

Punishment, Poverty, and the Limits of Judicial Policymaking

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ABSTRACT

In 1996, prisoners' rights formally fell out of public favor. The Prison Litigation Reform Act ("PLRA") put a period on the widespread prisoners' rights movement of the 1960s and 70s: it drastically diminished the ability of prisoners to vindicate their rights in courts, the incentives for lawyers to represent prisoners, and the ability of courts to grant structural relief for prisoners' rights violations. The paradigmatic analyses of this statute interrogate the quantity and quality of the pre-PLRA inmate docket and the judiciary's pre-PLRA effectiveness at implementing structural prison reform. However, these accounts of the statute—while descriptively accurate and analytically incisive—are historically incomplete.

This Article tells a new story about the PLRA. It links two bodies of history—welfare reform in the late twentieth century and concurrent judicial policymaking in prison systems—and in doing so, repositions the PLRA as a congressional capstone on both projects. By juxtaposing a period of striking judicial reform in prisons with growing sociopolitical skepticism over social services to the poor, this Article illuminates an overlooked continuity between welfare and prison reforms.

Recasting the PLRA as a restriction on welfare rights enriches our understanding of the statute and its place in history. It also implicates other conversations: about the relationship between procedure and substantive rights; the historical paradigm shift toward welfare services as moral gatekeeping; the judiciary as a protector of rights; and more substantively, the quality of prison conditions post-PLRA.

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INTRODUCTION

In May of 2020, at the height of the COVID-19 pandemic, the Supreme Court refused to order a geriatric prison to provide testing protocol, hand sanitizer, or masks because the inmate-plaintiffs did not adhere to the Prison Litigation Reform Act’s (“PLRA”) onerous complaint procedures.¹ By November, over 40% of the prison’s population had tested positive for the virus.² Nineteen elderly incarcerated people had died.³ The Supreme Court again refused to order the prison to change its COVID-19 procedures.⁴ And again, its refusal was founded on the PLRA.⁵

The PLRA of 1996 represents one of the most consequential instances of congressional interference in federal court jurisdiction in modern history. The initiative first surfaced in the early Clinton years as part of the Contract with America, a legislative agenda from the 104th Republican Congress.⁶ It purported to solve a major double-pronged problem in the federal courts: a deluge of frivolous inmate lawsuits that hindered federal courts’ operational abilities, and court orders that were unduly invasive in daily prison operations.⁷ Despite the apparent tension between these two prongs (courts were somehow at once overwhelmed and involving themselves excessively), the problem captured the public imagination.

And not totally without merit: the volume of prisoner lawsuits in federal courts was indeed large. In 1995, persons incarcerated in jail or prison filed about 40,000 new cases, comprising 19% of the federal docket, with a very low success rate.⁸ To boot, ongoing affirmative judicial decrees, often lasting for decades,

1. *Valentine v. Collier*, 140 S. Ct. 1598, 1598 (2020) (denying application to vacate stay).

2. *Valentine v. Collier*, 141 S. Ct. 57, 58 (2020) (again denying application to vacate stay).

3. *Id.*

4. *Id.* at 57 (denying application to vacate stay for a second time).

5. *Id.* at 57, 59.

6. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1566, 1592 (2003) (discussing the reasons why inmate success rates have been interpreted as low but noting mitigating factors and the slipperiness of the term “success”) [hereinafter *Inmate Litigation*].

7. *Id.*

8. *Id.* at 1558.

were frequently relitigated and contested in the courts.⁹ A 1995 *New York Times* article opined that “[t]axpayers have grown justifiably tired of footing the bill for the special privileges provided to prisoners when they file their suits.”¹⁰ Politicians (largely, though certainly not exclusively, conservative) further argued that “judicial orders entered under [f]ederal law have effectively turned control of the prison system away from elected officials accountable to the taxpayers and over to the courts.”¹¹

To fix the problem, the PLRA severely limited both access to the courts for inmate litigants and the scope of relief that federal courts could grant regarding prison conditions.¹² The National Association of Attorneys General and the National District Attorneys Association formed a “potent alliance” to back the Act, and it found further support in Congress from politicians whose constituents increasingly favored tough-on-crime policies.¹³ Members of Congress whose states had been subjected to decades of contentious judicial orders concerning prison conditions also adamantly supported the Act.¹⁴ Eventually, it was passed as a rider to an appropriations bill, and the Supreme Court upheld its jurisdictional limitations.¹⁵

The Act’s impact was swift and immense (though largely absent from the press): from 1995 to 2001, inmate filings decreased by 43%, concurrent with a 23% *increase* in the number of people incarcerated.¹⁶ In accordance with the Act, courts terminated or stayed longstanding court orders and consent decrees regarding prison conditions throughout the United States.¹⁷ The Act was enormously successful both in reducing the volume of inmate lawsuits and in preventing significant judicial involvement in conditions of confinement.

9. See *infra* Part I.

10. Dennis C. Vacco, Frankie Sue Del Papa, Pamela Fanning Carter & Christine O. Gregoire, Letter to the Editor, *Free the Courts From Frivolous Prisoner Suits*, N.Y. TIMES, Mar. 3, 1995, at A26 [hereinafter *Free the Courts*].

11. 142 Cong. Rec. S3703–01 (daily ed. Apr. 19, 1996) (statement of Sen. Spencer Abraham).

12. 18 U.S.C. § 3626(e).

13. *Inmate Litigation*, *supra* note 6, at 1566–67.

14. See 142 Cong. Rec. S83703–01 (Senator daily ed. Apr. 19, 1996) (statement of Sen. Spencer Abraham) (stating to Congress that “[c]omplying with these court orders, litigating over what they mean, and producing the reports necessary to keep the courts happy has cost the Michigan taxpayers hundreds of millions of dollars since 1984”); CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 9, 16, 37 (Ed Gillespie & Bob Schellhas eds., 1994) (co-authored by Texas and Georgia representatives) [hereinafter CONTRACT WITH AMERICA].

15. See *Miller v. French*, 530 U.S. 327, 342 (2000) (finding the automatic stay provision of the PLRA did not violate separation-of-powers principles).

16. *Inmate Litigation*, *supra* note 6, at 1559–60.

17. See, e.g., *Plyler v. Moore*, 100 F.3d 365, 375 (4th Cir. 1996); *Martin v. Ellandson*, 122 F. Supp. 2d 1017, 1024–25 (S.D. Iowa 2000); *Gavin v. Branstad*, 122 F.3d 1081, 1092 (8th Cir. 1997) (reversing district court order holding immediate termination provisions of the PLRA unconstitutional and remanding for application of those provisions to the facts of the case); *Hadix v. Johnson*, 133 F.3d 940, 943 (6th Cir. 1998) (finding that the district court erred in holding that the PLRA’s termination provisions violated separation-of-powers doctrine and reversing and remanding case accordingly); *Benjamin v. Kerik*, 102 F. Supp. 2d 157, 157, 180 (S.D.N.Y. 2000); *Benjamin v. Jacobson*, 124 F.3d 162, 180 (2d Cir. 1997).

There are two paradigmatic academic accounts of this statute. The first, developed primarily by Professor Margo Schlanger in the early 2000s, analyzes the content and outcome of individual inmate filings before and after the PLRA.¹⁸ Her work has been instrumental in revealing the magnitude of the PLRA's impact. It also provides invaluable quantitative insight into the content and relative success rate of inmate filings before and after the PLRA. For instance, her 2003 article in the *Harvard Law Review*, *Inmate Litigation*, showed that while inmates were indeed "extraordinarily litigious" in federal court, the differential all but disappeared once state court filings were taken into account, as they should be, to give an accurate picture of the overall litigiousness of a particular demographic.¹⁹ Additionally, her work demonstrated that while inmate filings indeed increased greatly over the two decades studied in this Article, that increase reflected an equally dramatic uptick in the prison population.²⁰ And finally, her work has empirically demonstrated that despite public and political hysteria over entitled inmates, in reality the vast majority of inmate filings concerned morally, if not always legally, meritorious claims over the hardships inherent to prison life.²¹ While the success rate for those suits was indeed low, Schlanger and others in the prisoners' rights field attribute this to procedural impediments to success (e.g., qualified immunity for government officials), rather than the validity of the subject-matter of the cases.²² This Article builds on Schlanger's work and would not have been possible without her contributions to the history of the PLRA.

The second academic treatment of the PLRA looks at judicial orders and consent decrees that affirmatively changed prison conditions prior to the enactment of the statute. In particular, this body of scholarship examines the efficacy of judicial intervention in prisons, often as a means of analyzing public law and judicial capacity at large.²³ There is a rich debate over whether judicial activism was an effective means of improving the conditions of American prisons, and on a larger scale, whether judicial policymaking can ever successfully repair flawed

18. See generally *Inmate Litigation*, *supra* note 6 (providing detailed analysis of inmate litigation trends before and after the enactment of the PLRA and outlining the PLRA's passage through Congress); see Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 154 (2015) (analyzing inmate litigation trends since the PLRA's enactment) [hereinafter *Trends in Prisoner Litigation*].

19. *Inmate Litigation*, *supra* note 6, at 1569–70.

20. *Id.* at 1586–87.

21. *Id.* at 1571.

22. See Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POLY INITIATIVE (Apr. 26, 2021), <https://repository.law.umich.edu/other/173>.

23. See Malcolm M. Feeley & Roger A. Hanson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and Review of the Literature*, in COURTS, CORRECTIONS, AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS 12 (John J. DiIulio, Jr. ed., 1990). See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

systems.²⁴ A substantial body of literature argues that judicial activism in prisons, like in school desegregation, did more harm for social progress than good.²⁵ In this Article, I do not interrogate whether courts may be effective agents of social change. It is entirely possible that the story of judicial activism in prison conditions and the subsequent enactment of the PLRA fits Gerald N. Rosenberg's (in)famous theory of the ineffectiveness of American courts.²⁶ I do, however, argue that courts have historically been one of the sole avenues to rights vindication available to prisoners, and that the PLRA effectively blocked access to that avenue. Whether or not other branches would be more effective (and I tend to think they probably would be) is not particularly important for my purposes. Because I do not advocate for judicial intervention in prisons as a solution, but merely observe that it in fact *was* virtually the only solution prior to the PLRA,²⁷ I need not wade into the debate over the power of the judicial branch.

Instead, this Article adds to and expands on the history of the PLRA by contextualizing it within two concurrent historical moments: a truly prominent and not since repeated period of judicial activism,²⁸ and a concurrent period of welfare reform. The Article thus participates in a body of scholarship that examines welfare reform and carceral systems as intertwined.²⁹ Despite the growing literature on this subject in the social sciences and by historians, there is a dearth of legal analysis on the relationship between the two systems, and indeed, on prison law more broadly.³⁰ Prison law is uniquely reliant on the Constitution and is

24. See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008).

25. The most seminal work critiquing the Court's role in school desegregation is Gerald Rosenberg's *The Hollow Hope*. See *id.* The literature on the prisoners' rights era tends to be more modest in its claims. See generally MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998); Erwin Chemerinsky, *The Essential But Inherently Limited Role of the Courts in Prison Reform*, 13 BERKELEY J. CRIM. L. 307 (2008) (arguing that prison reform requires legislative intervention). See also Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications*, 24 PACE L. REV. 433, 434 (2004) (arguing that while "courts are not powerful vehicles for social change" they were still highly successful at implementing change in prison conditions; still, the courts' accomplishments also produced a double-edged sword, wherein prisoners' rights were strengthened but so too was prison officials' capacity for control).

26. See generally ROSENBERG, *supra* note 24.

27. See Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 519 (2021) (detailing how prisoners' rights became constitutionalized, rather than legislated).

28. See FEELEY & RUBIN, *supra* note 25, at 117.

29. This Article is particularly indebted to Julilly Kohler-Hausmann, whose works on the relationships between welfare and incarceration in many ways inspired this Article. See generally Julilly Kohler-Hausmann, *Guns and Butter: The Welfare State, the Carceral State, and the Politics of Exclusion in the Postwar United States*, 102 J. AM. HIST. 87 (2015). See also Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, 3 PUNISHMENT & SOC'Y 43, 44 (2001) ("we suggest that welfare and penal institutions comprise a single policy regime aimed at the governance of social marginality"). See generally DAVID GARLAND, *PUNISHMENT AND WELFARE: A HISTORY OF PENAL STRATEGIES* (1985) (examining social regulation through penal and welfare institutions in England).

30. The legal academy tends to focus on either prison law as a discrete branch of constitutional law, see, e.g., Driver & Kaufman, *supra* note 27, or on imprisonment as a byproduct of penal populism.

central to American culture, but constitutional law textbooks typically only mention one prison litigation case—*Turner v. Safley*³¹—and mention it then only as a precursor to *Obergefell v. Hodges*³² or as an early substantive due process case.³³ Meanwhile, analysis of mass incarceration and criminal law tends to focus on the front-end of the law—penal codes—rather than the back end: imprisonment.³⁴ And finally, works on the welfare and carceral states typically do not address the role of the judiciary in either.³⁵ In this Article, I aim to fill some of these gaps.

This Article argues that the PLRA was part of a larger sociopolitical downsizing of the social safety net—targeted at judges rather than the administrative state. Accordingly, this Article begins by cataloguing the substance of judicial prison reform from the 1960s until the enactment of the PLRA. Part I demonstrates that judicial policymaking in prisons in many ways reflected the social safety net outside of prisons: judicial prison reforms required carceral institutions to provide habitable housing and medical services. The PLRA, like the welfare reforms that led up to it, erected oppressive barriers to public services, such as healthcare and habitable housing, by circumscribing judicial discretion and relief as well as the ability of inmate-litigants to get to court in the first place.

The historical period examined in this Article is defined by judicial involvement in prisons. As Part I explains, the judiciary was almost entirely absent in vindicating prisoners' rights until the 1960s.³⁶ Once it did get involved, though, it embarked on a hands-on project—or as some have said, micromanagement³⁷—of overseeing the treatment of prisoners. By 1984, 24% of the nation's 903 state

See generally Rachel Barkow, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019). While both approaches to prison law typically implicate politics and poverty, neither involves a legal analysis of the relationship between the welfare and carceral states. For a list of the “small group of scholars” who critique prison law, *see* Driver & Kaufman, *supra* note 27, at 520, n.31.

31. *See generally* *Turner v. Safley*, 482 U.S. 78 (1987) (holding that prisoners have a right to marry and introducing a new standard of review for prison conditions claims).

32. *See generally* *Obergefell v. Hodges*, 576 U.S. 644 (2015).

33. *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 546 (8th ed. 2018) (citing *Turner* as a marriage equality case).

34. *See, e.g.*, Julilly Kohler-Hausmann, “*The Attila the Hun Law*”: *New York’s Rockefeller Drug Laws and the Making of a Punitive State*, 44 J. SOC. HIST. 71, 71 (2010) (examining New York City’s “War on Drugs” as a means of remaking the welfare state) [hereinafter *The Attila the Hun Law*]; JULILLY KOHLER-HAUSMANN, GETTING TOUGH: WELFARE AND IMPRISONMENT IN 1970S AMERICA 112 (2017) [hereinafter GETTING TOUGH]. There is also a large body of scholarship devoted to re-entry. *See, e.g.*, Reuben Jonathan Miller, *Devolving the Carceral State: Race, Prisoner Reentry, and the Micro-Politics of Urban Poverty Management*, 16 PUNISHMENT & SOC’Y 305, 305 (2014). Other works on imprisonment zoom out and look at the socio-structural features that have led to mass incarceration. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (describing mass incarceration as a product of race relations); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009) (describing mass incarceration as a product of capitalist class systems).

35. Michele Goodwin’s work on prison labor as a site of modern slavery is an exception. *See generally* Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899 (2019).

36. *See infra* Part I.

37. *See* FEELEY & RUBIN, *supra* note 25, at 117.

prisons (including at least one in each of forty-three states and the District of Columbia) operated under a court order requiring reform in areas including housing conditions, security, medical care, mental healthcare, sanitation, nutrition, and exercise.³⁸ Forty-two percent of the nation's state prisoners were housed in a prison under court order.³⁹ Part I explores why and how this happened.

As Part II shows, state and national welfare reforms culminating in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA") severely curtailed the ability of impoverished people to access social-welfare rights, particularly those related to healthcare and housing. Viewed in this light, the PLRA was not just a prisoner litigation act, it was part and parcel with other welfare reforms that preceded it and may indeed be seen—functionally and historically—as a capstone on the welfare reforms of the 1980s-1990s.⁴⁰ This Article thus sits at the intersection of legal history and academic investigations of the relationship between the welfare and carceral states.

Part II, constrained by the time period in Part I, examines welfare reforms that occurred concurrently with the judiciary's involvement in prisons. In 1980, the U.S. spent three times more money on food stamps and welfare grants than on penal institutions; by 1996, the year of the PLRA's passage, the balance had reversed, with the nation devoting billions more to corrections than the two principal welfare programs.⁴¹ Part II, drawing on an eclectic collection of primary and secondary sources, details how the transition from Lyndon B. Johnson's War on Poverty to the conservative War on Drugs happened and interrogates the sociopolitical culture that propelled that change.

Part III connects the two stories. It details the birth of the PLRA within the context of judicial involvement in prisons described in Part I and welfare reforms described in Part II. Looking at both, it demonstrates that contrary to the dominant narrative of prisons replacing welfare services as the primary form of social control over the poor, the PLRA in fact neutered those services *within* prisons. That leads to a new insight: prisons did not replace welfare; rather, prisons were part of the welfare state.

Part IV examines the implications of this new history of the PLRA. It places the PLRA within a large body of scholarship that illuminates how procedure can operate as a veil of legitimacy over substantive value judgments that on their own might be unpalatable. Additionally, it exposes how the PLRA and its sister welfare reforms changed rights from being identity-based ('all prisoners have the right to minimally adequate healthcare'; 'all people below a certain poverty line have the right to federal welfare benefits') to being worth-based ('only those

38. Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2004 (1999) [hereinafter *Beyond the Hero Judge*].

39. *Id.*

40. This article does not delve into the thorny issue of congressional intent, assuming such a concept even exists. It is a historical retelling, not a reconstruction of the motivations or desires of members of Congress.

41. GETTING TOUGH, *supra* note 34, at 1.

prisoners who have not had three cases already dismissed and who can afford to pay filing fees that do not apply to those outside prison walls can get access to courts to vindicate their constitutional rights'; 'only those who have never committed a drug-related felony may receive food stamps').⁴² Finally, Part IV places this Article's history of the PLRA within modern-day prison conditions. In particular, as the first paragraph of this Article alluded, the COVID-19 crisis has brought the problem of prison oversight and conditions back to the public fore. It has also reilluminated the continuity between prisons and life outside prison walls.⁴³

While this Article focuses on prisons, it asks readers to not just consider how prison reform operated to impact the rights of incarcerated and formerly-incarcerated people, but also to examine how and why social services to the poor are erected, torn down, and routinely resurfaced as sources of sociopolitical controversy.

I. PRISON REFORM

Prior to 1965, judicial involvement in prison conditions was essentially non-existent.⁴⁴ This was not for lack of necessity: inmate torture was widespread, disease was rampant, and the rate of inmate death astonishingly high. But prisoners were legally considered "slaves of the state," not citizens with attendant rights, and courts treated them accordingly.⁴⁵

In the first half of the Twentieth Century until the advent of the prisoners' rights movement, incarcerated people were indeed treated as de facto slaves, particularly in Southern states which depended on inmate labor. In Mississippi, inmates worked grueling hours in penal farm fields where they were severely beaten by guards.⁴⁶ In Louisiana, dozens of prisoners in the 1950s slashed their own heel tendons to protest the brutality of Angola State Penitentiary.⁴⁷ Carceral institutions also treated prisoners as bodies to be experimented upon. For instance, researchers in the mid-1940s studied the transmission of a deadly

42. I will refer to welfare services as "rights" throughout this paper, though some may not be *legal* rights per se. This choice is in line with Charles Reich's seminal work, *The New Property*, and the Court's *Goldberg v. Kelly* line of cases. See generally Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

43. In the spring and summer of 2020, for instance, larger prison populations were associated with a spike in cases in the larger community outside prison walls. Gregory Hooks & Wendy Sawyer, *Mass Incarceration, COVID-19, and Community Spread*, PRISON POL'Y (Dec. 2020), <https://www.prisonpolicy.org/reports/covidspread.html>.

44. JOHN J. DI IULIO, JR., *Introduction to COURTS, CORRECTIONS, AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS* 3 (John J. DiIulio ed., 1990). See also *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871) (describing prisoners as "slaves of the state" without the "rights of freemen").

45. DI IULIO, *supra* note 44.

46. Roberta M. Harding, *In the Belly of the Beast: A Comparison of the Evolution and Status of Prisoners' Rights in the United States and Europe*, 27 GA. J. INT'L & COMP. L. 1, 9 (1998).

47. William Quigley, *Louisiana Angola Penitentiary: Past Time to Close*, 19 LOY. J. PUB. INT. L. 163, 165 (2018).

infectious disease by having young men at a reformatory prison in West Coxsackie swallow unfiltered stool suspension.⁴⁸ Similarly, from 1913 to 1951, a resident physician at San Quentin prison in California implanted testicles from livestock and recently-executed convicts into “devitalized men,” and experimented with plastic surgery as a tool for repairing physical abnormalities that he believed led to criminality.⁴⁹ Disease prevention was also minimal, if existent at all: in the 1950s, a study estimated that 3.3% of prisoners had “suspected tuberculosis”—a rate dozens of times greater than the population at large.⁵⁰

Arkansas provides a particularly harrowing example of prison conditions during this period. The state’s prison abuses could be traced back to 1846, when inmates revolted against their housing conditions and burned down the state’s penitentiary.⁵¹ In the 1860s and 70s, Arkansas engaged in a system of convict leasing, which for many incarcerated people amounted to a death sentence. Prisoners were sold to private industry, where they were beaten, denied food, and sometimes even murdered.⁵² A state-sponsored study found that between 1873 and 1893, one-fourth of prisoners died while in custody.⁵³ In 1902, the state acquired plantations and created a self-sustaining penal system wherein prisoners were expected to build their own housing and produce their own food by working in the fields.⁵⁴ The conditions on the plantations were by all accounts horrific: prisoners worked long days without adequate clothing or equipment; had no access to medical or dental care; and, since inmates were not paid for their work, the only way to earn money was to sell one’s blood.⁵⁵ One of the penitentiary’s most infamous practices was its use of the “Tucker Telephone,” a torture device by which a prisoner’s genitals and feet would be attached to a phone’s wires and electric shocks were sent through the victim’s body. The prison termed a prolonged session with the device a “long distance call.”⁵⁶

Still, the federal courts did not get involved.

The judiciary’s lack of involvement in prison conditions was not a reflection of contemporary standards, either. For instance, although it was routine for the above-mentioned San Quentin prison physician to remove an executed inmate’s testicles as part of his post-execution autopsy, when the mother of one such

48. Mike Stobbe, *AP Impact: Past Medical Testing on Humans Revealed*, OPELIKA-AUBURN NEWS (Feb. 27, 2011), https://oanow.com/news/ap-impact-past-medical-testing-on-humans-revealed/article_42509224-1bcc-5462-b180-c73cd6fb7d7d.html.

49. *Id.*

50. See Julius Katz & Robert E. Plunkett, *Prevalence of Clinically Significant Pulmonary Tuberculosis Among Inmates of New York State Penal Institutions*, 61 AM. REV. TUBERCULOSIS 51, 51 (1949).

51. FEELEY & RUBIN, *supra* note 25, at 51.

52. Colin Woodward, *There’s a Lot of Things That Need Changin’*, 79 ARK. HIST. Q. 40, 44 (2020).

53. FEELEY & RUBIN, *supra* note 25, at 52.

54. Woodward, *supra* note 52, at 44.

55. FEELEY & RUBIN, *supra* note 25, at 53–54.

56. Woodward, *supra* note 52, at 46–47.

inmate sued for unlawful mutilation of a corpse, the press seized on the story.⁵⁷ One reporter discovered the doctor had removed the testicles of every single executed prisoner since the beginning of his tenure there, believing removing the testes was part of a great tradition, dating back to “long before Biblical times.”⁵⁸ The public backlash at this revelation was swift—the doctor was threatened with losing his medical license, and newspapers condemned the practice.⁵⁹ Similar public outrage accompanied revelations from other prisons. Even as early as 1913, a letter to the *New York Times* said, regarding a prison in Auburn, New York, that “if the conditions are half as bad as reported . . . it is almost beyond belief.”⁶⁰ A Special Committee appointed by the Governor of Missouri in 1955 found the state’s prison to be “shockingly below accepted standards in virtually every phase of its operation.”⁶¹ Likewise, when Winthrop Rockefeller assumed the Arkansas Governor’s office in 1966 and reviewed a police study of one of the plantations that detailed abuses including torture, rape, prostitution, and beatings, his wife recalled that he was overtaken with physical revulsion.⁶²

No, the lack of judicial involvement in prison conditions could not be attributed to an unenlightened populace at the time. Rather, the courts’ reluctance to get involved was the product of a hands-off attitude⁶³ of deference toward prison administrators and their penological goals.⁶⁴

This longstanding judicial norm made a 1960s shift in judicial involvement surprising: federal courts not only determined that in fact they did have the constitutional authority to define minimum standards of confinement, but that they also had a *duty* to monitor prison operations in order to ensure compliance.⁶⁵ Based on

57. See Alan Bisport, *American Frankenstein – San Quentin’s Surgeon and his Human Experiments*, PLEASE KILL ME (Sept. 21, 2017), <https://pleasekillme.com/american-frankenstein-san-quentin-surgeon-experiments/>.

58. *Id.*

59. Despite public outcry, the doctor did not lose his license and in fact continued to practice at San Quentin for years, in large part because of the goodwill he had sown with the inmates of the prison. The point stands, however, that his eugenics-influenced medical experimentations were roundly condemned by the public. See *id.*; Ethan Blue, *The Strange Career of Leo Stanley: Remaking Manhood and Medicine at San Quentin State Penitentiary, 1913–1951*, 78 PAC. HIST. REV. 210, 211 (2009).

60. W.L.B., *Prison Conditions*, N.Y. TIMES (Apr. 30, 1913), <https://www.nytimes.com/1913/04/30/archives/state-prison-conditions.html?searchResultPosition=2>.

61. *Missouri Prison Called Shocking*, N.Y. TIMES (Jan. 2, 1955), <https://www.nytimes.com/1955/01/02/archives/missouri-prison-called-shocking-special-committee-appointed-after.html?searchResultPosition=9>.

62. Woodward, *supra* note 52, at 48.

63. The hands-off approach was not a formal doctrine; rather it is a post-hoc academic term to describe the judiciary’s pre-1960s approach to conditions of confinement litigation. See, e.g., Debra T. Landis, Annotation, *Propriety and construction of “totality of conditions” analysis in federal court’s consideration of Eighth Amendment challenge to prison conditions*, 85 AM. L. REPS. FED. 750, 750 (1987).

64. See, e.g., U.S. ex rel. Atterbury v. Ragen, 237 F.2d 953, 955 (7th Cir. 1956) (“[P]rison officials are vested with wide discretion in safeguarding prisoners committed to their custody. Discipline reasonably maintained in State prisons is not under the supervisory direction of federal courts.”).

65. FEELEY & RUBIN, *supra* note 25, at 13 (1998) (describing judicial involvement in prisons as “the most striking example of judicial policy making in modern America”).

a developing doctrinal body of standards and rights, largely though not solely developed under the Eighth Amendment's prohibition on Cruel and Unusual Punishment,⁶⁶ federal courts began to find that "the Amendment proscribes more than physically barbarous punishments."⁶⁷

This latent discovery came about in part because of the civil rights movement of the 1950s. Incarcerated members of the Nation of Islam and civil rights leaders, including Malcolm X, began to challenge the accepted notion that prisoners had forfeited their rights—particularly the right to free exercise of religion.⁶⁸ In 1964, after a series of lower court losses for incarcerated Black Muslims, the Warren Court held in a one-paragraph per curiam opinion that an incarcerated Muslim man had stated a claim under § 1983 for religious discrimination.⁶⁹ The terse, circumscribed decision opened the door to prison litigation in the federal courts.

It wasn't until 1974, however, that prisoners' rights doctrine more fully emerged. First, the Supreme Court held that prisoners possess due process rights in prison disciplinary hearings.⁷⁰ Then, just two years later, the Court decided the first conditions of confinement case, *Estelle v. Gamble*. In that case, the Court held that a prison's deliberate indifference to an inmate's serious medical needs violated the Eighth Amendment.⁷¹ While this decision was nominally based in precedent, it was the first time the Court applied the Eighth Amendment to internal prison operations. Previously, it was applied to, for instance, permissible forms of the death penalty⁷² or the constitutional limits on proportionality of crime and punishment⁷³—but the Court tended not to examine the lived experience of prisoners.⁷⁴ In *Estelle*, relying on state statutes as evidence of changing standards of decency, the Court found that "[t]he infliction of . . . unnecessary suffering is inconsistent with contemporary standards of decency . . . codifying the

66. U.S. CONST. amend. VIII.

67. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

68. *See In re Ferguson*, 361 P.2d 417, 418 (Cal. 1961) (en banc). *See also* MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 199 (1964) (discussing the problem of "Muslim teachings" in prisons).

69. *Cooper v. Pate*, 324 F.2d 165, 166 (7th Cir. 1963), *rev'd*, 378 U.S. 546 (1964) (per curiam). For a more in-depth description of the role that Black Muslim incarcerated people played in early prison litigation, see Driver & Kaufman, *supra* note 27, at 527–30.

70. *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974).

71. *See Estelle*, 429 U.S. at 97.

72. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 158 (1976) (finding the imposition of the death penalty for the crime of murder is not cruel and unusual); *see also Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947) (holding it is not cruel and unusual to electrocute a prisoner convicted to die a second time after the first electrocution failed).

73. *See, e.g., Robinson v. California*, 370 U.S. 660, 660 (1962) (finding a statute that criminalized the status of being addicted to narcotics violated the Eighth Amendment).

74. Part of the explanation for this was the latent incorporation of the Eighth Amendment, which did not occur until 1962. *See Robinson*, 370 U.S. at 666 (finding a statute that criminalized the status of being addicted to narcotics was violative of the Eighth Amendment). I do not address this factor in detail because it does not actually provide any insight into why the Court did begin to address conditions of confinement—it could have chosen to incorporate the Eighth Amendment well before 1962, and yet declined to do so.

common-law view that it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.”⁷⁵ While Gamble, the plaintiff in that case, still lost his claim, the importance of the decision extended well beyond his case: *Estelle* explicitly held that conditions of confinement imposed by prison officials, rather than by statute, could be considered “punishment” under the Eighth Amendment—an idea that is now so entrenched it may be difficult to appreciate how novel it was at the time.

This concept was expanded upon in several other Supreme Court decisions concerning, for instance, overcrowding,⁷⁶ severe punitive isolation,⁷⁷ and brutality.⁷⁸ However, the Court tended toward caution and took only a handful of prisoners’ rights cases. Instead, it was lower federal courts that took ahold of their new permission to apply the Constitution to prison conditions. And these courts, over the years between *Estelle* in 1965 and the enactment of the PLRA in 1996, transformed the Court’s carefully circumscribed conditions of confinement doctrine into an expansive body of standards and positive rights owed to prisoners. They didn’t stop there: the courts also became increasingly involved in overseeing the implementation of these standards, leading to what has since been dubbed “the most striking example of judicial policymaking in modern America.”⁷⁹

One of the first lower court conditions of confinement wins for prisoners was *Talley v. Stephens*, a district court case in Arkansas. In it, Petitioners alleged that they were denied needed medical treatment, subjected to severe corporal punishment, denied access to the courts, and subjected to unduly harsh working conditions in violation of the Eighth Amendment.⁸⁰ Before trial, the prison conceded many of the allegations and quickly made sweeping changes to the prison, including firing some particularly brutal guards, moving Petitioners into better housing, finding work more suitable to Petitioners’ disabilities, and promising to provide Petitioners with better medical care.⁸¹ As a result, the prison avoided serious judicial intervention—a very real threat in the wake of *Brown II* and the confrontations at Little Rock’s Central High School.⁸²

The prison’s strategy, however, provided only a short-lived respite from judicial involvement: far from appeasing the courts, *Talley* sparked local and nationwide judicial involvement in conditions of confinement. Dozens of decisions relied on *Talley* (and by extension, *Estelle*) for the proposition that inmates were not only entitled to negative rights such as not being tortured, but also to positive rights, particularly the right to healthcare. For instance, in *Finney v. Hutto*, a class

75. *Estelle*, 429 U.S. at 103–04 (internal quotation marks omitted).

76. See *Rhodes v. Chapman*, 452 U.S. 337, 345–46 (1981).

77. See *Hutto v. Finney*, 437 U.S. 678, 685 (1978).

78. See *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986) (describing the standard for use of force during prison riots).

79. FEELEY & RUBIN, *supra* note 25, at 13.

80. *Talley v. Stephens*, 247 F. Supp. 683, 685 (E.D. Ark. 1965).

81. See FEELEY & RUBIN, *supra* note 25, at 55. See also *Talley*, 247 F. Supp. at 687 (Respondent conceding and agreeing with the majority of the court’s conclusions).

82. See *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

of prisoners in Arkansas alleged thirteen violations of their constitutional rights, including overcrowding; lack of medical services and care; lack of rehabilitative services; lack of inmate safety; prohibitive grievance procedures; corrections officers' brutality; harmful disciplinary procedures; and conditions in administrative segregation (solitary confinement).⁸³ The district court issued an incredibly detailed opinion (since described as "the most comprehensive and thorough examination of a prison system ever undertaken by a court")⁸⁴ and cited *Talley* for the assertion that the "state owes to its convicts a constitutional duty to provide them reasonable and necessary medical and surgical care, and this duty extends to the field of mental health and also to other fields of health care."⁸⁵

Similar undertakings occurred in other states. In Texas, for instance, the Fifth Circuit affirmed a district court's decree requiring the Department of Corrections to file reports on the number of inmates and space per inmate, reduce its overall inmate population, ensure each inmate confined in a dormitory be provided with forty square feet of space, preserve a verbatim record of all disciplinary hearings, give inmates in administrative segregation the opportunity for regular exercise, and ensure inmates were allowed access to courts.⁸⁶ The lower court's decree had further mandated the Department take particular steps relating to good time, parole, work furlough and inmate furlough programs; required that the Department take detailed steps to improve a state prison hospital; and granted the special master "quasi-judicial" powers, all of which the appellate court found improper.⁸⁷ Despite these modifications, the appellate court opinion began with a resounding rejection of the judiciary's prior reluctance to involve itself in prisons: "There is no iron curtain drawn between the Constitution and the prisons of this country. When the remedial powers of a federal court are invoked to protect the constitutional rights of inmates, the court may not take a 'hands-off' approach."⁸⁸ The decree spawned over twenty years of court oversight. Its involvement resulted in overhauled living conditions as well as the hiring of professional guards, a federally trained superintendent, and medical personnel.⁸⁹ The implementation of the court's orders cost hundreds of millions of dollars.⁹⁰ Legal scholars have since recalled these proceedings as "the largest, most bitterly contested prison case in American history."⁹¹

Even in cases where circuit courts sided with prisons, judges reiterated their intolerance for unconstitutional living conditions in case after case. "Judges are

83. *Finney v. Hutto*, 410 F. Supp. 251, 257 (E.D. Ark. 1976), *aff'd*, 548 F.2d 740 (8th Cir. 1977), *aff'd*, 437 U.S. 678 (1978).

84. FEELEY & RUBIN, *supra* note 25, at 71.

85. *Finney*, 410 F. Supp. at 258.

86. *Ruiz v. Estelle*, 679 F.2d 1115, 1115 (5th Cir. 1982), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982).

87. *Id.* at 1148–50, 1162.

88. *Id.* at 1136.

89. FEELEY & RUBIN, *supra* note 25, at 80–95.

90. *See generally id.*

91. *Id.* at 95.

not wardens,” the Seventh Circuit wrote in a 1988 case, “but we must act as wardens to the limited extent that unconstitutional prison conditions force us to intervene when those responsible for the conditions have failed to act.”⁹²

Some of this judicial management manifested as settlements, not orders, motivated by prisons’ awareness of the judiciary’s newfound involvement in prison operations. In South Carolina, for instance, a federal court approved a sixty-eight-page consent decree that detailed access to over-the-counter pain medication, cell size, the amount of time a prisoner may spend in a cell, provision of hygiene supplies (including soap, toothbrush, toothpaste, deodorant, washcloth and towel, shampoo, shaving equipment, and personal hygiene products), and numerous other highly specific elements of confinement.⁹³ In New York, Green Haven Correctional Facility entered into a wide-ranging and highly detailed consent decree relating to the prison’s provision of medical care, which detailed medical staffing requirements, access to specialists, dental care provision, sick call procedures, diagnostic testing, and dozens of other healthcare related details.⁹⁴ Frequently, courts would appoint doctors or other special masters to oversee compliance.⁹⁵ In the Green Haven case, the court appointed a special master who continued to monitor the prison until the Consent Decree was stayed after the passage of the PLRA.⁹⁶

Judicial involvement in conditions of confinement also extended to jails. In New Orleans, for example, a federal judge found in 1970 that “the conditions of plaintiffs’ confinement in Orleans Parish Prison so shock the conscience as a matter of elemental decency and are so much more cruel than is necessary to achieve a legitimate penal aim that such confinement constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution.”⁹⁷ The court found that overcrowding made the jail a hotbed for infectious diseases; prescribed medication would frequently never reach an inmate or be stolen by another prisoner; inmates with chronic illnesses who should have been confined to bed were kept on open tiers; and the entire jail structure was infested with rats and other vermin.⁹⁸ These findings resulted in one of the longest federal court-ordered consent decrees in United States history.⁹⁹

92. *Harris v. Flemming*, 839 F.2d 1232, 1235 (7th Cir. 1988).

93. *Plyler v. Leeke*, Civ. A. No. 3:82-0876-2, 1986 WL 84459, at *15 (D.S.C. Mar. 26, 1986), *aff’d in part, appeal dismissed in part*, 804 F.2d 1251 (4th Cir. 1986).

94. *See generally* Stipulation of Terms of Modified Final Judgment by Consent, *Milburn v. Coughlin*, 79 Civ. 5077 (RJW) (S.D.N.Y. Aug. 1, 1991), <https://www.clearinghouse.net/chDocs/public/PC-NY-0006-0003.pdf>.

95. *See, e.g.*, *Grubbs v. Bradley*, 552 F. Supp. 1052, 1131–32 (M.D. Tenn. 1982) (ordering the parties to submit a Special Master to oversee the prison’s compliance with court-defined standards for sanitation, personal safety, health services, and housing).

96. *See* Decl. of Robert L. Cohen, MD at 23, 455 F. Supp. 3d 308 (S.D. Tex. 2020) (No. 4:20-cv-01115), <https://clearinghouse.net/chDocs/public/PC-TX-0025-0003.pdf>.

97. *Hamilton v. Schiro*, 338 F. Supp. 1016, 1019 (E.D. La. 1970).

98. *Id.* at 1017–18.

99. Alexandra E. Faia, *Prisons, Politics, and Pointing Fingers: The Issues Plaguing Orleans Parish Prison’s Consent Decrees*, 16 LOY. J. PUB. INT. L. 129, 132 (2014).

Alleged violations of consent decrees were also frequently litigated.¹⁰⁰ Accounts from special masters often indicated a discrepancy in the conditions described by the prisons and those observed by the special master. For instance, the doctor whom the court appointed to investigate the Orleans Parish Prison's medical deficiencies wrote that he found that the prison not only lacked medical records, basic equipment such as a scale or examination table, and necessary drugs to treat common issues such as seizures, but also that prisoners often had to pay off "hallboys" just to see a nurse, and that while the prison claimed its (one) physician treated roughly 800 patients per month, the doctor in fact saw only 180.¹⁰¹ Such obfuscation, of course, led to even more judicial involvement in and oversight of prisons.

While many of the lower courts' decisions amounted to "what may be called an adventure in judicial micromanagement,"¹⁰² they were typically tethered to the two Supreme Court decisions mentioned above, particularly *Estelle*, which was interpreted to stand for the proposition that prisoners have a right to healthcare while they are incarcerated.¹⁰³ On its face, however, that decision hardly established a positive right. The Court had held only that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment."¹⁰⁴ And yet, paying special heed to dicta, which noted an "obligation to provide medical care for those whom [the government] is punishing by incarceration,"¹⁰⁵ the lower court orders described above (which are but a few of the many handed down during the prisoners' rights era)¹⁰⁶ detailed comprehensive healthcare and living conditions systems and standards—indicating that prisoners were owed a right that, as a large body of legal scholarship has noted, is not extended to the general population.¹⁰⁷

100. See *Milburn v. Coughlin*, No. 79 Civ. 5077 (RJW), 1993 WL 190279, at *1 (S.D.N.Y. May 28, 1993); *Milburn v. Coughlin*, No. 79 Civ. 5077 (RJW), 1997 WL 371144, at *1 (S.D.N.Y. July 2, 1997); *Milburn v. Coughlin*, No. 79 Civ. 5077 (RJW), 1996 WL 633223, at *1 (S.D.N.Y. Nov. 1, 1996); *Milburn v. Coughlin*, No. 79 Civ. 5077 (RJW), 1995 WL 293686, at *1 (S.D.N.Y. May 11, 1995).

101. See Seth B. Goldsmith, *Jailhouse Medicine: Travesty of Justice?*, 87 HEALTH SERVS. REPS. 767, 772–73 (1972).

102. FEELEY & RUBIN, *supra* note 25, at 117.

103. See, e.g., *Ruiz v. Estelle*, 679 F.2d 1115, 1149 (5th Cir.), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982) (citing *Estelle v. Gamble*, 429 U.S. 97 (1976), for the proposition that "[t]he state has an obligation to provide medical care for those whom it is punishing by incarceration") (internal citations omitted).

104. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (internal citation omitted).

105. *Id.* at 103.

106. For a more comprehensive and detailed account of judicial involvement in prisons during this era, see FEELEY & RUBIN, *supra* note 25; DI IULIO, *supra* note 44.

107. See, e.g., David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864 (1986) (pointing out that constitutional jurisprudence generally recognizes no liability for government inaction); Jenna MacNaughton, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 756 (2001) ("Negative rights theorists recognize that many people will not be able to enjoy their constitutional rights, whether because their poverty makes such rights unaffordable, or because their youth or other circumstances render them vulnerable to private violence. However, this view argues that, because the government played no active part in creating these problems, it has no obligation to correct them. The consequentialist strain of the negative rights view

It was perhaps this positive rights feature of the prisoners' rights era that spawned growing public hysteria over prison litigation.¹⁰⁸

In 1964, no American court had ever ordered a prison to change its conditions of confinement; by 1984, 24% of the nation's 903 state prisons (including at least one in each of forty-three states and the District of Columbia) operated under a court order requiring reform in areas including housing conditions, security, medical care, mental healthcare, sanitation, nutrition, and exercise.¹⁰⁹ Forty-two percent of the nation's state prisoners were housed in a prison under court order.¹¹⁰ Prisoners' rights litigants were particularly successful at achieving injunctive relief in the nation's largest facilities, with approximately half operating under court order by 1984.¹¹¹ This period was unique not just because of the decisions issued, but also because of the scope of relief granted. Courts were not merely instructing prisons to improve conditions of confinement but were instead directly supervising those improvements.

In 1990, over 1,200 local prison systems were under federal court supervision.¹¹² Prison administrators complained about being micromanaged, local officials began to talk about the enormous financial and political costs of complying with court-ordered relief, and legislators blamed judicial activism for the state of prison litigation, finding unjustified usurpation of local criminal justice systems.¹¹³ To spur public support for a campaign against judicial involvement in prison administration, the National Association of Attorneys General distributed a list of the "top ten" frivolous prisoner lawsuits to the press.¹¹⁴ A *New York Times* opinion piece complained that "[t]axpayers have grown justifiably tired of footing the bill for the special privileges provided to prisoners when they file their suits."¹¹⁵ An article in the newspaper detailed the now-infamous cases of a prisoner who sued over receiving a jar of creamy peanut-butter instead of crunchy, and another who alleged a guard's refusal to refrigerate the inmate's ice cream

does not necessarily foreclose legislative action to create social services, but these services are seen as privileges, not rights that citizens can enforce in court.") (internal citations omitted).

108. The right continues to be highly controversial to this day: for instance, there is currently a deep circuit split over a prison's obligation to provide transsexual inmates with gender confirmation surgery. *Compare* *Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019) (granting preliminary injunctive relief for gender confirmation surgery), *cert. denied sub nom: Idaho Dep't of Corrs. v. Edmo*, 141 S. Ct. 610 (2020) (mem.) *with* *Gibson v. Collier*, 920 F.3d 212, 228 (5th Cir. 2019) (finding that "[i]t cannot be deliberately indifferent to deny in Texas what is controversial in every other state"), *cert. denied*, 140 S. Ct. 653 (2019). COVID-19 has similarly tested the limits of a prison's affirmative duty to provide healthcare.

109. FEELEY & RUBIN, *supra* note 25, at 13; *Beyond the Hero Judge*, *supra* note 38.

110. *Beyond the Hero Judge*, *supra* note 38.

111. *Id.*

112. Anne K. Heidel, *Due Process Rights and the Termination of Consent Decrees Under the Prison Litigation Reform Act*, 4 U. PA. J. CONST. L. 561, 561 (2002).

113. *Id.*

114. Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1777 (2003).

115. *Free the Courts*, *supra* note 10.

was cruel and unusual punishment.¹¹⁶ Conservative politicians argued that “judicial orders entered under Federal law have effectively turned control of the prison system away from elected officials accountable to the taxpayers and over to the courts.”¹¹⁷ The “problem” had captured the public and political imagination.

As the Introduction to this Article noted, however, this press was largely disingenuous. The vast majority of prison litigation did not concern frivolous claims about food preferences; instead, the pre-PLRA individual “inmate docket” in federal court consisted of four leading topics: inadequate medical care, physical assault, due process violations relating to disciplinary sanctions, and living-conditions claims (e.g. sanitation).¹¹⁸ Healthcare-related claims accounted for between 11% and 25% of all individual claims, and although estimates vary based on methodology, on average healthcare claims were the most frequent subject of inmate litigation prior to the enactment of the PLRA.¹¹⁹ Likewise, deficient medical services and overcrowding were tied for the highest incidence of court orders.¹²⁰ By 1990, 172 state correctional facilities (not including jails) were under court order or a consent decree for conditions relating to their medical facilities.¹²¹ Furthermore, these numbers likely underestimate the prevalence of medical-related claims because many claims that could be categorized as “living conditions” could also be categorized as health-related (e.g. cleanliness, diet, temperature control). Recall, too, that the first conditions of confinement case decided by the Supreme Court concerned the provision of medical care. Because of that, *Estelle*’s progeny often included at least one claim related to prison healthcare. While the inmate docket certainly included some frivolous claims, the cases and relief granted that defined the prisoners’ rights movement were not about diet preferences, but rather in large part about the provision of healthcare and sanitary living conditions.

It is, of course, possible that the public, politicians, and the press were simply misguided and unaware of the realities of inmate litigation. However, it is also

116. Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, N.Y. TIMES, Mar. 21, 1994, at A1.

117. 142 Cong. Rec. S3703-01 (1996).

118. *Inmate Litigation*, *supra* note 6, at 1555, 1571 n.48 (table showing percentage of each type of claim brought according to various studies).

119. The figures used to calculate the average estimate for each litigation topic were taken from *Inmate Litigation*, *supra* note 6, at 1571 n.48. The average was calculated by adding the estimates for each subject (taking the highest number when a range was given) and then dividing by the number of estimates. For assaults, the average estimate was 14.95%; for healthcare the average estimate was 16.3%; for discipline the average estimate was 15.46%; and for conditions the average estimate was 10.41%. Considering that many conditions litigation was in fact related to healthcare (consider, for instance, the provision of hand sanitizer and soap), the estimates for healthcare-related litigation are probably still lower than the reality.

120. See BUREAU OF JUST. STATS., U.S. DEP’T OF JUST., 1984 CENSUS OF STATE ADULT CORRECTIONAL FACILITIES 2 (1987), <https://www.bjs.gov/content/pub/pdf/csacf84.pdf>.

121. By this time, overcrowding overtook medical concerns by 1% or 14 decrees. Medical concerns were the second most common specific condition for which state facilities were under court order. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE 1990 CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES 7 (1990), <https://www.bjs.gov/content/pub/pdf/csfcf90.pdf>.

possible that those who were drumming up press over absurd prisoner claims were doing so in response to the substance of increasingly expansive judge-created prisoners' rights—that is, the judiciary's insistence that prisons provide (costly) medical care and reasonable housing.

In line with increasing public and political unease with court interference in prison administration, the Supreme Court started to overturn some of the most extreme lower federal court orders, particularly ones that addressed relatively benign constitutional violations. For instance, in a case concerning the staffing of a prison law library; the photocopying policy of the law library; the indigency standards for access to legal supplies; and the treatment of telephone calls to counsel, an Arizona district court appointed a special master to embark on an eight-month long investigation. The undertaking eventually resulted in a proposal for systemic permanent injunction, which the court adopted as a twenty-five-page order.¹²² The Supreme Court overturned the district court's decision, finding it was "wildly intrusive" in its lack of deference to prison officials.¹²³ "It is the role of courts to provide relief to claimants," the Court wrote, "[i]t is not the role of courts, but that of the political branches, to shape the institutions of government . . . it is for the political branches of the State and Federal Governments to manage prisons."¹²⁴ The Court also tightened its *Estelle* holding (albeit with four justices concurring only in the judgment), clarifying that prisoners alleging inadequate provision of medical care must show that the prison staff had a culpable state of mind, that they were "deliberate[ly] indifferen[t]."¹²⁵ Finally, the Court relaxed its standard of review for consent decrees into a flexible inquiry in which "a party seeking modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance."¹²⁶ This new standard made it easier for defendants to seek relaxation of sweeping consent decrees based on their compliance.

The Court's caution and admonishments, however, were insufficient to appease the public or politicians. And while the reasons proffered for such public concern tended to focus on peanut butter and melted ice cream, there is an alternative account of political interest in judicial involvement in prisons, one that involves concurrent developments in welfare policies.

II. WELFARE REFORM

The sweeping legal remedies described in Part I did not occur in a vacuum. While lower court federal judges were becoming increasingly involved with prison conditions, a series of welfare reforms resulted in a dramatic downturn in

122. *Lewis v. Casey*, 518 U.S. 343, 346–47 (1996).

123. *Id.* at 362.

124. *Id.* at 349.

125. *Wilson v. Seiter*, 501 U.S. 294, 297 (1991).

126. *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 393 (1992).

public services concurrent with a dramatic uptick in prison population. Part II of this Article details how public sentiment and political momentum drastically diminished the provision of welfare services, particularly the provision of housing and medical services. Additionally, this Part shows how welfare shifted from an access model of broad category-based rights into a model that—either explicitly or implicitly—erected moral gatekeeping such that only those *deserving* of, rather than *needing*, welfare services could receive them.

In the 1960s, social services were broadly accessible and modeled on a conception of those receiving government aid as victims—of addiction, circumstances, lack of education, etc.—rather than perpetrators of their own misfortunes. For example, state governments considered civil commitment and rehabilitation to be preferable to incarceration as methods of responding to drug addiction.¹²⁷

In New York, Governor Nelson Rockefeller “dedicated unprecedented physical, institutional, and monetary resources to a series of rehabilitative programs that approached drug addiction as a medical disease.”¹²⁸ At the time, New York was the primary entry point for heroin into the country, and New York City reportedly housed half the heroin addicts in the U.S.¹²⁹ Rockefeller, who served as governor from 1958 to 1973, initially responded to the epidemic with a series of costly therapeutics programs, many of which involved civil commitment. The first of these, created by the Metcalf Volker Act in 1962, created a drug addiction unit within the Department of Mental Hygiene and allowed criminal offenders to opt for lengthy treatment programs instead of incarceration.¹³⁰ The law was novel in its positioning of the addict as a victim of disease, rather than as a lawless criminal perpetrator.¹³¹

New York City also embarked on a series of public health and drug rehabilitation programs: in 1967, Mayor John Lindsay established a new agency directly responsible for substance abuse treatment, the Addiction Services Agency, and rapidly expanded treatment capacity.¹³² The city also enlarged its methadone (a synthetic opiate used to curb primarily heroin addiction) programs. Between 1971 and 1973, it increased its population of methadone patients by 170%, from 19,900 cases to 34,000—during which time drug arrests, complaints to the police about theft, and cases of serum hepatitis all fell significantly.¹³³ These treatment programs also helped curb the rapid spread of HIV, as at the time 41% of AIDS cases were related to injection drug use.¹³⁴

127. *The Attila the Hun Law*, *supra* note 34, at 76.

128. *GETTING TOUGH*, *supra* note 34, at 31.

129. *The Attila the Hun Law*, *supra* note 34, at 75–76.

130. N.Y. Mental Hygiene Law § 202 (McKinney 1951 & Supp. 1962); *The Attila the Hun Law*, *supra* note 34, at 76.

131. *The Attila the Hun Law*, *supra* note 34, at 76.

132. Nicholas Freudenberg et al., *The Impact of New York City's 1975 Fiscal Crisis on the Tuberculosis, HIV, and Homicide Syndemic*, 96 AM. J. PUB. HEALTH 424, 425 (2006), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1470515/>.

133. *Id.*

134. *Id.* at 427.

Such penal welfare programs were in line with national sentiment. President Lyndon B. Johnson, who served from 1963 to 1969 after the assassination of John F. Kennedy, believed that crime was rooted in social conditions rather than innate personal shortcomings.¹³⁵ His Great Society, a legislative agenda that included attack on disease, aid to education, Medicare, urban renewal, antipoverty programs such as housing subsidies, expansion of social security, the Civil Rights Act of 1964, and the Voting Rights Act, was intended to expand opportunities rather than punish and blame the poor and disenfranchised.¹³⁶ Congress, with some augmentations and amendments, rapidly enacted many of Johnson's recommendations.¹³⁷ One of the most impactful and lasting outcomes of the program was millions of elderly people gaining access to healthcare through the 1965 Medicare amendment to the Social Security Act.¹³⁸ President Johnson's aim was to "finish Franklin Roosevelt's revolution"—to leverage government programming as a means of uplifting the economy and encouraging upward social mobility.¹³⁹ In his State of the Union Address, the President dramatically announced that "this administration today, here and now, declares unconditional war on poverty in America."¹⁴⁰

Johnson's White House passed over 200 pieces of legislation under this agenda.¹⁴¹ Among them was the Economic Opportunity Act, which established the Office of Economic Opportunity to build educational, employment, and training programs to lift people out of poverty.¹⁴² Under the Act, spending on the poor doubled between 1965 and 1968.¹⁴³ Within a decade, the percentage of Americans living below the poverty line declined from 20% to 12%.¹⁴⁴ Johnson also launched a series of programs aimed at giving access to educational opportunities to those without means at every level of education—from preschool with his Head Start program to college with the Higher Education Act.¹⁴⁵ Additionally, Johnson's Omnibus Housing Act of 1965 provided affordable housing for low-income people and established funding for urban renewal.¹⁴⁶ It created the U.S. Department of Housing and Urban Development, provided large rent subsidies

135. See *Lyndon B. Johnson*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/presidents/lyndon-b-johnson/> (last visited Feb. 22, 2023).

136. *Id.*

137. *Id.*

138. *Id.*

139. See JOSHUA ZEITZ, BUILDING THE GREAT SOCIETY: INSIDE LYNDON JOHNSON'S WHITE HOUSE 6 (2018).

140. See Guian A. McKee, *Lyndon B. Johnson and the War on Poverty*, U. VIRG. (2010), <https://rotunda.upress.virginia.edu/pdf/american-cent/WarOnPoverty-introduction-USletter.pdf>.

141. *Evaluating the Success of the Great Society*, WASH. POST (May 17, 2014), <https://www.washingtonpost.com/wp-srv/special/national/great-society-at-50/>.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 451 (1965).

for low-income people moving into housing projects, and created grants to help low-income homeowners rehabilitate their properties.¹⁴⁷

Johnson's philosophy and legislative agenda were attuned to the Civil Rights Movement, which focused in large part on how economic inequality related to the nation's insidious patterns of racial discrimination. For many civil rights unionists, race and class were necessarily intertwined: "workplace democracy, union wages, and fair and full employment went hand in hand with open, affordable housing, political enfranchisement, educational equity, and an enhanced safety net, including healthcare for all."¹⁴⁸ One of the key policy agendas for Civil Rights leaders was to extend the economic citizenship that the New Deal had provided to working class white people, to citizens of all races.¹⁴⁹ The movement intended to capitalize on "the surge of progressive thought and politics in the American South" as well as the country at large.¹⁵⁰ In 1964, President Johnson signed the landmark Civil Rights Act of 1964 into law.¹⁵¹ The law prohibited discrimination on the basis of race, sex, and national origin, and today is considered by many scholars to be the most influential civil rights triumph of that period.¹⁵² One year later, Johnson extended many of the Act's same protections to the Voting Rights Act and the Civil Rights Act of 1968, which prohibited discrimination in housing.¹⁵³

This period of progressive politics was short-lived, however. Civil unrest, racialized public fear over drugs and crime, and an actual and unprecedented rise in violent crime¹⁵⁴ gradually transformed the War on Poverty into a War on Drugs and Crime.¹⁵⁵ In July of 1964, an unarmed black fifteen-year-old boy was killed by New York City police.¹⁵⁶ The incident sparked protests and violent clashes with police which continued in a prolonged and sporadic conflict that lasted over the course of multiple summers. In 1967, violent protests killed forty-three in

147. *Id.*

148. Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233, 1246 (2005).

149. *Id.*

150. *Id.*

151. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

152. *Legal Highlight: The Civil Rights Act of 1964*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/oasam/civil-rights-center/statutes/civil-rights-act-of-1964#:~:text=The%20Act%20prohibited%20discrimination%20in,continues%20to%20resonate%20in%20America> (last visited Feb. 22, 2023) ("The Civil Rights Act of 1964 is the nation's benchmark civil rights legislation, and it continues to resonate in America.").

153. The Voting Rights Act and the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968).

154. See generally John Clegg & Adaner Usmani, *The Economic Origins of Mass Incarceration*, CATALYST (Dec. 2019), <https://catalyst-journal.com/2019/12/the-economic-origins-of-mass-incarceration> (citing rising underemployment, particularly for Black people, and the deterioration of education and social services as the leading causes of "unprecedented rates of violence in [B]lack neighborhoods").

155. See generally Elizabeth Hinton, "A War Within our Own Boundaries": Lyndon Johnson's *Great Society* and the Rise of the Carceral State, 102 J. AM. HIST. 100 (2015).

156. *Id.*

Detroit, twenty-six in Newark, and twenty-three across other cities.¹⁵⁷ By the close of the 1960s, these protests constituted the largest period of domestic bloodshed since the Civil War.¹⁵⁸ In response, white suburban fears over drug and violence infiltrating “good” neighborhoods grew, and a period of mass white flight commenced.¹⁵⁹ Black men were the most visible protesters, and many blamed this group for the chaos that upended neighborhoods and dominated headlines.¹⁶⁰ Conservative politicians capitalized on the moment and commenced a campaign advocating for law and order, particularly emphasizing that being tough on crime would benefit Black communities.¹⁶¹

President Johnson valiantly attempted to dispute the narrative that Black rioting and drug use were responsible for this period of unusual domestic violence. A report commissioned by his office instead blamed the civil unrest on poor policing, a flawed justice system, minority voter suppression, lack of affordable housing, unemployment, and other forms of systemic racism.¹⁶² “White society,” the report said, “is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.”¹⁶³

This message no longer resonated with the American public, however. There was in the public discourse “an astonishingly sudden draining away of support for the ideal of rehabilitation . . . within a very short time it became common to regard the core value of the whole penal-welfare framework not just as an impossible ideal, but, much more remarkably, as an unworthy, even dangerous policy objective.”¹⁶⁴ Fear of crime emerged as a cultural theme: regardless of actual crime rates, the post-1970s public consistently believed that crime rates were getting worse and that the criminal justice system was ineffectual in combatting the problem.¹⁶⁵ The “welfarist image of the delinquent as disadvantaged” was replaced with depictions of “unruly youth, dangerous predators, and incorrigible

157. Alice George, *The 1968 Kerner Commission Got It Right, But Nobody Listened*, SMITHSONIAN MAG. (Mar. 1, 2018), <https://www.smithsonianmag.com/smithsonian-institution/1968-kerner-commission-got-it-right-nobody-listened-180968318/>.

158. Hinton, *supra* note 155.

159. Andrew Cohen, *How White Users Made Heroin a Public-Health Problem*, ATLANTIC (Aug. 12, 2015), <https://www.theatlantic.com/politics/archive/2015/08/crack-heroin-and-race/401015/> (“A surge in heroin use among blacks in the 1960s was blamed for a rise in violent crime, and provoked a harsh response.”).

160. George, *supra* note 157.

161. Julia Azari, *From Wallace to Trump: the Revolution of “Law and Order,”* FIVETHIRTYEIGHT (Mar. 13, 2016, 5:41 PM), <https://fivethirtyeight.com/features/from-wallace-to-trump-the-evolution-of-law-and-order/>.

162. U.S. NAT’L ADVISORY COMM’N ON CIV. DISORDERS, *THE KERNER REPORT: THE 1968 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* 123–93 (1988).

163. *Id.* at 1.

164. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 8 (2001).

165. *See id.* at 10.

career criminals.”¹⁶⁶ The public no longer had any interest in social engineering; it wanted punishment, pure and simple retribution.¹⁶⁷

Eventually, in response to immense political pressure and a rightward swing in national sentiment, Johnson’s Great Society morphed into an amalgamation of community-focused outreach programs and crime-focused penal programs.¹⁶⁸ In 1968, the Omnibus Crime Control and Safe Streets Act passed, paving the way for a carceral state that was, ironically, born from social programs originally established to combat racial inequality.¹⁶⁹ Subtly, President Johnson’s Great Society “had shifted in purpose toward controlling the violent *symptoms* of socio-economic problems” instead of the socioeconomic problems themselves.¹⁷⁰

A similar change took place at the local level. Toward the end of his tenure, Rockefeller, who had previously spearheaded New York’s rehabilitative approach to drugs, began to advocate for increasingly harsh criminal drug laws and the diversion of funds away from public welfare programming and toward policing. He vehemently supported increasingly draconian drug laws, which today are often credited with instigating the modern era of mass incarceration.¹⁷¹ In January of 1973, he proposed a mandatory lifetime prison sentence without option for probation or parole for the sale of hard drugs, regardless of quantity.¹⁷² That same year, he declared outright that the very programs he had championed for the past decade were failures: “It is a time for brutal honesty regarding narcotics addiction,” he said. “In this state, we have allotted over \$1 billion to every form of education against drugs and treatment of the addict through commitment, therapy, and rehabilitation. But let’s be frank—let’s tell it like it is: We have achieved very little permanent rehabilitation—and have found no cure.”¹⁷³ He called for a program of harsh deterrence wherein “drug pushers” would receive punishments more severe than those reserved for rape, kidnapping, and murder.¹⁷⁴ This shift from rehabilitation services to penal programs was reflected in budget cuts: in

166. *Id.*

167. John Clegg and Adaner Usmani persuasively argue that mass incarceration occurred as a result of two things: first, a real rise in crime (born out of a baby boomer-induced market failure) and second, the longstanding incapacity of America to fight crime at its roots. Thus, “the overdevelopment of American penal policy at the local level is the result of the underdevelopment of American social policy at the federal level.” By this account, the public didn’t demand harsh criminal policies, but rather demanded that the government do *something*—and because America has always struggled to adequately address class and social inequalities, that something became punishment. Clegg & Usmani, *supra* note 154.

168. See generally Hinton, *supra* note 155.

169. The Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 197 (1968).

170. Hinton, *supra* note 155, at 21.

171. See, e.g., Brian Mann, *The Drug Laws that Changed How We Punish*, NPR (Feb. 14, 2013), <https://www.npr.org/2013/02/14/171822608/the-drug-laws-that-changed-how-we-punish>.

172. *The Attila the Hun Law*, *supra* note 34, at 76.

173. *Id.* at 71.

174. *Id.*

1974, New York City provided \$15 million for Addiction Services Agency activities; four years later, the city invested only \$3.3 million.¹⁷⁵

In 1982, federal funding for urban development and public health problems such as tuberculosis, sexually transmitted infections, and mental health was consolidated into “block grants,” that gave states the ability to funnel funds into more politically-popular programs.¹⁷⁶ Between 1980 and 1990, federal support for the Community Development Block Grant program, a major source of support for low-income neighborhoods, was cut from \$6.1 billion to \$2.8 billion.¹⁷⁷

Increasingly, the political climate hardened against government-enabled “welfare queens.”¹⁷⁸ Richard Nixon, elected president in 1969, capitalized on the violent clashes between police and mostly Black protesters—in addition to a real rise in violent crime¹⁷⁹—to build a new narrative of the impoverished as lazy, violent freeloaders. The public became increasingly convinced that welfare was becoming a “way of life” rather than a bridge to jobs and opportunity.¹⁸⁰ Lawrence Mead, a political science professor at New York University, argued in his then-popular book *Beyond Entitlement: The Social Obligations of Citizenship* that America’s permissive welfare state had failed because it did not enforce the social obligation of work.¹⁸¹ Indeed, welfare became almost synonymous not just with poor work ethic, but also with criminal activity: Nixon frequently invoked the story of a woman who “used eighty names, thirty addresses, fifteen telephone numbers to collect food stamps, Social Security, veterans’ benefits for four non-existent deceased veteran husbands, as well as welfare.”¹⁸² Welfare was not just enabling joblessness, the story went, it was actually encouraging crime.

Budget cuts to welfare programs, particularly housing and healthcare related ones, had immediate consequences: in the aftermath of reductions in safety-net programs such as public assistance and Medicaid, New York City experienced a rapid increase in tuberculosis from 1978 until the 90s.¹⁸³ Additionally, post-1980 reductions in federal support for low-income housing resulted in a sharp increase in homelessness: between 1982 and 1992, the city’s homeless population grew

175. GETTING TOUGH, *supra* note 34, at 112.

176. Freudenberg et al., *supra* note 132, at 426.

177. *Id.*

178. A racist term popularized in the 1970s used to describe a mother who intentionally has as many children as possible in order to collect public welfare funds. *See generally* Bryce Covert, *The Myth of the Welfare Queen*, THE NEW REPUBLIC (July 2, 2019), <https://newrepublic.com/article/154404/myth-welfare-queen>.

179. *See generally* Clegg & Usmani, *supra* note 154 (“Between 1960 and 1980 the US homicide rate had more than doubled to 10.7 per 100,000, the peak for the twentieth century . . . these levels of violence were an order of magnitude more severe than anything observed in any other developed country.”).

180. R. KENT WEAVER, ENDING WELFARE AS WE KNOW IT 126–27 (2000) (citing statistics that indicate the American public was becoming disenchanted with welfare reforms).

181. *See generally* LAWRENCE M. MEAD, BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP (2001).

182. *See generally* Covert, *supra* note 178.

183. Freudenberg et al., *supra* note 132, at 426.

from 7,584 to 23,494. Homelessness made it difficult for hospitals to track treatment and follow-up for patients, which further contributed to the spread of tuberculosis, sexually transmitted diseases, and drug addiction.¹⁸⁴ Budget cuts for hospital services also exacerbated the problem, with overcrowded and understaffed hospitals becoming hotbeds for tuberculosis transmission. And finally, budget cuts in school health services prevented effective early education around health generally, and particularly around sexually transmitted infections. Between 1970 and 1980, New York City cut physicians' hours in schools by 84%, cut nurses' hours by more than 50%, and decreased the number of health education teachers.¹⁸⁵

These budget cuts were instituted as part of a "tough on crime" political attitude that recategorized addicts and the impoverished as criminals: "the mentally ill were swept out of hospitals, into the streets, and then into jails and prisons."¹⁸⁶ Criminologists of the welfare era had viewed human failings as a reflection of an imperfect society. But in the 1970s, control theories of criminology emerged and took hold, and these assumed a much darker view of human failings: that individuals were naturally drawn to nefarious activities and could only be prevented from engaging in them by robust enforcement of discipline.¹⁸⁷ In 1971, President Nixon categorized drugs as "public enemy #1" and declared an official "War on Drugs."¹⁸⁸ During his final state of the union address, he said "the federal government declared war on poverty, and poverty won"—as an indictment not of the Republican parties' dismantling of public assistance programs, but rather of "freeloaders" living off government checks.¹⁸⁹

Meanwhile, Governor Rockefeller's harsh late-term drug laws in New York became a model for other states. Where previously politicians had presented social engineering and public services as an effort to cure addicts of a disease, "they now framed [programs] as efforts to protect 'the public' from the 'addict' and the drug dealer or 'pusher.'"¹⁹⁰ Newt Gingrich, who was a champion of this new paradigm shift, declared that Democrats refused "to recognize that Lyndon Johnson's Great Society has failed."¹⁹¹

It was not just Republicans who had become disenchanted with Johnson's Great Society, though. By the late 80s, polls showed that most Americans believed that public assistance not only did not help the poor, but actually hurt

184. *Id.* ("[I]n 1988, 89% of patients discharged from Harlem Hospital, which served the district with the city's highest TB rates, were lost to follow-up or failed to complete treatment.").

185. Freudenberg et al., *supra* note 132, at 426.

186. Susan M. Reverby, *Can There be Acceptable Prison Healthcare? Looking Back on the 1970s*, 134 *PUB. HEALTH REP.* 89, 89 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6304726/>.

187. See GARLAND, *supra* note 164, at 15.

188. *The Attila the Hun Law*, *supra* note 34, at 75.

189. Clay Risen, *The War on the War on Poverty*, *DEMOCRACY* (Fall 2007), <https://democracyjournal.org/magazine/6/the-war-on-the-war-on-poverty/>.

190. *The Attila the Hun Law*, *supra* note 34, at 74.

191. Helen J. Knowles, *Taking Justice Kennedy Seriously: Why Windsor Was Decided "Quite Apart from Principles of Federalism,"* 20 *ROGER WILLIAMS U. L. REV.* 24, 32 (2015).

them.¹⁹² “The social problems associated with long-term welfare dependency cannot be addressed without first putting the brakes on the downward spirals of dysfunctional behavior common among so many recipients,” wrote welfare researchers in the 1990s.¹⁹³ “Character is built by the constant repetition of diverse good acts. These new behavior-related welfare rules are an attempt, long overdue in the minds of many, to build habits of responsible behavior among long term recipients; that is, to legislate virtue.”¹⁹⁴ By the early 90s, 74% of Americans believed that those receiving welfare were so dependent that they would never “get off” it.¹⁹⁵ And a central pledge of Democratic President Bill Clinton was to “end welfare as we know it.”¹⁹⁶

Bipartisan agreement that welfare needed reform culminated in drastic changes to government spending. In 1980, the U.S. spent three times more on food stamps and welfare grants than on penal institutions; by 1996, the year of the PLRA’s passage, the balance had reversed, with the nation devoting billions more to corrections than to its principal welfare programs.¹⁹⁷ Spending is, of course, only part of the story—the budgetary reversal was driven in part by necessity. New sentencing and policing structures meant there were vastly more people in prison than ever before.¹⁹⁸ Between 1986 and 1991, the number of state prison inmates incarcerated for drug offenses more than doubled to 21%.¹⁹⁹ In the federal system, the drug offender population more than doubled over ten years to 60% in 1993.²⁰⁰ Overall, the state and federal prison population more than tripled from 329,821 in 1980 to well over one million in 1994.²⁰¹ Meanwhile, many of the newly incarcerated were the same people who had previously been redirected from prison into rehabilitation programs.²⁰²

This had immediate consequences for the prison population. Without a comprehensive set of standards and policies for prison healthcare, many incarcerated people with pre-existing mental health issues, drug addictions, or chronic illness

192. WEAVER, *supra* note 180, at 126.

193. Douglas J. Besharov & Karen N. Gardiner, *Paternalism and Welfare Reform*, PUB. INT. 70, 84 (Winter 1996).

194. *Id.*

195. WEAVER, *supra* note 180, at 126.

196. *Text of President Clinton’s Announcement on Welfare Legislation*, N.Y. TIMES (Aug. 1, 1996), <https://www.nytimes.com/1996/08/01/us/text-of-president-clinton-s-announcement-on-welfare-legislation.html>.

197. GETTING TOUGH, *supra* note 34, at 1.

198. See German Lopez, *Mass Incarceration in America, Explained in 22 Maps and Charts*, VOX (Oct. 11, 2016), <https://www.vox.com/2015/7/13/8913297/mass-incarceration-maps-charts> (providing a visual chart showing the steep increase in incarceration after the 1970s). See also Dora M. Dumont et al., *Public Health and the Epidemic of Incarceration*, 33 ANN. REV. PUB. HEALTH 325, 326 (2012) (showing the steep increase in incarceration after the 1970s).

199. ALLEN BECK ET AL., U.S. DEP’T OF JUST., SURVEY OF STATE PRISON INMATES, 1991 4 (1993), <https://bjs.ojp.gov/content/pub/pdf/SOSPI91.pdf>.

200. ALLEN J. BECK & DARRELL K. GILLIARD, U.S. DEP’T OF JUST., PRISONERS IN 1994 10 (1995), <https://bjs.ojp.gov/content/pub/pdf/Pi94.pdf>.

201. *Id.*

202. See GETTING TOUGH, *supra* note 34, at 113.

decompensated while inside prison walls and were left no linkage to care upon release.²⁰³ Prisons were overcrowded, underfunded, understaffed, and very much unprepared for a health crisis within their walls. For instance, in 1986, the state of Michigan found that 30% of its prison population needed psychiatric intervention.²⁰⁴ By 1992, the AIDS incidence rate for federal and state prison systems was 362 per 100,000, twenty times greater than the rate for the general United States population.²⁰⁵

In this context, it is perhaps unsurprising that the judiciary became heavily involved in prison management. Political actors tended to focus on the front-end of criminalization—that is, arrests and sentencing—and there was little appetite for increased funding for or attention to prison healthcare.²⁰⁶ Because those incarcerated people who required healthcare intervention were often the same ones who previously had been placed in rehabilitation programs in the 1960s and early 70s, their reclassification from patient to criminal in the political discourse logically precluded a reversal back to patient once they were placed within prison walls.²⁰⁷ And yet, the services that had previously served these populations were needed *somewhere*, and in prisons the judiciary could point to a positive constitutional right to (minimal) healthcare under the Eighth Amendment.²⁰⁸ Thus, as the penal-welfare framework of punishment broke down, the judiciary stepped in to fill the gap by requiring minimal in-prison standards for diet, medical care, sanitation, and other conditions.

By the late 1990s, the sociopolitical shift away from social services and the judicial interest in prisons culminated in a new legislative agenda, one that would cut services and spending by weeding out those unworthy of government protection—without alienating Democrats.²⁰⁹ This legislative agenda was called the Contract with America, and it culminated in two landmark laws: the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA” or “the Act”), which overhauled the social safety net, and the PLRA, which will be described and interrogated more fully in Part III. Both laws ended “entitlement status”—the state’s obligation to provide assistance to persons belonging to a certain status—for the targeted groups (prisoners and welfare recipients).²¹⁰ “Isn’t it

203. *Id.*

204. Patricia A. Streeter, *Incarceration of the Mentally Ill: Treatment or Warehousing?*, 77 MICH. B.J. 166, 166 (1998).

205. Alan Berkman, *Prison Health: The Breaking Point*, 85 AM. J. PUB. HEALTH 1616, 1616 (1995).

206. See *The Attila the Hun Law*, *supra* note 34, at 71–73.

207. GETTING TOUGH, *supra* note 34, at 112–13.

208. *Estelle v. Gamble*, 429 U.S. 97, 104–06 (1976).

209. See *infra* Part III.

210. For instance, Title IV of the Social Security Act of 1935, which had established the Aid to Families with Dependent Children (AFDC) as a federal entitlement program, wherein those living below a certain income level were automatically entitled to federal assistance, was replaced by the PRWORA. See generally *Aid to Families with Dependent Children (AFDC) and Temporary Assistance for Needy Families (TANF) - Overview*, OFF. OF THE ASSISTANT SEC’Y FOR PLAN. & EVALUATION, [https://aspe.hhs.gov/aid-families-dependent-children-afdc-temporary-assistance-needy-families-tanf-overview#:~:text=Aid%20to%20Families%20with%20Dependent%20Children%20\(AFDC\)%20was%20established%20by,home%2C%20incapacitated%2C%20deceased%2C%20or](https://aspe.hhs.gov/aid-families-dependent-children-afdc-temporary-assistance-needy-families-tanf-overview#:~:text=Aid%20to%20Families%20with%20Dependent%20Children%20(AFDC)%20was%20established%20by,home%2C%20incapacitated%2C%20deceased%2C%20or) (last visited Feb. 22, 2023).

time for the government to encourage work rather than rewarding dependency?" the Contract with America asked.²¹¹ It continued, "[t]he Great Society has had the unintended consequence of snaring millions of Americans into the welfare trap."²¹²

The PRWORA was created to end this trap by requiring recipients to work,²¹³ disqualifying the vast majority of non-citizens from welfare benefits,²¹⁴ and discouraging "illegitimacy and teen pregnancy by prohibiting welfare to minor mothers and denying increased [Aid to Families with Dependent Children—a New Deal era program—]for additional children while on welfare."²¹⁵ The Act opened with findings, the first of which was "[m]arriage is the foundation of a successful society."²¹⁶ Accordingly, it required unmarried minor parents to participate in educational opportunities, appropriated \$50 million per year in abstinence education, and enabled states to impose harsh penalties on parents who were delinquent with child support.²¹⁷

The Act at once granted broad discretion to states while also circumscribing who could become eligible for welfare benefits. For instance, the PRWORA defined "work program" for the work requirement as either a program under two other federal acts or "a program of employment and training operated or supervised by a State or political subdivision of a State that meets standards approved by the Governor of the State."²¹⁸ Notwithstanding this discretion to states, individuals who did not work an average of twenty hours or more per week while receiving food stamps for three months (whether or not consecutively) were limited in their eligibility for food stamps.²¹⁹ Thus, while the precise process for determining eligibility was left in the hands of the states, the statute made clear that eligibility needed to be based on various hoop-jumping, not just an income statement. Recipients of welfare benefits were also required to cooperate with new procedures regarding, for instance, paternity identification.²²⁰ Additionally, the PRWORA imposed a five-year time limit on assistance to needy families and disqualified any individual convicted of a drug-related felony from any assistance funded by the Act and from any food stamp benefits.²²¹

211. CONTRACT WITH AMERICA, *supra* note 14, at 65.

212. *Id.*

213. 7 U.S.C. § 2015.

214. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, § 400, 110 Stat. 2105, 2260 (1996) (codified at 8 U.S.C. § 1601).

215. CONTRACT WITH AMERICA, *supra* note 14, at 17.

216. PRWORA, Pub. L. No. 104-193, § 101, 110 Stat. 2105, 2110 (1996).

217. *Id.* §§ 407(c)(2)(C) (codified at 42 U.S.C. § 607(c)(2)(C)), 912 (codified at 42 U.S.C. § 710), 823 (amending 7 U.S.C. § 2015).

218. *Id.* § 824(a).

219. *Id.*; Supplemental Nutrition Assistance Program, 7 U.S.C. § 2015(2). *See also A Short History of SNAP*, U.S. DEP'T OF AGRIC. (Sept. 11, 2018), <https://www.fns.usda.gov/snap/short-history-snap> (noting that the PRWORA placed a limit on food stamp receipt for those who did not work at least 20 hours per week).

220. PRWORA, Pub. L. No. 104-193, § 331, 110 Stat. 2105, 2227 (1996).

221. 21 U.S.C. § 862a.

The PRWORA differed from many of its predecessor welfare reforms in its intensive focus on morality.²²² Its stated purpose was to end “dependence” on and entitlement to government benefits and to encourage the formation and maintenance of the nuclear family.²²³ In the years leading up to its passage, both Republicans and Democrats used “personal responsibility” as a central theme for their respective welfare proposals.²²⁴ This was a notable departure from entitlement status, wherein the poor were viewed as victims of social conditions that the government should rectify through social services. No longer were the poor entitled to welfare benefits; instead, only the moral poor were entitled to welfare benefits. As Loïc Wacquant put it, the welfare reforms of the 1980s culminating in the PRWORA, converted “the right to ‘welfare’ into the obligation of ‘workfare.’”²²⁵

As Part III elaborates, the PLRA followed in the PRWORA’s footsteps by functionally limiting the provision of rights, specifically, provision of healthcare and habitable housing. It did so obliquely by cutting down access to the only entity that afforded those rights to prisoners: the federal courts. In doing so, the PLRA achieved the same aims as its welfare counterparts: it cut spending on healthcare and other services and limited who could access those rights in the first place.

III. READING THE PLRA AS A WELFARE REFORM

Like its welfare counterparts, the PLRA was first introduced as part of the Contract with America, a legislative agenda advocated for by the Republican party in the 1994 congressional elections.²²⁶ And like its welfare counterparts, it operated to reduce access to government services including healthcare and habitable housing. This Part briefly traces the passage of the PLRA; draws parallels between the effects of the PLRA and its welfare counterparts relying on the stories told in Parts I and II; and concludes with the thesis of this Article: that the PLRA was itself a welfare reform act. In Part III(B), the Article traces the continuing impacts of the PLRA on healthcare and housing in prisons. This then leads into Part IV, which discusses the implications of reading the PLRA as a welfare reform statute.

222. See 42 U.S.C. § 601 (describing the Act as designed to overcome the problems of out-of-wedlock births and welfare dependency, with a goal of strengthening marriage, work ethic, and personal responsibility among the poor).

223. *Id.*

224. See Brendan O’Connor, *The Protagonists and Ideas Behind the Personal Responsibility and Work Opportunity Reconciliation Act of 1996: The Enactment of a Conservative Welfare System*, 28 SOC. JUST. 4, 5 (2001).

225. WACQUANT, *supra* note 34, at 43.

226. *Inmate Litigation*, *supra* note 6, at 1559.

A. The PLRA in the 1990s

The PLRA's trajectory through the houses of Congress was relatively straightforward. The statute's precursor, "The Taking Back Our Streets Act," was to be an anti-crime package that would "make the death penalty real" and establish mandatory minimum sentences of ten years for any drug or violent crime involving the use of a firearm.²²⁷ Additionally, the Act would authorize over \$10 billion in funding for new prison construction in order to house a greater prison population.²²⁸ In order to be eligible for that funding, states would have to show they had increased the average prison time actually served in prison since 1993.²²⁹ The issue of prisoner lawsuits received only two short paragraphs. It read:

States are forced to spend millions of dollars defending prisoner lawsuits to improve prison conditions—many of which are frivolous. Critics of the proposal argue that it will restrict prisoners' rights to seek legitimate redress of grievances.

The Taking Back Our Streets Act directs federal courts to dismiss any frivolous or malicious suits brought by an adult convicted of a crime and confined in any jail, prison, or other correctional facility. The bill also requires that prisoners filing a suit include a statement of all assets in their possession so the court can require a full or partial payment of filing fees based on the prisoner's ability to pay.²³⁰

The vast majority of the 1994 Contract with America focused on sentencing and welfare reform. Over the course of the next two years, however, prisoner access to the courts became one of the major focal points of the agenda.²³¹ This change probably came about as a result of a logical realization: Republican politicians realized that they could not have harsher sentencing laws *and* maintain prison expenditures without breaking judicial orders and consent decrees entered into by their predecessors.²³² "They could not simply add new prisoners to prisons that the courts had held were unconstitutionally overcrowded, and at least early in their terms they were constrained politically to avoid substantial new expenditures on prison construction."²³³ Accordingly, in the early 1990s, Vice President Dan

227. CONTRACT WITH AMERICA, *supra* note 14, at 9, 16, 37.

228. *Id.* at 16, 51.

229. *Id.* at 51.

230. *Id.* at 51.

231. *See generally* 142 CONG. REC. S3703-01 (1996), https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/Prison_Litigation_Reform_Act_Legislative_History/Congressional_Record_Senate_Control_of_Prisons.pdf.

232. Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and The Prison Litigation Reform Act*, 47 DUKE L.J. 1, 12 (1997).

233. *Id.*

Quayle convened a special working group chaired by Kenneth Starr to “Reduce Frivolous and Protracted Prisoner Litigation.”²³⁴

Various versions of prisoner lawsuit reform initiatives surfaced in proposed bills, each with increasing emphasis on “abusive” prisoner lawsuits.²³⁵ In 1995, Senator Bob Dole introduced a version of a bill that would limit the prospective injunctive relief courts could grant and would impose filing fees on inmate litigants.²³⁶ By 1996, the initiative was described on the Senate floor as an act “to end frivolous lawsuits brought by prisoners, to remove . . . prisons from the control of Federal judges, and return control over them to . . . State and local officials.”²³⁷ Senate Republicans regaled Congress with tales of ludicrous suits: an inmate who alleged that being forced to listen to his unit manager’s country and western music constituted cruel and unusual punishment; an inmate who “sued because when his dinner tray arrived, the piece of cake on it was ‘hacked up’”; and of course, the inmate who sued over receiving chunky instead of creamy peanut butter.²³⁸ Like the “welfare queen,” PLRA proponents argued that prisoners had become wily, adroit at exploiting their unfettered access to the courts as a way of draining government resources for own comfort.²³⁹ “On and on the list goes, Mr. President,” said Senator Spencer Abraham, “with more and more ridiculous lawsuits brought by inmates in penitentiaries. A prisoner who sued demanding LA Gear or Reebok ‘Pumps’ instead of Converse tennis shoes. These kinds of lawsuits are an enormous drain on the resources of our States and localities.”²⁴⁰

Federal judges, the story went, were complicit with demanding and entitled prisoners. “The courts . . . raise the costs of running prisons far beyond what is necessary and undermine the very legitimacy and deterrent effect of prison sentences,” said Senator Abraham.²⁴¹ “Judicial orders entered under Federal law have even resulted in the release of dangerous criminals from prison.”²⁴² Like accessible welfare services, PLRA proponents argued that judges created perverse incentives for criminals who found themselves living in comfort on the government’s dime: “judicial orders entered under Federal law have effectively turned

234. *Id.* at 20.

235. See generally Margo Schlanger, *Prison Litigation Reform Act: Legislative History*, UNIV. OF MICH., <https://www.law.umich.edu/facultyhome/margoschlanger/Pages/PrisonLitigationReformActLegislativeHistory.aspx> (last visited Feb. 22, 2023).

236. 141 CONG. REC. 14570 (1995) (statement of Sen. Dole on Introduced Bills and Joint Resolutions, S. 866: A Bill to Reform Prison Litigation to the Committee on the Judiciary).

237. 142 CONG. REC. S3703-01, *supra* note 231.

238. *Id.*

239. Also like the myth of the welfare queen, many of the tales of frivolous prisoner lawsuits were overstated or fabricated. For instance, the prisoner who sued over peanut butter was in fact suing because he had not been reimbursed for a jar of peanut butter that the prison guard returned for him (due to it being the wrong kind). See Chief Judge Jon O. Newman, Second Circuit Court of Appeals, *Not All Prisoner Lawsuits Are Frivolous*, PRISON LEGAL NEWS (Apr. 15, 1996), <https://www.prisonlegalnews.org/news/1996/apr/15/not-all-prisoner-lawsuits-are-frivolous/>.

240. 142 CONG. REC. S3703-01, *supra* note 231.

241. *Id.*

242. *Id.*

control of the prison system away from elected officials accountable to the taxpayers and over to the courts . . . By interfering with the fulfillment of this punitive function, the courts are effectively seriously undermining the entire criminal justice system.”²⁴³

The public discourse, however, centered largely around systemic holes that allowed for occasional exploitation rather than enabler federal judges. This was an effective strategy for getting Democrats and the media on board. Early versions of the Act were met with opposition both from Democrats and legal institutions, including the American Bar Association.²⁴⁴ But because much of the discourse surrounding the passage of the PLRA centered on overwhelmed federal courts and high maintenance prisoners, liberals and media did not recognize it as a jurisdiction-stripping measure until it was passed in conjunction with other pieces of legislation that likewise restricted the process of law.²⁴⁵ A 1994 *New York Times* article on the “flood” of prisoner suits quoted New York State Attorney General G. Oliver Koppell (a Democrat) saying, “[t]hese cases are just burying us and consuming a tremendous amount of time. There has to be a way for prisoners to complain, but this is not the way.”²⁴⁶

Despite the PLRA’s positioning as being for the benefit of overburdened courts, the judiciary generally opposed the statute. A Judicial Impact Statement from the Administrative Office of the U.S. Courts on a 1995 version of the initiative found that the Act would be enormously expensive due to the volume of consent decrees and court orders that would be subject to court review and termination.²⁴⁷ The Administrative Office further found from its empirical study that the PLRA would not necessarily reduce the volume of inmate claims in federal courts—which was its primary rationale.²⁴⁸ The potential impact of the PLRA on the federal courts, it found, “could be substantial, incurring millions of dollars in annually recurring resource costs, depending on how the intent of Congress and these provisions are interpreted and implemented.” At the time, there were approximately 1,470 court orders and 2,500 consent decrees covering

243. *Id.*

244. Letter from American Bar Association to Senator (Feb. 17, 1995), https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/Prison_Litigation_Reform_Act_Legislative_History/13_Letter_from_ABA_to_Senator.pdf (arguing that an early version of the PLRA—which looked very similar to the version ultimately enacted—was unconstitutional, would burden the federal courts, and would encroach on states’ rights).

245. See Anthony Lewis, *Running From the Law*, N.Y. TIMES (Oct. 21, 1996), <https://www.nytimes.com/1996/10/21/opinion/running-from-the-law.html?searchResultPosition=7> (describing how a slew of jurisdiction-stripping pieces of legislature were passed in 1996).

246. Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, N.Y. TIMES (Mar. 21, 1994), <https://www.nytimes.com/1994/03/21/nyregion/flood-of-prisoner-rights-suits-brings-effort-to-limit-filings.html?searchResultPosition=17>.

247. JUD. IMPACT OFF. & ADMIN. OFF. OF THE U.S. CTS., 104TH CONG., JUDICIAL IMPACT STATEMENT ON VIOLENT CRIMINAL INCARCERATION ACT OF 1995, H.R. 667 (June 21, 1995), https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/Prison_Litigation_Reform_Act_Legislative_History/18_Judicial_Impact_Statement_HR_667.pdf.

248. *Id.*

prison and jail facilities, the majority of which were imposed or approved by federal courts.²⁴⁹

But ultimately, anecdotes about frivolous suits proved more convincing than studies from the courts. On April 26, 1996, the initiative was included as a rider to an appropriations bill and was enacted in that form as the Prison Litigation Reform Act.²⁵⁰ The PLRA's primary sponsors in the Senate included Senators Jon Kyl of Arizona, Arlen Specter of Pennsylvania (a Republican at the time), Spencer Abraham of Michigan, and Kay Bailey Hutchison of Texas.²⁵¹ Notably, each of these sponsors was from a state where prison institutional litigation had become politically contentious and costly.

As enacted, the PLRA contained numerous provisions that dramatically altered inmate litigants' access to the courts and the courts' ability to provide systemic relief. Two key provisions in particular definitively ended the judiciary's period of prison policymaking. First, the Act imposed an arduous exhaustion requirement on inmate litigants that made the process of getting into federal court time-consuming and Kafkaesque.²⁵² While the PLRA is silent on whether failure to properly adhere to prison grievance procedures bars subsequent litigation, courts have interpreted the PLRA to bar suits where prisoners made a procedural error during exhaustion.²⁵³ Second, it included a provision requiring immediate termination of long-standing injunctive orders—which would have a profound effect in particular on prison healthcare.²⁵⁴ Additionally, the Act included an automatic stay provision, under which any order that a defendant moved to terminate would be stayed pending legal resolution.²⁵⁵ Absent a finding that relief was narrowly drawn, extended no further than necessary to correct a current and ongoing violation of the federal right, and was the least intrusive means necessary to correct the violation, a defendant's motion to terminate would be granted.²⁵⁶ The result was a flood of stayed and terminated orders and consent decrees, and the undoing of much of the judicial work that had been done over the previous thirty years.²⁵⁷

249. *Id.*

250. *Inmate Litigation*, *supra* note 6, at 1559.

251. Tushnet & Yackle, *supra* note 232, at 21, n.129.

252. 18 U.S.C. § 3626(b) (2000).

253. For discussion of this interpretation, see Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1775 (2003).

254. 18 U.S.C. § 3626(b) (2000).

255. 18 U.S.C. § 3626(e)(2).

256. 18 U.S.C. § 3626(b).

257. *See, e.g.*, Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996); Martin v. Ellandson, 122 F. Supp. 2d 1017 (S.D. Iowa 2000); Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997); Hadix v. Johnson, 133 F.3d 940 (6th Cir. 1998); Benjamin v. Kerik, 102 F. Supp. 2d 157 (S.D.N.Y. 2000); Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997). *See generally* Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006) [hereinafter *Civil Rights Injunctions Over Time*].

The Act imposed enormous process on prisoner lawsuits and drastically decreased judicial discretion with regards to relief.²⁵⁸ But as Linda Greenhouse in a *New York Times* article from 1996 put it, the PLRA differed from the “titanic constitutional battles of the early 1980s, when the Republicans newly in control of the Senate pushed a series of bills to strip the Supreme Court and the lower Federal courts of jurisdiction to decide cases involving school prayer, busing and abortion” in its “precision and indirection.”²⁵⁹ She noted that the PLRA was “anything but frontal” and “left liberals searching for a theory to explain how it could have happened.”²⁶⁰

As Part I showed, the courts were the primary—indeed, essentially the exclusive—avenue for prisoners’ rights vindication prior to the enactment of the PLRA. Courts not only defined prisoners’ rights, they also enforced and oversaw the implementation of structural reform that would respect those rights.²⁶¹ Courts were *the* overseer for ensuring prisons provided adequate healthcare services, were not overcrowded, and had basic sanitation.²⁶² By circumscribing access to courts, the PLRA also circumscribed access to these services.

The PLRA’s impact on prison conditions is difficult to overstate. Most importantly from a long-term structural perspective, its automatic stay provision allowed defendants to move to terminate consent decrees absent a finding that relief is narrowly drawn, extends no further than necessary to correct a current and ongoing violation of the federal right, and is the least intrusive means necessary to correct the violation.²⁶³ If a prison was complying with a consent decree, there would, of course, be no ongoing violation of a federal right. Accordingly, immediately following the passage of the PLRA, consent decrees throughout the U.S. were terminated.²⁶⁴ Many of these consent decrees concerned overcrowding and health services.²⁶⁵ In 1984, 44% of states had prisons under court order. In 2000, that number dropped to 33%.²⁶⁶ Similarly, in 1983 over one third of the state prison population was housed in a prison under court order; by 1999 that

258. 18 U.S.C. § 3626(a)(3) (implementing procedural barriers to obtaining a “prisoner release order”). See also *Brown v. Plata*, 563 U.S. 493 (2011) (affirming imposition of prisoner release order in California).

259. Linda Greenhouse, *How Congress Curtailed the Courts’ Jurisdiction*, N.Y. TIMES (Oct. 27, 1996), <https://www.nytimes.com/1996/10/27/weekinreview/how-congress-curtailed-the-courts-jurisdiction.html?searchResultPosition=6>.

260. *Id.*

261. *Supra* Part I.

262. *Supra* Part I.

263. 18 U.S.C. § 3626(b), (e).

264. See, e.g., *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996) (granting motion to terminate decree); *Martin v. Ellandson*, 122 F. Supp. 2d 1017 (S.D. Iowa 2000) (granting motion to terminate consent decree); *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997); *Hadix v. Johnson*, 133 F.3d 940 (6th Cir. 1998); *Benjamin v. Kerik*, 102 F. Supp. 2d 157 (S.D.N.Y. 2000); *Benjamin v. Jacobson*, 124 F.3d 162 (2d Cir. 1997).

265. See, e.g., *Plyler*, 100 F.3d at 369; *Ruiz v. United States*, 243 F.3d 941, 946 (5th Cir. 2001). You may recall *Ruiz* from Part I of this Article; after the PLRA was passed, the bitterly contested court order was terminated.

266. *Civil Rights Injunctions Over Time*, *supra* note 257, at 577, Table 1.

number dropped to 8%.²⁶⁷ As Margo Schlanger quantitatively demonstrated in her article on injunctive orders over time, the mid-1990s represented a “sea change”: states had been similarly likely to face court order regulation of their prison and jail populations throughout the 1980s and early 90s, but the PLRA created “a stark disruption in the long-lived plateau of court-order regulation.”²⁶⁸

The PLRA also precluded the possibility of a new prisoners’ rights movement. When inmate plaintiffs *can* overcome the PLRA’s exhaustion requirements and win a victory in court, the scope of relief granted must be narrowly tailored—effectively foreclosing widespread systemic change absent truly flagrant constitutional violations.²⁶⁹ While there have been some class action victories for inmate litigants post-PLRA,²⁷⁰ they are significantly less widespread than in the pre-PLRA era. And any relief granted is less likely to have lasting impact without continuous litigation.

The PLRA’s exhaustion requirement also has a basic structural problem: the defendants in prisoner suits are the very people who design prison grievance systems. The PLRA thus gave prison administrators a strong incentive to design grievance procedures with short deadlines, confusing language, technical requirements, and multiple steps for appealing decisions internally. The statute did not place any limits on internal grievance procedures, and the Supreme Court in 2006 upheld the dismissal of a prisoner’s suit after he missed the prison’s internal *fifteen-day deadline* for filing a grievance.²⁷¹ By contrast, at the time, California’s statute of limitations for civil rights actions under § 1983 was one year, and it has since been revised to two years.²⁷²

All of these features of the PLRA—its automatic stay provision, its limitations on prospective relief, and its exhaustion requirement—resulted in a dramatic decline not just in court oversight of prisons, but also in incarcerated peoples’ ability to reach the courts in the first place.²⁷³ Despite the lofty language of the Fifth Circuit in *Ruiz v. Estelle*, discussed *supra* Part I, the courts were forced to return to the hands-off approach they had taken for decades prior.²⁷⁴ The “iron curtain” between the Constitution and the prisons of the country was drawn.²⁷⁵

267. *Id.* at 578, Table 2.

268. *Id.* at 582.

269. *See, e.g.*, *Cunningham v. Fed. Bureau of Prisons*, Civ. A. No. 12-cv-01570-RPM (Nov. 16, 2016) (settlement agreement for adequate mental health treatment at a maximum-security federal prison, at which psychologists dressed in riot gear, suicidal inmates were ignored, and medication was discontinued or altered on whims or as punishment).

270. Most notably *Brown v. Plata*, in which the Supreme Court upheld a remedial order requiring the state to reduce its prison population within two years. *See* 563 U.S. 493, 544–45 (2011).

271. *See* *Maldonado v. Harris*, 548 U.S. 81, 87 (2006).

272. *Maldonado v. Harris*, 370 F.3d 945, 954–55 (9th Cir. 2004).

273. *Inmate Litigation*, *supra* note 6, at 1559–60.

274. *Ruiz v. Estelle*, 679 F.2d 1115, 1126 (5th Cir.) (internal quotation marks omitted), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982).

275. *Id.*

While data on carceral spending is difficult to parse because of prison reporting categorizations, the spending story tends to track the narrative that prison services grew during judicial involvement in prisons and shrank once the PLRA passed. Per capita spending on corrections was \$26,036 in 1982, and had risen about \$4,000 by 1996, the year of the PLRA's passage.²⁷⁶ By 2010, it had decreased back to \$28,323.²⁷⁷ How much of that per capita spending went to healthcare and facilities—as opposed to, for instance, hiring more corrections officers—is unknown. However, it is not a stretch to hypothesize that healthcare and housing were financially de-emphasized once prisons no longer had courts looking over their shoulders.²⁷⁸

Whether or not prisons de-emphasized healthcare and housing services following the passage of the PLRA, though, the point stands that the PLRA undermined *access* to the very rights that welfare reforms limited and downsized. As Part II demonstrated, welfare reforms outside prison walls from the late 1970s until the passage of the PRWORA undermined low-income people's access to affordable housing, healthcare services—particularly in the context of rehabilitation and diseases commonly transported via drug use—and food stamps. The PLRA likewise diminished incarcerated people's access to the courts, where, as you may recall from Part I, the majority of inmate lawsuits concerned medical care, physical assault, due process violations relating to disciplinary sanctions, and living-conditions claims (e.g. sanitation).²⁷⁹ Healthcare related claims accounted for between 11% and 25% of all individual claims, and although estimates vary based on methodology, on average healthcare claims were the most frequent subject of inmate litigation prior to the enactment of the PLRA.²⁸⁰ Likewise, deficient medical services and overcrowding were tied for the highest incidence of court orders.²⁸¹

Viewed in this context, the PLRA was not just a prison tort reform measure but was substantively a welfare reform statute that significantly reduced access to government services, in particular healthcare, for incarcerated people. This

276. TRACEY KYCKELHAHN, STATE CORRECTIONS EXPENDITURES, FY 1982-2010, U.S. DEP'T OF JUST. 4 (Apr. 30, 2014), <https://bjs.ojp.gov/content/pub/pdf/scefy8210.pdf>.

277. *Id.*

278. This also accords with my interviews with incarcerated people at Greenhaven Correctional Facility who remained imprisoned before and after the passage of the PLRA. Of course, that is only anecdotal data.

279. *Inmate Litigation*, *supra* note 6, at 1571 n.48 (table showing percentage of each type of claim brought according to various studies).

280. The figures used to calculate the average estimate for each litigation topic were taken from *Inmate Litigation*, *supra* note 6, at 1571 n.48. The average was calculated by adding the estimates for each subject (taking the highest number when a range was given) and then dividing by the number of estimates. For assaults, the average estimate was 14.95%; for healthcare the average estimate was 16.3%; for discipline the average estimate was 15.46%; and for conditions the average estimate was 10.41%. Considering that many conditions litigation was in fact related to healthcare (consider, for instance, the provision of hand sanitizer and soap), the estimates for healthcare-related litigation are probably still lower than the reality. *Id.*

281. BUREAU OF JUST. STATS., *supra* note 120.

examination of the PLRA complicates descriptions of welfare and penal institutions that see the two as inversely related (i.e., when welfare goes down, incarceration goes up)²⁸² and instead positions the PLRA as evidence that welfare reform considerations do not end with prisons. To the contrary, prisons themselves were, prior to the PLRA, operating as a costly welfare state for many of the services that were being circumscribed outside prison walls.²⁸³ The PLRA, by limiting access to those services, operated in the same way as local welfare reform measures and the PRWORA. The substantive effects of the PLRA—curtailment of the ability of prisoner-litigants to remedy inadequate housing, healthcare, diet options, and sanitation concerns—illuminate the extent to which it operated as an apogee on the project of downsizing the welfare state.

B. *The PLRA Today*

The PLRA continues to operate as a check against access to healthcare and habitable housing today. Tales of the PLRA blocking vindication of rights violations abound. In Oklahoma, an incarcerated person was allegedly attacked by other prisoners and then left for twelve hours without medical attention.²⁸⁴ He fell into a coma for days and was hospitalized for months.²⁸⁵ The court dismissed his lawsuit because he filed his grievance *too early*.²⁸⁶ Willie Turner, an incarcerated individual in Georgia, alleged he was exposed to an electric shock that left him with permanent leg damage as retaliation from a guard for being “too fat.”²⁸⁷ Six days after being shocked and sent to the infirmary, Turner filed a formal grievance; two days later, he was summoned to the prison warden’s office, where the warden tore up the grievance in front of Turner, threatened to transfer Turner to an out-of-state prison if he complained again, and told Turner that he “better not” grieve or file a lawsuit regarding the electrical shock.²⁸⁸ Even accepting Turner’s stated facts as true (as was legally required at that stage of litigation), the case was dismissed for failure to exhaust because “threats alone cannot make administrative remedies unavailable.”²⁸⁹ Similar stories could fill an entire article.²⁹⁰

282. See, e.g., Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, 3 PUNISHMENT & SOC’Y 43, 44 (2001); WACQUANT, *supra* note 34, at 41 (describing the “gradual replacement of a (semi-) welfare state by a police and penal state for which the criminalization of marginality and the punitive containment of dispossessed categories serve as social policy at the lower end of the class and ethnic order”).

283. *Inmate Litigation*, *supra* note 6, at 1555, 1571 n.48 (detailing the subjects that comprised the inmate docket).

284. *Asberry v. Okla. Dep’t of Corr.*, 2009 WL 152536 (E.D. Okla. Jan. 21, 2009).

285. *Id.* at *1.

286. *Id.*

287. *Turner v. Burnside*, 541 F.3d 1077, 1080 (11th Cir. 2008).

288. *Id.* at 1081.

289. *Id.* at 1082.

290. For a few more examples, see *Richardson v. Stock*, Civ. A. No. 13-cv-00606-RM-KMT, 2015 WL 160949 (D. Colo. Jan. 13, 2015) (finding plaintiff with severe diabetes who was refused insulin, resulting in gangrene that caused his toe to “explode,” ultimately leading to his entire leg being amputated, was not entitled to relief because he had not grieved with sufficient specificity); *Mack v.*

The COVID-19 pandemic has starkly illuminated the PLRA's continuing impact: hundreds of COVID-19 suits have alleged that prisons don't even provide sufficient hand soap or cleaning supplies, much less masks.²⁹¹ These suits also allege that prisons have failed to implement quarantine procedures for COVID-19-positive inmates and social distancing throughout prisons.²⁹² In May of 2020, one of these cases made its way to the Supreme Court.²⁹³ The district court in that case had issued a temporary restraining order (TRO) for the prison to provide cleaning intervals for common areas, certain types of bleach-based disinfectants, specified alcohol content of hand sanitizer for all inmates, a mask requirement for inmates, and testing protocol.²⁹⁴ The Fifth Circuit stayed the TRO on the basis that the defendants had failed to exhaust their administrative remedies.²⁹⁵ The inmate litigants applied to the Supreme Court to vacate the stay, and the Supreme Court denied the application.²⁹⁶ In a detailed and impassioned dissent against the denial, Justices Sotomayor and Ginsburg pointed out the absurdity of the PLRA's requirements as applied to a highly infectious disease:

The facility at issue (the Pack Unit) houses about 1,200 inmates, more than 800 of whom are 65 or older. As the District Court found, the risk of Covid-19 spreading in the Pack Unit is particularly high. The facility is a dormitory-style prison, with each inmate separated only by a short, cubicle-style half-wall. When the District Court issued its ruling, Covid-19 had already begun to spread in the facility. On April 11, 2020, one inmate, Leonard Clerkly, was transferred to the hospital because of difficulty breathing, a symptom the hospital linked to Covid-19. He was pronounced dead mere hours later. . . . The Fifth Circuit seemed to

Klopotsky, 540 F. App'x 108 (3d Cir. 2013) (dismissing plaintiff's case for handwriting grievance instead of photocopying, even though the prison photocopier was broken).

291. *See* Maney v. Brown, No. 6:20-cv-00570-SB, 2020 U.S. Dist. LEXIS 235447, at *15 (D. Or. Dec. 15, 2020) (holding that there is "no dispute that this virus presents a sufficiently substantial risk of harm to [adults in custody], and it should have come as no surprise to Defendants [facility officers] that they have a duty to protect [adults in custody] from exposure to COVID-19"); *Gomes v. U.S. Dep't of Homeland Sec.*, 460 F. Supp. 3d 132, 148 (D.N.H. 2020) (finding that the failure of a civil detention facility to identify people at high risk of serious illness due to COVID-19 and provide them with additional protection is a violation of due process); *Tate v. Ark. Dep't of Corr.*, No. 4:20-CV-558-BSM-BD, 2020 U.S. Dist. LEXIS 236166, at *28 (E.D. Ark. Nov. 9, 2020) (holding that due to the unique issues presented by and nature of COVID-19, a novel coronavirus, no reasonable official would have known that jail facility precautions short of the full CDC recommended guidelines would violate an established constitutional or statutory right); *Mays v. Dart*, 974 F.3d 810, 823 (7th Cir. 2020).

292. *See* Elaina Marx, *Trans Medical Care in Prisons, COVID-19, and the Eighth Amendment's Uncertain Future*, CAL. L. REV. ONLINE (Jan. 2023), <https://californialawreview.org/trans-medical-care-in-prisons-covid-19-and-the-eighth-amendments-uncertain-future/> (describing COVID-related conditions of confinement suits).

293. *Valentine v. Collier*, 140 S. Ct. 1598, 1601 (2020).

294. *Valentine v. Collier*, No. 4:20-CV-1115, 2020 WL 1899274, at *1 (S.D. Tex. Apr. 16, 2020), *vacated and remanded*, 960 F.3d 707 (5th Cir. 2020).

295. *Valentine v. Collier*, 956 F.3d 797, 805 (5th Cir. 2020).

296. *Valentine v. Collier*, 140 S. Ct. at 1598.

reject the possibility that grievance procedures could ever be a “dead end” even if they could not provide relief before an inmate faced a serious risk of death. But if a plaintiff has established that the prison grievance procedures at issue are utterly incapable of responding to a rapidly spreading pandemic like Covid-19, the procedures may be “unavailable” to meet the plaintiff’s purposes. . . . It has long been said that a society’s worth can be judged by taking stock of its prisons. That is all the truer in this pandemic, where inmates everywhere have been rendered vulnerable and often powerless to protect themselves from harm. May we hope that our country’s facilities serve as models rather than cautionary tales.²⁹⁷

The Justices’ hopes went unfulfilled. By November of 2020, over 40% of the prison’s population had tested positive for the virus and nineteen elderly incarcerated people had died.²⁹⁸

Cases such as *Valentine* illuminate the extent to which the PLRA to this day impacts incarcerated individuals’ ability to access basic services that sustain life. As a statute aimed at limiting incarcerated people’s access to government-provided services, the PLRA has been an unqualified success.

Its success also has implications for the volume of people seeking welfare services outside prison walls. The prison population has a significantly higher rate of chronic illness than the general population,²⁹⁹ and the vast majority of incarcerated people are eventually released back into society, at which point they require treatment.³⁰⁰ Additionally, “[m]ore than half of all prisoners have an addiction, mental illness, or both,” which puts them at risk for a variety of diseases and infections.³⁰¹ “[A]n estimated 39–43% of all prisoners have at least one chronic condition, such as diabetes or hypertension, and that rate is expected to rise dramatically with the aging of the correctional population.”³⁰² Without court oversight, prisons have become increasingly crowded, and the ratio of doctors to patients has rendered effective healthcare a practical impossibility.³⁰³ Without

297. *Id.* at 1599–1601 (Sotomayor, J., dissenting).

298. *Valentine v. Collier*, 141 S. Ct. 57, 58 (2020) (Sotomayor, J., dissenting).

299. NAT’L COMM’N ON CORR. HEALTHCARE, *THE HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES: A REPORT TO CONGRESS* (Mar. 2002), https://www.ncchc.org/wp-content/uploads/Health_Status_vol_1.pdf.

300. See Josh McGhee, *Over 200,000 People Are Serving Life in U.S. Prisons. These are the Consequences*, INJUSTICE WATCH (Feb. 25, 2021), <https://www.injusticewatch.org/news/prisons-and-jails/2021/sentencing-project-report-life-imprisonment/>.

301. Josiah D. Rich et al., *How Healthcare Reform Can Transform the Health of Criminal Justice-Involved Individuals*, 33 HEALTH AFFS. 462, 463 (2014).

302. *Id.*

303. See, e.g., Sandy Hausman, *30,000 Inmates, 40 Doctors: Health Care Remains a Concern at Virginia Prisons*, WAMU 88.5 (Jan. 9, 2014), https://wamu.org/story/14/01/09/30000_inmates_40_doctors_health_care_remains_a_concern_at_virginia_prisons/ (Virginia has forty doctors to care for 30,000 incarcerated people).

healthcare and housing services either inside prisons or outside prisons, this growing population of people requiring those services is left without options.

This Part showed how the PLRA diminished access to the very services that welfare reforms targeted. While the entity being regulated differed—the courts, rather than the administrative state—the PLRA and its welfare counterparts had the same substantive aims and effects: to decrease the access that impoverished people had to government services, particularly healthcare and housing. As this Part demonstrated, the PLRA has been highly successful in its aim and continues to impact conditions of confinement today.

Part IV expands upon why we should care about reading the PLRA as a welfare reform statute, and how doing so changes our understanding of public law and the relationship between the welfare and carceral states.

IV. FURTHER INSIGHTS

Viewing the PLRA as a welfare reform statute inside prison walls yields several broader insights. First, the PLRA's passage and its provisions tie into a large body of scholarship on procedure as a tool for undermining substantive rights. Both the PLRA and its contemporaneous welfare reforms relied on greater procedural barriers as a means of substantively reconfiguring rights from being status-based to being worth-based. Second, drawing parallels between the PLRA and welfare reforms raises questions about the desirability and efficacy of the judiciary as a definer and protector of prisoners' rights and the rights of those dependent on the social-welfare apparatus (such as it exists these days). Third, recasting the PLRA as a welfare reform measure raises questions about the conventional explanations for welfare reform. Finally, recasting the PLRA as a welfare reform statute enriches contemporary analyses of the relationship between "prison problems" and "poverty problems."

A. Fetishizing Procedure at the Expense of Rights

The substantive implications of procedural rules have been a source of academic debate for decades. As John Hart Ely put it in 1974, "[w]e were all brought up on sophisticated talk about the fluidity of the line between substance and procedure."³⁰⁴ Most of this talk has centered on doctrines that are difficult to classify within the procedure-substance dichotomy, such as statutes of limitation, testimonial privileges, and burdens of proof.³⁰⁵ Others have outlined how process is nearly always inextricably linked to policy;³⁰⁶ and even in scenarios in which issues of process are significant in their own right, the concerns that drive them

304. John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724 (1974).

305. See Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 813 (2010) (listing difficult-to-classify doctrines).

306. Indeed, the relationship between substance and procedure is one of the most enduring topics of legal theory. See, e.g., Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 192–224 (2004) (summarizing various theories of the relationship between process and substance); Jenny S. Martinez, *Process and Substance in the War on Terror*, 108 COLUM. L. REV. 1013, 1019 (2008) ("The

tend to be based in substantive outcomes.³⁰⁷ “Procedure is an instrument of power that can, in a very practical sense, generate or undermine substantive rights,” and it has been used as such—either as a disguise for substantive change or as an incidental factor in substantive change—in a variety of contexts, including, *e.g.*, employment discrimination law.³⁰⁸

The relationship between the PLRA and the PRWORA can enrich this now-familiar story. Procedure was used in the cases of welfare and prison reform not just to undermine substantive rights, but also to alter the way American society views rights—specifically, rights that primarily benefit the poor.

Like the PRWORA before it, the PLRA used the “seeming neutrality” of process to “obscure value judgments about the underlying substantive policies.”³⁰⁹ It did not directly curtail the rights of prisoners; instead, it imposed a layer of procedural requirements that *effectively* curtailed the availability of rights to prisoners without *formally* doing so. Proponents of both the PLRA and the PRWORA leveraged procedural holes that supposedly allowed for welfare queens and fussy prisoners in order to pursue a substantive aim: the reconfiguration of rights from being based on entitlement status to being based on worth.

Regardless of whether the PLRA in fact helped or burdened federal courts, its proponents were effective at centering the discourse on that subject. But underlying disputes over costs and the relative frivolity of the inmate docket was a substantive issue: what kind of person should be permitted to vindicate their rights? The PLRA took aim at this issue in two ways. First, by circumscribing the extent and longevity of relief courts could grant to plaintiffs, the statute ensured that prison-wide, indiscriminate judicial relief would be severely curtailed. Second, by conditioning access to the courts on a prisoner’s ability to meticulously adhere to “error-inviting”³¹⁰ prison grievance systems, the statute ensured that only those inmates able to familiarize themselves with the law and adhere to oppressive prison procedures—even when adhering to those procedures would foreclose relief—could vindicate their rights.³¹¹

Proceduralization, both in the welfare and prison reform contexts, was an effective tool for a rights-theory shift in American law. Both the PLRA and the PRWORA were congressional capstones on a larger project of changing rights from being identity-based to being worth-based. The PLRA took aim at the courts because it was the courts, not the government, that were making sweeping prison reforms and mandating universal prison adherence to, for instance, population caps and medical protocols. The PRWORA, on the other hand, took aim at the

elusive relationship between substantive and procedural law is thus one of the recurring and unresolved debates in legal theory.”).

307. Martinez, *supra* note 306, at 108.

308. Main, *supra* note 305, at 802 (listing difficult-to-classify doctrines).

309. Martinez, *supra* note 306, at 1025.

310. *Trends in Prisoner Litigation*, *supra* note 18, at 154.

311. See *Valentine v. Collier*, 140 S. Ct. 1598, 1601 (2020) (foreclosing temporary restraining order on the grounds that inmate litigants were unlikely to prevail in showing they had properly grieved, despite the fact that adhering to grievance procedures would allowed for the rapid spread of COVID-19).

lack of institutional requirements for government services, and installed them even while nominally giving states wide latitude in how they dispensed government services. Both were doing the same thing: responding to institutions—federal courts or local benefits offices—that gave an unpopular minority group (prisoners and the impoverished) universal access to rights, without requiring a showing of worth. Loïc Wacquant describes this phenomenon as a shift from the *right* to “welfare” to the *obligation* of “workfare.”³¹² The PLRA may be described in similar terms: it shifted inmate litigation from being based in a *right* to access the courts to an *obligation* to properly exhaust prison remedies.

Much more could be said about this shift. In a very practical way, it altered the social safety net in the United States. In an actionable way, this may also serve as a larger cautionary tale. Nicholas Bagley has attacked the “instinctive faith” which lawyers often have in “the legitimacy and accountability” rationale for the procedural rules that characterize the administrative state.³¹³ As he chronicles, Republicans have leveraged liberal quiescence to “pile procedure on procedure in an effort to create a thicket so dense that agencies will either struggle to act or give up before they start.”³¹⁴ Linda Greenhouse’s description of liberal befuddlement over the PLRA is a similar story of quiescence to procedures that ultimately result in substantive ends that liberals *would* oppose—if they’d paid attention to it.³¹⁵

B. Conventional Explanations for Welfare Reforms

The conventional explanation for welfare reduction outside prison walls in the 1980s and 90s was that it reflected market-oriented policies.³¹⁶ As Part II outlined, the dominant narrative at the time was of an untapped workforce of entitled poor, with welfare reforms that would operate to spur that workforce into productivity. But viewing the PLRA as a sister statute to the PRWORA and other local welfare reforms challenges that story.

The prison population does not face a work or welfare dichotomy. Unlike with the poor outside prison walls, there is no link between cutting social services within prisons and incentivizing incarcerated people to work. Prison populations are, of course, a workforce, but prison labor does not operate under the same incentive structures that labor outside prison walls does.³¹⁷

312. WACQUANT, *supra* note 34, at 43.

313. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 345 (2019).

314. *Id.* at 346.

315. Greenhouse, *supra* note 259.

316. Kathleen Kost & Frank W. Munger, *Fooling all of the People Some of the Time: 1990s Welfare Reform and the Exploitation of American Values*, 4 VA. J. SOC. POL’Y & L. 3, 4 (1996) (“[T]he public discourse of welfare reform communicates a consensus across the political spectrum: welfare is the problem. Welfare not only burdens taxpayers but also cheats the poor themselves of an opportunity to achieve self-sufficiency. Reformers in both parties advocate placing conditions on welfare to change the behavior of welfare recipients.”).

317. See Dani Anguiano, *US Prison Workers Produce \$11bn Worth of Goods and Services a Year for Pittance*, GUARDIAN (June 15, 2022), <https://www.theguardian.com/us-news/2022/jun/15/us-prison-workers-low-wages-exploited>.

This raises two possibilities. The first, and the one that hews most closely to the story told in this Article, is that the conventional narrative was always a cover for more sinister motives. The problem was never really that poor people were on welfare instead of working, but rather something else—perhaps the target was the very notion of government social services and a robust social safety net. Under this explanation, the PLRA was simply another way to slash social services *period*, wherever they may have existed. This account would look at welfare systems themselves as a target, rather than the people they targeted.

Another possibility, in line with the work of Loïc Wacquant, is that both welfare reforms and the PLRA were methods of subjugating the poor, inside and outside prison walls. This story has purchase within a robust body of scholarship that views prisons as sites of social control over those at the bottom of the socioracial American hierarchy.³¹⁸ This account, in contrast to the first, looks at *who* is affected by the decimation of the welfare state, rather than the welfare state itself. As Wacquant points out, the American social services apparatus today is not wholly absent—it just exists for only those at the top of the social stratosphere:

The US government continues to provide many kinds of guarantees and support to corporations as well as to the middle and upper classes, starting, for example, with homeownership assistance . . . [the 1994] fiscal subsidy of \$64 billion to wealthy home owners dwarfed the national outlay for welfare (\$17 billion), food stamps (\$25 million), and child nutrition assistance (\$7.5 billion).³¹⁹

Similarly, “penal rigor [is] delivered very selectively in social space” with largely those at the bottom of the socioracial hierarchy being heavily policed, sentenced, and imprisoned.³²⁰ Data also tend to support this theory: the disparity in incarceration between rich and poor skyrocketed in the 1990s and continues to grow.³²¹ The incarceration rate for those with college degrees has declined (across racial lines) while the incarceration rate for those with less than a high school education has risen dramatically.³²²

This story is not incompatible with the first, and indeed the two may complement each other. If the welfare state was slashed *because* of who it primarily affected, then cutting services to the poor—whether inside or outside prison walls—

318. See, e.g., Clegg & Usmani, *supra* note 154 (“[N]umerically, mass incarceration has not been characterized by rising racial disparities in punishment, but *class* disparity”); cf. ALEXANDER, *supra* note 34 (characterizing mass incarceration as a project of Black subjugation fueled by white anxiety); David Jacobs & Aubrey L. Jackson, *On the Politics of Imprisonments: A Review of Systematic Findings*, 6 ANN. REV. L. & SOC. SCI. 129, Abstract 129 (2010) (calling Michelle Alexander’s story the most plausible explanation for the increase in US imprisonment rates); see generally Marilyn Buck, *Prisons, Social Control, and Political Prisoners*, 27 SOC. JUST. 25 (2000).

319. WACQUANT, *supra* note 34, at 42.

320. *Id.* at 67.

321. Clegg & Usmani, *supra* note 154, Figures 1 & 3.

322. *Id.*

would further the aims of welfare reformers. The aim of this Article has been to tell a new story about the PLRA, but as this section has briefly illustrated, the same story could also be told about the PRWORA.

C. The Judiciary as a Protector of Rights

Like the substance-procedure dichotomy, the topic of the judiciary's capacity to protect politically powerless groups' rights, including prisoners' rights, has been a recurring source of debate in the legal academy.³²³ My thesis is not dependent on the efficacy of the judiciary's prison reforms prior to the passage of the PLRA. It is highly probable that the legislative branch would be much more effective at protecting prisoners' rights than the judiciary, not least because there would not be the threat of a jurisdiction-stripping measure like the PLRA. In other words, the judiciary need not be the best avenue for prisoners' rights protections for the purposes of this Article; it is enough that it was in fact an avenue prior to the passage of the PLRA.

With that in mind, however, it is worth raising here that drawing parallels between judicial prison reforms and legislative welfare reforms raises interesting questions about the continuity between the two branches as protectors of rights.

For one, this story provides fodder for the idea of the judicial branch being the "least dangerous."³²⁴ At a time when the federal government wanted to downsize the social safety net, it was able to not only directly pass legislation to that effect (i.e., the PRWORA), but also to strip federal courts of jurisdiction to hear and provide relief for prisoner claims to that effect. As Linda Greenhouse wrote in 1996:

The legal system is just now beginning to absorb the impact of a range of actions Congress took this year, in bills signed into law by President Clinton, to limit access to the courts by poor people, by death-row inmates and other prisoners, and by illegal aliens and some lawful immigrants.³²⁵

Like the PLRA, the other statutes she references were stealth jurisdiction-stripping measures, but jurisdiction-stripping nonetheless.³²⁶ This observation further elucidates the extent to which prisons and welfare reforms were interconnected as a broader attack by Congress on the poor. It also gives rise to bigger questions such as: to what extent has the judiciary been complicit in the project of criminalizing the poor by upholding (or declining to review) jurisdiction-stripping measures that target access to the poor?

323. See generally DI IULIO, *supra* note 44, at 3.

324. See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986).

325. Greenhouse, *supra* note 259.

326. *Id.*

Second, this Article provides an inroad for connecting two related but disparate debates: the debate over the capacity of courts to effect structural change and social progress,³²⁷ and analysis of the relationship between the downsizing of social services and the upsizing of the penal state.³²⁸ If, as this Article posits, the judiciary's prison reforms may be seen as the functional prison equivalent of welfare services, then (a) to what extent should welfare services—imperfect as they have always been—form a baseline for analysis of the judiciary's efficacy in prison reform; and (b) to what extent is the judiciary implicated in the inverse relationship between the welfare and carceral states?

These are questions to be answered in a separate article (or articles). Here, it is sufficient to say that recognition of welfare's continuity into prisons raises larger questions over rights and the judiciary's role as a protector of rights.

D. More than a Prison Problem

For better or worse, as in the pre-PLRA era, the courts are still the most viable avenue incarcerated people have for remedying inadequate healthcare and living conditions in prisons (even as stunted as this avenue is today).³²⁹ This should be cause for concern, not just for the incarcerated population, but also for the population at large.

Healthcare in prisons is not just a “prison problem”—it substantially impacts the health and needs of indigent people outside of prison walls, which in turn exacerbates the need for public/welfare services.³³⁰ Indeed, the *American Journal of Law and Medicine* has referred to prisons as “epidemiological pumps.”³³¹ Infectious conditions are amplified and often untreated within prison walls and then sent out into society for distribution.³³² Prisons can also be sites for strains of infectious diseases to develop into treatment-resistant strains—a concern that should be particularly distressing in the midst of a pandemic.

As mentioned earlier in this Part, incarcerated people have a significantly higher rate of chronic illness than the general population.³³³ The vast majority of incarcerated people are eventually released—and when they are, they typically struggle to find employment that carries healthcare or pays enough to cover chronic healthcare expenses.³³⁴ Additionally, many formerly incarcerated people

327. Feeley & Hanson, *supra* note 23, at 17, n.14 (listing critics of the judiciary's ability to enact long-term structural change).

328. *See generally* GETTING TOUGH, *supra* note 34, at 112.

329. *See* Driver & Kaufman, *supra* note 27, at 521 (detailing the continued importance to incarcerated people of the federal courts, and the dignity that access to the courts affords them).

330. John V. Jacobi, *Prison Health, Public Health: Obligations and Opportunities*, 31 AM. J.L. & MED. 447, 448 (2005).

331. *Id.*

332. *Id.*

333. NAT'L COMM'N ON CORR. HEALTHCARE, *supra* note 299, at 21.

334. Rich et al., *supra* note 301 (“More than 95% of prisoners eventually return to the general population, bringing their health conditions with them, and 80% are without health insurance upon reentry into the community.”).

suffer from addiction, but without proper public rehabilitative services, may end up right back in prison, again without adequate treatment.³³⁵ Finally, the percentage of people in prisons with mental health issues is also much higher than in the general population.³³⁶ Even with proper care, prison tends to exacerbate these issues (high stress, new social order, limited nutrition, circumscribed ability to exercise).³³⁷ Without proper care outside prison walls, recidivism rates increase,³³⁸ as do the costs to society (homelessness, in-patient treatment, hospitalization, etc.).³³⁹

As has been well-documented and heavily discussed, the United States is a nation of mass incarceration. Today, 2.3 million Americans live in 1,719 state prisons, 109 federal prisons, 1,772 juvenile correctional facilities, 3,163 local jails, and 80 Indian Country jails.³⁴⁰ It may seem inappropriate in the midst of a trend in abolitionist discourse³⁴¹ to focus on conditions of confinement rather than confinement itself, but the reality on the ground for millions of Americans is one of imprisonment, and often imprisonment under inhumane conditions.

The PLRA should be a part of all these conversations. If we understand it not just as a statute impacting prisons, but also as a tool for decreasing indigent access to healthcare and healthful living conditions more broadly, it becomes a central component of welfare, healthcare, and prison litigation reform.

CONCLUSION

The PLRA was part of a wide-reaching sociopolitical project of downsizing the social safety net—targeted at judges rather than the administrative state. Viewing the statute through this historical lens enriches our understanding of the relationship between welfare and prison reforms both historically and contemporarily. Today, the COVID-19 pandemic has brought prison conditions, wealth disparity, and healthcare to the forefront of the political conscience and has created new urgency for reconsideration of how these structures are interrelated, politically understood, and legally regulated.

335. See generally Natasha H. Williams, *Prison Health and the Health of the Public: Ties that Bind*, 13 J. CORR. HEALTH CARE 80 (2007).

336. NAT'L COMM'N ON CORR. HEALTHCARE, *supra* note 299. See also *The Human Toll of Jail*, VERA INST. OF JUST. (June 21, 2016), <https://www.vera.org/the-human-toll-of-jail-2023#:~:text=But%20the%20truth%20of%20this,lives%2C%20families%2C%20and%20communities> (“Today, about 14.5% of men and 31% of women in jails have a serious mental illness, compared to 3.2 and 4.9% respectively in the general population.”).

337. See David H. Cloud et al., *Addressing Mass Incarceration: A Clarion Call for Public Health*, 104 AM. J. PUB. HEALTH 389, 389 (2014).

338. *Id.* at 390.

339. See generally COMM. ON THE CONSEQUENCES OF UNINSURANCE ET AL., *HIDDEN COSTS, VALUE LOST: UNINSURANCE IN AMERICA* (2003) (outlining the consequences of uninsurance in America).

340. Rabia Belt, *Mass Institutionalization and Civil Death*, 96 N.Y.U. L. REV. 857, 867–68 (2021).

341. See generally ABOLISHING CARCERAL SOCIETY 4 (Abolition Collective eds., 2018) (a manifesto for abolishing systems from prisons to patriarchy and capitalism); Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019).