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Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue

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Once, legally convicted prisoners were considered slaves of the state.[1] Like slaves, they were beneath empathy; like slaves, they could claim no rights. There was no prison litigation.

For a brief period in the wake of the Warren Court and the civil rights movement, prisoners were viewed as incarcerated people who shared at least some of the rights the Constitution confers, and thus shared the corollary right of access to the courts to redress violations of their rights. As prisoners brought their complaints regarding allegedly unconstitutional prison conditions to the federal courts in increasing numbers, the Supreme Court responded at first by expanding both the substantive rights of prisoners and the scope of available remedies. Initially, Congress did not either enlarge or reduce the scope of the rights the Court was conferring, not even by providing or curtailing jurisdiction or remedies for violations of those rights. Instead, Congress used its legislative powers modestly, to direct the flow of this new fount of litigation.[2]

But the kaleidoscope shifted again. Prisoners are no longer viewed as slaves, but they are not quite seen as full-fledged human beings either. They are portrayed as caged raptors being treated, at the federal courts' inexplicable insistence, like pets,

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[1] Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790 (1871) (a prisoner is "for the time being a slave, in a condition of penal servitude to the State, and subject to such laws and regulations as the State may choose to prescribe"). The Virginia courts declined to even hear Ruffin's challenge to his conviction.

[2] *See infra* Part II.

squandering taxpayer money on color television sets and Nautilus equipment. The litigation they bring is not generally viewed as a means of introducing the rule of law into the "dark and evil world" of prison.[3] Prisoners, as the public has gathered from fairly consistent media coverage, inundate the beleaguered federal courts with frivolous lawsuits complaining about whether the peanut butter they are served is chunky or creamy. Congress and the Supreme Court have reacted to this new conventional wisdom by putting their shoulders to the door to try to keep prisoners out of federal court once again.

Both the current Congress and the current Supreme Court have been "reforming" prison litigation to the disadvantage of prisoner-plaintiffs, but in markedly different ways. The Supreme Court has been cutting back previously recognized substantive constitutional rights, first, during the 1980s, by diluting those rights, and more recently, in *Sandin v. Conner*[4] and *Lewis v. Casey*,[5] by creating new pleading requirements applicable only to prisoners. Congress, unable to reduce constitutional rights directly, has tried to reduce the volume of prison litigation by squeezing prisoner-plaintiffs out of federal court procedurally. The recent Prison Litigation Reform Act (PLRA)[6] tries to prevent or deter prisoners from filing federal claims by banning some litigants and discouraging others. Would-be prisoner-plaintiffs might find themselves denied the opportunity to file their complaints in forma pauperis, due to conditions that would not apply to any other litigants. If they lose their cases, they cannot be excused from paying costs and may also lose good time credit, extending their incarceration; however, if they win their cases, they, unlike all other litigants, will not be allowed to collect costs. Prisoners must also meet special pleading requirements not imposed on other litigants.[7]

What justifies this counter-revolution? After the Supreme

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[3] *See* Holt v. Sarver, 309 F. Supp. 362, 381 (E.D. Ark. 1970).

[4] 515 U.S. 472 (1995).

[5] 518 U.S. 343 (1996).

[6] Pub. L. No. 104-134, 110 Stat. 1321 (1996); *see infra* Part II.

[7] Other sections of the PLRA, directed at federal judges more than plaintiffs, limit the availability of injunctive relief and, most controversially, provide for termination of existing consent decrees. In many respects these remedial measures are not so different from some of the measures the Court itself had taken. *See* Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 47-63 (1997). But the provisions directed at individual litigants are novel and

Court's decision in *Romer v. Evans*,[8] it seems plausible to ask whether it is a denial of equal protection to single out one group of litigants and impose unique obstacles to access to the courts only upon that group. There are two possible answers to the question of whether there is a rational and legitimate justification for treating prisoner litigants differently. The first, the explanation proffered during debate as the basis for the PLRA, is that prison litigation is different from other litigation. Prisoners, according to this story, have no disincentive to litigate (especially if they proceed in forma pauperis) and have more than enough time to do so. Thus, they overwhelm the federal courts with peanut butter cases, and the federal courts, in a state of crisis, need relief.

The measures Congress took in the PLRA, however, are not well calculated to reducing the volume of frivolous litigation. Many of the provisions deter meritorious cases along with the frivolous, and might not save the federal courts any significant amount of time or money.[9] It is no surprise that the PLRA provisions are not precisely crafted to accomplish these goals, because the legislation was based on myths rather than hearings.[10] Furthermore, deterring frivolous claims by abusive litigants was not the only goal of Congress. Underlying the PLRA is something that could fairly be described as animus—a sense that prisoners should not be consuming the federal courts' time, because they are not worthy of attention, except in extreme instances. If this legislation is inspired by animus (a desire to bar a group of people from the federal courts because of who they are), *Romer* might seem to suggest that the legislation amounts to a denial of equal protection. The second argument for treating prison litigation differently is that prisoners themselves are different from other litigants, since they do not share all constitutional rights equally. At a minimum, they have no right to be free. Is a desire to punish prisoners by limiting their access to the courts constitutionally acceptable in a way that distinguishes *Romer*?

It seems unlikely that the Supreme Court will hold the anti-

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consequential. See *infra* Part II for citations to and discussion of both types of provisions.

[8] 517 U.S. 620 (1996) (Colorado provision singling out one group—gays and lesbians—by denying them access to the political process denied equal protection to members of that group).

[9] *See infra* text accompanying notes 199-219.

[10] *See infra* text accompanying notes 194-198; *see also infra* Part III.B.

prisoner provisions of the PLRA unconstitutional, for the Court itself has been confused about the question of how far retribution against prisoners may go before being checked by judicially declared rights. In *Casey*, the Court carved its own holes in a prisoner's right of access to the courts, in a manner that might allow Congress or the states to go even further than the PLRA in keeping prisoners out of court by bringing back some forms of civil death.[11]

This Article will examine the dialogue between Congress and the Supreme Court regarding prisoners' rights in the few decades since the Warren Court suggested that a "prisoner's right" was not an oxymoron. Part I will discuss the theoretical question of what rights a prisoner should have and the Supreme Court's varying approaches to this question. This section will describe four models of a prisoner's constitutional rights (and the concomitant role of the federal courts), all of which the Court has espoused at various times: 1) a hands-off model—a judicial counterpart to civil death; 2) an equality model, where prisoners are considered to retain all constitutional rights not "inconsistent" with their status as prisoners; 3) an accommodationist model, where prisoners are considered to share a range of constitutional rights, although in distinctly diluted form; and 4) an Eighth Amendment model, where essentially the only right prisoners retain is the right to be free from cruel and unusual punishment. This section will also discuss the development of the Supreme Court's treatment of prisoners' freedom of expression and religion, and of prisoners' due process rights against arbitrary treatment in the prison,[12] both of which are now measured by standards unique to prisoners. This section will conclude with a discussion and analysis of the Court's recent renovation of prisoners' right of access to the courts in *Casey*.

Part II will discuss Congress' role, which has also fluctuated over the past few decades. Congress has not always exhibited the hostile attitude to prison litigation reflected in the PLRA. Rather, in the past, Congress attempted to solve the problems of federal court prison litigation in more empathetic ways, such as the Civil Rights of Institutionalized Persons Act.[13] Congress also attempted to expand prisoners' religious freedom beyond what

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[11] *See infra* text accompanying notes 140-55.

[12] *See* Sandin v. Conner, 515 U.S. 472 (1995).

[13] 42 U.S.C. § 1997(e) (1994 & Supp. 1998). *See infra* Part II.B.

the Court was willing to protect, in the Religious Freedom Restoration Act,[14] which the Court subsequently invalidated.[15] Curiously, Congress is likely to succeed in effectuating the restrictive provisions of the PLRA, while its earlier efforts to assist prisoners failed. This reality seems to fly in the face of the conventional wisdom that there is a one-way ratchet in constitutional law; that Congress may expand but not contract rights recognized by the Court. In the area of prisoners' rights, at least, Congress seems to have an easy time squeezing prisoners out of court through process if it believes that the Court has allowed too many rights, and what may be an impossible time providing additional federal protection if it believes that the Court has been too stingy with rights. There is a ratchet, but it goes in an unexpected direction.

Part III will examine the problem Congress claimed to be solving in the PLRA—the crisis of peanut butter cases clogging the federal courts. This section will discuss the extent to which prevailing wisdom about prison litigation is true, or demonstrably true. In addition, this Part will discuss how and why the peanut butter anecdote, which is no more accurate than it is representative, came to be the dominant view of the nature of prison litigation. Finally, a look at recent legal commentary reveals the noticeable inattention given to prisoners' rights today. In publicity, as in rights, the ratchet goes one way.

I conclude by inviting consideration of what the rise and fall of prisoners' rights has to teach us about the nature of judicially declared rights in general.

I

PRISONERS' RIGHTS AND THE SUPREME COURT

A. The Meaning of Being a Prisoner

There is a certain paradox in asserting that prisoners share the constitutional rights of non-prisoners, because at a minimum, prisoners do not share the right to physical freedom. As the Court has said, "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[16] In a more affirmative formulation, a prisoner "retains

[14] Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-2000bb-4 (1994)). *See infra* Part II.C.

[15] City of Boerne v. Flores, 521 U.S. 507 (1997).

[16] Price v. Johnston, 334 U.S. 266, 285 (1948).

those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[17] But these statements beg the question: Which rights or privileges prisoners lose or retain—which rights are "inconsistent" with the status of being a prisoner—must depend on fluctuating theories about the causes of crime and the purposes of punishment.

When punishment for crime was corporal, for example, it would have been most surprising for a court to declare that corporal punishment was cruel and unusual, as it would be viewed today.[18] Punishment was intended for the body of an offender, and therefore a right to bodily integrity was wholly inconsistent with a convict's status.

Michel Foucault aptly described the modern prison as creating an "economy of suspended rights"[19] that replaces corporal punishment. But what rights, other than physical freedom, are suspended, can still vary dramatically. For example, in the Quaker-run Walnut Street Jail, the model American penitentiary that drew Alexis de Tocqueville to America, the ascribed purpose of prison was to encourage inmates to repent, because crime was equated with sin and the cure for crime was thought to be located in the prisoner's own conscience.[20] Since penitence required solitude, prisons were built to isolate, and inmates were thus allowed little contact with the outside world or even with each other. Prisons were monastic in their architecture and in their regimens, including loss of the freedom of expression and sexual relations. Expression by inmates was inconsistent with the prevailing goals of punishment, and was consequently disallowed. Prisoners were not allowed to speak, except occasionally to their wardens.[21] The

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[17] Pell v. Procunier, 417 U.S. 817, 822 (1974).

[18] *See*, *e.g.*, Hudson v. McMillian, 503 U.S. 1 (1992) (physical abuse of prisoners by prison guards violates Eighth Amendment ban on cruel and unusual punishment).

[19] MICHEL FOUCAULT, DISCIPLINE AND PUNISH 11 (Alan Sheridan trans., Vintage Books ed. 1979) (1977). According to Foucault, this new form of punishment replaced an older form where the body was the locus of punishment, and unpleasant sensations constituted the punishment.

[20] *See* GUSTAVE DE BEAUMONT AND ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 79 (1843) (photo. reprint 1964); FOUCAULT, *supra* note 19, at 238-39.

[21] *See* BEAUMONT & DE TOCQUEVILLE, *supra* note 20, at 79 (commenting on the overwhelming silence of the American prison); David J. Rothman, *Perfecting the Prison, United States, 1789- 1865*, *in* THE OXFORD HISTORY OF THE PRISON 121 (Norval Morris & David J. Rothman eds., 1995). The Pennsylvania model went so

competing Auburn model allowed prisoners out of their cells to work and assemble, but nevertheless continued to prohibit them from speaking to one another.[22] The idea that those prisoners might have had any sort of right to free expression or sexual relations that an outside agency could superimpose would have been unimaginable—the notion of such rights was incompatible with the core meaning of being a prisoner during that era.

With the growth of the social sciences during the late nineteenth and early twentieth centuries, and the concomitant view that crime was at least in part a social disease, the therapeutic model of prison as a place of rehabilitation was born.[23] Criminals were thought to need treatment, not just isolation and repentance, to learn to avoid recidivism. The sources of cure would not spring from the prisoner's communion with himself, but from the prisoner's interactions with "correctional" experts. Sentences typically allowed an inmate the possibility of parole or some other form of conditional release, as both a reward for and result of the cure that was anticipated. In a system where one important purpose of incarceration was to "correct" inmates and prepare them for reintegration into society, allowing inmates to maintain contact with the outside world, including their families, became a positive goal.[24]

The idea of rehabilitation, or at least the reality of the prospect of parole, had a profound effect on what inmates were expected

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far in imposing isolation on prisoners that they remained in their cells for twenty-four hours a day, and new prisoners were required to wear hoods over their heads while walking past cells occupied by other inmates. *Id.* at 117-18.

[22] *See* Rothman, *supra* note 21, at 117; FOUCAULT, *supra* note 19, at 237-38; *see also* DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM 82-88 (1971) (describing the Auburn and Pennsylvania systems).

[23] *See generally* EDGARDO ROTMAN, BEYOND PUNISHMENT: A NEW VIEW ON THE REHABILITATION OF CRIMINAL OFFENDERS (1990) (discussing the theory and forms of rehabilitation); FRANCIS T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION (1982) (assessing the twentieth century rehabilitation policies).

[24] *See, e.g.*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS (1967) (the task of corrections is to build or rebuild an inmate's ties with the community by "restoring family ties, obtaining employment and education," and "securing in the large sense a place for the offender in the routine functioning of society").

How far to go in encouraging inmates to maintain family ties is nevertheless a difficult question. Inmates have been held to have a constitutional right to marry, *see* Turner v. Safley, 482 U.S. 78 (1987) (invalidating prison regulation requiring warden's permission for an inmate to marry), but not to maintain conjugal relations, Irah H. Donner, Comment, Goodwin v. Turner*: Cons and Pro-Creating*, 41 CASE W. RES. L. REV. 999 (1991).

to do during their prison stays. Inmates needed training or education to equip them to live a law-abiding life after release. Inmates also needed to be treated in a manner that would promote their rehabilitation by fostering a positive attitude toward society and to their place in society.[25] Honoring First Amendment values (dignity and the opportunity to participate in the political and social life of the outside community) as well as due process values (fair treatment in classifying and punishing prisoners) within prison walls was compatible with this revised idea of the purpose of prison. By the 1960s, the preconditions for the judicial recognition of a broader spectrum of rights existed because most jurisdictions had decided, to one degree or another, to treat prisoners with respect for their dignity and individuality in order to serve their own politically determined punitive goals.

B. The Supreme Court and Prisoners' Rights

1. An Overview of the Court's Approach

The Supreme Court's initial struggle to define what constitutional rights prisoners retain took place against this backdrop of a rehabilitative model of prisons. The Warren Court's hallmark concern with equality led the Court to treat prisoners like other disempowered minority groups in their need for judicially enforceable rights, during a period when prisoners were expected to be corrected and rejoin society. The federal courts were to ensure that prisoners retained rights not inconsistent with their status, even if prison administrators had to surrender some of their freedom to decide how to run their prisons.

It is not coincidental that as fashions in punitive theory shifted (as did the composition of the Court), the Court's prisoners' rights jurisprudence also changed dramatically. The increasingly tarnished ideal of rehabilitation gave way to renewed emphasis on retribution in punishment.[26] Reliance on the use of conditional release was receding. Prison was less often a halfway house, and more often a final destination. By the 1980s, Con-

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[25] *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 484 (1972) (Douglas, J., dissenting) ("Arbitrary actions in the revocation of [parole] can only impede and impair the rehabilitative aspects of modern penology."); Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 486 (1989) (Marshall, J., dissenting); Wolff v. McDonnell, 418 U.S. 539, 597 (1974) (Douglas, J., dissenting).

[26] *See generally* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1981).

gress enacted its revolutionary Sentencing Reform Act,[27] which sharply reduced the federal system's reliance on parole and probation systems and moved to a system of largely determinate, lengthy prison terms.

The Court responded by diluting the recently created prisoners' rights. Previously recognized "rights" were subjected to watered down balancing tests during the late 1970s and 1980s, with countervailing considerations like federalism and deference to prison administrators weighing more heavily in the balance. Two recent cases, however, go beyond this accommodationist approach: *Sandin v. Conner*[28] and *Lewis v. Casey*[29] eviscerated previously recognized rights.

The Court would undoubtedly describe its changing jurisprudence as influenced by a desire to allow the states to select their own philosophies of punishment, and not by a judicial choice about the meaing of being a prisoner. To defer to the states on the question of how extensively a prisoner may be punished, however, is to select a constitutional standard. This deference may also result in a race to the bottom, with the political branches of state and federal government honoring prisoners' claims to fair treatment, free expression, and access to the courts only in those limited circumstances where the voting public favor such rights.

The question of the proper role of the federal courts cannot be separated from the question of which constitutional rights a prisoner retains. Is the political insulation of federal judges necessary to protect prisoners against overly retributive reactions fostered by one-sided, unsympathetic news coverage? The Supreme Court's response to this question has gone through what may be characterized as four phases. At first, the federal courts claimed they had no role in overseeing conditions in state prisons—the so-called hands-off model. Judicial recognition of a right of access to the federal courts heralded an era when prisoners' rights were treated similarly to the rights of others, an equality model. This model was followed by an accommodationist

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[27] Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3673 (1994)); 28 U.S.C. §§ 991-98 (1994)).

For a brief history of these shifts in sentencing policy, see Norval Morris & David J. Rothman, *The Contemporary Prison*, *in* THE OXFORD HISTORY OF THE PRISON 242-44 (Norval Morris & David J. Rothman eds., 1995).

[28] 515 U.S. 472 (1995).

[29] 518 U.S. 343 (1996).

model, where prisoners could claim the same rights to free expression, religion, or due process, but only in a highly diluted form.[30] The recent cases seem to have developed a fourth model, which recognizes few federally enforceable prisoners' rights beyond the right to be free from cruel and unusual punishment.

2. *Access to the Federal Courts: A Hands-Off to Hands-On Approach*

In the era when prisoners were considered to be slaves of the state, prisoners were civilly "dead" according to the laws of many states and were not permitted to vote or litigate.[31] Like Dred Scott,[32] they could even be refused the attention of the federal courts to litigate their own slave status.[33] Gradually, at the federal courts' insistence that prisoners must at least have a right to litigate their own status or conditions, state civil death statutes were repealed or sharply limited.[34] Although Congress never adopted a civil death statute for prisoners,[35] the federal courts adopted their own judicial counterpart—the hands-off doctrine. This doctrine declared that the manner in which lawfully sentenced prisoners, especially state prisoners, are treated within a jail or prison is simply not the business of the federal courts.[36]

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[30] *See infra* text accompanying notes 71-107.

[31] Many states adopted civil death statutes modeled after English law, *see, e.g.*, *Special Project, Collateral Consequences of Criminal Conviction*, 23 VAND. L. REV. 929, 949-50 (1970) [hereinafter *Special Project*], even though some of the conditions that had given rise to that doctrine in England did not prevail. Because of attainder, convicted felons in England forfeited their property and thus had little to litigate. *Id.* at 1019. Civil death statutes applied to prisoners facing a capital sentence (a larger proportion of convicted felons at common law than under current laws) to help the death row prisoner's family settle property matters immediately. Comment, *The Rights of Prisoners While Incarcerated*, 15 BUFFALO L. REV. 397, 401 (1965) [hereinafter *Rights of Prisoners*].

The right to sue was considered a civil right, *see Special Project*, *supra*, at 1020, retractable on conviction.

[32] Scott v. Sandford, 60 U.S. 393 (1856) (a slave is not a "citizen" and therefore may not sue in federal court, even to establish that he has a right to be free).

[33] Ruffin v. Commonwealth, 62 Va. (21 Gratt) 790 (1871).

[34] *See Special Project*, *supra* note 31, at 1020-21 (civil death statutes may not prohibit prisoners from bringing habeas corpus or civil rights actions); *id.* at 1179 (states were slow to abolish civil death, but eventually most did).

[35] *See Rights of Prisoners*, *supra* note 31, at 400.

[36] *See* Kenneth C. Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the Hands Off Doctrine*, 1977 DET. C.L. REV. 795 (1977); Ira P. Robbins, *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIMINOLOGY 211, 213-15 (1980); Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the*

The courts afforded complete deference to prison administrators because of their presumed expertise and because of concerns about federalism. The consequences of a sentence of incarceration were determined entirely by the legislative and executive branches of the state and federal governments. The courts did not set any floor to limit overzealous states or prison administrators.

Because the question of what role the federal courts should play is a key question, it is not surprising that the earliest battle in the prisoners' rights revolution concerned the right of access to the federal courts. The first modern prisoner's right recognized by the Supreme Court, in the 1941 case of *Ex parte Hull*, was the right to file a federal habeas corpus petition challenging the legality of custody.[37] The right was narrowly defined as a prohibition against state interference with a prisoner's attempts to communicate with the federal courts.

Hull, a Michigan state inmate, had attempted to file a habeas corpus petition, but prison officials refused to notarize or mail his papers pursuant to a prison regulation that gave prison officials discretion to decide whether legal documents were "properly drawn" before agreeing to send them to the designated court.[38] Hull tried again, giving his petition to his father to file for him, but prison guards confiscated the papers. By sheer persistence, Hull finally managed to smuggle his habeas corpus petition to his father, who filed it for him. The Supreme Court found the prison regulation invalid.[39] The Court stated, "[t]he considerations that prompted its formulation are not without merit, but the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus."[40] The Court found whether a petition is properly drawn and whether allegations are properly stated to be questions that only a court may decide.[41]

Complaints of Convicts, 72 YALE L.J. 506 (1963). Prisoners are not considered wholly civilly dead under the hands-off doctrine, and could theoretically litigate matters not pertaining to prison conditions if those other matters were cognizable to the federal courts.

[37] 312 U.S. 546 (1941).

[38] *Id.* at 548. Hull was advised that his papers had been deemed "inadequate." *Id.* at 547 n.1.

[39] *Id.*

[40] *Id.* at 549.

[41] The Court subsequently applied the principle of *Hull* to a case where prison authorities discriminatorily deprived a defendant of his right to appeal to state court,

The right of access to the courts was subsequently expanded to prevent a prison from interfering with preparation of court papers as well as their filing. *Johnson v. Avery*,[42] decided in 1969 during Earl Warren's last term on the Court, invalidated a prison regulation that the Court deemed an interference with the right to file habeas corpus petitions. The Tennessee regulation in this case prohibited inmates from helping other inmates prepare their petitions, a ban on "jailhouse lawyers."[43] In a typical Warren Court opinion,[44] Justice Abe Fortas considered and rejected the state's claim that the regulation was justified as part of its disciplinary administration of the prisons. Federal rights supervened, the Court held, because Tennessee could not show that the prison regulation had not effectively prevented illiterate or poorly educated inmates from filing habeas corpus petitions.[45] The Court found it noteworthy that Tennessee offered no alternative assistance to prisoners who wished to file writs.[46] The Court viewed its decision as an additional step to ensure that prisoners' previously recognized right to file papers would not

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holding that even though the appeal was now late, the state must either hear the appeal or release the prisoner. Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951).

[42] 393 U.S. 483 (1969).

[43] *Id.* at 484. Ironically, Tennessee advised would-be petitioners to do exactly what Michigan had prohibited—send a letter to the court stating the inmate's complaint, even if the letter did not meet the required formalities. *Id.*

[44] In an interesting juxtaposition, *Johnson* was decided on February 24, 1969, the same day as the Warren Court's major declaration of students' rights in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

[45] *Johnson*, 393 U.S. at 489.

[46] Jailhouse lawyers were viewed as a substitute for counsel. The Court mentioned the possibility of providing legal services, or law students, to assist inmates. *Id.*

The Court's empathetic view of the problems of would-be prisoner litigants is notable. Justice Douglas, in a concurring opinion, wrote of "[t]he plight of a man in prison" and the legal problems that might beset him. *Id.* at 492 (Douglas, J., concurring). This was during an era where law reviews published views of inmates themselves on the nature of the problem. *See* Charles Larsen, *A Prisoner Looks at Writ-Writing*, 56 CAL. L. REV. 343, 345-346 (1968) (provision of legal services to prisoners would reduce the number of frivolous claims, sometimes filed because prisoners do not have the education to tell when their claim is meritorious). It is also notable that the Court was unimpressed by the state's claim that prison discipline and order could be compromised if jailhouse lawyers were tolerated. Apparently, the state could only have defeated the inmates' claim that jailhouse lawyers were a necessary aid to their exercise of their rights by offering the Court fairly strong proof of their contentions. Compare later cases, where the Court shifted the burden of proof to the prisoners to show that their exercise of a right would not impair the state's interest in order and discipline in the prison. *See infra* text accompanying notes 74-96.

become hollow. The constitutional right not to be prevented from litigating was extended to provide would-be litigants with a right to obtain appropriate help with legal requirements so that the courts, exercising the prerogative claimed in *Hull*, would not simply dismiss the litigant's papers as legally inadequate. In sum, prisoners could not be prevented from sharing their legal knowledge—an opportunity they would have had, had they not been incarcerated.

In 1977, *Bounds v. Smith*[47] expanded *Johnson* to ensure prisoners the opportunity to research and litigate their claims. The Court held that as part of the right of access to the courts, inmates have an affirmative right of access to either adequate law libraries or to legal services.[48] Justice Marshall's majority opinion did not discuss the precise constitutional basis of the right, but instead extrapolated from earlier cases, including equal protection cases focusing on the problems of all indigent litigants.[49]

Another way to ensure that prisoners receive a meaningful hearing from the courts is to address the court system itself. In a brief but often-cited per curiam opinion, *Cooper v. Pate*,[50] the Warren Court required a lower federal court to hear a prisoner's claim that he had been punished because of his religious beliefs. The opinion said almost nothing about the religious rights the prisoner claimed, but apparently assumed they existed. The case did set a welcoming standard for review of prisoner petitions, often drafted pro se, instructing the courts to take all allegations in the complaint as true. The later case of *Haines v. Kerner*[51] made the message explicit—the federal courts were required to generously construe the work of pro se plaintiffs, the usual category into which prisoners fall.

In these ways, the Court declared that prisoners were welcome in federal court and that their claims—regarding prison conditions as well as legality of custody—would be taken seriously.[52]

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[47] 430 U.S. 817 (1977).

[48] *Id.* This holding imposed an affirmative obligation on the states to provide inmates with a service that incarcerated people were unlikely to be able to obtain otherwise.

[49] *See id.* at 821-24.

[50] 378 U.S. 546 (1964) (per curiam). In this case, the prison refused to allow the prisoner to order religious literature. In addition, the prisoner lost various privileges.

[51] 404 U.S. 519 (1972).

[52] The Warren Court's hallmark concern with equality emerged in several other cases that, while not grappling with the nature of a prisoner's affirmative rights,

The courts were a prisoner's only realistic prospect of redress in many jurisdictions, for while the Supreme Court continued during the 1970s to guard a prisoner's right of access to the courts, it also upheld the constitutionality of another aspect of civil death—disenfranchising the convicted.[53] Prisoners are thus at the nadir of political power. Not only are they unpopular, but they may not even have the clout of being constituents of elected officials.

3. *The Prisoners' Rights Revolution*

It was not until the 1970s that the Court, now under the leadership of Warren Earl Burger, began in earnest to outline which claims concerning prison conditions were valid. Prisoners asked the federal courts to invalidate prison regulations or particular actions that interfered with their freedom of expression (like censorship of mail, or refusal to allow receipt of books), or their free exercise of religion (including prayer, group worship services, diets that respected religious restrictions, and use of religious paraphernalia, including rosary beads, head coverings, etc.). Prisoners complained to the federal courts that they were being physically abused by guards, subjected to overcrowded and unhealthful living conditions, denied adequate medical care and protection from other inmates, and subjected to major changes in their living conditions—in an arbitrary or unfair manner.

With a bench that still included Warren Court stalwarts William Brennan and Thurgood Marshall,[54] the Court recognized

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prohibited what the Court saw as examples of discrimination among inmates on the basis of their poverty or their race. Several cases held that an inmate's poverty could not be allowed to stand in the way of petitioning for a writ of habeas corpus. *See* Smith v. Bennett, 365 U.S. 708 (1961) (state may not validly condition habeas petition on payment of a $4 filing fee); Long v. District Court, 385 U.S. 192 (1966) (state must furnish indigent prisoners with a transcript or equivalent record of prior habeas corpus hearings for use in further proceedings).

In *Lee v. Washington*, 390 U.S. 333 (1968) (per curiam), the Court prohibited racial segregation of prisoners, despite the state's claim that this practice was necessary to maintain order and discipline within the prison.

[53] *See* Richardson v. Ramirez, 418 U.S. 24 (1974). The Court avoided considering whether the disenfranchised prisoners were being denied equal protection under Section 1 of the Fourteenth Amendment, on the theory that Section 2 of the Fourteenth Amendment, which specifically addresses the franchise, had authorized the distinct treatment of a prisoner's right to vote. *Id.* at 42-55.

[54] *See* Melvin Gutterman, *The Prison Jurisprudence of Justice Thurgood Marshall*, 56 MD. L. REV. 149 (1997) (prison jurisprudence demonstrated Marshall's conviction that "all persons, even disfavored minorities, are entitled to the Court's protection of their basic rights").

rights in all of the areas described above. Rights under the First Amendment were found to be consistent with a prisoner's status. Prisoners would have a judicially enforceable right to practice their religion while incarcerated, even if their religion was unusual. For example, in the 1972 case *Cruz v. Beto*,[55] over the newly appointed William Rehnquist's sole dissent, the Court upheld the claim of a Buddhist whose ability to practice his religion was being hindered because the prison officials were not accommodating his unfamiliar religious needs.[56] Two years later, *Procunier v. Martinez*[57] limited prison officials' ability to censor inmates' correspondence with non-inmates, applying heightened scrutiny in rejecting the officials' defense that censorship was necessary to maintain security and order in the prison.[58]

Treatment of the freedom of expression claim was not markedly different from First Amendment litigation in other contexts, although Justice Powell's majority opinion was based on the First Amendment rights of the inmates' non-prisoner correspondents, which left open the question of what First Amendment rights the inmates themselves might have.[59] Prison administrators were required to show that their regulations were actually necessary to promote a legitimate interest in security and order. Had the state demonstrated that leaving prison correspondence uncensored was likely to lead to escapes or other serious problems, that interest would presumably be compelling, and the censorship regulation would be permitted. Applying First Amendment strict scrutiny to the prison's regulation or actions did not mean that a prison would never be allowed to censor inmate mail; rather, it meant the prison would have to justify this incursion on free expression to a federal judge.[60]

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[55] 405 U.S. 319, 323 (1972) (per curiam). In *Cruz*, Justice Rehnquist distinguished *Cooper*, 378 U.S. 546, because Cruz did not claim he was being punished for exercising his religion. Because of his status as a prisoner, said Rehnquist, he was "understandably not as free to practice his religion as if he were outside the prison walls." *Cruz*, 405 U.S. at 324. Rehnquist criticized the majority for not being sufficiently deferential to the administrative discretion of the prison officials. *Id.* at 325. Rehnquist was, of course, right in noting that the Framers of the Constitution would have been surprised to learn how the Court was interpreting the First Amendment, in light of what the Framers would have seen as the necessary status of prisoners. *See supra* text accompanying notes 18-22.

[56] *Cruz*, 405 U.S. 319.

[57] 416 U.S. 396 (1974).

[58] "Magnify[ing] grievances" was one ground for censorship. *Id.* at 399 & n.2.

[59] *See id.* at 406-09.

[60] Senator Hatch presented this argument in debating whether the Court's later

During the same year, *Wolff v. McDonnell*[61] held that inmates also had some procedural due process rights within the prison, and could not be punished for infractions of prison rules without a fair hearing, including notice of the charges and an opportunity to be heard.[62] In other words, lawful incarceration did not retract the right not to be arbitrarily punished.

Perhaps most significantly, the Eighth Amendment right to be free from cruel and unusual punishment—the only constitutional right that by its very terms applies to those being punished[63]—was found to set an affirmative standard of care of prisoners. If a state takes custody of an individual and thus disables that individual from seeking medical care, the Court reasoned that it would be cruel and unusual not to make some form of medical care available. Thus, in a 1976 decision that paved the way for judicially-inspired or ordered improvements in prison health care delivery, *Estelle v. Gamble*[64] laid the basis for prisoners to win damages or injunctive relief if prison officials were "deliberately indifferent" to their known medical needs.[65] In addition, the 1978 case *Hutto v. Finney*[66] found that protracted confinement in an Arkansas prison's isolation unit amounted to cruel and unusual punishment in light of the brutal conditions in that unit.[67] Subsequent cases more fully defined the state's general affirmative obligation under the Eighth Amendment as providing pris-

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standards for measuring an inmate's right to exercise religion were adequate. *See infra* note 176.

[61] 418 U.S. 539 (1974).

[62] *Wolff* also upheld a procedure where prison officials would open, although not read or censor, mail from a prisoner's attorney. *See id.* at 575-77.

[63] The Eighth Amendment to the United States Constitution guarantees a right to be free from the infliction of cruel and unusual punishment. According to the Court in *Bell v. Wolfish*, 441 U.S. 520, 535 nn.16-17 (1979), those who have not been convicted of a crime are not included within this injunction, for they are not to be punished at all.

[64] 429 U.S. 97 (1976).

[65] This case spawned other cases finding a cause of action if prison officials were deliberately indifferent to inmates' needs in other ways, including protection from other inmates, *see, e.g.*, Hendricks v. Coughlin, 942 F.2d 109 (2d Cir. 1991), and suicide prevention, *see, e.g.*, Colburn v. Upper Darby Township, 946 F.2d 1017 (3d Cir. 1991).

[66] 437 U.S. 678 (1978).

[67] The Arkansas prison was the "dark and evil world" referred to in the earlier case of *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970). *See supra* note 3. Up to ten or eleven inmates were confined in an eight by ten foot cell, sometimes with contagious inmates, with no furniture, inadequate (and unappetizing) food, and were punished with a leather strap and electrical shocks to sensitive body parts. *Hutto*, 437 U.S. at 682-83.

oners with "basic human needs" including food, clothing, shelter, medical care, and reasonable safety.[68] Like the procedural due process cases, and like *Bounds v. Smith*,[69] these cases imposed affirmative obligations on the state that were enforceable, if necessary, in federal court.

The above cases all created prototypes for prisoner litigation. If prison administrators were found to have unconstitutionally denied an exercise of free expression or religion, exercised arbitrary authority in punishing prisoners, or failed to provide humane care, federal judges could, depending on the circumstances, issue injunctive relief or award monetary damages.[70] But lines still had to be drawn to determine exactly which claims, within these broad outlines, would prevail, and how active a role federal courts would assume as guarantors of prisoners' rights.

4. Accommodation

Ironically, just as the Court was promising easier and more meaningful access to the federal courts in *Bounds v. Smith*, judicial backlash was setting in.[71] During the next two decades, the changing Court, now under the leadership of Chief Justice Rehnquist,[72] responded to shifting ideological currents—to a renewed interest in federalism, and perhaps, in some measure, to the federal courts' own concerns about caseload—and imposed new restrictions on virtually all of the substantive constitutional claims about prison conditions established by earlier cases. The rights of prisoners, the Court declared, must "accommodate" the needs of prison security and order as well as the realities of the pris-

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[68] *See* DeShaney v. Winnebago County Dep't Soc. Serv., 489 U.S. 189, 198-200 (1989); Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

[69] 430 U.S. 817 (1977).

[70] Federal court involvement with the state prisons grew to be extensive. According to the National Prison Project, three-quarters of the states were under court order or consent decree with respect to at least some of their prisons by 1996; only three states had avoided involvement in major litigation concerning prison conditions. *See Status Report: State Prisons and the Courts* (visited Jan. 1, 1996) <http://www.erols.com/npporg/status/htm>.

[71] *See* Kenneth C. Haas & Geoffrey P. Alpert, *American Prisoners and the Right of Access to the Courts: A Vanishing Concept of Protection*, *in* THE AMERICAN PRISON 65 (Lynne Goodstein & Doris Layton MacKenzie eds., 1989).

[72] The new Chief Justice had already expressed his doubts about prison litigation generally in his dissent in *Cruz v. Beto*, 405 U.S. 319, 325-27 (1972), where he observed that prisoners should not be encouraged to file claims in the federal courts because they had little to lose and were likely to do so excessively.

oner's own status.[73] Respecting the dignity of prisoners faded as a goal. In its place came renewed sympathy for the prison officials' need to control all phases of prison life. Strict scrutiny was abandoned.

a. First Amendment Expression and Religion

The First Amendment, it turned out, only applied to prisoners in a highly modified form. Despite *Procunier v. Martinez*,[74] the Court reversed the burden of proof in prisoner First Amendment cases. Instead of the usual constitutional norm where the state must show it has a compelling reason for restricting a constitutional right,[75] the Court held that prisoner-plaintiffs alleging deprivation of their rights had to prove the state was exaggerating its claim that a particular prison regulation or practice was a reasonable means of promoting order or security.[76] This holding was one of the first signs that the Court was now seeking a compromise between an equality model (in which prisoners would truly retain some constitutional rights) and a return to the hands-off approach. In another departure from usual First Amendment analysis, the Court also declined to require prison official defendants to show there was no less restrictive alternative means of serving their goals without infringing upon an inmate's freedom of expression.[77]

A decade later in *Turner v. Safley*,[78] the Court confirmed that the rules would indeed be different when prisoners asserted violations of those substantive rights not considered inconsistent with their status as prisoners—including but not limited to the First Amendment. The Court announced that a general reasona-

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[73] Wolff v. McDonnell, 418 U.S. 539, 556 (1974). The Court frequently quoted its earlier, negatively formulated statement in *Price v. Johnston*, 334 U.S. 266, 285 (1948), that "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system," *see Wolff*, 418 U.S. at 555; Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977); Hewitt v. Helms, 459 U.S. 460, 466 (1983), rather than the more positive formulation of *Pell v. Procunier*, 416 U.S. 396 (1974), stressing that prisoners retain those rights not inconsistent with their status.

[74] 416 U.S. 396 (1974). *See supra* notes 57-59 and accompanying text.

[75] *See supra* note 46 (describing decision in *Johnson v. Avery*).

[76] *Jones*, 433 U.S. at 128 (citing *Pell*, 417 U.S. at 827 (ruling that inmates have no constitutional right to form a "union" to redress grievances in light of prison's concerns about security)).

[77] *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 532 (1979).

[78] 482 U.S. 78 (1987).

bleness standard, not heightened scrutiny, would apply to prisoners' First Amendment claims.[79] Justice O'Connor, for a divided court, stated, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if 'prison administrators . . ., and not the courts, [are] to make the difficult judgments concerning institutional operations.'"[80] Among the four factors the Court described as relevant to this inquiry were whether the inmate had other avenues for exercising the right in question (a curious mirror image of the standard First Amendment question of whether the defendants had alternatives to infringing rights) and the impact that accommodation of the right in question would have on the guards, other inmates, and on the allocation of prison resources.[81] What appeared irrelevant was whether the prisoner's exercise of the right actually posed any danger to prison order and security, or whether it was just a challenge to prison administrators' authority. The Court rejected the proposal that non-dangerous inmate exercises of expression be judged under a less deferential standard.[82] Under the new balancing test, prison officials were permitted to censor inmate to inmate correspondence,[83] prohibit inmates from receiving book shipments from anyone other than the book's publisher,[84] and deny representatives of television and radio stations access to newsworthy inmates[85]—often on highly speculative or flimsy claims of security interests.[86]

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[79] *Id.* at 89-90. In this case, the First Amendment claim was the right to correspond with inmates at other institutions.

[80] *Id.* at 89 (quoting *Jones*, 433 U.S. at 128).

[81] *Id.* at 90.

[82] *Id.* at 89.

[83] *Id.* at 91-93.

[84] Thornburgh v. Abbott, 490 U.S. 401 (1989) (prison could prohibit inmates from receiving books from anyone but publishers); Bell v. Wolfish, 441 U.S. 520 (1979) (same rule limiting access to hardback books for pretrial detainees and short-term prisoners).

[85] Pell v. Procunier, 417 U.S. 817 (1974) (media representatives may be prohibited from interviewing inmates); Houchins v. KQED Inc., 438 U.S. 1 (1978) (media have no special right of access to prisons under the First Amendment, and so may be subject to prison administrators' restrictions).

[86] Not inquiring whether less restrictive alternatives were available led the Court to accept asserted justifications at face value. The publishers-only rule, for example, was sustained because hardback books could contain contraband, even though there was no evidence that contraband could not be controlled by standard processes of searching and x-raying. *Wolfish*, 441 U.S. at 548-52.

Shortly thereafter, despite *Cruz v. Beto*,[87] *O'Lone v. Estate of Shabazz*[88] applied the same accommodationist, diluted balancing test to restrictions on an inmate's ability to exercise his or her religion. Under this lax test, prison administrators, acting on the flimsiest concerns about security or administrative inconvenience,[89] could often prohibit inmates from wearing head coverings required by their religions,[90] attending worship services,[91] observing religious dietary restrictions,[92] or observing their religions' requirements on cutting hair or beards.[93]

The shifted burden of proof also meant that although prison administrators did not need evidence to back up their assertions of need, prisoners needed evidence to prove that a conceded violation of their right of free expression had left them without "adequate" alternatives. In *Wolfish*, for example, the Court criticized the prisoners for failing to prove that the methods of getting books that the prison allowed were "inadequate." *Id.* at 548-52.

In *Pell*, 417 U.S. at 823-28, the Court accepted prison administrators' assertions that limitations on access by the media were permissible because of security, administrative, and rehabilitative considerations, without even discussing what those concerns were, whether they were more than just hypothetical, or whether they could easily be satisfied by some other means.

[87] 405 U.S. 319 (1972). *See supra* note 55 and accompanying text.

[88] 482 U.S. 342 (1987). See Matthew P. Blischak, O'Lone v. Estate of Shabazz: *The State of Prisoners' Religious Free Exercise Rights*, 37 AM. U.L. REV. 453 (1988), for a critique of the Court's focus on whether prisoners have alternative means of exercising their religion, and also for a discussion of the various tests lower courts had applied to judge prison religion claims before this decision.

[89] See *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990), where the court found the prison's asserted interest in identifying inmates (accepted as an adequate basis for hair length regulations by other courts) does not actually justify requiring Rastafarian inmates to cut their dreadlocks, because the inmates' hair could be worn tied back to reveal facial features.

Religion claims, like free expression claims, often involve a prisoner's challenge to the prison's assertion that certain restrictions are security measures. For a federal court to rule for the prisoner, in either type of case, the court would have to limit prison administrators' prerogatives. The religion cases also posed the possibility that the prisons might be put to the expense of accommodating a religious practice – providing a variety of religiously appropriate diets, for example, or assigning additional guards to escort prisoners to a group religious service.

[90] *See* Young v. Lane, 922 F.2d 370 (7th Cir. 1991) (prison's refusal to allow Orthodox Jewish inmate to wear yarmulke was not unconstitutional); *see also* Friend v. Kolodzieczak, 923 F.2d 126 (9th Cir. 1991) (prison could reasonably refuse to allow Catholic inmates to possess rosaries).

[91] *See O'Lone*, 482 U.S. 342 (Moslem religion's requirement of group prayer at particular times of the day need not be accommodated if guard assignments might need to be changed).

[92] *See* Kahey v. Jones, 836 F.2d 948 (5th Cir. 1988) (prison was not required to accommodate a Moslem inmate's request that she not be served pork and that her food be prepared with utensils that had not come into contact with pork).

[93] *See* Fromer v. Scully, 874 F.2d 69 (2d Cir. 1989) (orthodox Jewish inmate who challenged prison regulation restricting beard length to one inch had prevailed in the

Other substantive rights were similarly restricted. Fourth Amendment protections of privacy and property, for example, were found to be virtually nonexistent in prison.[94] But the new tests, although posing formidable obstacles for prisoner-plaintiffs, still left room for the Court to protect rights on occasion. While the *Turner* Court held, on a five to four vote, that inmates could be constitutionally prohibited from corresponding with one another, the Court in that same case, without dissent, applied the same freewheeling balancing test to invalidate a prison regulation disallowing prisoners with life sentences from marrying unless they received permission from the warden.[95]

In addition to raising the hurdles of substantive requirements almost across the board, the Court talked ever more insistently about the level of deference federal judges should afford prison officials in deciding how prisoners' rights should "accommodate."[96] The Court also invited prison defendants to reopen consent decrees if they could persuade a judge that changes in factual conditions had made compliance more onerous.[97]

Tightening the screws in these ways only seemed to affect the results rather than the volume of litigation.[98] The First Amend-

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district court, but the decision was reversed on appeal on the ground that the *Turner-O'Lone* standard is more deferential to prison officials than the district court had recognized); Pollock v. Marshall, 845 F.2d 656 (6th Cir.), *cert. denied*, 488 U.S. 987 (1988) (prison could require Lakota Indian, who believed that hair is sacred and must not be cut, to cut his hair, in light of concerns about prison security; inmate was free to exercise his religion in other ways); Scott v. Mississippi Dep't of Corrections, 961 F.2d 77 (5th Cir. 1992) (hair grooming regulation did not violate Rastafarian inmates' right of free exercise of religion, in light of legitimate penological interest in identification, so long as alternative means of religious expression remained open).

[94] Hudson v. Palmer, 468 U.S. 517 (1984) (prisoners have no reasonable expectation of privacy in prison cells that would preclude warrantless searches); Bell v. Wolfish, 441 U.S. 520 (1979) (rectal searches of inmates may be reasonable, depending on circumstances). *Lanza v. New York*, 370 U.S. 139 (1962), had already held that eavesdropping in jail cells was permissible.

Block v. Rutherford, 468 U.S. 576 (1984), also upheld a ban on contact visits as reasonably related to security concerns.

[95] Turner v. Safley, 482 U.S. 78, 94-99 (1987). The Court's discussion of this issue is quite skeptical of the defendants' asserted interests in preventing the formation of love triangles, for example.

[96] *See, e.g.*, *Block*, 468 U.S. at 588 (courts should not substitute their judgments for the judgments of prison administrators).

[97] Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992). See *Modification of Consent Decrees*, 106 HARV. L. REV. 289 (1992), for a critique of the Court's new standards for modification of decrees in prison cases.

[98] Through the 1980s, the prison docket in the federal courts continued to grow. *See infra* note 266.

ment balancing test reduced a prisoner's chances of prevailing but did not necessarily make claims easier to decide or dismiss on paper. What alternative means of expression or religious observation prisoners have, a prison's justifications for its rules or practices, the potential impact on cost of the practice plaintiffs advocate, are all fact-intensive inquiries that often will require hearings or trials. The Court's concern in these cases was clearly with the federal courts' proper role—and not with their proper workload.

b. Cruel and Unusual Punishment

During the 1980s and 1990s, the Eighth Amendment right to be free from cruel and unusual punishment was also whittled down to exclude some weighty claims about overcrowding and brutality.[99] The new restrictions rejected some claims that could have imposed significant financial costs on state prison systems, had they prevailed.[100] New mens rea requirements grafted onto the Eighth Amendment focused the Courts' inquiry not on what treatment a prisoner should have a right to expect during confinement, but on whether prison administrators had behaved culpably and deserved to be punished.[101] Prison administrators who

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[99] Rhodes v. Chapman, 452 U.S. 337 (1981) (double celling is not per se unconstitutional, even if space-per-prisoner falls below all standards recommended by expert groups and associations) (*see* Susan N. Herman, *Institutional Litigation in the Post-*Chapman *World*, 12 N.Y.U. REV. L. & SOC. CHANGE 299 (1983-1984)); Whitley v. Albers, 475 U.S. 312 (1986) (shooting of an inmate by a guard during a prison disturbance was not cruel and unusual punishment as long as the force was used in a good faith effort to restore order, even if the guard should have realized that the inmate was an innocent bystander).

[100] Justice Brennan's dissent in *Rhodes*, 452 U.S. at 356, noted that had the Court ruled that prisons were required to allocate the amount of space-per-prisoner recommended by most experts, approximately two-thirds of all inmates would be entitled to more space.

The Eighth Amendment prison conditions cases generally involve cost, and not the additional concerns about prison security and order that are raised in defense of First Amendment claims. In fact, most wardens would welcome an upgrade of conditions in their prisons. *See* Herman, *supra* note 99, at 307-08.

[101] The Court added a state of mind requirement to Eighth Amendment claims in *Wilson v. Seiter*, 501 U.S. 294 (1991) (prisoners claiming that conditions of confinement constitute cruel and unusual punishment must establish that prison officials showed deliberate indifference to prisoners' needs), and elaborated on the nature of that requirement in *Farmer v. Brennan*, 511 U.S. 825 (1994) (deliberate indifference exists in a case alleging failure to protect inmates only if the defendant prison officials actually knew the inmates faced a substantial risk of harm and disregarded that risk by failing to take reasonable measures to abate it, which is a criminal rather than a civil definition of recklessness).

remained oblivious to an inmate's need for protection, or perhaps even well-intentioned wardens who lacked adequate funding to maintain clean and safe institutions, now had a new defense against inmates' claims for minimally adequate treatment—a lack of mens rea.

Although the new law reduced a prisoner's prospects of winning lawsuits, it did not reduce the volume of cases.[102] Determining the extent of a warden's knowledge demands credibility assessments, not decision on motion papers. The Eighth Amendment continued to be the most fertile source of prisoner civil rights actions.[103] It is also noteworthy that during the same era, the Court resisted imposing other limitations on Eighth Amendment claims, holding for example, that prisoners alleging they had been brutalized by guards did not need to plead that they had been seriously injured in order to state an Eighth Amendment claim.[104] In another case, the Court held that a prisoner asserting his health was being threatened by exposure to his cellmate's heavy cigarette smoking need not wait until he became ill to raise a claim under the Eighth Amendment.[105] Had the Court imposed the new pleading requirements desired by prison administrators, the caseload might have been reduced. However, this goal did not seem to be a top priority for the Court. Although the deck was being stacked against prisoner-plaintiffs a bit more, the Court continued to acknowledge federal court responsibility for prisoners' health and welfare.

c. Procedural Due Process

In other areas of the law change was more radical. During the late 1970s and 1980s, procedural due process protections were

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[102] In fact, the standard imposed by *Rhodes*, 452 U.S. 337, substitutes a fact-intensive "totality of the conditions" test for what might have been an objective referent—the amount of space per prisoner regarded by experts as humane—thus inviting extensive litigation about the conditions in each facility.

[103] *See* Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 457 (1993) (author's study showing that complaints stating causes of action under the Eighth Amendment represented from over half to two-thirds of the prisoner civil rights complaints filed in three federal districts during the period studied, while religion claims did not amount to more than two percent of complaints filed).

[104] Hudson v. McMillian, 503 U.S. 1 (1992) (prison guards' use of excessive force against an inmate may be actionable cruel and unusual punishment even if the prisoner did not sustain any serious physical injury).

[105] Helling v. McKinney, 509 U.S. 25 (1993) (exposure to secondary smoke might be cruel and unusual punishment).

doled out in an increasingly stingy manner. *Meachum v. Fano*[106] emphasized that a lawfully incarcerated prisoner could be housed in any prison, or be transferred from prison to prison without any process at all. Under this theory, prisoners could be transferred to distant prisons, even for punitive reasons, or placed in restrictive housing units without any hearing or reasons, as long as the laws or regulations of their jurisdiction had not conferred rights upon them.[107]

It was not until the recent case of *Sandin v. Conner*[108] that the Supreme Court took dramatic measures to impose a special burden on prisoners litigating due process claims. After this decision, prisoner procedural due process claims are as different from the due process claims of others as their First Amendment claims. Together with *Lewis v. Casey*,[109] this case represents a dramatically revised approach to prisoners' rights cases not brought under the Eighth Amendment. *Conner* is also one of the first cases in which the Court seems to gerrymander prisoners' rights in order to reduce federal court caseload.

5. *From Revolution to Rout*

a. Sandin v. Conner—*The Newer Liberty*

The Supreme Court's decision in *Conner* clearly changed the law regarding a prisoner's right to a fair decision-making process, but the extent of that change remains unclear. If the Court's chief objective was to save the federal courts time in dealing with prisoner due process claims, it may not yet have achieved that goal. If its goal was simply to make litigation more difficult for prisoner-plaintiffs, however, it has certainly succeeded. The federal courts are now on notice that they should be unsympathetic to most prisoner due process claims, although it is not yet clear what form that lack of sympathy should take.

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106 427 U.S. 215 (1976).

107 Cases during the late 1970s and 1980s restricted both (1) the predicate for procedural due process protections, *see, e.g., id.* (intrastate prison transfer does not involve a liberty interest, and therefore requires no due process unless state statutory or regulatory law creates an entitlement; Massachusetts law did not create an entitlement); Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454 (1989) (no liberty interest in visitation procedures), and (2) the scope of procedural protection required if a liberty interest had been found, *see, e.g.*, Hewitt v. Helms, 459 U.S. 460 (1983) (entitlement to due process before confinement in administrative segregation requires only minimal due process).

108 515 U.S. 472 (1995).

109 518 U.S. 343 (1996).

(i) Pre-Sandin v. Conner Rights

In the several decades before *Conner*, the Supreme Court struggled to define when a prisoner could claim a right to procedural protections before being deprived of liberty.[110] Prisoners are uniquely subject to conferrals and deprivations of freedom: they may be granted or denied parole, have their parole revoked, be transferred to a harsher prison or a more restrictive housing unit within their own prison, be denied furloughs or work release status, or be denied visitation rights. There is usually no substantive question about the state's power to limit a prisoner's freedom in these ways. As the Court noted in *Meachum v. Fano*,[111] a lawful conviction gives the state power to decide how harshly to punish the convicted individual, subject only to the constraints of the Eighth Amendment (punishment cannot be cruel and unusual) and the requirements of procedural due process (deprivations of liberty must be accompanied by appropriate procedures). To determine what process was due, the Court used the same methodology it applied to non-prisoner claims regarding deprivation of liberty or property.

In *Morrissey v. Brewer*,[112] a 1972 case at the beginning of the prisoners' rights explosion, the Court held that parolees could not be reincarcerated without a careful hearing to decide whether or not the jurisdiction's criteria for parole revocation had actually been satisfied, because reincarceration after life on parole constituted a "grievous loss" of liberty. The Court has continued to insist that decisions about whether or not freed prisoners are to be reincarcerated must be carefully scrutinized.[113]

Decisions affecting the freedom of those still within prison walls, on the other hand, have not always commanded as much

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[110] *See generally* Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482 (1984).

[111] 427 U.S. 215, 225 (1976) (transfer to a more secure institution, like initial assignment to that institution, is "within the normal limits or range of custody which the conviction has authorized the State to impose").

[112] 408 U.S. 471, 481 (1972).

[113] *See, e.g.*, Young v. Harper, 520 U.S. 143 (1997) (early release program, characterized by Oklahoma as merely a different form of custody, in fact created a liberty interest that required a parole revocation hearing before Oklahoma could reincarcerate a released person); Lynce v. Mathis, 519 U.S. 433 (1997) (inmate was "punished" within the meaning of the Ex Post Facto Clause by being reincarcerated under an early release program devised subsequent to his sentencing).

sympathy from the Court. In 1974, *Wolff v. McDonnell*[114] provided that if inmates were deprived of "liberty" within the meaning of the Due Process Clause—punished at a disciplinary hearing by losing good time credit (affecting the date of their release)—they were entitled to notice, an opportunity to be heard, the right to present evidence at the disciplinary proceeding, and a written statement of reasons for the decision reached.[115] The later cases, addressing decisions to assign prisoners to harsher prisons[116] or administrative segregation units,[117] and even to deny parole,[118] applied an overtly positivist approach to determine when a prisoner is deprived of "liberty" within the meaning of the Due Process Clause, theorizing that freedom is to constitutionally protected "liberty" as wealth is to "property." State-guaranteed expectations of liberty are equivalent to state-guaranteed expectations in property. Adopting the *Board of Regents v. Roth*[119] two-part test, the *Wolff* Court ruled that prisoners generally have no right to due process in decisions affecting their freedom unless the state has created a liberty interest by providing criteria or by limiting the discretion of the decision-maker.[120] Later cases applied this positivist test in a highly formalistic manner, scanning the language of the statute or regulation for mandatory language restricting discretion, such as "must" instead of "may."[121]

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[114] 418 U.S. 539 (1974).

[115] The Court also suggested that similar procedures would be required "when solitary confinement is at issue" because such confinement represents a major change in the conditions of confinement. *Id.* at 571 n.19.

[116] Meachum v. Fano, 427 U.S. 215 (1976); Montanye v. Haymes, 427 U.S. 236 (1976).

[117] Hewitt v. Helms, 459 U.S. 460 (1983).

[118] Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1 (1979).

[119] 408 U.S. 564 (1972).

[120] *See, e.g., Meachum*, 427 U.S. at 228 (state officials had discretion to transfer prisoners to other facilities "for whatever reason or for no reason at all" and therefore no liberty interest existed); *Hewitt*, 459 U.S. at 471-72 (liberty interest is created by regulations requiring that "administrative segregation will not occur absent specified substantive predicates").

Vitek v. Jones, 445 U.S. 480 (1980), declared that there is a limit to positivist analysis. Where a state transferred a prisoner from a prison to a mental hospital for involuntary treatment, the Court held that the prisoner was entitled to careful procedures surrounding that decision, regardless of how the state characterized its decision-making process, because the new facility was "qualitatively different" and had "stigmatizing consequences." *Id.* at 493-94.

[121] *See Hewitt*, 459 U.S. at 471-72 (questioning whether state guidelines had used "language of an unmistakably mandatory character" in providing that deprivation

The positivist approach always reeked of compromise. Before *Conner*, the Court declined to look at the nature of the interest (denial of parole, for example, or transfer to a distant prison where the prisoner's family would be unable to visit)[122] in deciding whether any process was due. This doctrine therefore allowed the state to inflict grievous losses of freedom with no due process at all. Not only was a hearing not required for a decision not affecting a "liberty interest," but the state was not even compelled to provide reasons or an unbiased decision-maker. On the other hand, if a liberty interest was created, prisoners were not at the mercy of careless or vindictive deprivations of even small freedoms. The Court sometimes required procedural regularity, although not always when it was most needed.[123]

(ii) Sandin v. Conner's New Pleading Requirement

In *Conner*,[124] the Court recognized some of the above flaws but showed little inclination to abandon or modify the positivist approach to procedural issues generally, or even to procedural issues concerning all deprivations of liberty. Noting that the word-bound approach allowed recognition of trivial losses of freedom as liberty interests entitled to due process protection, the Court suggested that this problem is endemic in prison litigation, and the Court therefore created special rules applying only

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would not occur "absent specified substantive predicates"); Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 461, 464-65 (1989) (existence of liberty interests is determined by a close examination of the language of the relevant statutes and regulations).

122 Olim v. Wakinekona, 461 U.S. 238 (1983) (transfer of a Hawaiian prisoner to a prison on the mainland).

123 The positivist approach also has other drawbacks. Constitutional requirements differ from jurisdiction to jurisdiction, depending on how a particular jurisdiction describes its parole or transfer policy, and jurisdictions are encouraged to avoid the courts' imposition of procedure in the only way they can—by retaining the authority to act arbitrarily, thereby avoiding creating a liberty interest.

The Court has been tempted to avoid burdening states that have created liberty interests, by requiring only minimal procedure in the second part of the two-step analysis. An approach focusing on the content of each jurisdiction's statutes and regulations also requires extensive litigation. Generally, at least one case has to be decided in each jurisdiction as to each program before anyone can be sure whether a liberty interest in parole release, for example, exists. Ironically, under the positivist approach, the federal courts offer relief only to those inmates whose states have already conferred something like a right upon them (and who therefore might well have an opportunity to seek relief in state court), and no relief to those whose states reserved the right to be arbitrary. *See* Herman, *supra* note 110.

124 *See* Sandin v. Conner, 515 U.S. 472, 482 (1995) (*Hewitt* approach creates disincentives for states to codify procedures).

to prisoners. Chief Justice Rehnquist chose trivial examples of prisoner procedural due process cases, such as one prisoner's claim of entitlement to a tray instead of a sack lunch,[125] and another's demand for a cell with an electrical outlet.[126] However, the plaintiff, Conner, had actually raised the less trivial claim the Court had described sympathetically in *Wolff*—he had been sentenced to thirty days in a special housing unit after a disciplinary proceeding that he claimed did not satisfy the procedural requirements set forth in *Wolff*.

In a five to four decision, the Court sought to reduce the number of trivial procedural due process cases by simply adding a new pleading element that apparently applies only to prison due process claims: prisoners must show they have suffered an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life."[127] This new requirement is clearly an extension of the hands-off reasoning of *Meachum*.[128] The Court stated, "[d]iscipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law."[129] Prison litigation is qualitatively different from other due process litigation, according to the Court, because prison administrators need freedom to run secure prisons. Chief Justice Rehnquist complained that the positivist approach of the *Hewitt v. Helms* line of cases involved the federal courts in the day-to-day management of prisons.[130] The Court further explained that prison litigation is also different be-

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[125] Burgin v. Nix, 899 F.2d 733, 735 (8th Cir. 1990). The inmate actually challenged his reclassification as an "incorrigible inmate" without any notice or hearing. One of the consequences of the reclassification was that he received sack instead of tray lunches. Invoking the positivist test, the court of appeals concluded that arbitrary treatment in these circumstances was allowable because the wording of the relevant state laws did not create an entitlement.

[126] Lyon v. Farrier, 727 F.2d 766, 768-69 (8th Cir. 1984) (both district court and court of appeals held that no liberty interest was created by a state regulation that rather vaguely provided that an inmate's procedural rights would depend on the gravity of the loss involved).

It is somewhat misleading to characterize the prisoner's claim as one of entitlement to an electrical outlet. The plaintiff, who was suspected of planning an escape, was transferred to a less comfortable cell and punished in a variety of ways (loss of prison job, etc.) that the defendants claimed were inadvertent. It was also the allegedly arbitrary change of status in this case, along with its consequences, that the inmate challenged. *See id.* at 766-68.

[127] *Conner*, 515 U.S. at 484.

[128] 427 U.S. 215 (1975). *See supra* notes 106-111 and accompanying text.

[129] *Conner*, 515 U.S. at 485.

[130] *Id.* at 482-83.

cause prisoners tend to bring many lawsuits, many of which are frivolous. Allowing state prisons to punish inmates in ways that are not "atypical" or "significant hardships" allows more flexibility to the prisons and also reduces the number of cases in the federal courts. Thus, the right to have decisions curtailing one's freedom made fairly and carefully, unless those decisions are both "atypical and significant," becomes one of the rights retracted upon conviction.

(iii) The Practical Effects of Sandin v. Conner

Conner created more questions than it answered. The Court substituted a fact-intensive inquiry to determine what constitutes an atypical and significant deprivation, for the law-oriented inquiry that considers the applicable law or regulation. It is clear the Court intended to preclude de minimis claims about tray lunches and electrical outlets that could only have seemed plausible under a formalistic, word-bound approach. (Those claims, of course, did not often succeed regardless of the approach.) It is unclear, however, whether the Court intended this new test to supplant or supplement the positivist test.[131] Left unanswered is whether atypical and significant deprivations of freedom are always actionable, or actionable only if the state also has limited discretion with respect to its decision-making process.

Conner's new test is not a return to a grievous loss test, because deprivations of freedom must be not only significant, but also "atypical." What does "atypical" mean? According to the majority, Conner's sentence to disciplinary segregation was not atypical because it was "within the range of confinement to be normally expected for one serving an indeterminate term of [thirty] years to life."[132] Is this an empirical finding that the average prisoner in Conner's jurisdiction serving a sentence of that

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[131] *See id.* at 496-501 (Breyer, J., dissenting) (urging courts to continue using the positivist approach in deciding whether claims within a middle category—claims not so trivial as to be de minimis, nor so serious and atypical as to win protection under the Due Process Clause itself, as in *Vitek v. Jones*—give rise to liberty interests); Arce v. Walker, 139 F.3d 329 (2d Cir. 1998); Samuels v. Mockry, 77 F.3d 34, 37-38 (2d Cir. 1996) (questioning whether *Conner* confers a liberty interest on an inmate who would not have had one under the positivist analysis of *Hewitt v. Helms*); Jones v. Moran, 900 F. Supp. 1267, 1274 (N.D. Cal. 1995) (adopting Justice Breyer's suggestion and using *Conner* as a threshold test added to the *Hewitt* method of gauging liberty interests).

[132] *Conner*, 515 U.S. at 487.

length will be sentenced to thirty days in a segregated housing unit?

What does "significant" mean? The Court found that Conner had not really suffered much cognizable injury for two reasons. First, conditions in the punitive housing unit were not very different from conditions in the administrative segregation unit, to which Conner might have been assigned without a finding of misconduct. Second, Conner's chances of parole were not likely to have been affected by the finding of misconduct because the state expunged the record of the more serious charge, and also because the state code did not "require" the parole board to deny parole in the face of a misconduct record or to grant parole in its absence.[133] Thus, although Conner's punishment did have a significant impact on the conditions of his incarceration,[134] he was not deprived of "liberty" within the meaning of the Due Process Clause, and therefore had no right to call witnesses or to receive any form of fair treatment. After this decision, there are more occasions in which an inmate in Conner's position could be sent to a punitive segregation unit (or presumably a more restrictive prison) in disregard of the state's own statutes or regulations, without justification, for vindictive reasons, or by a biased decision-maker, and the federal courts would presumably refuse to hear his claim. Arbitrary state action not meeting the *Conner* requirements would now be unconstitutional, effectively, only if it amounts to cruel and unusual punishment.[135]

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[133] Note the Court's adherence to tenets of positivist analysis. If the parole board had discretion to deny parole on the basis of a procedurally flawed finding of misconduct, the Court finds nothing constitutionally wrong. Due process violations arise only if the parole board is bound by mandatory language.

The dissent pointed out, with respect to the first argument, that finding that Conner had no liberty interest because the state expunged the record after the fact seems like backwards reasoning. *Id.* at 489 n.1 (Ginsburg, J., dissenting); *id.* at 501-02 (Breyer, J., dissenting). The dissenters also contended that although Conner should have been found to have a liberty interest, had this case been remanded to the district court, defendants would have been sure to win a summary judgment motion because Conner had not shown that he had been denied any procedural right afforded him by *Wolff*. *Id.* at 491 (Ginsburg, J., dissenting); *id.* at 503-04 (Breyer, J., dissenting).

[134] According to Justice Breyer's description, in general population, Conner would have spent eight hours a day out of his cell at work or at classes; in disciplinary segregation, he spent less than one hour a day out of his cell, for brief exercise or shower periods, during which he was isolated and shackled. *Id.* at 494 (Breyer, J., dissenting).

[135] *Id.* at 487-88 n.11. Some claims might also be cognizable under the First Amendment, *see* Pratt v. Rowland, 65 F.3d 802 (9th Cir. 1995) (claim of punishment

The dissenters aptly complained that the majority left "consumers of the Court's work at sea, unable to fathom what would constitute an 'atypical, significant deprivation'. . . ."[136] The lower courts that have considered procedural due process cases since *Conner* have indeed had considerable difficulty deciding who has suffered an atypical and significant deprivation.[137] Further

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in retaliation for exercise of First Amendment rights not precluded by *Conner*), or the Equal Protection Clause, if treatment were racially discriminatory. The Court also noted that inmates can use internal prison grievance procedures and state judicial review "where available." *Conner*, 515 U.S. at 487-88. Most states never developed grievance procedures that met minimal federal standards. *See infra* text accompanying note 172.

One district judge complained that *Conner*'s result

> effectively treats wrongful commitment to segregation as an inherent consequence, a sort of assumed risk, of being in prison to begin with—strikes this Court as one more befitting a totalitarian regime than our own, and it is hard to credit that outcome as flowing from a principled Supreme Court decision.

Leslie v. Doyle, 896 F. Supp. 771, 774 (N.D. Ill. 1995), *aff'd*, 125 F.3d 1132 (7th Cir. 1997).

136 *Conner*, 515 U.S. at 490 n.2 (Ginsburg, J., dissenting).

137 For typical complaints about the decision's lack of clarity see *Justice v. Coughlin*, 941 F. Supp. 1312, 1317 (N.D.N.Y. 1996), stating that the decision does not "completely clarify the parameters of prison due process analysis"; *Zamakshari v. Dvoskin*, 899 F. Supp. 1097, 1106 (S.D.N.Y. 1995), stating that the impact of the decision is "unclear"; and *Knox v. Lanham*, 895 F. Supp. 750, 759 (D. Md. 1995), stating that it is unclear whether atypicality should be judged from an objective perspective or the subjective perspective of inmates in the particular classification of plaintiff. Not surprisingly, lower courts have provided a confounding array of answers to these questions, and have discovered that some of the questions spawn many additional questions.

Some courts have tried to apply a bright line rule to judge typicality. For example, if 30 days of segregation is not atypical and significant, then perhaps 60 days, *see, e.g.*, *Zamakshari*, 899 F. Supp. at 1108 (60 days found not atypical and significant), or six months would be, *see, e.g.*, Whitford v. Boglino, 63 F.3d 527, 533 (7th Cir. 1995) (remanding for determination of whether six month segregation was atypical and significant); Acker v. Maxwell, No. 94-17169, 1995 U.S. App., LEXIS 27455, at *1 (9th Cir. July 17, 1995) (same). What about one year, *see, e.g.*, Williams v. Fountain, 77 F.3d 372, 374 n.3 (11th Cir. 1996) (assuming one year of solitary confinement is atypical and significant); Lee v. Coughlin, 26 F. Supp. 2d 615, 632-34 (S.D.N.Y. 1998) (376 days was atypical and significant), or three years? Some courts consider the ratio of the segregation to the entire prison sentence. *See, e.g.*, Arce v. Coughlin, No. 93C1V4702, 1996 WL 252371, at *7 (S.D.N.Y. May 14, 1996) (citing cases); Walker v. Mahoney, 915 F. Supp. 548, 553 (E.D.N.Y. 1996) (concluding 23 day segregation is not atypical and significant, but would be if imposed during a two month sentence). Some consider the potential penalty that could have been imposed at the disciplinary hearing in determining the need for due process, rather than the penalty actually imposed. *See Coughlin*, 941 F. Supp. at 1322-23; Campo v. Keane, 913 F. Supp. 814, 821 (S.D.N.Y. 1996).

Another issue is whether the court considering each inmate's claim of "significance" should hold a hearing to determine the nature of conditions in the segregated

Supreme Court litigation is needed to understand how great a step the Court is taking in the direction of removing federal constitutional guarantees of fairness from decisions respecting prisoners, and thus redefining what it means to be a prisoner.[138]

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housing unit and how they differ from conditions in general population, *see*, *e.g.*, Cannistraci v. Van Der Veur, No. 96-4069, 1997 WL 31549, at *2 (10th Cir. Jan. 27, 1997) (remanding for factfinding on whether 30 days in segregation unit and a $200 fine constitute "atypical and significant deprivation"); Kennedy v. Blankenship, 100 F.3d 640, 641-42 (8th Cir. 1996) (holding demotion from administrative to punitive segregation not atypical and significant); Jones v. Kelly, 937 F. Supp. 200, 202 (W.D.N.Y. 1996) (holding 191 days assignment to special housing unit was not atypical and significant under circumstances); *cf.* Frazier v. Coughlin, 81 F.3d 313, 317 (2d Cir. 1996) (concluding the district court had done "extensive factfinding," so claim could be measured against Conner's), the impact of those conditions on the individual prisoner, *see* Delaney v. Selsky, 899 F. Supp. 923, 1927-28 (N.D.N.Y. 1995) (plaintiff confined to segregated housing unit for 197 days—a period that might not otherwise have been atypical and significant—did suffer a deprivation of liberty because of his unusual height in relation to the size of his bed in segregation), whether the prison had discretion to impose similar conditions with no substantive predicate, and what impact the ruling had or might have on future custody-related decisions like parole, *see generally* Hemphill v. Delo, 105 F.3d 391, 392 (8th Cir. 1997) (need for factual development precludes possibility of summary judgment); Duffy v. Riveland, 98 F.3d 447 (9th Cir. 1996) (same). Will a finding for the prisoner on any one of the above bases (Conner lost on all) lead to a finding that the deprivation was "significant," or will more than one factor be required?

Another issue is whether a court considering a claim of "atypicality" need hear testimony on how often such assignments are made in that prison or jurisdiction. *See*, *e.g.*, Jones v. Moran, 900 F. Supp. 1267, 1273 (N.D. Cal. 1995) (conditions in particular state's prison system must be considered). If a prison may impose any punishment, no matter how serious, as long as it is not "atypical," the test seems to allow the prison opportunities for shameless bootstrapping. The prison may do whatever the prison typically does. Or, is it possible that this test freezes what is typical or atypical at the time of the *Conner* decision and prevents a prison from using self help to defeat procedural claims? Perhaps a jurisdiction's practices should be compared to other jurisdictions for typicality, an approach that would avoid bootstrapping but that would also cut against the federalist model Congress and the Court value.

[138] The *Conner* decision clearly does have some limits. The additional requirement poses an obstacle for inmates who suffer losses of freedom while in prison, but not for those whose length of custody is affected by deprivation of good time credit. *See*, *e.g.*, Madison v. Parker, 104 F.3d 765 (5th Cir. 1997). Of course, the Supreme Court has already relegated due process claims concerning length of custody to initial decisions in state court by declaring them to be habeas corpus petitions subject to the exhaustion requirement. *See* Edwards v. Balisok, 520 U.S. 641 (1997); Heck v. Humphrey, 512 U.S. 477 (1994); Preiser v. Rodriguez, 411 U.S. 475 (1973). Challenges to parole denial also, presumably, would not have to satisfy the new test. *See*, *e.g.*, Maghe v. Koch, No. 96-7060, 1997 WL 76014, at *4 (10th Cir. Feb. 24, 1997) (*Conner* does not expand creation of liberty interests with respect to parole); Ellis v. District of Columbia, 84 F.3d 1413, 1418 (D.C. Cir. 1996) (*Conner* does not overrule previous law concerning creation of liberty interests with respect to parole decisions, in either an expanding or contracting direction); Orellana v. Kyle, 65 F.3d 29, 32 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 736 (1996) (same).

Providing judicial relief only in connection with atypical and significant deprivations of freedom may not be very different from protecting prisoners only against cruel and unusual punishment.

The Court's willingness to create such confusion in the lower courts may indicate that a majority of the Court believes desperate measures are required to reduce the volume of federal prison litigation in this area, particularly claims raised by individual prisoners.[139] *Conner* may ultimately lead to that result, especially if what is atypical and significant is to be judged by an objective standard. This decision suggests that there may be no consensus on the Court as to which procedural due process rights a prisoner should have, but that there is an urgent desire that prisoners have fewer due process rights than they had before *Conner*.

b. Lewis v. Casey: *Redefining Access to the Courts*

Lewis v. Casey also poses serious questions concerning the extent to which prisoners share rights—in this case, the right of access to the courts.[140] As in *Conner*, the Court imposed special pleading requirements on prisoners, in a manner that suggests prisoners may sometimes be kept from litigating in federal court as part of their punishment. If the decision is not qualified, *Casey* may reintroduce the concept of civil death as a limitation on a prisoner's right of access to the courts.

In *Casey*, twenty-two inmates from various Arizona prisons brought a class action claiming the prisons' law libraries were inadequate to ensure the *Bounds v. Smith*[141] right of access to the courts. Their complaints included inadequate training of library staff, insufficient updating of materials, and lack of assistance for illiterate or non-English speaking inmates.[142] The district judge, finding for the plaintiffs, appointed a special master to hold hearings and draft an injunction setting forth standards and procedures for all of the Arizona prison law libraries, in order to obviate the need for prison-by-prison, inmate-by-inmate

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Several courts have also shown reluctance to apply the new limits to pretrial detainees. *See, e.g.*, Mitchell v. Dupnik, 75 F.3d 517, 523-24 (9th Cir. 1996) (*Conner* rationale inapplicable to pretrial detainees); Whitford v. Boglino, 63 F.3d 527, 530 n.4 (7th Cir. 1995) (same).

[139] Procedural due process cases are, after Eighth Amendment cases, the largest category of prisoner civil rights complaints. *See* Eisenberg, *supra* note 103.

[140] 518 U.S. 343 (1996).

[141] 430 U.S. 817 (1977).

[142] *Casey*, 518 U.S. at 346-47.

litigation.[143] Every Supreme Court Justice found this dispositive injunction overly broad and detailed. However, over the protests of four members of the Court, the same five Justices forming the majority in *Conner*, rather than remanding the case, took the occasion to express their concerns about the overuse of federal equitable power, reliance on special masters, the need for deference to prison administrators, federalism, and separation of powers. Like *Conner*, *Casey* translated these general concerns into new, prisoner-only limitations on the right in question.

Disavowing dicta in *Bounds*, the Court declared that the constitutional right of access to the courts does not encompass an affirmative right to adequate prison law libraries. Moreover, it only requires that prisoners be afforded minimally adequate support, such as libraries, provision of counsel, or perhaps simplified court forms, to ensure they are not actually prevented from filing non-frivolous claims pertaining to their custody or the conditions of their custody.[144] Therefore, before they can claim a denial of right of access to the courts, prisoners must litigate whether or not the claim they would have brought, had they been able to research it (or had other appropriate assistance to enable them to formulate a claim), would have been non-frivolous.[145] Further, the Court held that "[t]he tools [*Bounds*] requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement."[146]

As a result of this decision, prisoners apparently have no right to conduct research or receive legal assistance concerning an array of civil litigation, presumably including litigation to determine such serious matters as their parental or marital status, or to defend themselves in civil lawsuits. They also apparently have no right to adequate legal assistance in any form during the course of their litigation. The purpose of the right of access to the courts is no longer the affirmative goal of enabling prisoners

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[143] The proceedings below had been the latest phase of prolonged litigation before the same judge, who had found the state to be recalcitrant on previous occasions. *See id.* at 411-12 (Stevens, J., dissenting).

[144] *Id.* at 351-52. An inmate might also show an eligible injury by showing that his lawsuit had been dismissed for lack of legal knowledge. *Id.*

[145] The majority also applied a tight version of the standing doctrine in finding the injunction overbroad when compared to the actual injuries established by particular plaintiffs. *Compare id.* at 349-54, *with id.* at 393-98 (Souter, J., dissenting in part).

[146] *Id.* at 355.

to litigate their disputes in the same manner as those outside prison walls—who could visit a library of their choice, or perhaps a legal services office—but rather the more limited instrumental goal of prohibiting the state from preventing inmates from filing particular types of claims.

Although the decision only addresses the right of access to libraries or legal assistance, the Court's language is broad enough to restrict the right of access to the courts themselves. If prisoners only have a right of access to the courts to file (or avoid dismissal of) non-frivolous claims pertaining to their own custody or conditions, could a state be permitted to bring back civil death and prohibit inmates from engaging in, or even defending civil litigation? Would Congress be permitted to impose restrictions denying access to the federal courts to inmates who wish to bring civil litigation outside the core areas the Court favors?[147]

The partially dissenting Justices in *Casey* complained that the Court had unnecessarily imposed these new conditions, and that the conditions themselves were unprecedented and unreasonable.[148] In other contexts the Court had not required a showing of actual injury as a prerequisite to a claimed violation of a prisoner's rights.[149] Furthermore, the Court had never before held that a prisoner's only right of access to the courts would be for the limited purpose of challenging custody or prison conditions,[150] or that the right of access to the courts did not attach except at the filing and dismissal stages of litigation.

The dissenters were correct in describing these restrictions as new to the Supreme Court's case law. The majority did not

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[147] The opinion in *Casey*, unlike *Conner*, seems more motivated by the goal of federalism than the goal of reducing the federal caseload. In this respect, *Casey* is akin to the provisions in the PLRA limiting the power of federal judges, rather than the provisions attempting to keep individual litigants out of court. *See infra* text accompanying notes 235-50. Adding a stage to litigation might seem to increase the time a federal court must spend in determining whether a claim is viable, but on the other hand, the new restrictive standards might, at least eventually, deter some claims and enable others to be resolved on motion papers.

[148] *Casey*, 518 U.S. at 391-414.

[149] In *Helling v. McKinney*, 509 U.S. 25, 33 (1993), for example, the Court found that a plaintiff who complained that he had been exposed to large amounts of secondary smoke could raise a claim even though he was still healthy and might remain so. In *Farmer v. Brennan*, 511 U.S. 825, 845 (1994) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)), the Court held that a prisoner does not have to "await the consummation of threatened [physical] injury to obtain preventive relief."

[150] *Casey*, 518 U.S. at 404 (Souter, J., dissenting).

provide a clear answer to the question of why a prisoner's right of access to the courts should be limited in this manner. There is considerable discussion of how far the holding in *Bounds* actually went and how far it should have gone, and some general discussion about the proper role of federal courts,[151] but there is no real explanation of why it should be considered constitutional to bar prisoners from civil litigation. In a telling moment, Justice Scalia remarked that it is appropriate to restrict the scope of the right of access to the courts to litigation of claims about the length or conditions of custody, because "[i]mpairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration."[152] Scalia did not explain why that should be the case, but there may well be some subterranean originalism beneath that statement: under common law at the time of the Constitution, prisoners were often subject to civil death statutes and were not considered to have the capacity to litigate.[153] Scalia may have assumed that it would be constitutional to go further than the majority of Justices had authorized in this case, and to allow a return to civil death subject only to the exception the Court carves out.

The majority's silence also leaves the new core right of access dangling, raising a series of questions without any rationale by which to judge future claims. If the right to litigate, like the right to free movement, may be suspended on conviction, then why, as a matter of constitutional theory, is the right to litigate one's sentence or prison conditions retained? Are prisoners entitled to bring habeas corpus and civil rights claims in federal court only because Congress, as opposed to the Court, has created that entitlement through its statutes? If so, could Congress rescind all or part of what it has given?[154] Although the Court has not said so, perhaps the core cases are exceptional because a majority of the Court would find it to be cruel and unusual punishment to deprive a prisoner of the opportunity to litigate allegedly unconstitutional prison conditions in federal court.[155] Without access to

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151 *Id.* at 349-52, 354-57.

152 *Id.* at 355.

153 *See supra* text accompanying notes 31-34.

154 This becomes relevant with respect to the constitutionality of some of the provisions of the PLRA. *See infra* text accompanying notes 251-57.

155 Justice Thomas characterized the claim in *Ex parte Hull*—preventing an inmate from submitting papers to the Court—as a due process claim, and as one rep-

the federal courts, inmates might have little opportunity to redress serious grievances about prison conditions, and prison conditions might fall below the Eighth Amendment mark the Court has maintained.

The new restrictions in both *Conner* and *Casey* may seem arbitrary because they are in fact the product of compromise. In a concurring opinion, Justice Clarence Thomas argued that *Casey* did not go far enough. He argued that rather than just disavowing the *Bounds* dicta, the Court should have disavowed the entire holding of that case and ruled that prisoners do not have any affirmative right to have the state assist them in their litigation efforts. According to Thomas, *Ex parte Hull* and *Johnson v. Avery* established that prisoners have the right not to have the state actively interfere with their litigation efforts, but that no other precedent supported the affirmative right declared in *Bounds*.[156] Thomas had previously taken the position that the Court should simply cancel various previously recognized prisoners' rights and return to a hands-off posture with respect to most prisoners' claims, including allegations of guard brutality.[157]

Thomas did not command a majority of the Court in *Casey* any more than in the brutality cases. A majority of the Court seems to believe that prisoners should have some judicially enforceable rights, including some affirmative rights, and that they should not be barred from federal court. On the other hand, a majority of the Court seems unwilling to live with the consequences of having declared an array of rights that many prisoners will litigate and that will therefore require the courts to sift, especially where the prisoners are state prisoners. The result, as *Conner* and *Casey* show, is that the Court is now radically reducing the scope of prisoners' rights in a manner that, like all compromises, leaves jagged edges. First Amendment and procedural due process rights as well as the right of access to the courts have

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resenting the proper limit of the access to the courts doctrine. *See Casey*, 518 U.S. at 379-381 (Thomas, J., concurring).

[156] *Id.* at 381-82. The equal access cases on which Justice Marshall's opinion in *Bounds*, *see supra* note 52, had, as Justice Thomas described, been contained by subsequent case law. *See Casey*, 518 U.S. at 382.

[157] *See* Hudson v. McMillian, 503 U.S. 1, 17-29 (1992) (Thomas, J., dissenting) (Eighth Amendment prohibition of cruel and unusual punishment should never have been applied to prison cases); Farmer v. Brennan, 511 U.S. 825, 859 (1994) (Thomas, J., concurring) (referring sarcastically to the Court's refinements of the "'National Code of Prison Regulation' otherwise known as the Cruel and Unusual Punishments Clause").

all been slashed; the Eighth Amendment, however, still relatively intact, provides a back-up.

6. *Four Models of Prisoners' Rights Compared*

As this brief chronicle shows, the swing of the ideological pendulum has not been complete. The Court has not come very close to returning to a total hands-off posture, despite Justice Thomas's advocacy. Eighth Amendment claims are certainly cognizable, as are shreds of First Amendment, procedural due process, and access to the courts claims. Nor is the Court very close to the other end of the spectrum—the equality model the Warren Court might have favored, where prisoners truly have the same rights of expression or religion as the non-incarcerated, unless the state can show a compelling justification for retracting a right.

In light of the Court's incremental cuts in the cases described above, it now seems hypocritical for the Court to continue to assert that under its accommodationist jurisprudence prisoners "retain" First Amendment, procedural due process, and court access rights. The diluted tests, skewed procedures, and now special pleading requirements imposed on prisoners have left most of these rights virtually unrecognizable, even to an accommodationist. It seems more accurate to describe the current Court as recognizing a prisoner's right to be free from cruel and unusual punishment as virtually the only right that truly survives incarceration. Eighth Amendment claims themselves have been spared some of the deep cuts other rights claims have suffered. In case after case, the Court seems to stop retracting rights only where it would be cruel and unusual to allow a prisoner to be deprived of religious observances or free expression, to be subject to arbitrary treatment, or to be excluded from law libraries and even the courts.

An Eighth Amendment model of prisoners' rights does not necessarily provide fewer protections to prisoners. The Cruel and Unusual Punishment Clause could be viewed as incorporating other Bill of Rights provisions not "inconsistent" with a prisoner's status, much as the Due Process Clause incorporates aspects of the Bill of Rights. However, recalling the debates about incorporation tests[158] suggests that an Eighth Amendment

[158] See, e.g., *Adamson v. California*, 332 U.S. 46 (1947), where Justices Black,

model, while possibly providing more truth in labeling, would not provide any clearer standards than the Court's previous models to determine when the federal courts should intervene to protect prisoners against the will of state executive or legislative bodies, or against the will of Congress. Ultimately, the question is the same in any formulation: whether federal court deference to the federal and state political branches should be greater in the area of prisoners' rights in order to allow those branches freedom to define what it means to be a prisoner, or whether deference should be less because prisoners are at such risk in the political arena.

As described above, the Supreme Court prohibits the political branches from declaring prisoners entirely without free expression and religious rights, wholly subject to arbitrary punishment, or completely civilly dead; but the Court has failed to safeguard those rights vigorously. The reversals of the burden and standard of proof in the First Amendment area enable prison administrators to avoid accommodating prisoners' expressive and religious exercises for trivial reasons, out of hostility, or even for no reason at all. This practice, judging from the case law, has the greatest impact on prisoners who, like Cruz, practice a non-mainstream religion, leaving them in even greater need of the championship of the federal courts.[159]

The recent cases cutting into the bone of procedural due process and access to the courts rights are still too recent for their impact to be fully assessed. The shape of procedural due process law after *Sandin v. Conner* is not yet clear. The Court will still have an opportunity, after reviewing the turmoil in the lower courts, to return to protecting prisoners against grievous losses of freedom. The new direction of inquiry in *Conner* could even provide the Court an opportunity to abandon its positivist due process test, which was just another means of abdicating judicial responsibility for identifying and protecting rights by deferring to legislative decisions.[160] Finally, *Lewis v. Casey* might still be

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Murphy, and Frankfurter outlined their radically different approaches to interpreting the Due Process Clause.

[159] As recently as 1994, Congress believed that the federal courts are not providing enough of a safety net for prisoners' religious freedom, and that reinstituting usual First Amendment standards to analyze prisoners' claims would not unduly restrict the prerogatives of prison administrators, as genuine security concerns could still be honored. *See infra* text accompanying notes 173-79.

[160] *See* Herman, *supra* note 110, at 552-55.

distinguished as restricting only the instrumental right of access to law libraries, and not the right of access to the courts themselves. If *Casey* is not so limited, the Court's stingy treatment of the right of access to the courts in that case, combined with lessons from other prisoners' rights cases (such as the freewheeling balancing of *Turner v. Safley*, and the reflexive acceptance of almost any rationale defendants offer to counter a prisoner's assertion of a right), sets the stage for the Court's acceptance of a new form of civil death—legislation like the Prison Litigation Reform Act, which treats prison litigation differently from all other civil litigation, mostly in order to reduce the number of prison cases in the federal courts.[161]

The Supreme Court's cuts to prisoners' rights seem to have been motivated more frequently by concern about the federal courts' role than about the federal courts' caseload. Here, I think the Court has been getting it right: if prisoners do have a claim to federal court attention, the fact that there are many cases should not be a justification for redefining the scope of the constitutional rights at stake. Indeed, one might take the volume of litigation as, in part, a demonstration of need.

The cases discussed in Part I illustrate that outlining prisoners' constitutional rights is a difficult and necessarily subjective task. The Court must continue to struggle with the question of how to maintain an appropriate floor of protection against excessive retribution because, as Part II illustrates, Congress is, even when not unwilling, unable to do so.

II

PRISONERS' RIGHTS AND CONGRESS

Congress has also gone through phases in its treatment of prisoners' rights, corresponding roughly to the Court's pendulum swings. During the 1960s and 1970s, at the onset of the Court's revolutionary phase, Congress adopted a laissez-faire position, and did not legislate to either expand or contract prisoners' new rights and remedies. In 1980, Congress enacted the Civil Rights of Institutionalized Persons Act,[162] trying to put a thumb on the scale of process by diverting some prison litigation to the states,

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[161] *See infra* Part II.

[162] Pub. L. No. 96-247, 94 Stat. 349 (codified at 42 U.S.C. §§ 1997a-1997j (1994)).

and empowering the Department of Justice to participate in federal court prison litigation.

When backlash set in, Congress was at first satisfied to rattle its sabers by enacting and introducing legislation that did not go much beyond what the Court had already done. Then, in an interesting change of direction, Congress tried, in the doomed Religious Freedom Restoration Act, to make it easier for state or federal prisoners to prevail in federal court freedom of religion claims. Most recently, the Prison Litigation Reform Act made a serious effort to reduce the number of prisoners litigating in federal court, by slashing access and interposing new obstacles in an astonishing variety of ways.

History shows that it has been easier for Congress to slash rather than to build, or even to manage, the federal presence in prisoners' rights.

A. Taking Rights Quietly

During the 1960s, Congress at times joined the Warren Court in promoting civil rights with landmark legislation going beyond what the Court ever would or could have effected alone. The Civil Rights Act of 1964[163] and the Voting Rights Act of 1965[164] were acts of partnership, with Congress and the Court sharing the goal of building an effective structure of federally enforceable rights. The Court's declarations of federal rights in other areas, even during the 1960s, engendered a more hostile response.

Congress was less sympathetic, for example, to the Warren Court's promotion of the rights of criminal defendants. Responding to the Court's expansion of substantive and procedural rights of criminal defendants, in 1968 Congress attempted to legislatively overrule *Miranda v. Arizona*,[165] and to cut back on federal court review of facts in state habeas corpus petitions.[166] Congress seemed to be more ambivalent about prisoners' rights

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[163] Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5, 28, and 42 U.S.C. (1994)).

[164] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1 (1994)).

[165] *Compare* Title II of the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. No. 90-35, 82 Stat. 197 (1968) (codified as amended at 18 U.S.C. §§ 3501-02 (1994)), *with* Miranda v. Arizona, 384 U.S. 436 (1966).

[166] See 28 U.S.C. § 2254(d) (1994 & Supp. 1998), overruling the Court's decision in *Townsend v. Sain*, 372 U.S. 293 (1963), on the level of deference to be afforded state court findings of fact in a federal habeas corpus proceeding.

with respect to prison conditions. The Congress of the 1960s and 70s adopted neither expansive legislation like the Civil Rights Act or Voting Rights Act, nor hostile legislation designed to curtail the effects of the Court's rulings. Congress instead left the issue to the courts.

B. A Procedural Response: The Civil Rights of Institutionalized Persons Act

The first major federal legislation responding to the judicial expansion of prisoners' rights exhibited some ambivalence, but took seriously the need for federal involvement to insure humane prison conditions in state as well as federal institutions. In the 1980 "Civil Rights of Institutionalized Persons Act," Congress expressed concern about the "systematic deprivations of the constitutional and Federal statutory rights" of institutionalized persons,[167] and provided statutory authority for the United States Attorney General to conduct litigation on behalf of the institutionalized.[168] The legislative history of the Act is studded with horror stories about prison conditions, as well as praise for the successes of the Department of Justice in helping to ameliorate abysmal conditions and in improving the quality of litigation in prison cases. Congress, in expanding the Department's operations, aimed to improve the quality of justice as well as the professional quality of federal court litigation. By involving the executive branch in institutional litigation, Congress expressed agreement with the Supreme Court that state and federal prison conditions were sometimes a matter of federal concern. Congress's vision of an expanded role for the Department of Justice was defeated, however, when President Ronald Reagan cut the budget and marching orders of his Department of Justice and left prison litigation to fend for itself.[169]

In the same Act, Congress also attempted to staunch the flow of prison cases in federal court by requiring prisoners to exhaust

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[167] *See* S. REP. NO. 96-416, at 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 787, 788. "Institutionalized" persons included residents of mental health institutions as well as prisoners. *See* 42 U.S.C. § 1997(1)(B) (1994 & Supp. 1998).

[168] S. REP. NO. 96-416, at 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 787, 790; 42 U.S.C. § 1997a (initiation of civil actions); 42 U.S.C. § 1997c (intervention in federal court institutional litigation).

[169] *See* Tushnet & Yackle, *supra* note 7, at 13 & nn.72-74; Note, *Resolving Prisoner Grievances Out of Court: 42 U.S.C. § 1997e*, 104 HARV. L. REV. 1309, 1320 n.55 (1991) [hereinafter *Resolving Prisoner Grievances Out of Court*].

state administrative procedures[170] before bringing a federal court claim, if the court believed that approach to be appropriate and in the interests of justice, provided that the state in question had an adequate grievance process that met fairly rigorous federal standards.[171] The hope was to deflect prisoners' claims by encouraging the states themselves to create fair dispute resolution systems in which complaints would receive serious consideration. Most states were unwilling to make the necessary effort to establish satisfactory grievance procedures, however, so the attempt to promote resolution of problems without resort to federal court litigation also fizzled.[172]

In adopting this exhaustion provision, Congress seems to have been motivated more by concern about management of the federal docket than by hostility to the claims being raised. The exhaustion procedures were intended to provide a different, front-line forum for state prisoners' grievances to be heard preliminarily. Unsatisfied grievants could still bring their cases to federal court, perhaps even with the aid of the Department of Justice if their claims were deemed serious. Congress was not questioning whether prisoners had rights, including the right to litigate in federal court; Congress was encouraging the states to find alternative ways to resolve disputes so that prisoners would not require the attention of all three branches of the federal government quite so often.

It is notable that both parts of this well-intentioned

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[170] Although the Court has declined to impose an administrative exhaustion requirement for civil rights actions under § 1983, *see* Patsy v. Board of Regents, 457 U.S. 496 (1982), the Court had already funneled prisoners' claims potentially affecting the length of their custody to state courts, characterizing them as habeas corpus claims requiring exhaustion of state court remedies. *See* Preiser v. Rodriguez, 411 U.S. 475 (1973).

[171] *See* 42 U.S.C. § 1997(e)(a)(1). Federal district courts could continue a state prisoner's § 1983 action to compel the prisoner to exhaust a grievance only if the state's grievance mechanism has been approved by the Department of Justice or a district court under standards promulgated pursuant to the Act. *See id.* § 1997e(a)(2).

[172] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 4 (1990); *accord* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702 § 102(b), 102 Stat. 4642, 4644 (1988); *see also* Donald P. Lay, *Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act*, 71 IOWA L. REV. 935 (1986); *Resolving Prisoner Grievances Out of Court*, *supra* note 169 (finding that even for those states that had adopted grievance mechanisms, there was not sufficient data to conclude that the number of prisoner § 1983 filings would decrease, and urging that the statute not be hastily revised in a way that might require prisoners to exhaust unfair grievance procedures).

congressional attempt to improve the quantity and quality of federal prison litigation failed, for want of cooperation of the executive branch and of the states.

C. *The Religious Freedom Restoration Act*

1. *Congress's Goal*

Congress intended the Religious Freedom Restoration Act[173] (RFRA) to restore religious liberty that had been compromised by *Employment Division v. Smith*,[174] a case not involving prisoners. However, legislative history shows that Congress also decided to restore the religious freedom of inmates suffering the effects of the grudging constitutional test of *O'Lone v. Estate of Shabazz*.[175] Senator Reid proposed an amendment to exclude prisoners from RFRA's provisions, but Senators Kennedy and Hatch made impassioned speeches championing the need for greater religious freedom in prison, and after debate, the amendment was defeated.[176]

Congress' strategy in RFRA was to restore the compelling interest test, established in prior federal court rulings, to federal judicial evaluation of claimed infringements of the freedom of religion.[177] Senator Hatch described this test as striking an appropriate balance even for prison litigation. He argued that if the state truly had an interest in limiting religious freedom to preserve order and security within a prison, that interest would

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[173] *See* 42 U.S.C. §§ 2000bb-2000bb-4.

[174] 494 U.S. 872 (1990) (First Amendment guarantee of freedom of religion "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'"). *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

[175] *See supra* text accompanying notes 88-93.

[176] 139 CONG. REC. 14,350-68 (1993). Thirteen state attorneys general, and U.S. Attorney General Janet Reno opposed the amendment to exclude prisons, *see id.* at 14,351-52, while all fifty state-prison directors supported it, *see id.* at 14,355-56. The *O'Lone* test was one of the principal subjects of the debate. *Compare id.* at 14,351, *with id.* at 14,356 (statement of Sen. Reid).

In large measure, the debate was a war of anecdotes, with Senators Reid and Simpson proffering examples of "bizarre" claims by scary inmates abusing the privilege of federal litigation, *see id.* at 14,354, while Senator Hatch emphasized the importance of promoting religion in prison, and expressed his belief that a Catholic prisoner should be at least as entitled to seek the aid of the federal courts if he had been denied communion as the "prisoner who sued prison administrators in Nevada for serving him creamy peanut butter rather than the chunky peanut butter he requested," *id.* at 14,363.

[177] 42 U.S.C. §§ 2000bb(a)(5) & (b)(1).

be considered compelling and the state could still prevail.[178] Conversely, if the state did not have any genuine need to restrict religious exercise, inmates should be permitted to follow all of the dictates of their religions, not just those a federal court might deem "adequate."

Congress was right in believing that the test applied would make a difference to federal judges evaluating the religion claims of the unpopular, including prisoners. Once lower federal courts began applying the compelling interest test required by RFRA, prisoners' claims about prison administrators' refusal to allow them to wear or use religious paraphernalia, to grow facial hair or beards, or to comply with dietary restrictions, began to prevail far more frequently than at any time since *O'Lone*.[179] The Act's burden and standard of proof, as well as its positive attitude about the significance of a prisoner's ability to observe religious rituals, had an impact. Federal judges who had found, under *O'Lone*, that prisoners had not been able to prove that prison administrators were exaggerating their concern that a yarmulke, for example, might hide a weapon, could easily conclude that those same prison administrators could not show they had any compelling need to prohibit inmates from wearing yarmulkes.

2. *The Court's Response*

This congressional attempt to help prisoners in their litigation efforts also failed when RFRA was invalidated by the Supreme Court. In *City of Boerne v. Flores*,[180] the Court found that Congress had exceeded its constitutional power in enacting RFRA, because Congress may not "enforce a constitutional right by

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[178] 139 CONG. REC. at 14,362.

[179] *See, e.g.*, Sasnett v. Sullivan, 91 F.3d 1018 (7th Cir. 1996) (prison officials' assertion that they may prohibit prisoners from wearing crucifixes because their points, even on small crosses, might be capable of lacerating the skin, is rejected under the RFRA test); Harris v. Lord, 957 F. Supp. 471 (S.D.N.Y. 1997) (Moslem inmate may not be prohibited from attending group religious service, without showing of some compelling reason).

On the other hand, because RFRA also spoke of the need for deference to the judgment of prison officials, many claims were also denied when the prison's justifications were found to be compelling. *See, e.g.*, Hamilton v. Schriro, 74 F.3d 1545 (8th Cir.), *cert. denied*, 519 U.S. 874 (1996) (prison demonstrated sufficiently compelling reason in light of policy of deference to justify denying Native American inmate the opportunity to use a sweat lodge or to grow his hair); Lawson v. Singletary, 85 F.3d 502 (11th Cir. 1996) (viewed deferentially, prison has compelling interest in censoring Hebrew Israelite literature found to be racist and inflammatory).

[180] 521 U.S. 507 (1997).

changing what the right is."[181] Congress' power under Section Five of the Fourteenth Amendment, the Court explained, is only remedial and not substantive.[182] The Court therefore distinguished *Katzenbach v. Morgan*,[183] and held that Congress could not add in this manner to the floor of constitutional protection provided by the Court.

Flores stymied Congress in its attempt to redraw the balance between prisoners' religious freedom and prison administrators' concerns by encouraging the courts to hear claims more sympathetically, rather than by trying to act directly. In light of this separation of powers ruling and the Court's burgeoning interpretation of the Tenth Amendment,[184] it is not clear what, if anything, Congress can do to enhance the freedom of prisoners, especially state prisoners, to exercise their religions. Might Congress use its power under the Commerce Clause, for example, to require state prisons to allow Catholic inmates to possess rosaries, or to provide kosher diets? In the recent case of *Pennsylvania Department of Corrections v. Yeskey*,[185] the Supreme Court found that the Americans with Disabilities Act applies to state prison inmates, because the statute included general terminology and did not exclude prisons. At the same time, the Court dourly warned that the question of whether Congress actually had power under the Commerce Clause, or anywhere else, to impose this requirement on state prisons remained open.[186]

While it is relatively easy for Congress to curtail the Court's expansion of rights by enacting restrictive remedial and other measures clearly within its power,[187] it may be practically and politically impossible for Congress to move in the other direction. Even if Congress could muster the political will to specifically and explicitly champion particular religious freedoms for prisoners, *Flores* seems to require Congress to add to a right only

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[181] *Id.* at 519.

[182] *Id.* at 529 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

[183] 384 U.S. 641 (1966) (Voting Rights Act provision prohibiting states from adopting English language proficiency requirements for voters is a permissible exercise of Congress' powers under Section V of the Fourteenth Amendment).

[184] U.S. CONST. amend. X. *See* Printz v. United States, 521 U.S. 898 (1997) (Congress may not "commandeer" state administrative officials to enforce federal policy).

[185] 524 U.S. 206 (1998).

[186] *Id.* at 220-21.

[187] See *infra* text accompanying notes 216-18, 247-54 for an account of federal court case law upholding the restrictive provisions of the PLRA.

by adding remedies, and not by enhancing the substantive right itself. If Congress may not specify that an individual has a right to a religiously acceptable diet in prison on any terms other than those the Court has already set forth in *O'Lone*, making additional remedies available to prisoners who are not receiving such a diet will be ineffectual. Adequate remedies already exist if a prisoner can prevail in a religion claim under the *O'Lone* standard. The obstacle to relief lies not in the scope of remedies available, but in the scope of the diluted right the Court has deemed appropriate.[188]

The text of RFRA itself is instructive on the political realities surrounding federal legislation expanding prisoners' rights. Whether this legislation still would have passed if its applicability to prisoners had been set forth in the statute itself instead of buried in the legislative history is debatable. Likewise, it is questionable whether the Americans with Disabilities Act would have been applied to state prisoners if that subject had been openly debated and written into the statute. The same political realities that have led Congress to pass the PLRA and not to pass any legislation explicitly favorable to prisoners since the Civil Rights of Institutionalized Persons Act, which only offered procedural assistance, make it seem unlikely that the scope of *Flores* will be tested with respect to prisoners. It remains to be seen whether any form of creative legislation can or will restore any part of the protection of religious freedom Congress tried to provide in RFRA.

D. From Menacing to Slashing—The Prison Litigation Reform Act

Congress' recent attempts to restrict prisoner access to the federal courts, on the other hand, have been almost universally accepted by the lower federal courts because they are procedurally based.

In earlier terms, an increasingly conservative Congress had been content to grandstand by enacting provisions that sounded

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[188] One power Congress retains is the power to spend federal money to bribe the states to provide additional support for prisoners' religious exercise. Senator Dole had proposed the Criminal Justice Construction Reform Act, S. 186, 97th Cong. (1981), to provide federal funding and expert assistance to states so that they could avoid the supervision of the federal courts by actually improving their prison conditions. That bill never passed; a bill to replace RFRA by spending money would seem similarly doomed.

as if they restricted prison litigation, but did not actually change the law in any significant way.[189] Members of Congress could gain whatever political advantage "tough on crime" positions conferred without actually doing much. But eventually, euphemistically named acts like the "Stop Turning Out Prisoners Act (STOP)"[190] gave way to the "Prison Litigation Reform Act,"[191] which settled down to reform prison litigation in two ways. First, the PLRA contains the STOP provisions, which were designed to clip the wings of federal judges by reducing their remedial power in institutional litigation.[192] Second, in moves that have commanded less attention from the public or from scholars,[193] the PLRA deters and prevents individual prison litigation by imposing financial and other restrictions on prisoner-plaintiffs. This second tactic is accomplished by imposing additional requirements on some types of claims, by punishing prisoner-plaintiffs whether they win or lose, and by refusing forma pauperis status to plaintiffs who have previously filed three unsuccessful petitions. In introducing the legislation, Senator Dole explained that such restrictions were necessary because federal court complaints filed by prisoners had grown astronomically, and involved such grievances as insufficient storage space "and yes, being served chunky peanut butter instead of the creamy variety."[194]

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189 The Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1827 (codified at 18 U.S.C. § 3626 (1994 & Supp. 1998)), known as the Helms Amendment, for example, provided that federal courts "shall not hold prison or jail crowding unconstitutional under the [E]ighth [A]mendment except to the extent that an individual plaintiff . . . proves that the crowding causes the infliction of cruel and unusual punishment." This is a fair statement of the Supreme Court law that existed both before and after the Helms Amendment. *See* Elizabeth R. Alexander, *Confronting the Helms Amendment*, *in* PRISONERS AND THE LAW 7-73 (Ira P. Robbins ed., 1998). As Alexander pointed out, serious separation of powers questions would arise if Congress had indeed attempted to change the quantum of proof required to demonstrate a constitutional violation. *Id.* at 7-76-7-78.

190 STOP was introduced by Senator Hutchinson, 141 CONG. REC. S2649 (daily ed. Feb. 14, 1995), as a response to a Philadelphia case in which a federal court consent decree had set a cap on the number of inmates who could be held in city jail in order to reduce overcrowding. *See Overhauling the Nation's Prisons: Hearings Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) (testimony of Lynne Abraham, District Attorney of Philadelphia).

191 Pub. L. No. 104-134, 110 Stat. 1321 (1996).

192 These were the provisions largely anticipated by the Supreme Court's earlier decisions. *See* Tushnet & Yackle, *supra* note 7, at 47-62.

193 Tushnet and Yackle are virtually the only non-student law review authors to have discussed these provisions, although at far less length than the institutional reform provisions. *See id.* at 64-70.

194 *See* 141 CONG. REC. S14,413 (daily ed. Sept. 27, 1995). See *infra* Part III.A for

The legislative process leading to the passage of the PLRA was characterized by haste and lack of any real debate. The Act was passed as a rider to the Balanced Budget Downpayment Act, without a Judiciary Committee Report and without committee mark-up.[195] Its provisions, which amend a number of different sections of the United States Code,[196] bear many signs of the haste with which they were passed. Key terms were not defined,[197] some provisions conflicted with preexisting law,[198] and even the title could have used editing: entitled the Prison Litigation Reform Act of 1995, it was actually passed in 1996.

In substance, the Act takes a scattershot approach to reducing the cost and volume of prison litigation in the federal courts. These strategies do not necessarily reduce frivolous litigation, however, and do not necessarily save the federal courts money.

1. PLRA's Money Saving Regime

Some provisions of the PLRA seem to cut expenses incurred by the federal courts in litigation. For example, the Act attempts to save costs of transporting prisoners to court hearings by providing for proceedings to be conducted by telephone, video

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a discussion of the particular case that gave rise to the characterization of prisoners' litigation as focusing on peanut butter.

[195] *See* 142 CONG. REC. S2285-02 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy).

[196] Specifically, the PLRA amended the Proceedings in forma pauperis statute, 28 U.S.C. § 1915 (1994 & Supp. 1998), originally enacted to excuse indigent litigants from paying filing fees, the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e (1994 & Supp. 1998), and added 18 U.S.C. § 3626 (1994 & Supp. 1998), a new section on remedies.

[197] Some new provisions of the in forma pauperis statute relating to payment of fees, for example, apply to "civil actions" or appeals of judgments in "civil actions," 28 U.S.C. § 1915(a)(2), without defining what civil actions are covered. The federal courts have already spent substantial amounts of time considering whether the term "civil action" includes habeas corpus proceedings, *see, e.g.*, Reyes v. Keane, 90 F.3d 676 (2d Cir. 1996) (habeas petitions are not civil actions); Van Doren v. Mazurkiewicz, 935 F. Supp. 604 (E.D. Pa. 1996) (filing fee provisions apply to habeas corpus petitions), and mandamus proceedings, *see, e.g.*, Martin v. United States, 96 F.3d 853 (7th Cir. 1996) (provisions should apply if mandamus arises out of civil proceedings).

[198] One amendment to the in forma pauperis statute conflicted with a preexisting federal rule of appellate procedure; no one had seemed to be aware of the conflict until a court, after enactment, had to puzzle out the relationship between the two provisions. *See* Jackson v. Stinnett, 102 F.3d 132 (5th Cir. 1996) (provisions of PLRA requiring financial disclosure prior to appeal supersede Federal Rule of Appellate Procedure 24(a) providing that a prisoner may appeal in forma pauperis a case brought in forma pauperis below unless the district court decertifies the prisoner's status).

conference, or other telecommunications technology, or at the inmate's facility.[199] These expenditures, of course, would only arise in connection with those allegations district judges have deemed substantial enough to warrant holding hearings, even under the current heightened standards of what constitutes a viable federal claim. These provisions do not specifically address problems caused by frivolous litigation, and they may not be well-designed to save much money. They are, however, provisions that might, if not implemented cautiously by the district judges, detract from the fairness of federal proceedings adjudicating those claims still considered viable by the Supreme Court.

Other provisions aim to save the states money by limiting prison litigation defendants' exposure with respect to attorney's fees awards,[200] and to save the federal government money even more effectively by providing that the United States is simply not liable for costs incurred by a prevailing prisoner-plaintiff.[201] These provisions are aimed, by their very terms, only at successful litigation, and not at the peanut butter cases, which do not generally prevail. One provision that does target frivolous cases tries to save the states time and therefore money by safeguarding defendants against an adverse default judgment if they waive the right to reply to a prisoner complaint.[202] Although saving money might seem a logical goal for a rider to a budget act, the Administrative Office estimated that implementing the PLRA would, at least in the short run, entail a significant cost to the federal courts, none of which had been budgeted.[203]

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[199] 42 U.S.C. § 1997e(f). This provision might also be regarded as attempting to remove an incentive for prisoners to litigate by reducing the chance that bringing a viable lawsuit will result in a welcome trip to court to break the tedium of prison life.

[200] *Id.* § 1997e(d)(1) (limiting the predicate for awards of fees); *id.* § 1997e(d)(3) (limiting the hourly rate of fees to be awarded); *id.* § 1997e(d)(2) (requiring up to 25% of plaintiff's monetary judgment to be applied to pay defendant's attorney's fees, and requiring defendant to pay attorney's fees only if they are not greater than 150% of the judgment). The provision then cautiously specifies that these protections are only for the state defendants and that the plaintiff inmate may be required to pay greater attorney's fees.

[201] 28 U.S.C. § 1915(f)(1). Here too, the drafters make clear that the Act is asymmetrical and that costs may be assessed against the prisoner plaintiff. *Id.* § 1997e(g)(2).

[202] 42 U.S.C. § 1997e(g)(1). The defendant may wait to see whether the court deems the allegation serious enough to order a reply. *Id.* § 1997e(g)(2).

[203] In a June 21, 1995 assessment, the Administrative Office estimated the "potential annual resource costs of [the PLRA] could be more than $239 million and 2,096 positions, of which at least 280 would be judicial officers - Article III judges and/or

2. *The PLRA's Financial Squeeze on Prisoners*

a. *Risk of Dismissal as the Price of Indigency*

The vast majority of prisoners who litigate in federal court have been able to establish that they are indigent and therefore have typically received the courts' authorization to file their lawsuits in forma pauperis—without payment of fees or security.[204] This dispensation always came with a thorn: in reviewing the prisoner's affidavit of indigency, district judges were also invited to review the merits of the claim and to dismiss the complaint sua sponte if it appeared frivolous or malicious.[205] This authority is expanded in the PLRA to also allow the district judge to dismiss a prisoner's complaint for failure to state a claim,[206] and to dismiss the complaint sua sponte if the defendant seems entitled to raise an immunity defense.[207] Note that the courts are invited to treat prisoner complaints more summarily than any other type of litigation: dismissal may be sua sponte, replies might not be required, default judgments are precluded, and sua sponte dismissal may be predicated on the failure to state a claim or on an affirmative defense (immunity), which in any other litigation would be considered waived if not raised.[208]

b. *Prepayment of Costs*

Prisoners who can afford the usual filing fees can avoid the risk of dismissal, unless they cannot afford an attorney and seek as-

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magistrate judges." 142 CONG. REC. 52285-02, 2296 (1996) (statement of Sen. Kennedy). The bill provided no funds to cover these projected expenses. *Id.*

[204] 28 U.S.C. § 1915(a). *See* William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 617 (1979)(ninety-five percent of prisoner complaints filed in forma pauperis).

[205] 28 U.S.C. § 1915(d).

[206] The Supreme Court had held that the frivolousness standard for dismissal under § 1915 was very different from dismissal for failure to state a claim. *See* Neitzke v. Williams, 490 U.S. 319, 329-30 (1989). At least one court of appeals judge has expressed concern about the constitutionality of this provision of the PLRA, in light of *Neitzke*. *See* Mitchell v. Farcass, 112 F.3d 1483, 1490-93 (11th Cir. 1997) (Lay, J., concurring) ("While courts have recognized that this seemingly innocuous change is a significant expansion of the court's power . . . nothing . . . indicates that Congress was aware of the real meaning of the change. *See* 141 CONG. REC. S14,413-S14,419 (daily ed. Sept. 27, 1995); 141 CONG. REC. S7525-S7527 (daily ed. May 25, 1995).").

[207] 28 U.S.C. § 1915(e)(2)(B)(iii). The district court may also prevent an appeal from being taken in forma pauperis by certifying that the appeal is not taken in good faith. *Id.* § 1915(a)(3).

[208] *See* FED. R. CIV. P. 12.

signment of counsel.[209] Those who cannot afford to litigate and who therefore apply for permission to proceed in forma pauperis will now nevertheless be liable to pay filing fees, on an installment plan. First comes a bureaucratic ordeal for the inmate and his or her present and former jailers. The inmate must submit, with a forma pauperis affidavit, a "certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined."[210] Next comes an accounting procedure for the court. An inmate who has any funds is required to prepay twenty percent of the greater of the average monthly deposits to the inmate's account, or the average monthly balance in the prisoner's account for the six-month period preceding the filing of the complaint or appeal.[211] The prisoner is then required to make monthly payments of twenty percent of each previous month's income until the fee is paid.[212]

These provisions have two obvious motivations—to act as bureaucratic and financial disincentives. First, the bureaucratic hurdles may be high enough to cause some litigious prisoners to stumble and never get the planned case to court at all. Second, the requirement of payment is designed to deter litigation by making it costly.[213] If prisoners can proceed in forma pauperis, they do not have the financial disincentive that might cause other litigants to forego litigation possibilities. For years, critics like Chief Justice Rehnquist have complained that indigent prisoners have something to gain and nothing to lose by litigating whatever comes into their heads.[214] This provision is more a deterrent than an economic measure. It seems unlikely that these fee-col-

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209 *See* 28 U.S.C. § 1915(e)(1).

210 *Id.* § 1915(a)(2). Note that much of the burden of supplying these documents falls not on the inmate but on state prison officials, who are required to prepare these documents for the federal courts' benefit. In light of the recent decision in *Printz v. United States*, 521 U.S. 98 (1997), might state officials argue that this requirement violates the Tenth Amendment?

211 28 U.S.C. § 1915(b)(1).

212 *Id.* § 1915(b)(2). Again, it is the "agency having custody of the prisoner" that is required to "forward payments from the prisoners' account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid." *Id.* Note another added burden to state officials who might take their Tenth Amendment rights seriously.

213 *See* 141 CONG. REC. S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl).

214 *See supra* note 72.

lecting procedures will actually offset the costs of federal court litigation. In fact, the costs of administering this payment scheme might well exceed the income derived from piecemeal payments of dollars and pennies.[215]

Requiring only prisoners and no one else to repay costs when they proceed in forma pauperis has been challenged as a denial of equal protection. Thus far, the courts have unanimously found nothing constitutionally suspect in these provisions.[216] A Warren Court case, *Rinaldi v. Yeager*,[217] had declared a provision recouping costs for criminal appeals transcripts only from incarcerated appellants to be a denial of equal protection. The Eleventh Circuit distinguished *Rinaldi* "easily" on the ground that the Supreme Court in that case had found no good reason to single out prisoners, whereas the PLRA is based on what the court found to be a rational distinction between prisoners and all others—prisoners need to be prevented from filing baseless lawsuits.[218] Could this assumption be borne out if substantiation were required? So far, the courts have not required proof of this nexus, but have simply assumed its rationality on the basis of the conventional wisdom about prison litigation.

Even if the new financial disincentives do reduce the number of prisoner cases, there is no way to assess whether the prisoners

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[215] *See* Julie M. Rieue, Note, *The Least Among Us: Unconstitutional Changes in Prisoner Litigation Under the Prison Litigation Reform Act of 1995*, 47 DUKE L.J. 117, 138 nn.112-13 (1997) (footnote 112 discusses the difficulty of collecting filing fees from prisoners, including legislative testimony of one court clerk that it would take over six years for a court to collect a $25 filing fee from a prisoner earning $3 per month and footnote 113 discusses the author's empirical study in the Middle District of North Carolina demonstrating that prisoner account balances of over $10 are exceptional) [hereinafter *The Least Among Us*].

[216] *See, e.g.*, Hampton v. Hobbs, 106 F.3d 1281 (6th Cir. 1997) (fee requirements do not violate right of access to the courts, First Amendment, due process, equal protection, or double jeopardy rights); Mitchell v. Farcass, 112 F.3d 1483 (11th Cir. 1997); *cf.* Evans v. Croom, 650 F.2d 521 (4th Cir. 1981) (prisoners are assured necessities of life by state, and so do not have same financial needs as others), *cert. denied*, 454 U.S. 1153 (1982).

[217] 384 U.S. 305, 308-10 (1966).

[218] *Mitchell*, 112 F.3d at 1489. Another petitioner's claim that this provision denies equal protection was rejected on the theory that the provision is rationally related to the legitimate goal of sparing the courts the burden of frivolous prison litigation. *Hampton*, 106 F.3d at 1286. The court applied rational basis scrutiny on the theory that prisoners are not a suspect classification, and that no fundamental right was involved because poor prisoners are not actually denied their right of access to the courts—the Act provides that inmates who do not have the 20% prepayment may not be prohibited from litigating in forma pauperis under 28 U.S.C. § 1915(b)(4). *Hampton*, 106 F.3d at 1286-87.

who are deterred would have brought frivolous or substantial claims.[219] Senator Kyl, in introducing the PLRA to the Senate, announced that the amount of the filing fee required under the PLRA was "small enough not to deter a prisoner with a meritorious claim, yet large enough to deter frivolous claims and multiple filings."[220] This assertion does not seem to have been based on anything other than wishful thinking. If it is not possible to calculate a filing fee that will separate the wheat from the chaff, which is worse—to risk deterring or precluding some meritorious suits, or to tolerate some that are not meritorious? These new provisions may address quantity, but do not address the quality of litigation.

c. Assignment of Damages and Payment of Costs

In addition, under section 807 of the PLRA, prevailing plaintiffs will find their compensatory damage awards directly assigned to satisfy any outstanding restitution order against them, evidently without any opportunity for the prisoner to contest this diversion of funds. Under section 804(c), prisoners, unlike any other litigants, must pay awards of costs against them in full,[221] which eliminates the discretion a court might otherwise exercise to mitigate awards of costs, or excuse costs in cases brought in good faith.[222] Thus, prisoners lose financially, regardless of whether they win or lose their lawsuits. If they win, they may be unable to collect costs; if they lose, they cannot be excused from paying costs in full. In either case, they are treated differently from all other litigants.

d. The Three Strikes Provision

Under section 1915(g), a prisoner may not "bring a civil action or appeal a judgment" in forma pauperis if the prisoner has:

> on [three] or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief

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[219] The inmates themselves might in fact be unable to distinguish the frivolous from the non-frivolous because they are not lawyers and usually do not have access to a lawyer. *See* Eisenberg, *supra* note 103.

[220] *See* 141 CONG. REC. S7526 (daily ed. May 25, 1995).

[221] This section amended 28 U.S.C. § 1915(f) (1994 & Supp. 1998).

[222] Weaver v. Toombs, 948 F.2d 1004, 1013-14 (6th Cir. 1991) (costs award reduced); Marks v. Calendine, 80 F.R.D. 24, 31 (N.D. W. Va. 1978) (good faith).

> may be granted, unless the prisoner is under imminent danger of serious physical injury.[223]

It is obvious what motivates this restriction. For years, federal courts have been perplexed by the question of how to handle litigants who persist in filing frivolous claims. Some judges have tried enjoining recidivist litigants from filing any complaints at all, but have been chastised because the right of access to the courts entitles plaintiffs to file papers that do state a claim.[224] If a judge specifically enjoins a persistent litigant from filing any more frivolous complaints, the court must then spend the same amount of time determining whether or not a new complaint is indeed frivolous.

Congress's new provision does not bar litigation; it just requires the previously unlucky plaintiff to prepay fees in full before filing a fourth complaint.[225] The problem with this provision is equally obvious, especially to anyone who recalls the story of *The Boy Who Cried Wolf*. There may come a time when there really is a wolf. Just because a prisoner has brought three complaints that did not meet the courts' current exacting standards for stating a constitutional claim, does not mean the prisoner will not develop a legitimate or compelling claim. In fact, it is sometimes the persistent litigants (particularly jailhouse lawyers) who tend to generate serious claims. Rodney Haymes, for example, a jailhouse lawyer who tried litigating claims on behalf of other prisoners during the 1970s (certainly more than three unsuccessfully), was such an irritant to his jailers that they transferred him to a far more rigorous prison in retaliation for his circulation of a petition for redress of grievances—an exercise of a right a court subsequently found guaranteed under *Johnson v. Avery* and the First Amendment.[226] As noted above, it is not apparent that indigent, poorly educated pro se litigants can always tell which claims are frivolous and refrain from bringing only those claims. It is also not apparent that inmates who presumably could have

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[223] 28 U.S.C. § 1915(g) (1994 & Supp. 1998).

[224] Restrictions on access to the courts must be tailored to avoid precluding meritorious claims. De Long v. Hennessey, 912 F.2d 1144, 1148 (9th Cir. 1990); Abdullah v. Gatto, 773 F.2d 487, 488 (2d Cir. 1985). Even abusive litigants cannot be completely barred from filing lawsuits. Abdul-Akbar v. Watson, 901 F.2d 329, 331-32 (3d Cir. 1990); *In re* Davis, 878 F.2d 211, 212-13 (7th Cir. 1989); *In re* Powell, 851 F.2d 427, 434 (D.C. Cir. 1988).

[225] 28 U.S.C. § 1915(g).

[226] *See* Montanye v. Haymes, 547 F.2d 188, 191 (2d Cir. 1976), *cert. denied*, 431 U.S. 967 (1977).

met the new statute's exacting standards of indigency would be able to find funding if they did have a serious claim. This provision may reduce the volume of litigation, but again does so without sorting the wheat from the chaff.

The PLRA drafters seem to favor the risk that substantial claims will be kept out of court over the risk that non-substantial claims will be let in. This seems true even though the risk to the court is one of time, while the risk to the inmate is that some of the few serious constitutional violations the courts still recognize may go unredressed. Notably, the only circumstance where the drafters recalculate and prove unwilling to impose the risk on the would-be prisoner-plaintiff is when the inmate can show a risk of "serious physical injury."[227] The Act does not define serious physical injury, however, and thus it is left to the courts to decide just how great that risk must be. Would the exception include the threatened injury of inadequate medical care, or the anticipated injury of attacks by other inmates or guards? It clearly would not include a prisoner who, like the plaintiff in *Cruz v. Beto*, was being prevented from practicing his religion or even being punished for practicing his religion, or a prisoner who has suffered an unfairly imposed atypical and significant deprivation of freedom.[228] Like the current Supreme Court, Congress seems inclined to privilege prisoners' claims of cruel and unusual punishment, especially those with a physical element, over claims of a right to share other rights with the non-incarcerated.

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227 *See* 28 U.S.C. § 1915(g).

228 One district court, in a rare instance of taking a challenge to the provisions of the PLRA seriously, found this provision unconstitutional, holding that the restriction imposes a "substantial burden" on the affected inmate's fundamental right of access to the courts, therefore applying strict scrutiny and concluding that this provision is not narrowly tailored to achieve a compelling governmental interest, *see* Lyon v. Vande Krol, 940 F. Supp. 1433, 1438 (S.D. Iowa 1996), but the Court of Appeals then held that the prisoner plaintiff, who could have paid the filing fee, lacked standing to challenge the provision's constitutionality, *id.*, 127 F.3d 763 (8th Cir. 1997). Other courts upheld the provision. *See* Rodriguez v. Cook, 163 F.3d 584, 587-91 (10th Cir. 1998) (upholding provision); *In re* Tyler, 110 F.3d 528, 529 (8th Cir. 1997); Abdul-Wadood v. Nathan, 91 F.3d 1023, 1025 (7th Cir. 1996) (both enforcing 1915(g) without questioning its constitutionality); *see also The Least Among Us*, *supra* note 215, at 125-51 (strict scrutiny of these claims should be required; three-strikes provision, among others, is unconstitutional); Simone Schonenberger, Note, *Access Denied: The Prison Litigation Reform Act*, 86 KY. L.J. 457 (1997-1998) (three-strikes provision, unlike the other filing fee provisions, is unconstitutional).

e. Non-Financial Disincentive

Under section 809, a federal prisoner-plaintiff will lose good time credit if a court finds the claim was filed for a malicious purpose or to harass the defendant, or if the prisoner testifies falsely or otherwise knowingly presents false evidence or information to the court.[229] The scope of punishment and lack of process of this provision far exceed sanctions that could be imposed on any non-prisoner litigant under Rule 11 of the Federal Rules of Civil Procedure, or for perjury or contempt, absent a separate proceeding. Prisoners and only prisoners can be punished by a new term of incarceration if their testimony is not found credible. If, for example, a prisoner testifies that he has been brutalized by a guard and a judge or jury credits the guard's defensive testimony, the prisoner might find his sentence extended, without the procedural niceties that a contempt or perjury trial would have afforded other civil litigants.

3. The New Civil Rights of Institutionalized Persons Act

The PLRA amendment to the Civil Rights of Institutionalized Persons Act (CRIPA) contains another undefined reference to "physical injury."[230] Under § 1997e(e), prisoners may not bring federal civil actions for "mental or emotional injury" suffered while in custody without a "prior showing of physical injury."[231] Under previous law (still current law for all non-prisoners) mental or emotional distress may be compensable under 42 U.S.C. § 1983.[232] In one case demonstrating the effect of this new section, a state prisoner exposed to asbestos while working in a prison kitchen brought a § 1983 action subsequent to enactment of this provision, only to be told that exposure to asbestos was not the type of "physical injury" this provision requires, and that this prisoners-only limitation to § 1983 is not unconstitutional.[233]

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229 This section amended 28 U.S.C. § 1932.

230 42 U.S.C. § 1997e (1994 & Supp. 1998) (suits by prisoners).

231 A separate section of the PLRA, section 805, also amends the Federal Tort Claims Act to impose the same limitation, 28 U.S.C. § 1346(b).

232 Carey v. Piphus, 435 U.S. 247 (1978).

233 Zehner v. Trigg, 952 F. Supp. 1318 (S.D. Ind.), *aff'd*, 133 F.3d 459 (7th Cir. 1997). The court held that Congress in this provision only restricted the prisoner's remedies, and not the prisoner's Eighth Amendment right to be free from cruel and unusual punishment, rejecting separation of powers, access to the courts, and equal protection claims. *Id.* at 1328 (citing 141 CONG. REC. S7526 (daily ed. May 25, 1995 (statement of Sen. Kyl)). Catching Congress in another example of sloppy drafting,

The new version of CRIPA also drops the limited exhaustion requirement that the earlier law had predicated on a state's creation of an approved grievance mechanism.[234] As a result, litigation is not deferred, but simply disallowed.

4. *18 U.S.C. § 3626 ("Appropriate Remedies with Respect to Prison Conditions")*

a. *Limitations on Prospective Relief*

This Section of the Act does not target frivolous cases, but cases where a prisoner-plaintiff has prevailed despite the rigors of current federal law. Here, Congress turns to restricting remedies for the prevailing plaintiffs.

Another myth about prison litigation is that federal judges are liberal busybodies who delight in interfering with the states' administration of their prisons through unnecessarily intrusive micromanagement.[235] This section of the PLRA imposes a series of commands on district judges who issue prospective relief in prison cases. (Note again that this means that, despite the rigors

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the court wondered what Congress might have meant by requiring the prisoner to make a "prior" showing: does this mean "prior in time" asked the court, so that it must somehow be made before filing a civil action and, if so, in what manner or what forum would such a showing be made? *Id.* at 1323 n.3. The court did not answer the question it posed, in light of its ruling on the substance of the plaintiff's claim.

The Fifth Circuit helpfully construed the "physical injury" requirement to incorporate Eighth Amendment standards—the injury must be more than de minimis but need not be "significant," *see* Siglar v. Hightower, 112 F.3d 191 (5th Cir. 1997) (citing Hudson v. McMillian, 503 U.S. 1 (1992)), and thus was able to uphold its constitutionality. Construing the physical injury requirement as consistent with the Eighth Amendment still excludes cases where constitutional violations are not physical. Does this mean that prison guards now have license to terrorize prisoners as long as they do not physically wound them? *See* Parrish v. Johnson, 800 F.2d 600, 605 (6th Cir. 1986) (officer brandished a knife and threatened paraplegic prisoners without justification).

Do suits for "mental or emotional distress" include all litigation about violations of the First Amendment freedom of expression or religion, where injuries are not usually physical, or litigation about inhumane prison conditions—not only asbestos, but filth or rodents—that leave no physical mark?

234 *See supra* text accompanying notes 170-72.

235 *See* 141 CONG. REC. S14,413-S14,414 (daily ed. Sept. 27, 1995) (statement of Sen. Dole); *id.* at S14,418 (statement of Sen. Hatch). Another goal of the PLRA was to get the federal courts off the backs of the states so that the states could use the money in their prison budgets for more beds instead of more humane conditions. *See Overhauling the Nation's Prisons: Testimony Before the Senate Judiciary Committee*, 1995 WL 496,909 (1995) [hereinafter *Testimony*] (testimony of Lane McCotter, Executive Director, Utah Dep't of Corrections); *id.* at 1995 WL 475,404 (testimony of William P. Barr).

of current federal law, the prisoner-plaintiff has prevailed, suggesting that the case is probably not frivolous by any reasonable definition.)

These new limiting provisions are more a boon for prison defendants' lawyers than for the defendants themselves. It is common knowledge that prison conditions cases sometimes border on collusion. The prison warden-defendants would certainly prefer to run institutions that are not overcrowded, that have adequate ventilation, adequate nutrition, and enough security to prevent inmates from attacking one another, and to prevent overworked guards from using shows of force to control inmates, but they often lack adequate funding to do so, and so are delighted if a court requires the legislature to increase their budgets. There are some prison cases in which prison administrators vigorously defend their actions (censorship, confiscation of valuables) as required by the need for security. These cases tend to concern the rights of individuals and focus on particular incidents, after disciplinary proceedings. In the type of systemic challenge Congress addressed in 18 U.S.C. § 3626, however, the defendants generally would be pleased to address prisoners' requests, if only they had the funding. In light of the myth of peanut butter, state legislatures are unlikely to allocate more money to make prisons more comfortable, when the public would prefer to subsidize additional prison beds rather than additional comforts. The federal courts therefore became a necessary lever.

If prison conditions sink below the level required under current federal law, federal courts can issue orders requiring the defendants to improve conditions, which gives the wardens clout in asking the state for more money. Congress, in its current federalist mode, however, is not comfortable with that role. In the PLRA, Congress accepts that the similarly inclined Supreme Court nevertheless believes that the federal courts will (and should) find some prison conditions to fall below minimum federal constitutional standards.

The PLRA requires that in ensuring that prospective relief, including preliminary relief, is narrowly tailored to redress only the precise violation proved by that plaintiff, the district judge consider whether lesser alternative means would correct the violation, and give weight to any adverse impact the relief might cause to public safety or the operation of the criminal justice system.[236]

[236] 18 U.S.C. §§ 3626(a)(1) & (2) (1994 & Supp. 1998).

This section contains a fair amount of grandstanding. As Professors Tushnet and Yackle note, the Section does not radically change the law governing injunctions,[237] especially in light of the fact that the Supreme Court was moving in the same direction in *Lewis v. Casey*.[238] The chief purpose of this section seems to be precatory, in that Congress attempts to dissuade district judges from granting injunctive relief, or if they are granting relief, encourages them to keep it narrow. The provision, of course, trades judicial modesty for the increased caseload required to litigate each prisoner's dispute individually (if the prisoners are not discouraged from bringing individual cases).[239]

By incorporating the stillborn "Stop Turning Out Prisoners Act," Congress prohibits courts from issuing any order that entails releasing prisoners unless three requirements are met: overcrowding is the primary cause of a violation of federal rights; the court has previously entered an order for less intrusive relief that has failed to remedy the violation; and the defendant has had a reasonable amount of time to comply with the previous court order.[240] This section does not seem to represent any significant change in the law, at least according to some courts. Release orders are singled out not because the federal courts were indeed routinely turning out state prisoners, but for political advantage: Congress protects the public against dangerous felons the courts might be releasing, regardless of whether that was likely to happen, and regardless of whether it will happen any less often

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237 Tushnet & Yackle, *supra* note 7, at 47-59. It is, of course, well established that relief for constitutional violations should not extend further than necessary to cure the constitutional violation. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 489-90 (1992).

238 *See supra* text accompanying notes 140-55.

239 If this section does have the desired effect of serving the goals of federalism by reducing the number and scope of federal court prison injunctions, it may well be at odds with the goal of reducing the quantity of federal prison litigation. In a case where a judge and the institutional defendants might have been inclined to address the proven inadequacies of a prison's law library, or medical care delivery system, for example, by working out one consent decree, the court will now be required to deal narrowly with each individual problem that arises, prisoner by prisoner. Individual prisoners will not have standing to raise general problems. This is a prescription for increased litigation. In addition, while the issuance of prospective relief is a matter for the judge alone, claims for individual violations, which inmates will be encouraged to bring if they cannot hope for systemic relief, may entail jury trials. In these individual actions, prisoners who suffer from conditions that were previously declared inadequate will be positioned to win damages, and not just injunctive relief. The price of this form of federalism may be felt in the federal court workload.

240 Furthermore, such an order may only be issued by a three-judge court. 18 U.S.C. § 3626(a)(3).

under the "new" standard. In short, the very existence of the legislation propagates myths.

b. Termination of Prospective Relief

The PLRA's more meaningful constraints on federal equitable power are temporal. Under the new provisions, defendants in prison actions are entitled to request that previously granted prospective relief be terminated according to a time schedule,[241] unless the order was entered without the required findings,[242] in which case defendants are entitled to immediate termination.[243] To deny the motion for termination of relief, the court must make written findings like those required by section (a), above.[244] These provisions aim to ensure that relief remains narrowly tailored to what is necessary to redress federal violations.[245] Finally, if defendants have moved for termination of relief, relief is automatically stayed thirty days after the filing of such a motion, if the court has not yet entered the required findings.[246]

The above provisions have been of greatest concern to the courts, because they concern the power of the courts themselves, not just of prisoner litigants.[247] Nevertheless, the automatic stay provisions have been upheld,[248] and the termination provisions have been upheld by almost all of the courts of appeals that have considered the question.[249]

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241 Relief is terminable two years after the date the court granted or approved the relief, one year after the court has entered an order denying termination of relief, or, for relief issued on or before the date of enactment of the PLRA, two years after the date of enactment. *Id.* § 3626(b)(1)(A).

242 *Id.* § 3626(a).

243 18 U.S.C. § 3626(b)(2). The Act also provides that preliminary relief is to expire in 90 days unless relief is made final within that time period. *Id.* § 3626(a)(2).

244 18 U.S.C. § 3626(b)(3). This section covers consent decrees as well as injunctions. *Id.* §§ 3626(g)(7) & (g)(9).

245 *See* H.R. REP. NO. 104-21 at 24 n.2, 25-26 (1995).

246 18 U.S.C. § 3626(e)(2).

247 One separation of powers argument is based in part on the holdings in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (Congress may not reopen the final judgments of Article III courts by providing for reinstatement of cases the courts have dismissed after changing the applicable limitation period), and another in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871) (Congress may not prescribe rules of decision for the Article III courts).

248 Hadix v. Johnson, 144 F.3d 925 (6th Cir. 1998).

249 *See* Hadix v. Johnson, 133 F.3d 940, 942-43 (6th Cir.), *cert. denied*, 118 S. Ct. 2368 (1998); Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2366 (1998); Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997),

Here too, it is questionable whether Congress needed to go out on a constitutional limb to ensure that decrees in prison cases could be reopened if ongoing relief became unnecessary. The Supreme Court had already held that if changes in factual conditions make compliance with a consent decree substantially more onerous, defendants may be granted modification of the decree.[250] Congress nevertheless issued the Supreme Court a challenge, which, with the current split among the Circuits, the Court may be considering soon.

5. *The Constitutionality of the PLRA*

It would be surprising if the Supreme Court did not agree with the majority of the courts of appeals that the provisions of the PLRA are constitutional. The separation of powers challenge to the termination provisions probably has the best chance of inspiring indignant opinions, as in *City of Boerne v. Flores*, where the Court protected judicial prerogative. An equal protection argument, however, based on the fact that the PLRA treats prisoners so differently from other litigants, is not likely to be received any more sympathetically than it was by the courts of appeals.

At the all-important fork of selecting the appropriate standard of review, the courts of appeals unanimously concluded that strict scrutiny was inappropriate, because the termination provisions did not limit the right of access to the courts as narrowly defined in *Lewis v. Casey*.[251] That being accomplished, the courts easily accepted Congress's desire to disentangle the federal judiciary from prison administration as rational, and did not ask questions about whether that goal could have been approached with more narrow provisions that did not single out

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cert. denied, 118 S. Ct. 2374 (1998); Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997) (all rejecting a range of constitutional challenges to the termination provisions); Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996), *cert. denied*, 520 U.S. 1277 (1997). Only the Ninth Circuit has found these provisions unconstitutional. *See* Taylor v. United States, 143 F.3d 1178 (9th Cir. 1998), *aff'd on narrower ground*, Nos. 97-16069, 97-16071, 1999 U.S. App. LEXIS 13405 (9th Cir. June 18, 1999) (affirmed on ground that the order terminated had been a final judgment). The Second Circuit upheld the termination provisions, but only by adopting a narrowing construction the Ninth Circuit believed inconsistent with the legislative history. *See* Benjamin v. Jacobson, 124 F.3d 162 (1997), *vacated and remanded on reh'g en banc*, 1999 U.S. App. LEXIS 5130, at *1 (2d Cir. 1999).

250 *See supra* text accompanying note 97.

251 *See, e.g.*, *Gavin*, 122 F.3d at 1090; *Plyler*, 100 F.3d at 373; *Benjamin*, 124 F.3d at 174.

prisoners. One court distinguished *Romer v. Evans*[252] on the theory that in that case, a distinct group was excluded from all three branches of political process, whereas the PLRA only limits prisoners' ability to receive full remedial attention from the federal courts.[253] Another court explained that because the PLRA has such a clear rational basis in legitimate aims of Congress (as to the federal courts' role), it is therefore not based on "animus" against a particular group, as was the case in *Romer*.[254] Thus the court avoided confronting the question of whether it would in fact be acceptable to act with animus toward prisoners.

It is also likely that the Supreme Court will share the attitude of most lower courts as to the provisions hindering individual prisoners in their efforts to receive the attention of the federal courts. Some of these provisions may actually prevent some prisoners from bringing non-frivolous claims pertaining to prison conditions, and thus would substantially burden the rights within the core of *Casey*. The question remains of whether the Court will apply strict scrutiny even to these claims,[255] or whether the Court will adopt the *Turner v. Safley* accommodationist approach allowing a more diluted balancing, even of a prisoner's right of access to the courts, and an uncritical acceptance of Congress's justifications. *Casey*'s cavalier treatment, in dicta, of prisoners' access claims does not suggest that the Court will ask hard questions about Congress's decisions in the PLRA.

Under strict scrutiny, many of the provisions described above could easily be found not narrowly tailored enough to meet Congress's ostensible goal of reducing frivolous litigation. In fact, it is arguable that some provisions should not even survive rational basis scrutiny.[256] The many provisions described above that go beyond targeting frivolous claims (for example, keeping indigent litigants from filing claims regardless of their merits)[257] seem un-

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252 517 U.S. 620 (1996).

253 *See Benjamin*, 124 F.3d at 175.

254 *See Gavin*, 122 F.3d at 1090.

255 See cases described in *supra* notes 218 and 228 for a discussion of whether to apply strict scrutiny.

256 *See The Least Among Us*, *supra* note 215, at 138-43 (some provisions are so sloppily tailored that they should not even survive rational basis review). Whether there were less restrictive means by which Congress might have served its legitimate goals of cutting down the amount of time frivolous litigation consumes in the federal courts will be discussed in Part III, along with an analysis of how great a problem frivolous litigation actually is for the federal courts.

257 Although most provisions refuse to subsidize claims prisoners might bring and

able to even pass the test of serving a legitimate goal. It hardly seems legitimate to prevent a prisoner who might have a non-frivolous claim from litigating that claim simply because that prisoner is a member of a group of people who often file frivolous claims. These provisions disadvantage an individual solely because of that individual's identity as a member of a disfavored group. The PLRA certainly exhibits animus to prisoner-plaintiffs in the individual cases, and thus *Romer* is not really distinguishable—unless, of course, this expression of animus toward prisoners is permissible as part of their punishment.

The idea that limiting individual actions might not be an important inroad upon a prisoner's ability to redress grievances because only one out of three branches of the federal government is made unavailable ignores the fact that, historically, prisoners have been most successful in the least political arena--the federal courts. The breadth of injury to prisoners, whose ability to raise a range of rights claims in federal court has been their principal protection against mistreatment, is fully comparable to the denial of access to the political forum in *Romer*. Prisoners, unlike the plaintiffs in *Romer*, cannot even vote for executive or legislative officials in some states. As the discussion in Part I showed, however, the Supreme Court has been loath to cast questions about prisoners' rights in terms of equal protection, preferring to simply assume that prisoners are different. After the PLRA, they are indeed treated differently.

E. The Consequences of the PLRA

It is too soon to tell what impact Congress's efforts have had or will have on the number of prisoner cases filed in federal court.[258] Even if the overall number of petitions filed is reduced, there is no way to tell whether the unfiled cases would have been frivolous, or whether it is only the indigent who are being prevented or deterred from filing cases, whether frivolous or not.

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thus arguably are merely refusing to confer governmental largess, even largess must be distributed consistently with equal protection principles.

258 Initial figures indicate that filings after the PLRA are down, although it is hard to measure cause and effect or to project longer term figures. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 1997 REPORT OF THE DIRECTOR 132 [hereinafter 1997 ADMINISTRATIVE OFFICE REPORT] (prisoner civil rights petitions filed in federal court went down 30.5%, from 41,215 during the year ending September 30, 1996, to 28,635 during the year ending September 30, 1997).

Many of the PLRA provisions eliminate meritorious claims along with the frivolous, single out particular categories of prisoners for different treatment, and prevent, or at least deter, indigent prisoners from litigating claims a more affluent prisoner would be able to litigate. It is also too soon to tell whether there has been or will be any corresponding change in prison conditions, as the prisons more frequently fall outside the range of the vision of the federal courts.

Shortly after passage of the PLRA, Congress held oversight hearings to ensure that the Department of Justice, under the aegis of President Clinton, who had initially used his veto on the Budget Act (although not because of the PLRA provisions), would implement its new product zealously.[259] One of the Senate's complaints was that the Clinton Justice Department continued to use its authority under the Civil Rights of Institutionalized Persons Act to file pro-plaintiff briefs in prison cases.[260] Recalling how an earlier Congress found itself defeated by the Reagan Department of Justice decision not to use its litigation authority under CRIPA,[261] it once again appears that the ratchet under which Congress is operating only goes in one direction—toward the bottom.

III

PRISON LITIGATION AND THE FEDERAL COURTS: MYTH AND REALITY

A. Defining the Problem

As noted above, in enacting the PLRA provisions restricting access to the courts by individual prisoner litigants, Congress did not purport to be making a policy statement about who prisoners are and how they may be punished. The legislation was not justified expressly by invocation of a new retributive ideal. Congress claimed to be saving the federal courts from drowning in a sea of frivolous prisoner petitions—a claim that may be empirically difficult to prove. However, Congress did not even try to establish the need for, nor the effect of its solutions. Congress bypassed

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[259] *See, e.g.*, 142 CONG. REC. S10,576-02 (daily ed. Sept. 16, 1996) (statement of Senator Abraham) (including account of presidential veto).

[260] *See id.* at S10,577 (complaining that the Clinton Department of Justice continued to file briefs in prison cases under CRIPA, even after the PLRA).

[261] *See supra* text accompanying note 169.

usual processes in connection with the PLRA,[262] and consequently the Act is based on the assumption that prisoners are overwhelming the federal courts with frivolous litigation, and the hope that the adopted measures would help. Congress shared this assumption with the public, which had already been schooled to believe that prison litigation, rather than prisons themselves, needed reform.

Prisoners unquestionably bring many actions in the federal courts. People incarcerated because of a criminal conviction are, of course, highly motivated to bring habeas corpus petitions challenging their convictions and therefore their custody.[263] It is equally unsurprising that prisoners bring many cases about prison conditions in federal court. Indeed, owing to the nature of the punishment of incarceration, virtually every tort or small claims action a non-incarcerated person might raise in state court, is, for a prisoner, a dispute with the state. As the Supreme Court itself has commented, "[w]hat for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State."[264] In a rights-oriented society, when the state punishes by retraction of rights, litigation about the degree of retraction of those rights may be inevitable.

Statistics on the volume of prison litigation in federal courts may be described in many ways. One concrete statistic has documented the growth in the federal court prison docket. During the 1960s and 70s, as the federal courts rejected the hands-off doctrine and created rights and remedies for prisoners, the number of complaints filed grew exponentially.[265] From 1980 to 1996, the absolute number of claims filed continued to grow, nearly tripling.[266] Of course, during that same period, the prison population more than tripled, and thus the filing rate per prisoner actually decreased by seventeen percent.[267] The increase in

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[262] *See supra* note 195-98.

[263] During the year ending September 30, 1997, for example, state prisoners filed 21,858 habeas corpus petitions, and federal prisoners filed 11,675 motions to vacate sentence. 1997 ADMINISTRATIVE OFFICE REPORT, *supra* note 258, at 129.

[264] Preiser v. Rodriguez, 411 U.S. 475, 492 (1973).

[265] In 1966, the first year for which the federal courts reported this statistic, prisoners filed 218 civil rights claims. By 1980, that number had grown to 12,395 claims (filed by state prisoners). ADMINISTRATIVE OFFICE, ANNUAL REPORT (1980).

[266] 1997 ADMINISTRATIVE OFFICE REPORT, *supra* note 258, at tbl. C-2 (state prisoner civil rights claims filed numbered 12,395 in 1980 and 39,996 in 1996).

[267] *See* BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, PRIS-

prison litigation is attributable to increased use of incarceration, not only to the courts' early welcome.

Because the volume of prison litigation is large, it could be said that prison cases represent a hefty percentage of the federal docket.[268] While this is true in terms of numbers of cases, the prison cases do not consume nearly a proportionate share of the federal courts' time. The number of hours actually spent on each prisoner petition is not tracked by the Administrative Office,[269] but prisoner petitions rarely go to trial or even to hearings,[270] and are generally screened and summarily dismissed at early stages of the proceedings.[271] The authors of several empirical studies have concluded that it is misleading to speak of prisoner civil rights petitions as burdening the federal courts, despite their numbers.[272]

The frequent dismissal of prison petitions might seem to support Congress's other assumption—that most prisoner complaints are frivolous. To some extent, however, frivolity is a self-

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ONER PETITIONS IN THE FEDERAL COURTS, 1980-96 1(1997) (rate of petitions filed dropped from 72.7 petitions per 1,000 inmates to 60.5).

[268] In the year ending September 30, 1997, for example, state prisoner civil rights petitions accounted for approximately ten percent of the number of civil cases filed in federal district courts. 1997 ADMINISTRATIVE OFFICE REPORT, *supra* note 258, at 128-29.

[269] Statistics are kept on how long cases remain on the federal court docket, and here, prison cases may be about average, *see* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 532-33 (1982) [hereinafter T. Eisenberg], but this figure does not reveal how many hours during that period were actually spent on each case.

[270] *See* 1997 ADMINISTRATIVE OFFICE REPORT, *supra* note 258, at 152 (0.5 percent of prisoner civil rights petitions went to trial); *id.* at 355 (in proceedings before magistrate judges, hearings were held in 867 prisoner civil rights proceedings, out of 16,480 cases handled, *see id.* at 351); RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 228-29 tbl. 7.4 (1996). Prison cases also tend to consume less than their proportionate share of time on appeal. *See id.* at 231.

[271] *See* Turner, *supra* note 204, at 637. Professor Eisenberg, in fact, thought the statistics suggested that the federal courts were not reading prisoner petitions sympathetically enough. *See* T. Eisenberg, *supra* note 269, at 544.

[272] T. Eisenberg, *supra* note 269, at 524, 530. *See also* Turner, *supra* note 204, at 637 (the "impact of prisoner section 1983 cases on the efficient functioning of the federal district courts is not nearly as great as the numbers might indicate"). Recommended procedures for handling prisoner petitions include screening by staff attorneys, who develop expertise in identifying when a pro se complaint states a cognizable claim. *See* FEDERAL JUDICIAL CENTER RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS (1980). Screening procedures certainly represent a less restrictive means of handling frivolous petitions than does completely discouraging indigent inmates from filing claims. Congress made little effort to determine whether the courts' screening procedures already had the situation under control.

fulfilling category. As the Supreme Court narrows the definition of rights and raises the procedural hurdles for relief, prisoners are bound to lose more cases. A growing number of complaints fail to state a claim on which relief can be granted, simply because the courts are less willing to grant relief on those claims. This result does not necessarily mean that the claims are unworthy, but only that they are unsuccessful.[273] Those losing claims may now include a religious inmate's claim for a kosher diet or the right to keep a rosary—claims that Congress itself had recently found compelling.[274]

Even if Congress had looked carefully at the facts, in all likelihood the PLRA still would have been enacted because it is based not on facts, but on value judgments. To illustrate, if we were to assume that five percent of prisoner petitions prevail and thus are presumably meritorious, and we then identified how much time courts had spent in screening other cases and considering that five percent, would we conclude that the courts were wasting their time, or that they were doing a difficult and necessary job? In other words, the question is how much time is too much time for courts to spend on these cases. This judgment may depend on the focus of the question. If the focus is on the five percent of cases, and the evaluator is aware that those prevailing cases sometimes protected prisoners against disease, gang rape, and guard brutality, the time seems well spent. However, if the focus is on the 95% of cases dismissed, and it is assumed they were for the most part about nothing more serious than peanut butter, the time instead may seem wasted.

B. The Myth of Prison Litigation

In the absence of hearings, the PLRA Congress focused on anecdote[275]—the colorful, reassuringly trivial cases that anyone would agree should be dismissed. There was no testimony or discussion about gang rape in prison, or on the dangers of over-

[273] The Court itself has declined to equate failure to state a claim on which relief can be granted with "frivolity" within the meaning of the forma pauperis statute. *See* Neitzke v. Williams, 490 U.S. 319, 329-31 (1989); *see also* Stephen M. Feldman, *Indigents in the Federal Courts: The In Forma Pauperis Statute—Equality and Frivolity*, 54 FORDHAM L. REV. 413, 415 & n.14 (1985) (on the variety of judicial definitions of frivolity).

[274] *See* discussion *supra* Part II.C.

[275] *See, e.g.*, *supra* note 194 (Senator Dole on peanut butter); *see also supra* note 176 (Senator Hatch on the need for protection of religious freedom compared to suits about peanut butter).

crowding and the spread of tuberculosis, but there was talk about peanut butter. The history of the peanut butter story is instructive, for it reveals a distortion in the way the public gets information from the media, the Supreme Court, and even from the scholarly press. The public's beliefs then become political reality for elected officials.

1. The Media and the Myth of Peanut Butter

The media have participated, perhaps unintentionally, in a public disinformation campaign, partly at the behest of the state officials who defend prisoner lawsuits. As Second Circuit Judge Jon Newman said:[276]

> [l]aboring under the burdens of having to respond to thousands of lawsuits, most of which are frivolous, the attorneys general of the states adopted the tactic of condemning all prisoner litigation as frivolous. Their national association canvassed the attorneys general for their lists of top ten frivolous prisoner lawsuits and widely disseminated to the press the lists the association collected.[277]

The eye-catching cases presented as "typical" included an inmate who allegedly sued because his prison had no salad bars or brunches on weekends or holidays; a prisoner who allegedly sued New York State because his towels were white instead of his preferred beige; and finally, and most infamously, an inmate who was said to have claimed cruel and unusual punishment because he received one jar of chunky and one jar of creamy peanut butter after ordering two jars of chunky peanut butter from the prison canteen.[278]

Anyone familiar with prison litigation would have several reactions to these examples. First, even if these cases were "typical," federal judges are not often tempted to issue injunctive relief or award damages to inmates who are aesthetically displeased with the color of their towels. Second, these examples do not fairly reflect the range of claims that command the attention of federal judges. The attorneys general, who represent one side in adver-

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[276] *See* Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519 (1996).

[277] *Id.* at 520; (citing Attorneys General Seek to Curtail Frivolous Inmate Lawsuits; Call Upon U.S. Congress, States Legislatures to Respond, News release, Nat'l Ass'n of Att'ys Gen., Washington, D.C. (Aug. 1, 1995)).

[278] *See* Dennis C. Vacco et al., Letter to the Editor, *Free the Courts from Frivolous Prisoner Suits*, N.Y. TIMES, Mar. 3, 1995, at A26.

sarial proceedings, are not anxious to remind the public that the prison cases they actually spend time trying are more likely to involve complaints about gang rape and the spread of tuberculosis, than the spread of peanut butter.[279]

Judge Newman researched the cited cases and discovered that in addition to being misleading, the much-publicized descriptions of the selected cases were sometimes "simply false."[280] The "salad bar" allegation was an ancillary, exemplary point included in a twenty-seven page complaint alleging dangerously unhealthy prison conditions, including food contaminated by rodents, lack of ventilation, and forced confinement of prisoners with contagious diseases.[281] The "beige towel" complaint actually claimed that the prison had confiscated towels (which happened to be beige) and a jacket that the prisoner's family had sent him and then improperly disciplined the prisoner for receiving the package.[282] The notorious peanut butter case involved a complaint that prison officials had continued to improperly deduct money from the prisoner's account for a jar of peanut butter that he had been permitted to return when the canteen officials conceded that it was not what he had ordered.[283] This may not seem like a weighty matter, but it is an understandable complaint given that the price of a jar of peanut butter may represent about two weeks of an average prisoner's income.[284]

The attorney general letter was considered "news" because public figures can call press conferences or issue press releases that actually get read. The media do not frequently consider prisoner complaints of unfair treatment to be newsworthy. The news about prisoners' complaints thus tends to be one-sided. This situation feeds on itself; as prisoners are perceived as unduly magnifying petty grievances, the news media become even less interested in their complaints, except in the occasional sensa-

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279 *See, e.g.*, Harris v. Thigpen, 941 F.2d 1495 (11th Cir. 1991)(on treatment of HIV positive inmates); Austin v. Lehman, No. CIV.A.90-7497, 1992 WL 277511, at *1 (E.D. Pa. Sept. 29, 1992) (requiring prison to institute procedures to avoid spread of tuberculosis).

280 Newman, *supra* note 276, at 520.

281 Tyler v. Carnahan, No. 4 94 CV 0017WSB (E.D. Mo., filed Dec. 17, 1993).

282 Rivera v. State, No. 90811 (N.Y. Ct. Cl., filed Dec. 21, 1994).

283 Newman, *supra* note 276, at 521.

284 A prisoner's salary generally amounts to no more than a few dollars a day. *See The Least Among Us*, *supra* note 215, at 138 nn.112-13 (on the size of prisoner's salaries and bank accounts).

tional case. In publicity as in rights, the ratchet only seems to go one way.

The isolation of the prisons is also an important factor contributing to the public's ignorance of the number of serious problems in the prisons. Prisons tend to be physically isolated and difficult to reach, and it is therefore easy for the public to remain unaware of what is happening inside. Prison security, as well as isolation, can make it difficult for journalists to see first-hand what is happening. The Supreme Court has also contributed to the difficulty, with case law supporting the right of prison administrators to limit the media's access to prisons and their inmates.[285]

In the peanut butter case, journalists allowed themselves to be misled, and simply passed along information from press releases. The attorneys general had cannily selected colorful sound bites of facts from lengthy, tedious legal documents. Reporters apparently did not investigate whether the characterizations of this litigation were misleading or untrue. In fact, the only fact checking done, significantly after the fact, was by a federal judge who explained his findings to the vastly smaller audience of a law review article.[286]

2. *The Supreme Court and Frivolity*

In a solitary dissent in *Cruz v. Beto*,[287] the case of a Buddhist claiming the right to practice his religion while incarcerated, now Chief Justice Rehnquist chastised the majority for taking this claim seriously, announcing that he, unlike eight other Justices, would have dismissed the complaint as "frivolous."[288] Justice Rehnquist now commands a majority on the Court in many prison cases, and can often give his own definition to "frivolity." If the Supreme Court, the guardian of our countermajoritarian traditions, declares claims like the right to practice one's religion to be frivolous, it is unlikely the public will disagree. The moral

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[285] *See supra* note 85. Foucault suggests that the isolation of the prison and the invisibility of what happens within the prison are essential to the true function of the prison, and not just a manifestation of the need for prison security. Invisible punishment replaced the public "spectacle of the scaffold," leading the public to associate the exclusion of prisoners with the exclusion of lepers, and thus creating an isolated locus for delinquency. FOUCAULT, *supra* note 19, at 35-69, 124-26, 195-201, 236-239. Rather than failing at reforming prisoners, the prison can then be regarded as succeeding in breeding and isolating delinquency. *Id.* at 277-92.

[286] *See supra* note 276.

[287] 405 U.S. 319 (1972) (per curiam); *see supra* text accompanying notes 55-56.

[288] *Cruz*, 405 U.S. at 329.

authority with which the Warren Court, and even the Burger Court, spoke about the importance of enforcing the rights of the unpopular is gone.

The Court's rhetoric as well as results in the most recent cases further encourage the view that prisoners' claims only rarely deserve serious attention. In *Sandin v. Conner*,[289] for example, the Court was asked to consider a prisoner's claim that he had been unfairly punished by being sentenced to a punitive housing unit for thirty days without an adequate hearing. Chief Justice Rehnquist, in describing the procedural due process claims plaguing the courts, chose instead to emphasize cases involving far pettier claims than Conner's: one inmate's claim of entitlement to a tray rather than a sack lunch, and another's demand for an electrical outlet in his cell.[290] The majority did not mention the more serious claims that the new restrictive test would foreclose. Nor did the majority point out that trivial claims about sack lunches do not tend to prevail, or to consume much judicial time. The fact that Conner, like most prisoner litigants in the Supreme Court recently, lost his case, also sends a message that prison claims need not be taken seriously.

C. *The View from the Law Reviews*

The prisoners' rights revolution, with its many cases and skirmishes, was grist for the scholarly press. Articles on particular cases, particular rights, and prisoners' rights in general, abounded. During the 1970s and 80s, most legal commentators commended the courts for decisions enhancing prisoners' rights and criticized the Supreme Court's backlash.[291]

There has been backlash in the law reviews too. In the 1990s, fewer pages of the law reviews have been devoted to prisoner cases, and most of what is written is by student authors. The student authors who discuss recent Supreme Court cases and the PLRA are typically critical of cutbacks in rights,[292] but an in-

[289] *See* discussion *supra* Part I.B.4.a.

[290] *See supra* notes 125-26. As in the cases Judge Newman investigated, the characterizations of the claims raised were somewhat misleading. *See supra* notes 125-26.

[291] Note, *Creatures, Persons and Prisoners: Evaluating Prison Conditions Under the Eighth Amendment*, 55 S. CAL. L. REV. 1099 (1982); Robbins, *supra* note 36, at 213-15.

[292] Student authors' commentary on the case of *Sandin v. Conner* generally criticize the Court for being insufficiently sympathetic to prisoners' claims that they are being treated arbitrarily. *See, e.g.*, Philip W. Sbaratta, Note, Sandin v. Conner: *The*

creasing number accepts as gospel that there is a need to take drastic measures to save the federal courts from drowning in a sea of prison litigation.[293]

In every context, voices willing to challenge the current conventional wisdom have become rare.

CONCLUSION

Neither Congress nor the Supreme Court has raced all the way to the bottom. Prisoners do still have Eighth Amendment rights, and some bits of other constitutional rights as well. But the downward momentum is alarming. The Court, in service of its idea of federal modesty, has cut prisoners' rights, and invalidated Congress's attempt, in RFRA, to expand those rights. Congress, ostensibly out of concern for the courts or for federalism but fundamentally out of a belief that prisoners are not wor-

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Supreme Court's Narrowing of Prisoners' Due Process and the Missed Opportunity to Discover True Liberty, 81 CORNELL L. REV. 744, 767, 772, 775 (1996) (*Conner* reduced prisoners' due process rights and protection against arbitrary treatment to an unacceptable level); John K. Edwards, Note, *A Prisoner's Threshold for Procedural Due Process After* Sandin v. Conner*: Conservative Activism or Legitimate Compromise?*, 33 HOUSTON L. REV. 1521 (1997); Julia M. Glencer, Comment, *An "Atypical and Significant" Barrier to Prisoners' Procedural Due Process Claims Based on State-Created Liberty Interests*, 100 DICK. L. REV. 861, 907, 914 (1996) (Supreme Court is leaving prisoners without adequate protection against arbitrariness); Deborah R. Stagner, Note, Sandin v. Conner*: Redefining State Prisoners' Liberty Interest and Due Process Rights*, 74 N.C. L. REV. 1761, 1781-82 (1996) (without federal court protection, prisoners will be subject to a wide range of serious actions without recourse); Michelle C. Ciszak, Sandin v. Conner*: Locking Out Prisoners' Due Process Claims*, 45 CATH. U. L. REV. 1101, 1144-45 (1996) (effectively eliminating federal forum for redress "locks out" judicial review).

The authors also criticized the Court for writing an ambiguous opinion that gave insufficient guidance to the lower courts. *See, e.g.*, *Prisoners Rights—Punishments Imposed by Administrative Proceedings*, 109 HARV. L. REV. 111, 146 (1995) (describing *Conner* as "fraught with ambiguity"); Scott F. Weisman, Note, Sandin v. Conner*: Lowering the Boom on the Procedural Rights of Prisoners*, 46 AM. U. L. REV. 897, 919 (1997); Ciszak, *supra*, at 1139; Quan Luong, Note, Sandin v. Conner*: Prisoners' Rights and State-Created Liberty Interests—Has the Court Come Full Circle?*, 7 GEO. MASON U. CIV. RTS. L.J. 25, 27 (1997); Edwards, *supra*, at 1559.

Most of the smaller number of student authors who wrote on the PLRA thought some of its provisions were unconstitutional or unwise. *See* Schonenberger, *supra* note 228; *The Least Among Us*, *supra* note 204; *see also* Catherine G. Patsos, *The Constitutionality and Implications of the Prison Litigation Reform Act*, 42 N.Y.L. SCH. L. REV. 205 (1998); Jennifer A. Puplava, Note, *Peanut Butter and Politics: An Evaluation of the Separation-of-Powers Issues in Section 802 of the Prison Litigation Reform Act*, 73 IND. L.J. 329 (1997).

[293] *See, e.g.*, Kristin L. Burns, Note, *Return to Hard Time: The Prison Litigation Reform Act*, 31 GA. L. REV. 879, 925 (1997) (measures like this are necessary to control frivolous litigation, and are "consistent with the temper of the times").

thy of the courts' time, has been cutting prisoners' access to the federal courts, making it difficult for them to raise even those claims the Supreme Court has left extant. The Court, in turn, seems more likely to hear Congress's message in the PLRA and uphold the draconian measures designed to keep prisoners out of court, than to heed the message of RFRA and revise its own disdainful treatment of prisoners' religion claims.

What does this story tell us about rights, and about judge-made law as an instrument for social change? When scholars debate the efficacy of judicial declaration of rights as a means of promoting the interests of the politically powerless, the debate, like Justice Ruth Bader Ginsburg's moot discussion of the abortion cases,[294] sometimes centers on whether the Court can effectively take the lead, or whether social acceptance must grow outside the courts before rights can truly be won. The Warren Court, in assuming responsibility for assuring prisoners a right of access to the federal courts, believed that prisoners, like its other disempowered constituents, needed rights and were unlikely to win them except in the federal courts. Subsequent developments show that without public acceptance, rights, even those once protected in federal court, dissipate—under assault from Congress, the Court, or both. In light of the one-sided information the public receives, however, it would be surprising if any amount of time were to generate so much public sympathy with the plight of prisoners in cases like *Turner v. Safley* (inmate-to-inmate correspondence), *Sandin v. Conner* (arbitrary punishment within a prison) and *Lewis v. Casey* (lack of legal research tools), that these prisoners would find their concerns honored without federal judicial involvement.

Will the Court continue to lower the floor of protection for prisoners? If the public in a particular state supports the reemergence of the chain gang school of incarceration, might the Court hold that rights generated under a rehabilitative philosophy may now be retracted upon conviction, if that is how the voters choose to define being a prisoner? Would the Court allow infliction of arbitrary punishment, arbitrary denial of religious worship, or arbitrary denial of access to the courts to become the new punishment? If the federal courts did tolerate such extreme

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294 Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1205-08 (1992) (Supreme Court's abortion rulings did not invite "dialogue" with legislatures, and halted political process apparently moving in the direction of reform).

views, would Congress, in light of *City of Boerne v. Flores*, be able to find a way to set a higher floor of federal protection?

As long as the Supreme Court continues its current course of compromise, prisoners will retain some federally guaranteed rights, regardless of what theory of punishment gains ascendancy. But there is even less ambivalence about prison litigation than there is about prisoners, both on and off the Court. The Supreme Court and Congress, along with the public, seem to believe that prison litigation is fair game for radical reconstruction—that prisoners get more than their proper share of federal court time. The recent measures taken by Congress, and to some extent by the Court, may succeed in reducing the volume of prison litigation, but they do so at the cost of preventing or discouraging claims that are valid even under the Court's newly demanding standards, by discriminating against indigent prisoners, and by underdefining the right of access to the courts itself.

If the Supreme Court continues to guard its turf as jealously as it did in *Flores*, only the Court can remedy the increasing discrimination against prisoner-litigants in federal court. Of course, the Court can and probably will respond, "let them go to state court."[295] Under the circumstances, it remains to be seen whether that sentiment will end up sounding like Marie Antoinette.

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[295] *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) (concluding that state courts are the ultimate protectors of federal constitutional liberties).