaut* case did not comply with this ruling, it was dismissed in August 1991.[207]

Later that year, the President signed the Federal Deposit Insurance Corporation Improvement Act of 1991.[208] Buried in this act was a section that, in effect, lifted the Court-imposed time bar by allowing cases that had been dismissed due to time limitations to be reopened upon motion.[209] Based on separation of powers, the Supreme Court found the act to be unconstitutional, and repeated the affirmations of several precedents that forbade Congress from reopening court-made judgments.[210] The Court emphasized that this is true particularly with the adjudication of private rights.[211] The Court distinguished this case from the situation in which Congress may, by explicit retroactive legislation, alter an Article III judgment that is still on appeal.[212] Unlike judgments on appeal, judgments from which all appeals have been exhausted are final; therefore Congress may not reopen them.[213] The Court concluded by stating that "[w]e know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment, and for good reason."[214]

Rufo v. Inmates of Suffolk County Jail[215] began in 1971, when the district court held that the conditions of the jail, which housed pre-trial detainees, were unconstitutional.[216] By 1977, the conditions had not been remedied, and the Court of Appeals affirmed the district court's decision prohibiting further incarceration of detainees at the facility.[217] Several

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206. *See id.* (citing Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 364 (1991)).

207. *See Plaut*, 514 U.S. at 214 (dismissed with prejudice).

208. *See id.*

209. *See id.*

210. *See id.* at 217-18.

211. *See id.* at 226.

> "[I]t is urged, that the act of Congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby . . . . This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties."

Id. (quoting Pennsylvania v. Wheeling Bridge Co., 18 How. 421, 431 (1856)).

212. *See Plaut*, 514 U.S. at 227.

213. *See id.* at 227.

214. *Id.* at 240.

215. 502 U.S. 367 (1992).

216. *See id.* at 372.

217. *See id.* at 373.

months later, the District Court approved a consent decree outlining steps to be taken to remove the violations, including the construction of a new jail by 1983.[218] By 1984, however, construction had not yet begun, and the prison population outgrew projections.[219] The court then ordered the defendants to build a larger jail, and the consent decree was subsequently modified to permit this.[220] Four years later, with the new facility under construction, the defendants moved for a modification of the consent decree to allow 197 cells to be double bunked as a result of change in law and fact.[221] The District Court denied their motion, and the Court of Appeals affirmed the decision.[222]

On appeal, the Supreme Court held that to modify a consent decree, the moving party must show "a significant change either in factual conditions or in the law."[223] To warrant a modification, the changed factual conditions must make adherence to the decree "substantially more onerous."[224] The Court listed examples of these conditions, including: "unforeseen obstacles;" inability to "find appropriate housing facilities for transfer patients;" and situations in which enforcing "the decree without modification would be detrimental to the public interest."[225]

A change in law can support a modification if the change legalizes what "the decree was designed to prevent."[226] The Court distinguished "changes" in law from "clarifications" in the law by concluding that to hold that clarifications would automatically allow relitigation of consent decrees "would undermine the *finality* of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation."[227]

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218. *See id.* at 374-75. Under the consent decree, specifications for the new jail included a kitchenette and recreation area, inmate laundry room, education units, indoor and outdoor exercise areas. *See id.* at 375.

219. *See id.* at 375-76.

220. *See id.* at 376.

221. *See id.* "The asserted change in law [that facilitated the modification] was this Court's 1979 decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), handed down one week after the consent decree was approved by the District Court. The asserted change in fact was the increase in the population of pretrial detainees." *Id.*

222. *See Rufo*, 502 U.S. at 376-77.

223. *Id.* at 384.

224. *Id.*

225. *Id.* (citing New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 969 (2d Cir. 1983), Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114 (3d Cir. 1979), Duran v. Elrod, 760 F.2d 756, 759-61 (7th Cir. 1985)).

226. *Id.* at 388 (citing Railway Employes [sic] v. Wright, 364 U.S. 642 (1961)).

227. *See id.* at 389 (emphasis added).

After the moving party establishes a legitimate change in law or fact, the court must then determine if the requested modification is "suitably tailored to the changed circumstance."[228] The Court set forth three criteria required to meet this standard.[229] First, the "modification must not create or perpetuate a constitutional violation."[230] Second, "[a] proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor."[231] It should do no more than solve the problems created by the changed circumstances, because "a consent decree is a final judgment that may be reopened only to the extent that equity requires."[232] Finally, a court should consider the public interest when determining whether or not to modify a consent decree.[233]

These three cases, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, *Plaut v. Spendthrift Farm, Inc.*, and *Rufo v. Inmates of Suffolk County Jail*, are commonly used precedent for courts addressing the issue of the constitutionality of § 3626.[234] Although the courts have agreed that Congress cannot modify Constitutionally created rights, they have not agreed upon their finality.[235] Both of the *Hadix* courts and the courts in *Gavin* and *Inmates of Suffolk County Jail* concluded that consent decrees are final judgments; on the other hand, *Plyler* held that they were not final.[236] *Benjamin* did not directly address this issue, but instead focused primarily on statutory interpretation as a means of determining the constitutionality of the provision at issue.[237]

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228. *Id.* at 391.

229. *See id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *See id.* at 392 (stating that a court should consider the public interest although state and local officials may agree to do more than the constitutional minimum).

234. *See, e.g.*, Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997); Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996); Inmates of Suffolk County Jail v. Sheriff of Suffolk County, 952 F. Supp. 869 (D. Mass. 1997); Benjamin v. Jacobson, 935 F. Supp. 332 (S.D.N.Y. 1996); Gavin v. Ray, No. 4-78-CV-70062, 1996 WL 622556 (S.D. Iowa Sept. 18, 1996); Hadix v. Johnson, 947 F. Supp. 1100 (E.D. Mich. 1996); Hadix v. Johnson, 933 F. Supp. 1362 (W.D. Mich. 1996).

235. *See, e.g.*, *Benjamin*, 124 F.3d at 178; *Plyler*, 100 F.3d at 372; *Inmates of Suffolk County Jail*, 952 F. Supp. at 878; *Benjamin*, 935 F. Supp. at 344; *Gavin*, 1996 WL 622556 at *4; *Hadix*, 947 F. Supp. at 1103; *Hadix*, 933 F. Supp. at 1367.

236. *Compare Inmates of Suffolk County Jail*, 952 F. Supp. at 878, *and Hadix*, 947 F. Supp. at 1103, *and Gavin*, 1996 WL 622556 at *4, *and Hadix*, 933 F. Supp. at 1367, *with Plyler*, 100 F.3d at 372.

237. *See Benjamin*, 124 F.3d at 168.

Benjamin v. Jacobson began in 1978 with a consent decree that addressed the "environmental health and safety concerns, and overcrowding" on Rikers Island as well as other jails in New York City, which today house approximately 16,000 detainees.[238] In 1981, however, because the City did not comply with the consent decree, the plaintiffs filed a motion to hold the City in contempt.[239] Rather than litigating this motion, the City agreed to finance the development of the Office of Compliance Consultants (OCC) which made progress reports on the City's compliance with the consent decree.[240]

By 1990, conditions had not improved in the prisons, so the court laid out specific procedures for the City to take in order to comply with the consent decree.[241] By 1996, the OCC's reports still indicated that the City had not complied with many of the requirements, including the fire safety, maintenance, and sanitation criteria.[242] Its report also observed that the accomplished improvements were the result of time and attention paid to them "by the parties and the [f]ederal court."[243] Judge Harold Baer, Jr., in his opinion, agreed that "federal court oversight of prison conditions was valuable."[244] Nonetheless, Judge Baer granted the defendants' motion to terminate the consent decrees based on the termination provisions of the PLRA.[245] In doing so, he also concluded that §§ 3626(a)(1), 3626(b)(2) and 3632(b)(3) of the PLRA were not unconstitutional.[246]

The case was argued before the Second Circuit Court of Appeals in November 1996, and the court's long-awaited decision came down on

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238. *Benjamin*, 935 F. Supp. at 342. The Supreme Court has dealt with Constitutional rights of pre-trial detainees in a similar fashion as the rights of prison inmates. *See* Bell v. Wolfish, 441 U.S. 520, 540 (1979) ("[I]n addition to ensuring the detainees' presence at trial, the effective management of the detention facility . . . is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment."). "[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Id.* at 546.

239. *See Benjamin*, 935 F. Supp. at 342.

240. *See id.*

241. *See id.* (citing Benjamin v. Sielaff, 752 F. Supp. 140 (S.D.N.Y. 1990)).

242. *See Benjamin*, 935 F. Supp. at 342.

243. *Id.* at 343.

244. *Id.*

245. *See id.* at 358. (vacating the consent decrees pursuant to 18 U.S.C. § 3626(b)(2)).

246. *See id.*

August 26, 1997.[247] For reasons discussed below,[248] the Second Circuit upheld the constitutionality of the termination provision, but reversed the district court's decision to vacate the consent decree, keeping in tact the stay it issued a year prior.[249]

Plyler v. Moore was initially litigated in South Carolina in 1982, in response to overcrowding and inadequate health services, food services, and educational and vocational programs.[250] In 1986, the District Court approved a consent decree that was designed primarily to alleviate the overcrowding, but contained provisions regarding the other violations as well.[251] After the PLRA was enacted, the State moved to "terminate the consent decree pursuant to 18 U.S.C.A. § 3626(b)(2)."[252] The District Court granted the State's motion, and the inmates appealed.[253] For the reasons discussed below, the Court of Appeals affirmed the District Court's decision to terminate the consent decree.[254] The court also held that § 3626(b)(2) of the PLRA did not violate the separation of powers doctrine, nor the equal protection principles nor due process protections of the Fifth Amendment.[255]

The *Hadix* cases began in 1980 as one case in the Eastern District of Michigan in which prisoners of the State Prison of Southern Michigan filed a complaint against prison officials alleging constitutional violations resulting from the conditions of their confinement.[256] Five years later, the District Court approved a consent decree[257] that addressed most of the claims.[258] The remainder of the claims, including those related to mental health, medical care, and access to the courts, were transferred to the

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247. *See* Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997).

248. *See infra* notes 325-37.

249. *See Benjamin*, 124 F.3d at 163.

250. *See* Plyler v. Moore, 100 F.3d 365, 369 (4th Cir. 1996).

251. *See id.* (noting other provisions involved health services, educational programs, vocational training, food service, and visitation).

252. *Id.*

253. *See id.* The inmates asserted that § 3625(b)(2) did not require termination of the consent decree or in the alternative, such termination would be unconstitutional. *See id.*

254. *See id.* at 375.

255. *See id.* ("We also hold that the term 'Federal right' as used in § 3626(b)(2) does not include rights conferred by consent decrees . . . above the requirements of federal law.").

256. *See* Hadix v. Johnson, 947 F. Supp. 1100, 1102 (E.D. Mich. 1996).

257. *See id.*

258. *See* Hadix v. Johnson, 933 F. Supp. 1362, 1364 (W.D. Mich. 1996).

Western District of Michigan.[259] Judge Feikens of the Eastern District emphasized the importance of this consent decree, noting that the parties deliberated for four years to come to an agreement that would address the constitutional violations, and explicitly detailed how the violations would be remedied.[260] The defendants in both cases moved to terminate the respective consent decrees pursuant to the PLRA termination provisions.[261] Both courts, however, declared the applicable provisions of the PLRA unconstitutional, and therefore denied the defendants' motions.[262] These courts' opinions are discussed more fully below.[263]

The class action suit of *Gavin v. Ray* was initiated in 1978 by the inmates of the Iowa State Penitentiary (ISP) who alleged that the prison's disciplinary segregation practices and policies violated their constitutional rights.[264] These practices and policies included using tear gas and restraints, stripping cells, and limiting access to the courts.[265] In 1984, after the parties came to an agreement, the district court approved the consent decree.[266] In September of 1996, the defendants moved to terminate this consent decree pursuant to the termination provision[267] of the PLRA.[268] The district court denied their motion, concluding that the termination provision violated the separation of powers doctrine, and was therefore unconstitutional.[269]

Rufo was resurrected last year in *Inmates of Suffolk County Jail v. Sheriff of Suffolk County*, when the sheriff moved to terminate the nearly twenty-year-old consent decree.[270] The decree had been modified several times since 1979 due to non-compliance, and it was modified once again

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259. *See id.*

260. See *Hadix*, 947 F. Supp. at 1103.

261. *See id.* at 1100; *Hadix*, 933 F. Supp. at 1362.

262. *See Hadix*, 947 F. Supp. at 1113; *Hadix*, 933 F. Supp. at 1369.

263. *See infra* notes 298-304, 306-08, 316-23 and accompanying text.

264. *See* Gavin v. Ray, No. 4-78-CV-70062, 1996 WL 622556, at *1 (S.D. Iowa Sept. 18, 1996).

265. *See id.*

266. *See id.* (noting that the proposed settlement was fair, reasonable, and in the best interests of all persons affected).

267. 18 U.S.C. § 3626(b)(2) (1996).

268. *See Gavin*, 1996 WL 622556, at *1.

269. *See id.* at *4.

270. Inmates of Suffolk County Jail v. Sheriff of Suffolk County, 952 F. Supp. 869, 872-73 (D. Mass. 1997).

after the Supreme Court decision in *Rufo*.[271] This final modification allowed the sheriff to double cell pre-trial detainees under limited circumstances.[272] Early this year, the sheriff of Suffolk County moved to terminate the prospective relief contained in the consent decree, and to vacate the decree itself.[273] Relying on *Rufo*, the Massachusetts District Court granted the defendant's motion to the extent that some of the obligations imposed by the last modification would not be enforced through specific performance.[274] However, the court denied the motion to the extent that these obligations would be terminated, and it denied the motion to vacate the consent decree.[275]

B. *Rationales Used to Determine Finality of Consent Decrees*

These cases present three main rationales for determining the finality of consent decrees.[276] The first is *Rufo's* changes in fact and law standard[277] discussed above,[278] and the second reasoning concerns the character of relief granted.[279] The third rationale, an extension of the character of relief reasoning, is the contractual nature of consent decrees.[280]

In *Rufo*, the Supreme Court held that decrees may be modified when the law has changed so as "to make legal what the decree was designed to

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271. *See id.* at 871-73; *see also supra* notes 215-33 and accompanying text (describing the change in law of fact standard).

272. *See Inmates of Suffolk County Jail*, 952 F. Supp. at 873 (allowing double occupancy for up to 100 cells).

273. *See id.* at 874.

274. *See id.* at 883 (referring to paragraphs (1) and (2) of the final order of June 14, 1994).

275. *See id.*

276. *See, e.g.*, Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996); Inmates of Suffolk County Jail v. Sheriff of Suffolk County, 952 F. Supp. 869 (D. Mass. 1997); Hadix v. Johnson, 947 F. Supp. 1100 (E.D. Mich. 1996); Hadix v. Johnson, 933 F. Supp. 1362 (W.D. Mich. 1996).

277. *See Plyler*, 100 F.3d at 372; *Benjamin*, 935 F. Supp. at 346; Hadix, 947 F. Supp. at 1104.

278. *See supra* notes 223-33 and accompanying text.

279. *See, e.g., Plyler*, 100 F.3d 365; *Hadix*, 947 F. Supp. at 1105-07 (discussing the Supreme Court's treatment of consent decrees); *Inmates of Suffolk County Jail*, 952 F. Supp. at 869.

280. *See Plyler*, 100 F.3d 365; *Hadix*, 947 F. Supp. at 1106-07 (detailing the incorporation of contractual doctrine into the history of consent decrees); *Inmates of Suffolk County Jail*, 952 F. Supp. at 869.

prevent."[281] *Rufo* cited *Railway Employes [sic] v. Wright*[282] as an example of how a change in law warranted a consent decree modification.[283] *Railway Employes* [sic] involved a suit filed by nonunion employees against a railroad and its unions for violating the Railway Labor Act, which prohibited carriers from requiring prospective employees to join a union.[284] After the parties entered a consent decree that prohibited the railway from engaging in such discrimination, the Railway Labor Act was amended to allowed a union shop requirement in certain circumstances.[285] The union then requested that the Court modify the consent decree.[286] The Court granted the modification because, as both parties had realized, the consent decree's prohibitions were illegal according to the new act.[287]

Plyler used the change in law standard to conclude that consent decrees are not final judgments.[288] It relied on an oft-quoted modification standard from *United States v. Swift*[289] to advance its changes in law argument.[290] *Swift* involved a consent decree between the government and the meat-packing industry which prohibited the meat-packers from fixing prices.[291] Ten years later, the meat-packers unsuccessfully moved to modify the decree alleging changes in the meat-packing industry.[292] The *Swift Court*, in rejecting their claim, made the following distinction between cases that warrant decree modification, and those that do not.

> The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative . . . . The consent is to be read as directed toward

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281. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 388 (1992).

282. 364 U.S. 642 (1961).

283. *See Rufo*, 502 U.S. at 388.

284. *See Railway Employes* [sic], 364 U.S. at 643.

285. *See id.* at 644-45.

286. *See id.*

287. *See Rufo*, 502 U.S. at 388. "[A] 'court must be free to continue to further the objectives of th[e] Act when its provisions are amended.'" (quoting *Railway Employes* [sic], 364 U.S. at 651).

288. *See* Plyler v. Moore, 100 F.3d at 365, 371 (4th Cir. 1996) (stating that injunctive relief is subject to subsequent changes in law).

289. 286 U.S. 106 (1932).

290. *See Plyler*, 100 F.3d at 371.

291. *See Swift*, 286 U.S. at 111.

292. *See id.* at 113.

> events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.[293]

Plyler's use of this standard is misplaced when used to enforce its changes in law argument.[294] It may be conceded that consent decrees involve "supervision of changing conduct or conditions;"[295] however, this has nothing to do with changes in law. Furthermore, *Rufo* used this standard in the context of how changes in *fact* can promote consent decree modification.[296] The crucial point that *Plyler* failed to recognize is that *Rufo* held that consent decrees are final judgments "that may be reopened only to the extent that equity requires."[297]

Hadix II used the changes in fact standard[298] to explain why it had previously modified the consent decree at issue, as well as to conclude that it should not now be modified.[299] The decree was modified in 1994 because the defendants were unable to comply with particular elements of one of the plans.[300] *Hadix II* emphasized *Rufo's* requirement that, if changed circumstances warrant a modification, the modification must be "suitably tailored to the changed circumstance" and the changed circumstances must have been unforeseen.[301] *Hadix II* underscored *Rufo's* directive that "[a] proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor."[302] *Hadix II* interpreted *Rufo's* decision as a balancing test that the court should use to evaluate the inmates' constitutional rights against the public's right to control its prisons.[303] The court maintained, however, that the PLRA "completely rewrites the standard for modification in prison litigation,

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293. *See id.* at 114-15.

294. *See generally* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 379 (1992) (permitting a less stringent standard); *see also infra* note 296 and accompanying text.

295. *Swift*, 286 U.S. at 114.

296. *See generally Rufo*, 502 U.S. at 378-82 (explaining circumstances under which decree modification is proper).

297. *Id.* at 391.

298. *See supra* notes 224-25 and accompanying text.

299. *See* Hadix v. Johnson, 947 F. Supp. 1100, 1104-05 (E.D. Mich. 1996).

300. *See id.* at 1103-04 (noting that defendants could no longer comply with elements of the Out-of-Cell Activity Plan).

301. *Id.* at 1104 (quoting *Rufo*, 502 U.S. at 383).

302. *Id.* (quoting *Rufo*, 502 U.S. at 391).

303. *See id.*

making the consent decrees subject to the constitutional floor—in direct contrast to *Rufo*."[304]

The courts in *Hadix I, Plyler* and *Inmates of Suffolk County Jail* utilized the character of relief reasoning to determine whether or not consent decrees are final judgments.[305] *Hadix I* relied on the holding in *Plaut* that judgments become final once all appeals have been waived, exhausted or time barred.[306] *Hadix I* concluded that this holding was "consistent with the general understanding of a final judgment as one which resolves all legal issues."[307] Because a consent decree resolves the matter at issue, it amounts to a waiver of appeal and is therefore a final judgment.[308]

Plyler applied the reasoning that consent decrees are subject to continued court supervision, and therefore are distinct from money damages.[309] In doing so, however, it referred to consent decrees as "*final judgment[s]* granting injunctive relief. . . ."[310] *Inmates of Suffolk County Jail*, however, articulated the distinction between subsequent adjudication that required continued court supervision, and remedies.[311] It stated that in tort and contract cases, judgments for money damages are normally awarded.[312] However, if the judgment is not satisfied, orders are made for enforcement; yet, these are separate orders, which are not part of the judgment.[313] Similarly, modifications to consent decrees are "judicial determinations," which are "distinct from the relief ordered as remedies."[314] Based, in part, on this analysis, the court in *Inmates of Suffolk County Jail* held that consent decrees are final judgments.[315]

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304. *Id.*

305. *See* Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996); Inmates of Suffolk County Jail v. Sheriff of Suffolk County, 952 F. Supp. 869 (D. Mass. 1997); Hadix v. Johnson, 933 F. Supp. 1362 (W.D. Mich. 1996).

306. *See Hadix*, 933 F. Supp. at 1368.

307. *Id.*

308. *See id.* (noting that consent decrees are in some respects contractual in nature).

309. *See Plyler*, 100 F.3d at 371-72.

310. *Id.* at 372 (emphasis added).

311. *See* Inmates of Suffolk County Jail v. Sheriff of Suffolk County, 952 F. Supp. 869, 878-79 (D. Mass. 1997).

312. *See id.* at 876.

313. *See id.*

314. *Id.* at 879.

315. *See id.* at 882.

The *Hadix* cases take the *Inmates of Suffolk County Jail* analysis a step further by discussing the contractual nature of consent decrees.[316] *Hadix II* noted that consent decrees, at the time of *Swift*, were not considered contractual.[317] Over the years, however, the Supreme Court began to recognize their contractual nature, and that they had "attributes both of contracts and judicial decrees."[318] *Hadix I* quoted *Rufo's* conclusion that consent decrees "embod[y] an agreement between the parties and thus in some respects [are] contractual in nature."[319] *Rufo* went on to state that consent decrees are agreements that the parties expect to be enforced as judicial decrees "that [are] subject to the rules generally applicable to other judgments and decrees."[320] According to *Hadix I*, one of these rules is the finality of the judgment.[321] Therefore, "where appeals have been exhausted or the time for appeal has elapsed or been waived, consent decrees become final judgments."[322] In an attempt to resolve the issue of whether consent decrees should be labelled as contracts or judgments, *Hadix II* cited the Supreme Court's conclusion that "we can do both."[323]

C. *Statutory Interpretation*

A second area of debate on the constitutionality of the PLRA centers around the Act's apparent ambiguity. While the district court in *Benjamin* discussed at length the issue of finality of consent decrees,[324] the Second Circuit, which apparently acknowledged their finality,[325] focused primarily on statutory interpretation in determining the constitutionality of the

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316. *See* Hadix v. Johnson, 947 F. Supp. 1100, 1106-07 (E.D. Mich. 1996); Hadix v. Johnson, 933 F. Supp. 1362, 1368 (W.D. Mich. 1996).

317. *See Hadix*, 947 F. Supp. at 1106.

318. *Id.* (citing Local Number 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501, 519 (1986)).

319. *Hadix*, 933 F. Supp. at 1368 (quoting Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378 (1992)).

320. *Rufo*, 502 U.S. at 378.

321. *See Hadix*, 933 F. Supp. at 1368.

322. *Id.*

323. *See Hadix*, 947 F. Supp. at 1106 (citing *International Ass'n of Firefighters*, 478 U.S. at 519).

324. *See* Benjamin v. Jacobson, 935 F. Supp. 332, 344-49 (S.D.N.Y. 1996).

325. *See* Benjamin v. Jacobson, 124 F.3d 162, 170-71 n.13 (2d Cir. 1997) ("The plaintiffs correctly note that the Supreme Court has stated as a general matter that a consent decree is a final judgment.") (citing *Rufo*, 502 U.S. at 391).

PLRA's termination provision.[326] The only other case considering the constitutionality of the PLRA to dedicate comparably detailed attention to the Act's interpretation is *Inmates of Suffolk County Jail*.[327] The provision at issue in both of these cases was the termination provision,[328] whose interpretation is largely dependent upon the Act's subsequent definitions of key terminology.[329] These terms include "prospective relief,"[330] "relief,"[331] "private settlement agreement,"[332] and "consent decree."[333]

Benjamin upheld the constitutionality of the termination provision,[334] however its conclusion rested solely on its self-proclaimed "saving interpretation."[335] In approaching the issue, the court articulated two plausible interpretations of the termination provision: 1) that the provision limits the federal courts' jurisdiction in a manner which would prohibit them from enforcing prior consent decrees unless they met the statute's federal rights requirement; and 2) that previously approved consent decrees would be "render[ed] null and void" if they were not "narrowly tailored to a federal right."[336] As conceded by *Benjamin*, the latter interpretation would raise serious constitutional questions regarding separation of powers.[337]

It is well settled in federal jurisprudence that, when a statute's ambiguity creates more than one feasible interpretation, the court should adopt the reading that avoids constitutional questions, unless contrary

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326. *See Benjamin*, 124 F.3d at 173-77.

327. *See* Inmates of Suffolk County Jail v. Sheriff of Suffolk County, 952 F. Supp. 869, 876-78 (D. Mass. 1997).

328. *See* 18 U.S.C. § 3626(b)(2) (1996) (allowing a defendant or intervenor "immediate termination of any prospective relief" if the statutory requirements are not met).

329. *See Benjamin*, 124 F.3d at 174-75; *Inmates of Suffolk County Jail*, 952 F. Supp. at 877-78.

330. *See* 18 U.S.C. § 3626(g)(7) (including "all relief other than compensatory monetary damages").

331. *See id.* § 3626(g)(9) (including consent decrees but excluding private settlement agreements).

332. *See id.* § 3626(g)(6) (explaining that such an agreement is enforceable only by reinstatement of the relevant civil proceeding).

333. *See id.* § 3626(g)(1) (indicating a court approved agreement).

334. *See Benjamin*, 124 F.3d at 174-77.

335. *Id.* at 177.

336. *See id.* at 167.

337. *See id.* at 169 (explaining the roots of the separation of powers doctrine).

Congressional intent is apparent elsewhere in the legislative context.[338] Following these "principles of restraint,"[339] *Benjamin* based its analysis on the first interpretation of the termination provision.[340] The pivotal grounds for the court's interpretation of the termination provision lies in the meaning of "termination of prospective relief."[341] The court maintained that if prior consent decrees were included in "prospective relief," then they would be terminated by the PLRA.[342] If, on the other hand, the provision means that federal courts are unable to provide *future* relief, then previous decrees would not be rendered invalid, but merely relegated to state courts.[343]

The PLRA's statutory definitions appear circular and confusing, and require close analysis to map out and understand their meaning. To begin, "prospective relief" means "all *relief* other than compensatory monetary damages."[344] Relief, in turn, is defined as "all *relief* in any form that may be granted or approved by the courts and includes consent decrees but does not include private settlement agreements."[345] The statute defines private settlement agreements as "an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled."[346] Finally, consent decrees are defined as "any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlement agreements."[347]

As confusing as these definitions may seem, *Benjamin* twisted them even more. Although the court acquiesced to the plausibility that consent decrees fall within the purview of "prospective relief," it nonetheless imported "linguistic problems" into that interpretation.[348] It maintained that this interpretation would imply that "relief," in and of itself, would

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338. *See* Inmates of Suffolk County Jail v. Sheriff of Suffolk County, 952 F. Supp. 869, 877 (D. Mass. 1997) (citing DeBartolo v. Florida Gulf Trades Council, 485 U.S. 568, 575 (1988)); *see also Benjamin*, 124 F.3d at 168 (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)).

339. *Benjamin*, 124 F.3d at 168.

340. *See id.* (forcing plaintiffs to seek redress for non-federal aspects of decrees in state courts).

341. *Id.* at 166.

342. *See id.* (focusing on the effect of the PLRA on past decrees).

343. *See id.*

344. 18 U.S.C. § 3626(g)(7) (1996) (emphasis added).

345. *Id.* § 3626(g)(9) (emphasis added).

346. *Id.* § 3626(g)(6).

347. *Id.* § 3626(g)(1).

348. Benjamin v. Jacobson, 124 F.3d 162, 167 (2d Cir. 1997).

include "private settlement agreements," and as such, "it would be a remarkable twisting of language to describe a contract or an agreement as a form of relief."[349]

Viewed more plainly, however, a consent decree, such as the one at issue in *Inmates of Suffolk County Jail*, is a court approved agreement,[350] which would seemingly put it squarely within the definition of "relief," and hence within "prospective relief." It follows, therefore, based on this more simplistic analysis, that the PLRA allows consent decrees to be terminated by a defendant or intervenor.

Although the Supreme Court advises against confronting constitutional issues when an alternative statutory interpretation would avoid them,[351] this is dependent upon the parity of the different interpretations, and the lack of contrary Congressional intent.[352] First, although the opposing interpretations may ultimately carry equal weight, both *Benjamin* and *Inmates of Suffolk County Jail* jumped through pages of analytical and definitional hoops to conclude that their interpretations avoid constitutional issues.[353] Second, the PLRA's legislative history is replete with Congressional intent aimed toward keeping inmates out of the court room, and federal courts out of the prisons.[354] While these intents may not in and of themselves be dispositive of the PLRA's constitutionality, they should at least be given more consideration in resolving this issue.[355] Even *Benjamin* and *Inmates of Suffolk County Jail* treaded lightly on their constitutional interpretations of the termination provision, leaving open alternative constructions.[356]

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349. *Id.*

350. Inmates of Suffolk County Jail v. Sheriff of Suffolk County, 952 F. Supp. 869, 876 (D. Mass. 1997).

351. *See supra* note 338.

352. *See Inmates of Suffolk County Jail*, 952 F. Supp. at 877.

353. *Benjamin*, 124 F.3d at 166-68; *Inmates of Suffolk County Jail*, 952 F. Supp. at 877.

354. *See, e.g.*, 141 CONG. REC. S14413 (daily ed. Sept. 25, 1995) (statement of Sen. Dole); 141 CONG. REC. S14627 (daily ed. Sept. 27, 1995) (statement of Sen. Reid).

355. *See Benjamin*, 124 F.3d at 177 ("We cannot, of course, read statutes against their *clear meaning*, even to save them." (emphasis added) (citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.")).

356. *See id.* at 176 ("[T]he provision's constitutionality is only comfortably preserved by assuming that . . . the PLRA . . . does not destroy the underlying agreements themselves."); *Inmates of Suffolk County Jail*, 952 F. Supp. at 882 ("[S]hould my interpretation of the statute be rejected . . . . ").

D. *The Paradox*

The paradoxical element of the Act's authorization to modify or terminate consent decrees is that they can be modified or terminated if the court finds no violation of a federal right; yet, if there was compliance with the consent decree, there would be no evidence of such a violation.[357] Furthermore, many consent decrees were entered into without requiring the court to find constitutional violations.[358] As stated in *Hadix II*, consent decrees are designed to avoid such findings, because they are products of conscientious negotiation between the parties which effect exact terms.[359] As a result, the parties waive their right to litigation on the issue, thereby saving them both the risk of litigation as well as the time and expense that legal proceedings involve.[360] By requiring courts to reopen consent decrees and find federal violations, all these savings become futile.[361] In this manner, "the PLRA cuts a swath through the judicial process."[362]

This paradox essentially puts all consent decrees otherwise in good standing at risk of termination.[363] When a prisoner enters into a consent decree with an opposing party, he should be able to expect that agreement to be enforced.[364] By putting these agreements at risk of termination, prisoners have no recourse to secure their constitutionally granted rights.[365] There are many meritorious cases currently under consent decrees that now face this risk.[366]

Furthermore, faced with the prospect that consent decrees may be terminated after two years,[367] inmates who bring civil suits alleging constitutional violations have no incentive to reach such an agreement. As a result, they are more likely to fully litigate their claims than negotiate and settle, thereby exhausting even more of the courts' time and resources.

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357. *See* Gavin v. Ray, No. 4-78-CV-70062, 1996 WL 622556 at *4 (S.D. Iowa Sept. 18, 1996); *see also* Tom Terrizi, *Should Prison Consent Decrees Be Vacated?*, N.Y.L.J., Aug. 22, 1996, at 2.

358. *See, e.g., Gavin*, 1996 WL 622556, at *2; Hadix v. Johnson, 947 F. Supp. 1100, 1102 (E.D. Mich. 1996).

359. *See Hadix*, 947 F. Supp. at 1108.

360. *See id.*

361. *See id.* at 1108-09 (arguing that the parties' strategy to save time, expense, and inevitable risk of litigation "are all made futile by a requirement to make these findings").

362. *Id.* at 1109.

363. *See, e.g., Top Ten, supra* note 20.

364. *See infra* notes 437-48 and accompanying text.

365. *See infra* notes 437-48 and accompanying text.

366. *See Top Ten, supra* note 20.

367. *See* 18 U.S.C. § 3626(b)(1)(i) (1996).

V. SEPARATION OF POWERS

If consent decrees are considered final judgments, and the narrower interpretation of the PLRA is adopted, the Act presents serious constitutional concerns under the doctrine of separation of powers.[368] Under the separation of powers doctrine, it is beyond Congress' power to enact retroactive legislation that affects a final judgment by an Article III court.[369] John Boston, an attorney with the National Prison Project, argues that, "prisoners are the first constituency in more than a century whose unpopularity is so great as to overcome a Congressional majority's scruples about judicial independence."[370] According to Boston, *United States v. Klein*,[371] decided in 1871, was the last time Congress attempted to exercise control over the Supreme Court's jurisdiction in preventing a disfavored population from obtaining relief.[372]

United States v. Klein involved an act of Congress that affected Southerners' right to obtain the proceeds of their property that was sold after the Civil War.[373] In 1863, Congress enacted the Abandoned and Captured Property Act[374] which allowed owners of property seized by the government to claim the proceeds of such property upon proof that they had not aided in the rebellion against the Union.[375] A year earlier, however, Congress passed an act which authorized the President, upon proclamation, to award pardons and amnesty to participants in the rebellion in such instances where he may decide it to be "expedient for the

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368. *See* Inmates of Suffolk County Jail v. Sheriff of Suffolk County, 952 F. Supp. 869, 876-77 (D. Mass. 1997) (arguing that if the PLRA requires an entire consent decree to be terminated, Congress acted without consideration for a body of judicial precedent).

369. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 225-26 (1995) (citing THE FEDERALIST NO. 81, at 545 (Alexander Hamilton) (J. Cook ed., 1961). "[W]e know of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation." *Id.* at 230; *see also* Gordon v. United States, 117 U.S. 697, 700-04 (1864); Hayburn's Case, 2 U.S. (2 Dall.) 409, 413 (1792) ("[N]o decision of any court of the United States can, under any circumstances, . . . be liable to a revision, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested.").

370. Memorandum from John Boston, *PLRA and the Separation of Powers; Prospective Applications* 8 (Apr. 22, 1996) (on file with the *New York Law School Law Review*).

371. 80 U.S. 128 (1871).

372. *See* Boston, *supra* note 370, at 8 n.11.

373. 80 U.S. at 136.

374. 12 Stat. 820 (1863).

375. *See id.*; *Klein*, 80 U.S. at 139.

public welfare."[376] In December of 1863, the President issued a proclamation granting full pardon and restoration of all property rights to participants in the rebellion who took an oath of loyalty to the United States Constitution.[377] This proclamation, which was refined in March 1864,[378] was restricted only to people who came forth voluntarily to take the oath.[379] After several subsequent proclamations, full pardon and amnesty was granted in December 1868, to participants without exception, and without an oath requirement.[380]

The defendant in *Klein* had aided in the rebellion, had abandoned his cotton to the Treasury Department, and had taken an oath of loyalty.[381] The Court of Claims therefore held that he was entitled to the proceeds of his property.[382] Soon after this judgment, Congress enacted a provision to the Abandoned and Captured Property Act prohibiting pardons and acceptances of oaths to be admitted as evidence in "any claim against the United States in the Court of Claims."[383] The provision also prohibited proof of loyalty upon any executive pardon, and restricted such proof to be made only according to certain statutes.[384] It further stated that if a judgment had been rendered based on proof of loyalty other than a statute, the Supreme Court would not have jurisdiction over the case, and would be required to dismiss it for that reason.[385]

The thrust of this provision was that the acceptance of a pardon amounted to evidence of disloyalty,[386] but the pardon could not be used as evidence of the rights it bestowed.[387] The *Klein* Court determined that the language of the provision indicated that withholding jurisdiction was

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376. *Klein*, 80 U.S. at 139.

377. *See id.* at 139-40.

378. *See* 13 Stat. 741 (1864).

379. *See Klein*, 80 U.S. at 140-41.

380. *See id.* at 141.

381. *See id.* at 142-43.

382. *See id.* at 143.

383. *Id.* (noting that this provision was introduced as a clause in the general appropriation bill for payment of judgments of the Court of Claims and received little consideration in either House).

384. *See id.*

385. *See id.*

386. *See id.* at 144 ("The substance of this enactment is that an acceptance of a pardon, without disclaimer, shall be conclusive evidence of the acts pardoned . . . .").

387. *See id.* (arguing that Congress made the oath "null and void as evidence of the rights conferred by it").

merely a "means to an end."[388] Its actual purpose, the Court said, was to deny the effect of pardons that the Supreme Court deemed them to have.[389] The Court concluded that by denying jurisdiction to the Court, the provision was "founded solely on the application of a rule of decision . . . prescribed by Congress,"[390] and that Congress does not have the power to "make exceptions and prescribe regulations to the appellate power."[391]

The Court distinguished this case from *Wheeling*, because *Wheeling* did not involve an arbitrary rule of decision.[392] Instead, that Court was allowed to apply its regular rules to the Act's newly created circumstances.[393] In *Klein*, however, the Act did not create any new circumstances.[394] Still, the Act directed the Court to give the evidence the precise opposite effect that the Court had previously deemed it to have.[395] The court held that Congress, through this provision, overstepped its limits, and thereby violated the separation of powers.[396]

In applying *Klein*, the *Hadix I* court stated that an act of Congress which dictates the result of a case whereby "the intervening step in which a court interprets and applies the rule on a case-by-case basis is effectively eliminated, Congress encroaches upon that power which has been reserved for the independent Judiciary."[397] *Hadix I* concluded that the automatic stay provision of the PLRA represents an attempt by Congress "to perform a judicial function," and in doing so, has violated the separation of powers.[398]

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388. *Id.* at 145.

389. *See id.* ("The proviso declares that pardons shall not be considered by this court.").

390. *Id.* at 146.

391. *Id.*

392. *See id.*

393. *See id.* at 147.

394. *See id.* ("In the case before us no new circumstances have been created . . . .").

395. *See id.* (arguing that it was essentially "forbidden" to give the evidence the effect the Court found it to have).

396. *See id.*

397. Hadix v. Johnson, 933 F. Supp. 1362, 1366 (W.D. Mich. 1996) (citing *Klein*, 80 U.S. 128).

398. *Id.* at 1367.

The second separation of powers rationale used by courts deciding PLRA cases is the public/private rights distinction.[399] This reasoning stems from the mandate set forth in *Wheeling* that an "act of congress [sic] cannot have the effect and operation to annul the judgment of the court already rendered, . . . especially as it respects adjudication upon the private rights of parties."[400] *Wheeling*, however, distinguished Congress's power over private rights from its governance over public rights, holding that the latter are within Congress's control and regulation.[401]

Hadix I held that, unlike the rights involved in *Wheeling*, the rights at issue under the PLRA are constitutional rights, which are private rights.[402] As such, they "[cannot] be abridged by an act of Congress."[403]

The *Benjamin* court, however, maintained that *Wheeling's* public/private rights distinction is merely an ancillary "constitutional barrier" in analyzing the separation of powers issue.[404] Drawing upon *Wheeling*, the *Benjamin* court averred that the analysis instead rests on the distinction between prospective and retrospective relief.[405] This analysis turns *Wheeling* on its head. In *Wheeling*, the Court concluded that whether the obstruction at issue is of a continuing or executory nature depends upon "whether or not it interferes with the right of navigation," which it held was a public right and within Congress' power to control.[406] In fact the holding in *Wheeling* is predicated on the finding that the right of navigation is a public right.[407]

Hadix II maintained that the *Rufo* Court resolved the public/private rights issue as it pertains to public reform litigation.[408] Public rights, meaning the right to maintain control over institutions, are protected by

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399. *See* Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997); Hadix v. Johnson, 947 F. Supp. 1100 (E.D. Mich. 1996); Gavin v. Ray, No. 4-78-CV-70062, 1996 WL 622556 (S.D. Iowa Sept. 18, 1996), *rev'd sub nom* Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997); Benjamin v. Jacobson, 935 F. Supp. 332 (S.D.N.Y. 1996); *Hadix*, 933 F. Supp. 1362 (W.D. Mich. 1996).

400. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421, 431 (1855).

401. *See id.* at 431-32; *see also supra* notes 197-203 and accompanying text.

402. *Hadix*, 933 F. Supp. at 1367 ("[T]he rights that are at issue in the instant case derive from the most sacred of sources, the Constitution.").

403. *Id.* ("Unlike statutorily created rights, which Congress can create, modify, define, and terminate, Constitutionally created rights can not be abridged by an act of Congress.").

404. *Benjamin*, 124 F.3d at 172.

405. *See id.*

406. *Wheeling & Belmont Bridge Co.*, 59 U.S. at 431.

407. *See id.*

408. Hadix v, Johnson, 947 F. Supp. 1100, 1107 (E.D. Mich. 1996).

requiring consent decrees to be codified based on changed circumstances.[409] Private rights, on the other hand, are protected by preventing either the court or Congress "from stripping a consent decree down to the constitutional floor."[410] The PLRA, however, has undermined this resolution by requiring consent decrees to be "subject to the constitutional floor."[411]

In *Plaut*, Justice Scalia stressed the importance of the separation of powers doctrine, and described it as a "prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict."[412] *Benjamin*, however, maintained that this "categorical language" was "not absolute."[413] It reasoned that *Plaut* itself "expressly recognized a number of cases[, including *Wheeling*,] that 'distinguish themselves' from its decision."[414] In other words, according to *Benjamin*, *Plaut* devised exceptions to Congress' inability to modify final judgments.[415] In reality, *Plaut* did not necessarily "create exceptions" to this rule, but merely *acknowledged* that these cases, which incidently were introduced by the petitioner, were not relevant to the issue at hand, and that "nothing in [its] holding . . . call[ed] them into question."[416] Moreover, the petitioners in *Plaut* relied upon general statements in these cases which had little precedential value.[417] Furthermore, *Benjamin's* analysis on this point rested on the Court's dicta, which further weakens the persuasiveness of its rationale.[418]

Benjamin concluded that, based on its "saving interpretation,"[419] the PLRA's termination provision does not annul prior consent decrees, but merely shifts the jurisdiction of consent decree adjudication from the

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409. *See id.* (arguing that consent decrees relate to conditions which are provisional and tentative and thus not impervious to change).

410. *Id.*

411. *Id.* at 1104.

412. Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 239 (1995).

413. Benjamin v. Jacobson, 124 F.3d 162, 171 (2d Cir. 1997).

414. *Id.*

415. *Id.*

416. *Plaut*, 514 U.S. at 232 (arguing that petitioner's cases are distinguishable from the instant case).

417. *See id.*

418. *See id.* at 232-33 (arguing that even if the Court were to decide these cases using prior dicta, it could find many dicta opposite to petitioner's which would carry more weight).

419. *Benjamin*, 124 F.3d at 177.

federal courts to the state courts.[420] Concededly, Congress has the authority to create and establish lower federal courts.[421] The Supreme Court has interpreted this authority to include establishing federal court jurisdictional limitations as well.[422] However, the Second Circuit, in *Battaglia v. General Motors*,[423] made a point of clarifying that this authority is not without limits.[424] Specifically, it stated that Congress' exercise of control over federal court jurisdiction is subject to constitutional requirements.[425] In other words, Congress may not use its jurisdictional authority "to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation."[426] Assuming that the consent decrees are vested rights and therefore property rights,[427] the PLRA, under *Benjamin's* interpretation, could still run constitutionally afoul.

Benjamin's jurisdiction-shifting interpretation also clashes with the notion of jurisprudential fairness.[428] As one legal scholar put it, "[w]hen Congress parses jurisdiction between the state and federal judiciaries," it could lead to the assumption "that the state courts enjoy parity with the lower federal courts."[429] Furthermore, constitutional litigants are entitled to have their claim heard in a competent court.[430] When Congress

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420. *See id.*

421. *See* U.S. CONST. art. III, § 1.

422. *See* Lockerty v. Phillips, 319 U.S. 182, 187 (1943) ("The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'" (quoting Cary v. Curtis, 3 How. 236, 245)); *see also* Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938).

423. 169 F.2d 254 (2d Cir. 1948).

424. *See id.* at 257 (arguing that Congress' control is subject, at the very least, to the requirements of the Fifth Amendment).

425. *See id.*; *see also* Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 71 (1981) ("[T]he Second Circuit took pains to say that the jurisdictional limitation could not survive if the substantive provisions of the Act were unconstitutional . . . .").

426. *Battaglia*, 169 F.2d at 257.

427. *See infra* notes 441-48 and accompanying text.

428. *See* Sager, *supra* note 425, at 76.

429. *Id.* at 72.

430. *See id.* at 80 (defining such court to be one capable of dealing fairly and independently with the claims).

relegates them to state courts, it places these litigants at a "high risk of state court prejudice."[431]

Although Congress does possess the power to regulate public rights,[432] and to limit the jurisdiction of courts it has established,[433] it lacks the power to intervene in judgments which the court has rendered final.[434] The significance of the separation of powers doctrine is deeply rooted in the federal judiciary, and is of grave importance in determining the constitutionality of the PLRA.[435]

VI. DUE PROCESS

The Fifth Amendment to the Constitution provides that "[n]o person shall. . . be deprived of life, liberty, or property, without due process of law."[436] The PLRA violates prisoners right to due process in two ways: 1) it deprives them of their vested rights provided by their consent decrees[437] and 2) it burdens their fundamental right of access to the courts.[438]

Analysis of due process as it relates to the PLRA rests on the finality of consent decrees,[439] which the Supreme Court established in *Rufo*.[440] A

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431. *Id.* at 79.

432. *See* Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421, 431 (1855).

433. *See* U.S. CONST. art. III, § 2, cl. 2.

434. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 226 (1995); Hadix v. Johnson, 933 F. Supp. 1362, 1367 (W.D. Mich. 1996).

435. See Inmates of Suffolk County Jail v. Sheriff of Suffolk County, 952 F. Supp. 869, 882 (D. Mass. 1997).

> The effect of the PLRA, unless construed to preserve these obligations, . . . would be to set aside by statutory directive a final judgment of a court. This would be the most serious intrusion on the separation of powers of any of the various alleged intrusions plaintiffs have challenged. For the same reason, it would be the strongest ground for a holding of unconstitutionality.

Id.; *see also* Benjamin v. Jacobson, 935 F. Supp. 332, 344 (S.D.N.Y. 1996).

436. U.S. CONST. amend. V.

437. *See* Hadix v. Johnson, 933 F. Supp. 1362, 1369 (W.D. Mich. 1996).

438. *See* Benjamin v. Jacobson, 935 F. Supp. 332, 352 (S.D.N.Y. 1996) (contending that "the PLRA burdens the fundamental right of access to the courts," and defendants admitting "that this right is constitutional in nature"); *see also* Bounds v. Smith, 430 U.S. 817, 821 (1977) ("It is now established beyond doubt that prisoners have a constitutional right of access to the courts.").

439. *See* Plyler v. Moore, 100 F.3d 365, 374 (4th Cir. 1996) (stating that "Congress may not mandate the reopening of final judgments").

440. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 391 (1992).

final judgment is a property right, and is therefore subject to the vested rights doctrine.[441] Sections 3626(b) and (e) of the PLRA terminate consent decrees without adjudication,[442] and thereby deprive prisoners of their property rights without due process of law.[443] Furthermore, under the vested rights doctrine, private rights which have been granted by a court judgment cannot be abrogated by subsequent legislation.[444] As mentioned previously, the rights affected by the PLRA are constitutional rights,[445] and therefore private rights.[446] Minimally, due process requires that a party be heard before stripping him of his vested rights.[447] The PLRA, however, does not provide that opportunity, because these sections permit consent decrees to be terminated without a judicial hearing.[448]

The second manner in which the PLRA violates inmates' due process rights is that it burdens their fundamental right of access to the courts by imposing filing fees and forbidding prisoners from bringing civil actions in forma pauperis if they have had three or more previous suits dismissed as being frivolous.[449] This, in essence, is a violation of their equal protection.[450] Although the Fifth Amendment does not contain an equal protection clause, it nonetheless forbids unjustifiable discrimination, and employs the standards of the Fourteen Amendment's equal protection clause[451] to demarcate equal protection violations.[452] For equal protection

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441. *See Hadix*, 933 F.3d at 1369 ("A judgment that has become final is a type of property right that is subject to this rule.").

442. *See supra* notes 41-52 and accompanying text (discussing the PLRA provision allowing prison officials to petition courts to terminate consent decrees).

443. *See* Hadix v. Johnson, 933 F.3d 1362, 1369 (W.D. Mich. 1996) (arguing that the PLRA takes away the vested right in the judgment "without any process at all").

444. *See* McCullough v. Virginia, 172 U.S. 102, 123-24 (1898); Hodges v. Snyder, 261 U.S. 600, 603 (1923).

445. *See supra* note 402 and accompanying text.

446. *See Hadix*, 933 F. Supp. at 1367-68 (noting that private rights are derived from the Constitution unlike the public rights involved in *Wheeling & Belmont Bridge Co.*).

447. *See id.* at 1369 (Due process requires, "at the very least, notice and an opportunity to be heard before there is a deprivation of property.").

448. *See* 18 U.S.C. § 3626(e)(1) (1996) ("The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions.").

449. *See* 28 U.S.C. § 1915(a), (b), (g) (1996).

450. *See infra* notes 455-70 and accompanying text.

451. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

purposes, a fundamental right is a Constitutionally protected right,[453] and access to the courts falls within this purview.[454]

When legislation burdens a fundamental right, the courts have applied the strict scrutiny standard to determine if the legislation violates equal protection.[455] The strict scrutiny standard requires the government to establish that there is a compelling or important interest which necessitates the legislation's differential treatment.[456] This standard also requires that the legislation be narrowly tailored to achieve its compelling interest.[457]

Procunier v. Martinez[458] involved a prison regulation that inhibited prisoners' access to the courts. The prisoners challenged this rule, which prohibited law students and paralegals from conducting attorney-client interviews with the prisoners.[459] The Court in this case stated that access to the courts is a collateral right to due process of law, meaning that prisoners must be able to obtain legal assistance.[460] Therefore, the Court deemed invalid any regulation that inhibited prisoners' access to the courts.[461] According to this Court, the governmental interest in banning these interviews did not outweigh the prisoners' fundamental right of access to the courts.[462] Sections 1915(a), (b) and (g) likewise burden prisoners' access to the courts, and therefore violate their due process under the law.

The court in *Lyon v. Krol*[463] applied the strict scrutiny standard to hold that the "three strikes" provision[464] of the PLRA was

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452. *See, e.g.*, Richard v. Hinson, 70 F.3d 415, 416-17 (5th Cir. 1995) (explaining that the same test is employed to evaluate claims under the Fifth and Fourteenth Amendments); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 173-74 (1980) (citing Fourteenth Amendment cases in evaluating a Fifth Amendment claim).

453. *See Richard*, 70 F.3d at 417.

454. *See supra* text accompanying note 438.

455. *See Richard*, 70 F.3d at 417; *see also* Romer v. Evans, 116 S. Ct. 1620, 1627 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

456. *See City of Cleburne*, 473 U.S. at 440. *See generally* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that a municipal ordinance, which was not uniformly applied, did not show any compelling state interest).

457. *See City of Cleburne*, 473 U.S. at 440.

458. 416 U.S. 396 (1974).

459. *See id.* at 398.

460. *See id.* at 419.

461. *See id.* (citing *Ex parte* Hull, 312 U.S. 545 (1941)).

462. *See id.* at 421-22.

463. 940 F. Supp. 1433 (S.D. Iowa 1996).

464. *See* 28 U.S.C. § 1915(g) (1996).

unconstitutional.[465] Under this provision, a plaintiff who has previously brought three or more civil actions or appeals that were dismissed as being frivolous is prohibited from filing a suit in forma pauperis.[466] The plaintiff in *Lyon* filed an action claiming that the defendants prohibited him from participating in Jewish religious practices.[467] Because Lyon had already filed more than three actions which were deemed frivolous, this case was dismissed pursuant to § 1915(g).[468] On the plaintiff's motion to alter or amend this ruling, the court declared that this section would only prevent indigent prisoners who had three or more cases dismissed as frivolous from filing additional meritless cases.[469] Given that the stated government interest was to deter all inmates from filing frivolous lawsuits, the court held that § 1915(g) was not "narrowly tailored to achieve a compelling government interest," and was therefore unconstitutional under the Fifth Amendment.[470]

Even under a less exacting standard of review, however, the PLRA will not likely pass constitutional muster. If a law does not burden a fundamental right or disadvantage a suspect class,[471] it will be upheld if it has a *rational* relationship to a legitimate governmental interest.[472] This standard was applied in the recent Supreme Court case, *Romer v. Evans*.[473]

Romer involved an amendment to the Colorado Constitution that prohibited any "legislative, executive or judicial action" that protected homosexuals from discrimination.[474] The Supreme Court held that this amendment was unconstitutional because it did not "bear a rational relationship to a legitimate governmental interest."[475] The "rational

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465. *Lyon*, 940 F. Supp. at 1439.

466. *See* 28 U.S.C. § 1915(g) (noting an exception for prisoners who are under imminent danger of serious physical injury).

467. *See Lyon*, 940 F. Supp. at 1435.

468. *See id.*

469. *See id.* at 1438 (arguing that non-indigent inmates could file as many suits, frivolous or not, as long as they could afford the filing fee).

470. *See id.* at 1439.

471. *See generally* United States v. Wehr, 20 F.3d 1035, 1037 (9th Cir. 1994) (noting that "persons convicted of a crime do not constitute a class that is suspect in terms of constitutional deprivation").

472. *See* Romer v. Evans, 116 S. Ct. 1620, 1627 (1996).

473. *Id.*

474. *Id.* at 1623.

475. *Id.* at 1629 ("The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also

relation" to "legitimate legislative end" protects against legislative classifications that are designed intentionally to burden a disadvantaged group through the law.[476] The *Romer* Court concluded that the amendment to Colorado's constitution "impos[ed] a broad and undifferentiated disability on a single named group," and that its breadth was so inconsistent with its purpose, that it was clearly born out of animosity toward the effected class.[477]

The PLRA's legislative history, as well as the concurrent animosity between the federal judiciary and Congress,[478] indicates that its purpose was to limit judicial remedies and frivolous lawsuits filed by prisoners, largely because prisons had become too comfortable at the hands of federal courts.[479] Governor William Weld's statement that "prisons should be 'a tour through the circles of hell' where inmates should learn only 'the joys of busting rocks'" is indicative of the lack of deference society gives to prisoners.[480] These prevailing attitudes[481] demonstrate that the PLRA was born out of animosity toward the prisoner status, as identified in *Romer*.[482] Additionally, prisoners have historically been considered one of the most unpopular groups of people.[483] According to the Supreme Court, however,

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cites its interest in conserving resources to fight discrimination against other groups.").

476. *Id.* at 1627 ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect." (citing United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 181 (1980) (Stevens, J., concurring))).

477. *Id.*

478. *See infra* notes 527-32 and accompanying text.

479. *See* Benjamin v. Jacobson, 935 F. Supp. 332, 340 (S.D.N.Y. 1996) (citing 141 CONG. REC. S14316 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham) and 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Abraham)); *see also* Rhodes v. Chapman, 452 U.S. 337, 354 (1981).

480. *See Benjamin*, 935 F. Supp. at 341.

481. *See, e.g., Rhodes*, 452 U.S. at 377 (Marshall, J., dissenting)

> With the rising crime rates of recent years, there has been an alarming tendency toward a simplistic penological philosophy that if we lock the prison doors and throw away the keys, our streets will somehow be safe. In the current climate, it is unrealistic to expect legislators to care whether the prisons are overcrowded or harmful to inmate health.

Id.

482. *See supra* notes 474-77 and accompanying text.

483. *See Rhodes*, 452 U.S. at 358 (Brennan, J., concurring) ("Prison inmates are 'voteless, politically unpopular, and socially threatening.' Thus, the suffering of prisoners, even if known, generally 'moves the community in only the most severe and exceptional cases.'" (citing Morris, *The Snail's Pace of Prison Reform*, 1970 PROCEEDINGS OF THE 100TH ANNUAL CONGRESS OF CORRECTION OF THE AMERICAN CORRECTIONAL ASS'N 36, 42)); *see also*, O'Lone v. Estate of Shabazz, 482 U.S. 342, 354

equal protection, at the very least, implicates that the "desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[484] Therefore, even under a rational relation basis, the PLRA violates inmates' right to equal protection.

VII. RETROACTIVITY OF THE FILING FEES AND ATTORNEY FEE PROVISIONS

Changes to Title 28 § 1915[485] and Title 42 § 1997(e)[486] of the United States Code present the issue of a legislation's retroactive effects. Section 1915 imposes filing fees on prisoners who attempt to bring a civil action or appeal in forma pauperis (i.f.p.).[487] Unlike the previous section of Title 28, which merely required an in forma pauperis litigant to file an affidavit of poverty, under the PLRA, a prisoner must also submit "a certified copy of [his] trust fund account statement" for the prior six-month period.[488] Furthermore, the United States Court of Appeals has interpreted § 1915 to mean that prisoners who have already been granted i.f.p. status will have to refile for the status.[489]

Title 42 § 1997(e) of the United States Code sets the rate of court-appointed attorneys' fees in prison litigation.[490] As applied, § 1997(e) effectively reduces attorney fees to $60 to $112.50 per hour, where previously fees were obtainable at the market rate.[491] It also deviates from the former applicable statute, § 1988 of Title 42,[492] which permitted fees for all time reasonably spent on prison litigation cases.[493] Under the new Act, fees can only be awarded if it is "directly and reasonably incurred in

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(1987) (Brennan, J., dissenting) ("Prisoners are persons whom most of us would rather not think about.").

484. Romer v. Evans, 116 S. Ct. 1620, 1629 (1996) (quoting Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

485. 28 U.S.C. § 1915 (1996).

486. 42 U.S.C. § 1997(e) (1996).

487. 28 U.S.C. § 1915(b) (1996).

488. 28 U.S.C. § 1915(a)(2).

489. *See* Jackson v. Stinnett, 102 F.3d 132, 136 (5th Cir. 1996) (requiring a prison inmate to refile for i.f.p. status under PLRA).

490. 42 U.S.C. § 1997(e) (1996).

491. *See* Ayesha N. Khan, Memorandum on the Retroactivity of the Attorney's Fee Provision of the Prison Litigation Reform Act 1 (Apr. 12, 1996) (on file with author).

492. 42 U.S.C. § 1988 (1994).

493. *See* Khan, *supra* note 491, at 1.

proving an actual violation of the plaintiff's rights," or "in enforcing the relief ordered for the violation."[494]

The basic issue that arises under PLRA litigation involving the fee provisions is whether or not the provisions apply retroactively to cases and appeals filed before the enactment of the PLRA.[495] Historically, retroactivity has not been favored by the courts,[496] principally because it is unfair to deprive litigants of their expectations based on what the law was at the time they filed.[497]

In determining the issue of retroactivity, federal courts have looked to the language of the statute to see if Congress explicitly stated that statute's reach.[498] Absent a clear indication of intention, the court bases its decision of retroactivity on the following factors: 1) "whether it would impair rights a party possessed when he acted[; 2) whether it would] increase a party's liability for past conduct[; and 3) whether it would] impose new duties with respect to transactions already completed."[499] In *Landgraf v. USI Film Products*,[500] the Supreme Court pointed out that, although some procedural rules may have retroactive effect, this does not apply to the filing of complaints.[501]

Landgraf involved a suit filed pursuant to the Civil Rights Act of 1991.[502] The plaintiff had previously filed a suit under the Title VII of the Civil Rights Act of 1964.[503] That case was dismissed, however, because the District Court held that her employment termination did not violate the statute, and equitable relief was not available to her.[504] While her case awaited appeal, Congress enacted the 1991 Act, which allowed

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494. 42 U.S.C. § 1997(e) (1996).

495. *See, e.g.*, Leonard v. Lacy, 88 F.3d 181, 184 (2d Cir. 1996).

496. *See, e.g.*, Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994) ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.") (citing Kaiser & Aluminum Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990)).

497. *See id.* at 265 ("Settled expectations should not be lightly disrupted.") (citing General Motors Corp. v. Romein, 112 S. Ct. 1105, 1112 (1992)).

498. *See id.* at 270 ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress has made clear its intent.").

499. *Id.* at 280.

500. *Id.*

501. *See id.* at 275 n.29.

502. *See id.* at 247.

503. *See id* at 248.

504. *See id.*

compensatory and punitive damages for such cases.[505] The United States Court of Appeals declined to remand her case for a jury trial pursuant to the 1991 Act,[506] because, unlike other provisions of the 1991 Act, the provision at issue did not contain explicit language regarding its retroactive effect.[507] The Supreme Court held that if Congress had intended for all the provisions to have a precise meaning, it would have used language similar to that used in those with explicit retroactive provisions.[508] In contrast, the PLRA provides no language indicative of a retroactive effect.[509]

Federal courts have disagreed over the retroactivity of the PLRA's filing fee requirements.[510] The Second Circuit, however, distinguishes the Act's retroactive effect on cases filed prior to the PLRA's enactment from those filed subsequent to this date.[511] According to this court, plaintiffs, who at the time of enactment, had already expended time, effort, and judicial resources in preparing their complaints should not be subjected to the Act's retroactive effects.[512] According to the Second Circuit, requiring these inmates to pay the filing fees "would not further the congressional purpose[ ] of reducing . . . or deterring future frivolous litigation."[513]

Although the filing fee may seem nominal to many ($105 to file a case and $150 for an appeal), the impact on economically deprived prisoners is significant.[514] According to William Gibney of the Prisoners' Legal

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505. *See id.*

506. *See id.* at 249.

507. *See id.* at 256.

508. *See id.*

509. *See, e.g.*, Green v. Nottingham, 90 F.3d 415, 420 (10th Cir. 1996) ("Application of [the PLRA] to prisoner suits dismissed prior to the statute's enactment thus does not raise concerns of statutory retroactivity because the provision does not have a 'retroactive effect'.").

510. *See, e.g.*, Ayo v. Bathey, 106 F.3d 98 (5th Cir. 1997) (holding that application of PLRA revoked prisoner's previously obtained i.f.p. status); Strickland v. Rankin County Correctional Facility, 105 F.3d 972 (5th Cir. 1997) (holding that prisoner was required to refile her application for i.f.p. status); Duamutef v. O'Keefe, 98 F.3d 22 (2d Cir. 1996) (holding that PLRA filing fee requirement did not apply where inmate's appeal had been fully briefed before fee provisions were known to either party); Ramsey v. Coughlin, 94 F.3d 71 (2d Cir. 1996) (holding that PLRA did not apply to cases submitted before the date it became effective); Covino v. Reopel, 89 F.3d 105 (2d Cir. 1996) (holding that PLRA fee requirements applied to prisoners who filed notice of appeal prior to the effective date).

511. *See Duamutef*, 98 F.3d at 24; *Ramsey*, 94 F.3d at 73; *Covino*, 89 F.3d at 106.

512. *See Covino*, 89 F.3d at 108.

513. *Duamutef*, 98 F.3d at 24 (quoting *Ramsey*, 94 F.3d at 73).

514. *See* Interview with William Gibney, Attorney at Prisoners' Legal Services of New York, New York, N.Y. (Oct. 30, 1996) (on file with author).

Services, most prisoners' weekly income is only five dollars.[515] In addition to the prisoners' financial burden, inmates must face the obstacle of processing the newly required forms within the allotted time period.[516] Furthermore, an inmate who falls within the purview of the "three strikes" provision is required to the pay the entire fee prior to commencing a suit, as opposed to monthly installments.[517] As stated by the *Lyon* court, this up front payment "is a substantial burden to those who would otherwise qualify for i.f.p."[518]

In regard to attorneys' fees, the practical effect of limiting these fees is that there will be significantly fewer attorneys who will agree to take on such cases, and it is questionable as to who will fill the legal services gap this consequence creates.[519] This deficit in legal representation is compounded by Congress' recent funding cutbacks for Legal Services Corporation, which provides legal services for indigents.[520] The combination of these provisions raises serious issues surrounding prisoners' access to the courts.

VIII. THE PLRA AND OTHER ATTACKS ON FREEDOM AND THE FEDERAL JUDICIARY

The PLRA is only one example of recent legislative endeavors aimed at restricting constitutional protections and reining in the federal judiciary.[521] In addition to the PLRA, Congress also recently enacted the Anti-Terrorism and Effective Death Penalty Act,[522] and restrictions on the Legal Services Corporation.[523] Another new law denies the rights of thousands of aliens to obtain legal status that they would have been entitled

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515. *See id.*

516. *See id.*

517. *See* 28 U.S.C. § 1915(b); *see also* Lyon v. Krol, 940 F. Supp. 1433, 1435 (S.D. Iowa 1996).

518. *Lyon*, 940 F. Supp. at 1437.

519. *See* Telephone Interview with Henry Dlugacz, Attorney for Prisoners' Rights (Jan. 13, 1997) (on file with author).

520. *See infra* notes 540-48 and accompanying text.

521. *See* ACLU Special Report, *"Court Stripping": Congress Undermines the Power of the Judiciary* (last updated June 1996)<http://www.aclu.org/library/ctstrip.html> [hereinafter *Court Stripping*].

522. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (limiting application period for federal habeas corpus relief).

523. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (prohibiting representation of incarcerated persons).

to under a 1986 statute, which provided amnesty to illegal aliens.[524] This law could affect as many as 300,000 people whose cases would be denied in court.[525] All of these laws remove power from the federal judiciary.[526]

Animosity between Congress and the Judiciary began to escalate in early 1996, when Pat Buchanan referred to federal judges as "little dictators in black robes."[527] Judge Harold Baer, Jr., from New York's Southern District, who ironically upheld the constitutionality of §§ 3626(a)(1) and 3626(b)(2) of the PLRA,[528] intensified this animosity when he refused to admit illegally obtained evidence in a widely publicized drug case.[529] At the same time that many people called for Judge Baer's resignation, Senator Bob Dole accused liberal judges appointed by President Clinton as being "the root causes of the crime explosion," and declared that the American Bar Association was "nothing more than another blatantly partisan liberal advocacy group."[530] All this hostility created an environment in which judges became intimidated, and Congress was enabled to pursue its anti-civil liberties agenda.[531] This agenda included laws and restrictions that "will have long lasting and profound consequences for the independence and integrity of the federal courts."[532]

Among these laws is a provision that was buried in the Anti-Terrorism and Effective Death Penalty Act, and affects the writ of habeas corpus.[533] Under this provision, federal courts are prohibited from granting a writ of habeas corpus unless it finds that the state court's decision to convict was "unreasonably" erroneous, or contradicts explicit Supreme Court rulings.[534] This provision makes it nearly impossible for federal judges to

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524. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (repealing 8 U.S.C. § 1105(a) which had provided judicial review to aliens who have been denied legal status).

525. *See* Anthony Lewis, *Running from the Law*, N.Y. TIMES, Oct. 21, 1996, at A17.

526. *See* Naftali Bendavid, *GOP Crime Bills Cost Judges Clout*, LEGAL TIMES, Apr. 10, 1995, at 1; *Court Stripping*, *supra* note 521, at 1.

527. *Court Stripping*, *supra* note 521, at 2.

528. *See supra* notes 238-46 and accompanying text.

529. *See Court Stripping*, *supra* note 521, at 2.

530. *Id.*

531. *See id.*

532. *Id.*

533. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

534. *See id.*

make their own conclusions based upon a review of the evidence.[535] Since the death penalty was reinstated, the federal appellate courts have found reversible constitutional errors in over 40% of the death sentences they reviewed.[536] This law also contains a statute of limitations on filing habeas corpus petitions.[537] Petitioners must now file within one year of their conviction, or, in cases involving post-conviction proceeding, within six months.[538] These constraints make it extremely difficult to effectively litigate habeas corpus cases, because attorneys will have insufficient time to properly investigate the claims.[539]

The Legal Services Corporation (LSC) provides legal services to indigent citizens across the country who might not otherwise have access to judicial proceedings.[540] Their clients include the elderly, the disabled, victims of child abuse and domestic violence, and the unemployed.[541] Under the 1996 appropriations bill, LSC's funding will be cut by one-third.[542] There is also a provision that prohibits LSC from bringing class action suits, and taking part in welfare reform litigation.[543] This provision will prevent LSC from accepting many of the types of cases it had previously litigated and won.[544] One example is a case in which a class of disabled people were wrongly denied Social Security benefits, some of whom died as a result.[545] The LSC helped a class of homeowners recover damages after they had lost their homes due to their lending institution's fraudulent practices.[546] The LSC also brought a class action against a California county that forced children to work in the fields instead of

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535. *See Court Stripping*, *supra* note 521, at 5.

> It elevates process over results: a person convicted because of constitutional error, such as the failure to disclose evidence establishing innocence, may well be foreclosed from federal habeas corpus relief as long as the state court allowed him to present his arguments, even if the state court came to the wrong conclusion.

Id.

536. *See id* at 6.

537. *See* Antiterrorism and Effective Death Penalty Act § 101.

538. *See id.* at § 107.

539. *See Court Stripping*, *supra* note 521, at 6.

540. *See id.* at 7.

541. *See id.*

542. *See id.*

543. *See id.*

544. *See id.*

545. *See id.*

546. *See id.*

going to school, in order to receive their benefits.[547] In this case, it was successful in preventing the county from further violating state child labor laws and the Aid to Dependent Children Act.[548]

Proponents of the PLRA tout it as a "much needed legislative gift,"[549] and "significant progress in the federal fight against crime."[550] They argue that the PLRA releases federal judicial control over prisons, and returns control to the municipalities.[551] They also contend that the PLRA will reduce the numerous frivolous lawsuits that are filed each year.[552] Proponents cite to cases in which the alleged violations included being served melted ice cream, and creamy rather than smooth peanut butter; being denied salad bars on certain days; and receiving white rather than beige towels.[553]

In reality, however, these examples, published in the *New York Times* by four attorneys general, are "highly misleading and, sometimes, simply false."[554] For example, in the peanut butter case, which was an extremely popular paradigm during congressional deliberation on limiting prisoner litigation, the real issue was over an improper charge for peanut butter that the inmate never received.[555] The prisoner had ordered and paid for a jar of chunky peanut butter, but received creamy instead.[556] He was assured that he would receive a replacement the next day, however, he was transferred that night to another facility, and was never reimbursed for his purchase.[557] Although the actual amount owed to the prisoner was minimal according to most standards, for someone with extremely limited funds, it was substantial.[558] In the "salad bar" case, the minor deficit in menu options was but an aside to the extensive list of complaints, which included "overcrowding, forced confinement of prisoners with contagious diseases, lack of proper ventilation, lack of sufficient food, and food

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547. *See id.*

548. *See id.*

549. Ross Sandler & David Schoenbrod, *Statute Promised Local Relief from Overbearing Judges*, TAMPA TRIB., Dec. 8, 1996, at 6.

550. *Review and Outlook*, WALL ST. J., June 10, 1996, at A18.

551. *See id.*; *see also* Sandler & Schoenbrod, *supra* note 549, at 6.

552. *See, e.g.*, *Review and Outlook*, *supra* note 550, at A18.

553. *See id.*; Dennis Vacco et al., *Free the Courts from Frivolous Prisoner Suits*, N.Y. TIMES, Mar. 3, 1995, at A26.

554. Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520 (1996).

555. *See id.* at 521-22.

556. *See id.* at 521.

557. *See id.*

558. *See id.* at 522.

contaminated by rodents."[559] Despite proponents claims of rampant frivolous prisoner litigation, in reality, fewer than 20% of prison litigation in federal courts is dismissed as being frivolous.[560]

The lack of public outcry over the PLRA can be attributed, in part, to public attitudes regarding prisoners.[561] The fact that the act was buried in a budget bill may have also contributed to this silence.[562] As noted above, the Anti-Terrorism and Effective Death Penalty Act and the restrictions on Legal Services Corporation were also tucked away in unrelated legislation.[563] Similarly, the act at issue in *Plaut*, which became part of the Securities Exchange Act, was signed into law under the Federal Deposit Insurance Corporation Act of 1991.[564] Likewise, the disputed provision in *Klein* was part of a general appropriation bill, and faced little Congressional debate.[565]

Furthermore, it would seem that an act with such grave effects on prisoners' constitutional rights would provoke a substantial amount of Congressional debate. In fact, only one Senate hearing before the Judiciary Committee and one House Report were conducted before the PLRA was enacted.[566] The clear import of this is that Congress has set a dangerous precedent by sliding constitutionally restrictive legislation into law unnoticed,[567] and it may continue to do so. Based on their perceptions of what they think the public wants, legislatures assure us that it is not *our* freedom that will be sacrificed.[568] But it seems that "our" includes only those who are in the legislature's good favor. Based on Congress' recent

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559. *Id.* at 521.

560. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS 20 (1995) [hereinafter JUSTICE STATISTICS].

561. *See* Lewis, *supra* note 525, at A17.

562. *See Court Stripping*, *supra* note 521, at 3.

563. *See id.* at 2; *see also* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

564. *See* Plaut v. Spendthrift, 514 U.S. 211, 214 (1995) (discussing that the provisions at issue had nothing to do with FDIC improvements).

565. *See* United States v. Klein, 80 U.S. 128, 143 (1871) ("[T]he Provision was introduced . . . in the general appropriation bill . . . with perhaps little consideration in either House of Congress.").

566. *See* Benjamin v. Jacobson, 935 F. Supp. 332, 340 (S.D.N.Y. 1996) ("'[S]ome believe that this legislation . . . deserved to have been the subject of significant debate. It was not.")

567. *See* Lewis, *supra* note 525, at A17.

568. *See* Susan N. Herman, *Clinton Takes Liberties with the Constitution*, NEWSDAY, Aug. 4, 1996, at A46.

successes in singling out groups of people to whom it denies constitutional rights, how secure can any one of us be that we may not, one day, fall into one of their disfavored classifications?

These recent acts are not Congress' first attempts to usurp power from the federal judiciary.[569] Over fifteen years ago, Congress endeavored to strip the federal courts of their jurisdiction through bills related to "abortion rights, school prayers, and public school desegregation."[570] Then, as now, Congress's motive was rooted in hostility toward the federal judiciary and its constitutional interpretations.[571] Lawrence Sager aptly summarized the threat to the federal judiciary that existed in 1981, and is mirrored in these recent enactments:

> [I]f Congress stops speaking softly and actually swings its jurisdictional club, our basic institutional arrangements will be badly unsettled. At a time when Congress appears to be seriously considering such action, a clear understanding of the constitutional boundaries of Congress' power to enact jurisdictional legislation seems highly desirable.[572]

IX. CONCLUSION

Congress publicized two goals it wanted to achieve with the PLRA: 1) to eliminate frivolous prison litigation,[573] and 2) to impede the federal courts' "micro-management" of our country's prisons.[574] These intentions, however, seem suspect in light of the political climate in which the PLRA was passed, and in the manner in which it was passively enacted.[575]

As mentioned, frivolous lawsuits do not consume courts' time nearly as much as meritorious lawsuits do;[576] yet, the latter are affected by the PLRA as much, if not more, than the former.[577] A prisoner with a valid claim must still meet the same exacting requirements as one who alleges

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569. *See* Sager, *supra* note 425.

570. *See id.* at 18 n.3.

571. *See id.* ("These bills are a product of deep hostility . . . . [Their] sponsors . . . are candid about their goals; they aim to undo the mischief that the federal courts have wrought through erroneous interpretations of the Constitution.").

572. *Id.* at 21.

573. *See* Ericson, *supra* note 16, at 1.

574. *See id.*

575. *See supra* notes 527-32, 562 and accompanying text.

576. *See supra* notes 17-18 and accompanying text.

577. *See, e.g., Top Ten, supra* note 20, at 1 (explaining that many meritorious lawsuits will be affected by PLRA).

"melted ice cream."[578] And inmates who have entered into consent decrees are likely to find their vested rights usurped.[579] Another ramification of the PLRA is that it will discourage settlements of this sort,[580] thereby resulting in an increase in the number of cases brought to trial. In addition, decrees that are terminated after two years are likely to be relitigated.[581] The result will be antithetical to Congress' intent in that there will be more litigation, not less.[582] Moreover, over the past twenty-five years, federal courts have created increasingly stringent standards for establishing a constitutional violation based on prison conditions.[583]

Congress' second purpose of the PLRA was to reduce federal court intervention in prison administration.[584] History has demonstrated, however, that court intervention is necessary to preserve inmates' rights.[585] In addition, federal courts have repeated their reluctance to interfere with prison management.[586] Proponents of the PLRA insist that prison administration be left to the municipalities who know best how to manage their institutions.[587] The chilling thought is that twenty-five years ago, under municipal prison regulation, armed "trusties" were guarding fellow inmates, and allowing rampant assaults and drug trafficking.[588] Is this the

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578. *See Court Stripping*, supra note 521, at 3 (explaining the difficulty in ensuring meaningful prison reform as a result of the PLRA).

579. *See supra* notes 439-48 and accompanying text.

580. *See* Rufo v. Inmates of Suffolk, 502 U.S. 367, 389 (1992) ("To hold that clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation.").

581. *See supra* notes 357-67 and accompanying text.

582. *See* Joseph Wharton, *Courts Now Out of Job as Jailers: New Law to End Prison Oversight Applauded by State Attorneys General*, A.B.A. J., Aug. 1996, at 40.

583. *See supra* notes 71-174 and accompanying text.

584. *See* Ericson, *supra* note 16.

585. *See* Rhodes v. Chapman, 452 U.S. 337, 354 (1981) (Brennan, J., concurring) ("[L]ower courts have learned from repeated investigation and bitter experience that judicial intervention is indispensable if constitutional dictates—not to mention considerations of basic humanity—are to be observed in the prisons."); *see also* Benjamin v. Jacobson, 935 F. Supp. 332, 338 (S.D.N.Y. 1996) (giving a brief history of prison reform).

586. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 847 (1994); *Rhodes*, 452 U.S. at 352; Holt v. Sarver, 442 F.2d 304, 309 (8th Cir. 1971).

587. *See supra* notes 549-53 and accompanying text.

588. *See Holt*, 442 F.2d at 308.

type of prison litigation toward which we are headed, or the "evolving standards of decency" referred to in *Rhodes*?[589]

Under our criminal justice system, people who commit crimes are punished by serving time in prison, not by being subjected to inhumane conditions which deprive them of minimal human decency, and a justice system that restricts their ability to seek redress.[590] Judge Harold Baer, while not finding the PLRA unconstitutional, admitted that "the Court's concerns with this new legislation are myriad."[591] and that, although the PLRA "passes Constitutional muster, . . . [f]ar more important is what will happen to prisoners' rights and the conditions in our prisons as a consequence of this legislation."[592] As stated by Justice Brennan, "Prisoners are too often shielded from public view; there is no need to make them virtually invisible."[593]

The swiftness and public inattention with which Congress was able to slide the Prison Litigation Reform Act into law beguiles our sense of security commonly perceived under the Constitution. As one District Court Judge put it, "a society is judged by how it treats the least among it, not the best. The job of the Constitution is to make sure that everyone is treated properly."[594] Without such protection, our Constitution is null and void.[595]

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589. *Rhodes*, 452 U.S. at 364 (citing Trop v. Dallas, 356 U.S. 86, 101 (1958)).

590. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 355 (1987) (Brennan, J., dissenting) ("When prisoners . . . press a constitutional claim, they invoke no alien set of principles drawn from a distant culture . . . . [A]s members of this society, prisoners retain constitutional rights that limit the exercise of official authority against them.").

591. Benjamin v. Jacobson, 935 F. Supp. 332, 337 (S.D.N.Y. 1996).

592. *Id.* at 340.

593. *O'Lone*, 482 U.S. at 358.

594. *See* JUSTICE STATISTICS, *supra* note 560, at 35.

595. *See O'Lone*, 482 U.S. at 356-58 (Brennan, J., dissenting).

> The Constitution . . . was meant to provide a bulwark against infringements that might otherwise be justified as necessary expedients of governing . . . . Once we provide . . . an elastic and deferential principle of justification, '[t]he principle . . . lies about like a loaded weapon ready for the hand of any authority that can bring forth a plausible claim of an urgent need.' (quoting Korematsu v. Untied States, 323 U.S. 214, 246 (1994) (Jackson, J., dissenting)) . . . . Mere assertions of exigency have a way of providing a colorable defense for governmental deprivation, and we should be especially wary of expansive delegations of power to those who wield it on the margins of society.

Id.