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# Trends in Prisoner Litigation, as the PLRA Enters Adulthood

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# Trends in Prisoner Litigation, as the PLRA Enters Adulthood

Margo Schlanger\*

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## INTRODUCTION

The Prison Litigation Reform Act (PLRA),<sup>1</sup> enacted in 1996 as part of the Newt Gingrich “Contract with America,”<sup>2</sup> is now as old as some prisoners. In the year after the statute’s passage, some commenters labeled it merely “symbolic.”<sup>3</sup> In fact, as was evident nearly immediately, the PLRA undermined prisoners’ ability to bring, settle, and win lawsuits.<sup>4</sup> The PLRA conditioned court access on prisoners’

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\* Henry M. Butzel Professor of Law, University of Michigan. Thanks to Grady Bridges for data management assistance and, as always, to Sam Bagenstos for his helpful comments. I wish to acknowledge the generous support of the William W. Cook Endowment of the University of Michigan.

1. Prison Litigation Reform Act, Pub. L. No. 104-134, tit. 8, §§ 801–810, 110 Stat. 1321, 1321-66 to -77 (1996) (codified as amended at 11 U.S.C. § 523 (2012); 18 U.S.C. §§ 3624, 3626 (2012); 28 U.S.C. §§ 1346, 1915, 1915A, 1932 (2012); 42 U.S.C. §§ 1997a–c, e–f, h (2012)). The PLRA was part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

2. NEWT GINGRICH ET AL., CONTRACT WITH AMERICA 53 (Ed Gillespie & Bob Schellhas eds., 1994) (referring to the PLRA’s predecessor bill, the Taking Back Our Streets Act, H.R. 3, 104th Cong. (1995)).

3. 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 (1997).

4. For in-depth examination of the PLRA’s impact on damage actions, see Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003) [hereinafter Schlanger, *Inmate Litigation*]. For in-depth examination of the PLRA’s impact on injunctive litigation, see Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006) [hereinafter Schlanger, *Civil Rights Injunctions*]. Note that the subsequent description of the PLRA in this paragraph

meticulously correct prior use of onerous and error-inviting prison grievance procedures.<sup>5</sup> It increased filing fees,<sup>6</sup> decreased attorneys' fees,<sup>7</sup> and limited damages.<sup>8</sup> It subjected injunctive settlements to the scope limitations usually applicable only to litigated injunctions.<sup>9</sup> It made prison and jail population caps—previously common—far more difficult to obtain.<sup>10</sup> And it put in place a rule inviting frequent relitigation of injunctive remedies, whether settled or litigated.<sup>11</sup>

The resulting impact on jail and prison litigation has been extremely substantial. In two articles about a decade ago, I presented descriptive statistics showing the PLRA-caused decline in civil rights filings and plaintiffs' victories,<sup>12</sup> and the likewise declining prevalence of court-ordered regulation of jails and prisons.<sup>13</sup> More up-to-date information has not been published, so here I update those statistics for use by policymakers, judges, and other researchers, and discuss them briefly. I look in Parts I through III at damage actions, using primarily the

also appears in my article, *How Prisoners' Rights Lawyers Are Preserving the Role of the Courts*, 69 U. MIAMI L. REV. (forthcoming 2015).

5. 42 U.S.C. § 1997e(a) (“No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”); *see also* Woodford v. Ngo, 548 U.S. 81 (2006). A good deal has been written about this provision. *See, e.g.*, Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139 (2008); *see also, e.g.*, Alison M. Mikkor, *Correcting for Bias and Blind Spots in PLRA Exhaustion Law*, 21 GEO. MASON L. REV. 573 (2014); Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771 (2003); Giovanna Shay, *Exhausted*, 24 FED. SENT'G REP. 287 (2012); Eugene Novikov, Comment, *Stacking the Deck: Futility and the Exhaustion Provision of the Prison Litigation Reform Act*, 156 U. PA. L. REV. 817 (2008).

6. 28 U.S.C. § 1915(b) (excluding prisoners from the ordinary in forma pauperis ability to file without payment of fees); *see also id.* § 1914(a) (setting the fee for a district court civil action at \$350).

7. 42 U.S.C. § 1997e(d)(3) (capping defendants' liability for attorneys' fees in civil rights cases at 150% of the rate paid publicly appointed defense counsel). In addition, the PLRA has been read to further cap defendants' liability for attorneys' fees in monetary civil rights cases at 150% of the judgment. *Id.* § 1997e(d)(2); *see, e.g.*, Robbins v. Chronister, 435 F.3d 1238 (10th Cir. 2006) (en banc) (reversing the district court and disagreeing with appellate panel, holding that this limitation applies even to fees awarded even for a lawsuit involving a preincarceration claim).

8. 42 U.S.C. § 1997e(e) (“No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury . . . .”); *see, e.g.*, Hilary Detmold, Note, *'Tis Enough, 'Twill Serve: Defining Physical Injury Under the Prison Litigation Reform Act*, 46 SUFFOLK U. L. REV. 1111 (2013).

9. 18 U.S.C. § 3626(a)(1)(A) (2012) (“Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.”).

10. 18 U.S.C. § 3626(a)(3) (setting out procedural and substantive hurdles to obtaining a “prisoner release order”); *see also* Plata v. Brown, 131 S. Ct. 1910 (2011) (affirming imposition of such an order in California).

11. 18 U.S.C. § 3626(b) (allowing defendants in prison conditions cases to periodically seek “termination” of previously entered injunctions).

12. *See, e.g.*, Schlanger, *Inmate Litigation*, *supra* note 4, at 1583–87, 1660–64.

13. *See, e.g.*, Schlanger, *Civil Rights Injunctions*, *supra* note 4, at 576–89.

data compiled by the Administrative Office of the U.S. Courts (the AO) for each federal district court case “terminated” (that is, marked complete by a district court, whether provisionally—say, pending appeal—or finally). These data are discussed in this Article’s Technical Appendix, which follows the main text; replication code is also posted online.<sup>14</sup> Part I examines prisoner filings over time and by state. Part II examines outcomes over time and compares outcomes in other case categories. And Part III looks at litigated damages. (Because the AO’s data on damages are error-ridden,<sup>15</sup> Part III supplements the AO database with docket-based research into individual cases.) All three Parts uncover a number of topics that are ripe for additional research.

In Part IV, I move to the topic of injunctive prison and jail litigation—cases in which prisoner plaintiffs seek a change in policy or other aspects of prison conditions. The PLRA was motivated in large part by Republican discontent with plaintiffs’ successes in such litigation,<sup>16</sup> and Part IV demonstrates more comprehensively than prior data that it has succeeded in radically shrinking—but not eliminating—the coverage of such orders.

## I. FILINGS

The PLRA’s sharp impact on the prevalence and outcomes in prison litigation is clear. Begin with filings. These are affected by numerous PLRA provisions, including: the rule that filing fees are unwaivable for indigent prisoners;<sup>17</sup> the requirement of administrative exhaustion<sup>18</sup> (which discourages lawsuits where such exhaustion has not occurred, since they will almost certainly fail); the attorneys’ fees limits;<sup>19</sup> and the three-strikes requirement compelling frequent lawsuit filers to satisfy filing fees in advance without regard to their ability to pay.<sup>20</sup> As before the PLRA, litigation remains one of the few avenues for prisoners to seek redress for adverse conditions or other affronts to their rights. Accordingly, litigation continues—but at a much reduced rate. Table 1

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14. See Margo Schlanger, *Data Appendix: Trends in Prisoner Litigation, As the PLRA Enters Adulthood*, *U.C. Irvine Law Review* (2015), <https://www.law.umich.edu/facultyhome/margoschlanger/Pages/Trends.aspx>.

15. See Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 *NOTRE DAME L. REV.* 1455 (2003).

16. See, e.g., 152 *CONG. REC.* S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch in support of S. 1279) (“While prison conditions that actually violate the Constitution should not be allowed to persist, I believe that the courts have gone too far in micromanaging our Nation’s prisons.”).

17. See 28 U.S.C. § 1915(b) (2012).

18. See 42 U.S.C. § 1997e(a) (2012).

19. See *id.* § 1997e(e).

20. See 28 U.S.C. § 1915(g) (“In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section [that is, in forma pauperis] if the prisoner has, on 3 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 may be granted, unless the prisoner is under imminent danger of serious physical injury.”).

demonstrates. It shows jail and prison populations from 1970 to the present, along with federal court filings categorized by the courts as dealing with “prisoner civil rights” or “prison conditions.”<sup>21</sup> Figures A and B present some of the same information in graphic form—Figure A shows filings compared to prison and jail population, and Figure B shows filing *rates* compared to prison and jail population.

The national trends in Table 1 and Figures A and B are clear. A steep increase in prisoner civil rights litigation combined in the 1970s with a steep increase in incarcerated population. The filing rate slowly declined in the 1980s, but the increase in jail and prison population nonetheless pushed up raw filings. Then, as in the 1970s, the 1990s saw an increase in both jail and prison population *and* filings rates, until 1995. In 1996, the PLRA immediately transformed the litigation landscape. After a very steep decline in both filings and filing rates in 1996 and 1997, rates continued to shrink for another decade (although the increasing incarcerated population meant that the resulting number of filings increased a bit). Since 2007, filing rates, prison population, and filings have all plateaued.

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21. Litigation figures are calculated using data released annually by the Administrative Office of the U.S. Courts, available in digital form from the Inter-university Consortium for Political and Social Research at <http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/00072/studies>. Prisoner population figures come from a variety of publications by the Bureau of Justice Statistics, a component of the U.S. Department of Justice. Sources are set out comprehensively in the Technical Appendix that follows this Article.

**Table 1:** Prison and Jail Population and Prisoner Civil Rights Filings  
in Federal District Court, Fiscal Years 1970–2012<sup>22</sup>

Fiscal Year of Filing	Incarcerated Population				Prisoner Civil Rights Filings in Federal District Court			
	Total	State Prison	Fed. Prison	Jail	Total	Non- Fed. Defts.	Fed. Defts.	Filings per 1000 Prisoners
1970	359,555	178,654	20,038	160,863	2,245	2,092	153	6.2
1971	358,061	177,113	20,948	160,000*	3,179	2,969	210	8.9*
1972	356,092	174,379	21,713	160,000*	3,635	3,393	242	10.2*
1973	364,211	181,396	22,815	160,000*	4,665	4,257	408	12.8*
1974	389,721	207,360	22,361	160,000*	5,573	5,185	388	14.3*
1975	413,816	229,685	24,131	160,000*	6,527	6,020	507	15.8*
1976	438,000	248,883	29,117	160,000*	7,096	6,702	394	16.2*
1977	449,563	258,643	30,920	160,000*	8,347	7,842	505	18.6
1978	454,444	269,765	26,285	158,394	10,087	9,520	567	22.2
1979	474,589	281,233	23,356	170,000*	11,713	11,149	564	24.7*
1980	503,586	295,819	23,779	183,988	13,079	12,496	583	26.0
1981	556,814	333,251	26,778	196,785	16,328	15,539	789	29.3
1982	614,914	375,603	27,311	212,000	16,809	16,075	734	27.3
1983	651,439	394,953	28,945	227,541	17,512	16,788	724	26.9
1984	678,905	417,389	30,875	230,641	18,337	17,468	869	27.0
1985	752,603	451,812	35,781	265,010	18,485	17,658	827	24.6
1986	802,132	496,834	39,781	265,517	20,360	19,654	706	25.4
1987	853,114	520,336	42,478	290,300	22,067	21,410	657	25.9
1988	942,827	562,605	44,205	336,017	22,642	21,866	776	24.0
1989	1,070,227	629,995	53,387	386,845	23,737	22,804	933	22.2
1990	1,151,457	684,544	58,838	408,075	24,051	23,028	1,023	20.9
1991	1,215,144	728,605	63,930	422,609	24,352	23,567	785	20.0
1992	1,292,465	778,495	72,071	441,899	28,544	27,723	821	22.1
1993	1,375,536	828,566	80,815	466,155	31,693	30,842	851	23.0
1994	1,469,904	904,647	85,500	479,757	36,595	35,550	1,045	24.9
1995	1,588,370	989,004	89,538	509,828	39,053	38,022	1,031	24.6
1996	1,643,196	1,032,676	95,088	515,432	38,262	37,126	1,136	23.3
1997	1,733,150	1,074,809	101,755	556,586	26,095	25,226	869	15.1
1998	1,816,528	1,111,927	110,793	593,808	24,212	23,304	908	13.3
1999	1,889,538	1,155,878	125,682	607,978	23,512	22,645	867	12.4
2000	1,915,701	1,177,240	140,064	598,397	23,357	22,399	958	12.2
2001	1,969,747	1,179,954	149,852	639,941	22,131	21,224	907	11.2
2002	2,035,529	1,209,145	158,216	668,168	21,988	21,044	944	10.8
2003	2,082,145	1,225,971	168,144	688,030	22,061	20,914	1,147	10.6
2004	2,137,476	1,244,216	177,600	715,660	21,553	20,337	1,216	10.1
2005	2,189,696	1,261,071	186,364	742,261	22,484	21,317	1,167	10.3
2006	2,260,714	1,297,536	190,844	772,334	22,469	21,443	1,026	9.9
2007	2,295,982	1,316,105	197,285	782,592	21,978	20,825	1,153	9.6
2008	2,302,657	1,324,539	198,414	779,704	23,555	22,395	1,160	10.2
2009	2,274,099	1,319,563	205,087	749,449	22,698	21,552	1,146	10.0
2010	2,255,188	1,314,445	206,968	733,775	22,736	21,614	1,122	10.1
2011	2,227,723	1,290,212	214,774	722,737	23,362	22,067	1,295	10.5
2012	2,229,879	1,266,999	216,915	745,965	22,662	21,628	1,034	10.2

\* Estimates (jail population is unavailable for these years).

Figure A: Prisoner Population and Civil Rights Filings, Fiscal Years 1970–2012<sup>23</sup>

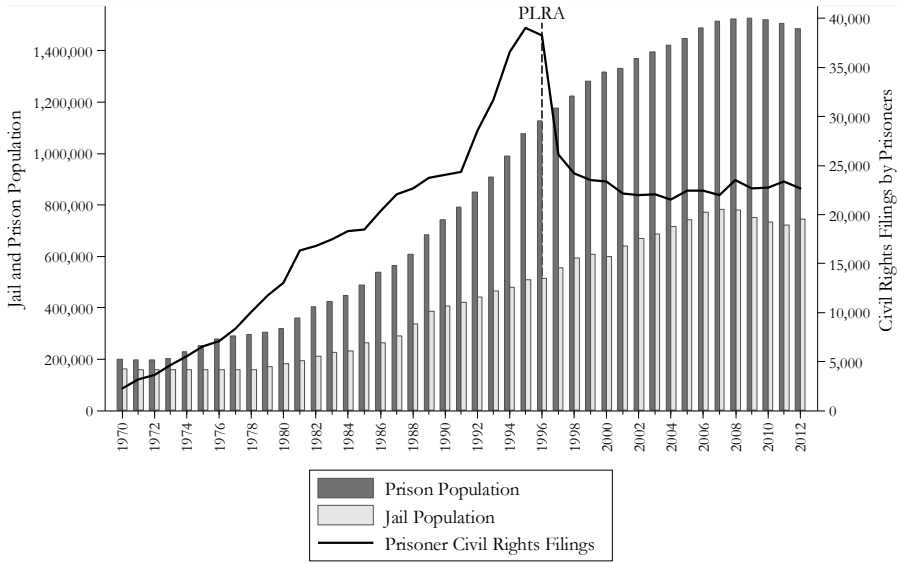
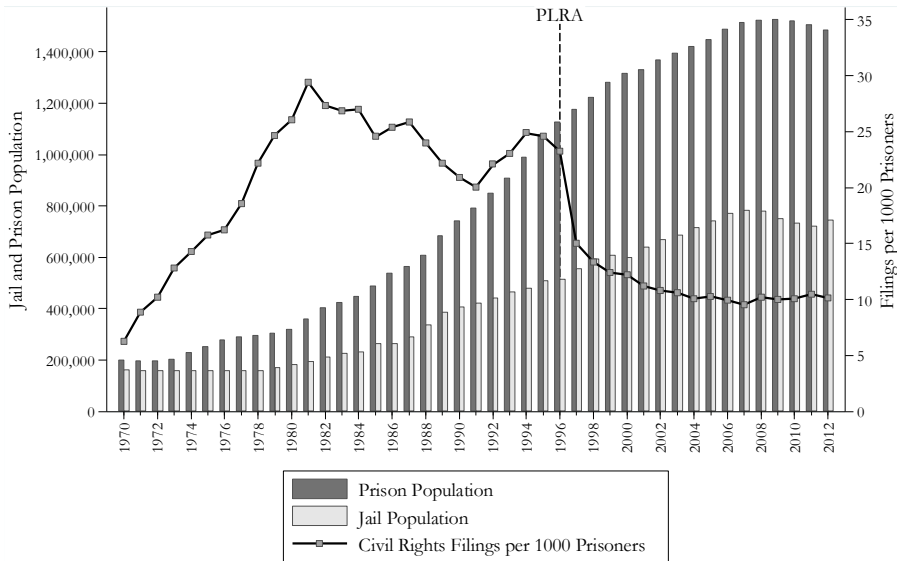


Figure B: Prisoner Population and Civil Rights Filings per 1000 Prisoners, Fiscal Years 1970–2012<sup>24</sup>



23. See *infra* Technical App. at A, C–E. Jail population is estimated for 1971–1977, 1979.

24. See *infra* Technical App. at A, C–E. Jail population is estimated for 1971–1977, 1979.

The state-by-state story is far more varied. Table 2 presents the data: it compares 1995 (the year prior to the PLRA) and 2011 (the latest year for which state-by-state jail information—and therefore filing rate information—is available). The first set of columns show the jail and prison population,<sup>25</sup> the prisoner civil rights filings in federal district court, and the resulting filing rate in 1995. The states are set out in rank order, with Iowa, the state whose prisoners were in 1995 the most litigious, ranked 1. The second set of columns presents the same information for 2011. The third set of columns shows the change over the sixteen year period, as a simple change and as a percent change—so Iowa's change from a filing rate of 101.7 to 14.5 federal lawsuits per 1000 prisoners is shown both as a change of 87.2 (101.7 – 14.5), and 85.7%. Nationwide the filing rate shrank by 14.1 filings per 1000 prisoners, and by nearly 60%, from 24.6 to 10.5 lawsuits per 1000 prisoners. For thirty states, the proportional change was that big or bigger, and for most of the rest, nearly as big. But as Table 2 presents, for a few states the change was far smaller. California, in fact, has seen almost no change in its filing rate—although it is alone in that experience. Figure C puts the penultimate columns of Table 2 into a histogram, to make plainer the varied experience of the states.

Figures D and E focus additional attention on the varying effects of the PLRA by state. Figure D presents the six states that have experienced the steepest decline in filing rates since 1995, showing their changed filing rates by year. (So for example, a drop of 10 filings per 1000 inmates from the rate in 1995—whatever that rate was—is shown as -10.) Figure E is the same information for the six states that have experienced the shallowest decline.

Figure D's states look very like the nation as a whole, although the pattern is more pronounced. But Figure E's patterns are quite different. While the trend lines are not entirely consistent state to state, they generally are U-shaped curves. That is, even in these least-affected states, filing rates declined for some years after the PLRA's passage. At that point, something—I imagine something different in each state—turned that trend around and caused the filing rate to increase. Future research might uncover what that spur was. We can guess that it was *not* appellate precedent; the states in question are from the First, Second, Third, Seventh, Eighth, and Ninth Circuits—no circuit has more than one state represented in the bottom six.

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25. Because state-by-state jail population is not available from 1994 to 1999, the jail population is calculated using a linear interpolation between the 1993 and 2000 figures.

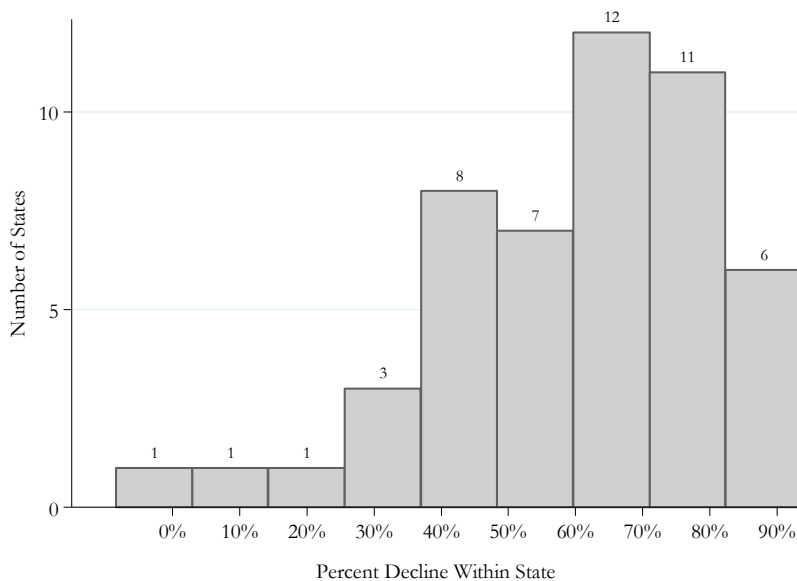


**Table 2:** Change in Prisoner Filings in U.S. District Court and Filing Rates by State, Fiscal Years 1995–2012<sup>26</sup>

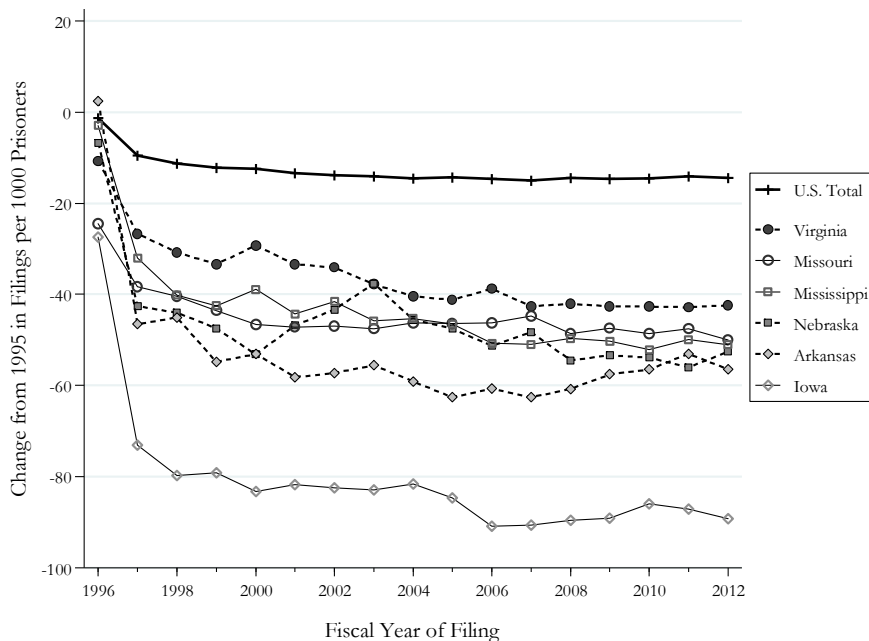
State	1995				2012				1995–2012		
	Jail and Prison Pop.	Filings	Filing Rate	Rate Rank	Jail and Prison Pop.	Filings	Filing Rate	Rate Rank	Rate Change		Rank Change
									N	%	
All U.S.	1,588,370	39,053	24.6		2,229,879	22,662	10.2		14.4	58.7%	
Iowa	8,015	815	101.7	1	12,999	162	12.5	14	89.2	87.7%	-13
Ark.	11,786	967	82.0	2	25,405	651	25.6	1	56.4	68.8%	1
Miss.	16,273	1,035	63.6	3	34,535	433	12.5	13	51.1	80.3%	-10
Neb.	4,733	297	62.8	4	8,163	83	10.2	22	52.6	83.8%	-18
Mo.	25,883	1,523	58.8	5	44,746	393	8.8	29	50.1	85.1%	-24
Va.	41,047	2,166	52.8	6	64,825	673	10.4	20	42.4	80.3%	-14
Ala.	31,639	1,403	44.3	7	43,926	690	15.7	6	28.6	64.6%	1
Del.	4,799	205	42.7	8	6,730	154	22.9	2	19.8	46.4%	6
La.	38,106	1,548	40.6	9	57,189	660	11.5	15	29.1	71.6%	-6
Nev.	11,898	475	39.9	10	19,516	289	14.8	8	25.1	62.9%	2
Ariz.	32,628	1,247	38.2	11	59,559	598	10.0	23	28.2	73.7%	-12
Me.	2,329	87	37.4	12	3,276	34	10.4	21	27.0	72.2%	-9
Ky.	22,084	824	37.3	13	41,149	228	5.5	43	31.8	85.2%	-30
Ind.	26,922	967	35.9	14	48,616	371	7.6	35	28.3	78.8%	-21
Tenn.	30,799	1,076	34.9	15	49,516	571	11.5	16	23.4	67.0%	-1
Pa.	63,720	2,114	33.2	16	101,938	1,281	12.6	12	20.6	62.1%	4
Colo.	20,278	634	31.3	17	36,746	353	9.6	26	21.7	69.3%	-9
Wyo.	1,913	57	29.8	18	3,723	18	4.8	46	25.0	83.8%	-28
Mont.	2,575	76	29.5	19	5,067	93	18.4	5	11.2	37.8%	14
Vt.	1,245	35	28.1	20	2,034	20	9.8	25	18.3	65.0%	-5
Haw.	2,812	76	27.0	21	5,993	81	13.5	9	13.5	50.0%	12
Kan.	12,373	333	26.9	22	18,850	136	7.2	38	19.7	73.2%	-16
Wis.	21,275	559	26.3	23	36,511	296	8.1	32	18.2	69.1%	-9
Utah	6,633	169	25.5	24	12,597	93	7.4	37	18.1	71.0%	-13
W. Va.	6,855	169	24.7	25	20,219	142	7.0	40	17.6	71.5%	-15
S.C.	26,927	648	24.1	26	40,679	621	15.3	7	8.8	36.6%	19
Wash.	20,185	481	23.8	27	29,729	375	12.6	11	11.2	47.1%	16
Conn.	15,740	370	23.5	28	18,497	154	8.3	31	15.2	64.6%	-3
Ga.	64,977	1,496	23.0	29	108,644	996	9.2	28	13.9	60.2%	1
Ill.	56,827	1,270	22.3	30	75,886	1,447	19.1	4	3.3	14.7%	26
Md.	32,295	708	21.9	31	35,499	393	11.1	19	10.9	49.5%	12
Mich.	56,049	1,217	21.7	32	62,226	794	12.8	10	9.0	41.2%	22
Okla.	21,686	437	20.2	33	38,689	180	4.7	48	15.5	76.9%	-15
N.C.	39,360	760	19.3	34	62,960	530	8.4	30	10.9	56.4%	4
R.I.	2,854	54	18.9	35	3,042	30	9.9	24	9.1	47.9%	11
Tex.	194,719	3,597	18.5	36	257,849	1,473	5.7	42	12.8	69.1%	-6
N.Y.	103,799	1,860	17.9	37	88,997	1,729	19.4	3	-1.5	-8.4%	34
Fla.	110,948	1,968	17.7	38	170,474	1,220	7.2	39	10.6	59.7%	-1
S.D.	3,239	57	17.6	39	6,195	47	7.6	36	10.0	56.9%	3
Alaska	2,876	50	17.4	40	6,412	7	1.1	50	16.3	93.7%	-10
Or.	14,327	227	15.8	41	23,853	187	7.8	33	8.0	50.5%	8
N.M.	8,022	124	15.5	42	16,219	93	5.7	41	9.7	62.9%	1
Idaho	4,978	75	15.1	43	11,443	107	9.4	27	5.7	37.9%	16
N.J.	42,701	639	15.0	44	45,473	504	11.1	18	3.9	25.9%	26
N.H.	3,244	47	14.5	45	4,711	36	7.6	34	6.8	47.3%	11
Ohio	57,732	746	12.9	46	73,687	248	3.4	49	9.6	74.0%	-3
Cal.	218,145	2,575	11.8	47	231,515	2,592	11.2	17	0.6	5.2%	30
Minn.	11,515	124	10.8	48	20,198	97	4.8	47	6.0	55.4%	1
Mass.	19,067	153	8.0	49	21,883	108	4.9	45	3.1	38.5%	4
N.D.	1,112	8	7.2	50	2,603	13	5.0	44	2.2	30.6%	6

26. See *infra* Technical App. at A, C–E.

**Figure C:** Percent Decline in Prisoner Filing Rate in U.S. District Court, Fiscal Years 1995–2012, by State<sup>27</sup>



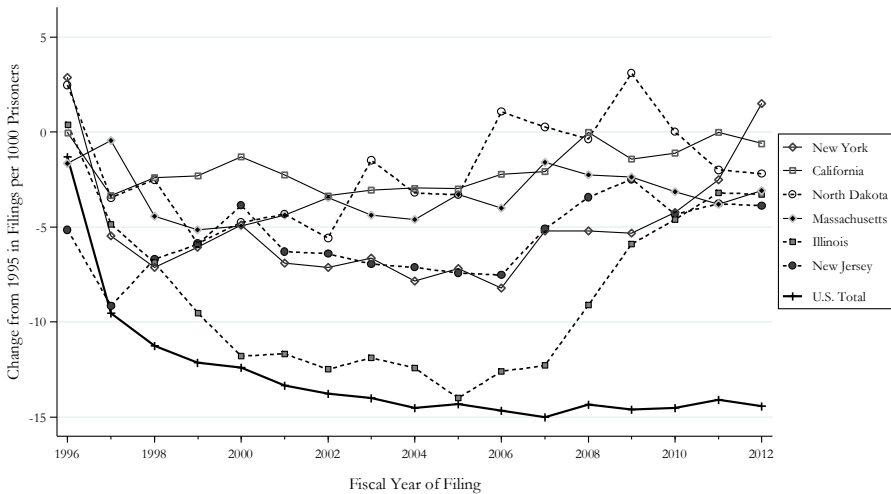
**Figure D:** Decline in Prisoner Filing Rate in U.S. District Court, Fiscal Years 1995–2012, Six States with Largest Declines<sup>28</sup>



27. See *infra* Technical App. at A, C–E.

28. See *infra* Technical App. at A, C–E.

**Figure E:** Decline in Prisoner Filing Rate in U.S. District Court, Fiscal Years 1995–2012, Six States with Smallest Declines<sup>29</sup>



## II. OUTCOMES

One might expect that the drastic pruning of the prisoner civil rights docket that occurred beginning in 1996 would tilt the docket toward higher quality cases—so that prisoner success rates would go up. However, I previously demonstrated, using data through 2001, that the PLRA not only made prisoner civil rights cases harder to bring, as illustrated above, but also made them harder to win.<sup>30</sup> In particular, prisoners' cases are thrown out of court for failure to properly complete often-complicated grievance procedures,<sup>31</sup> or because they do not allege physical injury, which some courts read the PLRA to require for recovery even in constitutional cases.<sup>32</sup> Now that we have another decade of data, it's worth reexamining this issue, to see if trends have continued, moderated, or reversed.

New data, presented in Table 3, confirm my earlier conclusions. The table presents outcomes in prisoners' federal civil rights cases, resolved from Fiscal Year 1988 through 2012, the last year for which data are available. (1988 is chosen as a start date because of federal coding protocol changes prior to that year.) Each row is a year, each column a particular outcome. Scanning the table one column at a time, to detect trends over time, reveals that the courts are becoming less and less hospitable for prisoners' claims. Column (a) shows filings; column (b) terminations; and column (c) the portion of those terminations that constituted

29. See *infra* Technical App. at A, C–E.

30. See Schlanger, *Inmate Litigation*, *supra* note 4, at 1644–64.

31. See *supra* note 5 and accompanying text.

32. See *supra* note 8.

judgments. (Most non-judgments are transfers to another court.) Most remaining outcomes are calculated as a proportion of judgment dispositions. Column (d) is pretrial decisions for the defendant; tracing it through the years shows that after the PLRA, such decisions increased although not overwhelmingly so. On the other side, pretrial victories for the plaintiff, in column (e), have declined, though some of that decline predates the PLRA.<sup>33</sup> Column (f) shows a decline in settlements, much but not all postdating the PLRA. Column (g) shows a similar decline in voluntary dismissals, which are often settlements as well. And column (h) shows a decline in trials, again much of it subsequent to the PLRA. (Plaintiffs' victories at those decreasing numbers of trials, in column (i), appear not to have changed.) Columns (j) and (k) show the timing of settlements, before or after "issue is joined," (that is, before or after the filing of an answer to the civil complaint). The declining portion of settlements in column (j) suggests that settlements have become harder to come by for plaintiffs. And finally, column (l) sums up the portion of the docket in which it appears plaintiffs may have succeeded in any way, adding together settlements, voluntary dismissals, pretrial victories, and victories at trial. Those numbers are down substantially since the early 1990s.

In short, in cases brought by prisoners, the government defendants are winning more cases pretrial, settling fewer matters, and going to trial less often. Those settlements that do occur are harder fought; they are finalized later in the litigation process. Plaintiffs are, correspondingly, winning and settling less often, and losing outright more often. Probably not all these changes were caused by the PLRA—several of the trend lines seem to start prior to the statute's enactment. But given the PLRA's very definite anti-plaintiff tilt, it seems nearly certain that the statute has caused at least some of the declining access to court remedies demonstrated in Table 3.

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33. This variable is sufficiently error ridden, at least in the prisoner litigation data, to counsel against reliance on it. See *infra* text accompanying Table 7 (discussing high error rates).

**Table 3: Outcomes in Prisoner Civil Rights Cases in Federal District Court, Fiscal Years 1988–2012<sup>34</sup>**

Fiscal Year	(a) Filings	(b) Terminations	(c) Judgments, as % of Terminations	Outcomes, as % of Judgment Dispositions					(i) Plaint. Trial Vict., as % of Trials	Timing of Settlements, as % of Settlements, per Vol. Dismissals		(l) All Plaint. Successes, as % of Judgments
				(d) Pretrial Decisions for Deft.	(e) Pretrial Decisions for Plaintiff.	(f) Settled	(g) Vol. Dismissals	(h) Trials		(j) Before Issue Joined	(k) After Issue Joined	
1988	22,642	24,077	96.5%	83.2%	1.1%	7.1%	4.0%	3.6%	13.6%	58.5%	41.5%	12.6%
1989	23,737	24,714	96.5%	82.1%	1.0%	7.3%	5.1%	3.7%	14.0%	52.3%	47.7%	13.9%
1990	24,051	24,864	96.0%	82.7%	1.1%	7.6%	5.0%	3.4%	16.6%	48.8%	51.2%	14.3%
1991	24,352	24,877	95.0%	82.1%	0.9%	7.7%	6.1%	3.1%	15.2%	52.1%	47.9%	15.2%
1992	28,544	28,357	94.9%	80.2%	1.2%	7.6%	7.5%	3.3%	12.1%	60.2%	39.8%	16.8%
1993	31,693	31,893	95.1%	81.2%	1.0%	6.8%	8.0%	2.8%	15.3%	60.0%	40.0%	16.2%
1994	36,595	36,098	94.9%	80.9%	0.8%	7.2%	7.2%	2.9%	13.1%	53.8%	46.2%	15.6%
1995	39,053	41,201	94.8%	83.5%	0.7%	6.2%	6.5%	2.5%	10.7%	61.3%	38.7%	13.7%
1996	38,262	42,522	95.0%	84.5%	0.6%	5.5%	6.3%	2.5%	9.5%	61.8%	38.2%	12.7%
1997	26,095	34,982	96.0%	83.8%	0.7%	5.4%	6.8%	2.8%	10.7%	61.2%	38.8%	13.2%
1998	24,212	29,938	95.9%	85.2%	0.5%	5.2%	6.0%	2.5%	8.6%	60.7%	39.3%	12.0%
1999	23,512	26,561	94.7%	86.5%	0.5%	4.7%	5.2%	2.4%	12.1%	56.7%	43.3%	10.7%
2000	23,357	25,176	93.7%	86.3%	0.4%	4.2%	5.7%	2.4%	13.6%	54.0%	46.0%	10.7%
2001	22,131	24,572	93.9%	87.0%	0.4%	3.9%	5.7%	2.1%	14.0%	53.9%	46.1%	10.3%
2002	21,988	24,245	93.9%	87.9%	0.4%	3.6%	5.6%	1.8%	8.8%	55.2%	44.8%	9.8%
2003	22,061	23,653	93.6%	88.0%	0.6%	3.8%	5.1%	1.4%	14.1%	53.2%	46.8%	9.7%
2004	21,553	23,181	92.8%	86.0%	0.4%	3.8%	4.8%	1.4%	13.2%	55.4%	44.6%	9.2%
2005	22,484	23,712	92.5%	85.0%	0.3%	3.8%	4.4%	1.2%	10.0%	53.4%	46.6%	8.7%
2006	22,469	24,846	93.6%	83.2%	0.3%	3.9%	4.0%	1.2%	12.9%	54.3%	45.7%	8.4%
2007	21,978	23,630	92.5%	82.0%	0.2%	3.8%	4.7%	1.3%	9.4%	56.7%	43.3%	8.9%
2008	23,555	25,097	92.2%	85.3%	0.5%	3.7%	4.6%	1.2%	15.1%	53.2%	46.8%	9.0%
2009	22,698	24,454	91.9%	87.0%	0.5%	4.2%	5.3%	1.3%	13.1%	51.2%	48.8%	10.2%
2010	22,736	24,781	91.3%	85.9%	0.5%	4.8%	5.2%	1.3%	14.4%	47.6%	52.4%	10.7%
2011	23,362	24,760	90.4%	85.8%	0.4%	4.9%	5.4%	1.2%	11.6%	49.5%	50.5%	11.0%
2012	22,662	24,673	90.9%	84.9%	0.5%	5.0%	5.4%	1.3%	11.9%	50.6%	49.4%	11.1%

Table 4 next provides some context for the very limited success prisoner plaintiffs experience, setting out the same outcome information but for other categories of cases, all in Fiscal Year 2012. As it shows, only in the other prisoner category—habeas cases and other similar quasi-criminal matters—do plaintiffs fare anywhere close to as badly.

34. See *infra* Technical App. at A.

**Table 4:** Outcomes in Federal District Court Cases  
by Case Type, Fiscal Year 2012<sup>35</sup>

	Outcomes, as % of Judgment Dispositions											
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	Timing of Settlements, as % of Settlements, per Vol. Dismissals		(l)
	Filings	Terminations	Judgments, as % of Terminations	Pretrial Decisions for Def.	Pretrial Decisions for Plaint.	Settled	Vol. Dism- issals	Trials	Plaint. Trial Vict., as % of Trials	Before Issue Joined	After Issue Joined	All Plaint. Succes- ses, as % of Judg- ments
All	278,442	271,572	87.9%	41.7%	6.8%	32.6%	14.5%	1.1%	43.4%	42.2%	57.8%	54.4%
Habeas, Quasi Crim.	26,241	27,245	89.9%	90.2%	2.1%	2.2%	2.3%	0.4%	35.9%	77.0%	23.0%	6.7%
Prisoner Civil Rights	22,662	24,673	90.9%	84.9%	0.5%	5.0%	5.4%	1.3%	11.9%	50.6%	49.4%	11.1%
Bankr.	3,778	2,934	86.8%	52.2%	6.6%	8.6%	8.3%	0.2%	75.0%	56.0%	44.0%	23.7%
Immigra- tion	1,742	1,821	92.9%	57.4%	2.1%	10.5%	27.1%	0.2%	100.0%	77.1%	22.9%	40.0%
Civil Rights	19,707	20,661	92.3%	48.8%	1.9%	32.9%	12.7%	3.1%	28.3%	26.4%	73.6%	48.4%
Statutory Actions	49,846	48,888	84.4%	29.3%	7.8%	26.2%	23.3%	0.7%	64.3%	51.3%	48.7%	57.7%
Other	5,714	5,253	79.0%	39.0%	17.9%	24.0%	17.9%	0.8%	48.5%	45.3%	54.7%	60.1%
Civil Rights, Empl.	16,261	16,984	92.8%	37.7%	1.1%	45.0%	13.9%	1.8%	34.3%	16.5%	83.5%	60.7%
Torts (Non- product)	18,051	19,580	85.6%	31.8%	2.2%	46.6%	16.0%	2.7%	52.6%	21.3%	78.7%	66.2%
U.S. Plaint.	14,055	14,609	89.9%	28.5%	38.4%	15.4%	16.9%	0.3%	63.2%	60.2%	39.8%	70.9%
Contract	23,859	26,358	88.0%	25.0%	12.1%	40.5%	20.3%	1.6%	68.9%	29.0%	71.0%	73.9%
Product Liability	22,942	43,914	83.6%	24.1%	0.1%	64.5%	11.0%	0.2%	30.8%	59.6%	40.4%	75.7%
Labor and Empl.	18,752	18,652	93.8%	19.0%	15.7%	43.7%	20.5%	0.8%	59.3%	37.0%	63.0%	80.3%

Prisoner plaintiffs not only lose more often than other plaintiffs—they lose faster. Table 5 sets out the time to disposition for cases filed in district courts, Fiscal Year 1988 to 2011, the last year with full data available.

35. See *infra* Technical App. at A.

**Table 5: Days to Disposition: District Court Cases by Fiscal Year of Filing<sup>36</sup>**

Fiscal Year	Prisoner Civil Rights Cases		"Other" Civil Rights Cases		All Cases Except Prisoner Civil Rights	
	25% of docket	50% of docket	25% of docket	50% of docket	25% of docket	50% of docket
1988	46 days	170 days	122 days	294 days	103 days	234 days
1989	42 days	165 days	116 days	290 days	104 days	239 days
1990	49 days	176 days	114 days	276 days	111 days	252 days
1991	61 days	196 days	120 days	291 days	107 days	237 days
1992	53 days	185 days	116 days	279 days	98 days	217 days
1993	50 days	180 days	93 days	258 days	95 days	228 days
1994	46 days	176 days	87 days	252 days	103 days	238 days
1995	40 days	149 days	107 days	276 days	106 days	231 days
1996	38 days	130 days	111 days	275 days	106 days	249 days
1997	44 days	128 days	112 days	276 days	105 days	258 days
1998	41 days	120 days	117 days	284 days	100 days	237 days
1999	41 days	119 days	114 days	277 days	92 days	212 days
2000	43 days	122 days	116 days	275 days	94 days	219 days
2001	43 days	120 days	114 days	273 days	99 days	234 days
2002	43 days	120 days	112 days	270 days	96 days	238 days
2003	44 days	130 days	113 days	267 days	105 days	244 days
2004	44 days	130 days	111 days	261 days	112 days	263 days
2005	44 days	134 days	111 days	268 days	96 days	232 days
2006	43 days	132 days	110 days	273 days	78 days	231 days
2007	42 days	120 days	100 days	267 days	111 days	281 days
2008	35 days	110 days	100 days	267 days	111 days	289 days
2009	38 days	122 days	100 days	270 days	98 days	230 days
2010	39 days	124 days	97 days	264 days	75 days	209 days
2011	42 days	134 days	98 days	265 days	67 days	198 days

Table 6 provides one piece of the explanation, setting out the proportion of cases by type of suit, litigated by plaintiffs without counsel. It shows that prisoner civil rights cases, as one would expect, are overwhelmingly pro se—and at a much higher rate than prior to the PLRA, which drastically limited attorneys’ fees.<sup>37</sup>

36. See *infra* Technical App. at A.

37. The table begins with 1996 because that is the first year for which data are available, but the prisoner cases terminated in 1996 were overwhelmingly (eighty-six percent) filed prior to the enactment of the PLRA.

**Table 6:** Pro Se Litigation in U.S. District Courts,  
Cases Terminated Selected Fiscal Years<sup>38</sup>

<b>Case Category</b>	<b>1996</b>	<b>2000</b>	<b>2006</b>	<b>2012</b>
Contract	2.5%	2.6%	3.7%	4.4%
Torts (Nonproduct)	5.4%	6.0%	8.7%	12.6%
Product Liability	0.8%	1.5%	1.5%	1.1%
Civil Rights	29.8%	30.1%	32.7%	34.6%
Civil Rights Employment	16.3%	20.3%	19.2%	19.8%
<b>Prisoner Civil Rights</b>	<b>83.3%</b>	<b>95.6%</b>	<b>96.5%</b>	<b>94.9%</b>
Labor and Employment	2.9%	3.8%	3.0%	2.9%
Statutory Actions	6.0%	6.5%	6.4%	8.2%
U.S. Plaintiff	3.4%	1.3%	4.6%	13.2%
Habeas, Other Quasi Criminal	72.2%	84.5%	85.1%	88.8%
Bankruptcy	12.8%	18.2%	19.0%	20.5%
Immigration	8.6%	29.9%	18.9%	35.4%
Other	11.8%	19.7%	13.6%	14.5%
<b>Total</b>	<b>26.9%</b>	<b>26.2%</b>	<b>25.0%</b>	<b>26.1%</b>
<b>Total Without Prisoner or Habeas Cases</b>	<b>7.8%</b>	<b>8.6%</b>	<b>8.2%</b>	<b>10.5%</b>

### III. DAMAGES

As the last aspect of my examination of prisoner damage actions, I look at the damages themselves. I previously conducted a study of cases terminated in 1993, and found that (after excluding one very large outlying award) the average damages in cases with trial judgments for prisoner plaintiffs were about \$18,800, with a median of a mere \$1000.<sup>39</sup> I decided to repeat this study, to see what might have changed in the two decades since. To do this, I examined—using the docket sheet and other court documents—each case coded by the court system as ending with a trial or other litigated judgment in Fiscal Year 2012, the latest data available. The AO's coding is somewhat imprecise, particularly for the non-trials. Of those cases that met these initial selection criteria, most turned out to be defendants' victories, and others turned out to be settlements: I excluded both. Table 6 presents the results. As it shows, case results for 2012 are entirely consonant with the 1993 study. Of fifty-eight litigated judgments, the mean award was under \$22,000 for trials and under \$19,000 for non-trials, with a median of just \$1525 for

38. See *infra* Technical App. at A.

39. See Schlanger, *Inmate Litigation*, *supra* note 4, at 1603.



trials and \$7000 for non-trials. Across all the cases, nationwide litigated damages totaled a mere \$1,000,000.

**Table 7:** Prisoner Civil Rights Litigated Victories,  
Fiscal Year 2012 (Excludes Settlements)<sup>40</sup>

	<b>Trials</b>	<b>Non-trials</b>	<b>All</b>
Plaintiffs Wins	36	21	57
Injunctive Matters	4	3	7
≤ \$1,000	15	3	18
\$1,001–13,000	8	12	20
25,000–80,000	7	2	9
\$100,000 +	2	1	3
Total Damages Awarded	\$700,908	\$339,862	\$1,040,770
Cases with Damages	32	18	50
Average Damages per Case	\$21,903	\$18,881	\$20,815
Median Damages per Case	\$ 1,525	\$7,000	\$4,185

Thus when prisoners do litigate all the way to victory, they tend to win pretty small.

#### IV. COURT ORDERS

Since the 1970s, court orders have been a major source of regulation and oversight for American jails and prisons—whether those orders entailed active judicial supervision, intense involvement of plaintiffs’ counsel or other monitors, or simply a court-enforceable set of constraints on corrections officials’ discretion.<sup>41</sup> The PLRA altered this system with provisions that promote termination of existing court orders, and others that shortened the life span of new orders.<sup>42</sup> The impact took some time to manifest, but is now very clear. Table 7 shows the results.<sup>43</sup>

40. See *infra* Technical App. at A–B.

41. See Schlanger, *Civil Rights Injunctions*, *supra* note 4, at 552.

42. See *supra* notes 10–11.

43. Table 7 is based on data reported by jail and prison officials in the censuses conducted by the Bureau of Justice Statistics every five or six years. Since 1983, the censuses have included questions about the existence of court orders on a variety of (specified) topics. The resulting data are the most comprehensive information available, although the data include demonstrable and important omissions. For example, there has been a court order involving mental health care at every California prison since 1997, and another involving medical care since 2002. For information on the mental health orders, see *Coleman v. Brown*, No. 2:90-cv-00520 (E.D. Cal.), CIVIL RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=573> (last visited Nov. 1, 2014). For information on the medical decree, see *Plata v. Brown*, No. 3:01-cv-01351 (N.D. Cal.), CIVIL RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=589> (last visited Nov. 1, 2014); *Order Adopting Class Action Stipulation as Fair, Reasonable and Adequate*, *Plata v. Davis*, No. 3:01-cv-01351 (N.D. Cal. June 20, 2002), <http://www.clearinghouse.net/chDocs/public/PC-CA-0018-0001.pdf> (last visited Nov. 1, 2014); and the underlying Stipulation for Injunctive Relief, *Plata v.*

**Table 8:** Incidence of Court Orders, Local Jails and State Prisons, 1983–2006<sup>44</sup>

	Year	(a) Total Facilities	(b) Facilities with Orders	(c) Total Population	(d) Population Housed in Facilities with Orders
Local Jails	1983	3,338	18%	227,541	51%
	1988	3,316	18%	336,017	50%
	1993	3,268	18%	466,155	46%
	1999	3,365	17%	607,978	32%
	2006	3,282	11%	756,839	20%
State Prisons	1984	694	27%	377,036	43%
	1990	957	28%	617,859	36%
	1995	1,084	32%	879,766	40%
	2000	1,042	28%	1,042,637	40%
	2005	1,067	18%	1,096,755	22%

Columns (a) and (c) show the total number of facilities, and total incarcerated population, for jails and prisons in each census year. Columns (b) and (d) then show the proportion of those totals in which the census responses report court orders. Looking at columns (b) and (d) in the censuses most immediately following the PLRA—1999 for jails and 2000 for prisons—suggests only a very limited impact of the statute. (This is what I reported in 2006, before data from the next iteration of the census became available.) The next census administration is the one where the PLRA’s impact is much more marked: the decline in covered facilities (column (b)) is very large, and the decline in covered population (column (d)) even more so.

And finally, Table 9 emphasizes the new rarity of system-wide court order coverage. The table’s first row lists, by census year, how many states report one or more facilities subject to court order. That number remains substantial. But the second row shows states in which sixty percent or more of the facilities or population are covered by court order—and that row demonstrates that where this kind of system-wide (or close to it) coverage used to be quite common, it is now rare. In 2005 and 2006, respectively, only five states reported system-wide court order coverage of their prisons, and only two states of their jails.<sup>45</sup>

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Davis, No. 3:01-cv-01351 (N.D. Cal. June 13, 2002), <http://www.clearinghouse.net/chDocs/public/PC-CA-0018-0005.pdf> (last visited Nov. 1, 2014). Yet no California prison reported *any* court order in the Census responses in 2005. So the data in Table 7 should be taken as indicative of trends, rather than dispositive about any given state or facility.

44. See *infra* Technical App. at F–G.

45. I define “system-wide” as reaching sixty percent or more facilities or population in a state, in a given census administration, after private and community-corrections facilities are excluded.

**Table 9:** System-Wide Court Order Coverage, by State<sup>46</sup>

	Local Jails (n = 47)					State Prisons (n = 51)				
	1983	1988	1993	1999	2006	1984	1990	1995	2000	2005
States w/ Any Court Orders	44	46	43	43	39	43	44	41	30	25
States w/ System-Wide Orders*	8	8	9	3	2	11	14	16	12	5
<u>System-Wide Court Order Coverage</u>										
Alaska						•	•	•	•	
Ariz.	•	•	•	•	•				•	
Ark.						•				
Cal.	•	•	•	•	•				•	
Colo.										•
Conn.									•	•
Del.								•		
D.C.	•	•	•	•		•	•	•	•	
Fla.	•	•	•			•				
Ga.								•		
Ill.	•	•	•							
Ind.							•			
Kan.							•	•		
La.	•	•	•			•	•	•		
Minn.						•				
Miss.						•	•	•	•	
Mont.									•	•
N.H.						•	•	•		
N.J.	•									•
N.M.						•	•	•		
N.Y.	•	•	•						•	
N.C.								•		
Ohio									•	
Or.		•	•							
R.I.								•	•	
S.C.							•	•		
S.D.							•	•		
Tenn.			•			•	•		•	
Tex.						•	•	•	•	•
Utah							•	•		
W. Va.							•	•		

\* States in which the proportion of the states' non-private, non-community corrections facilities reporting court orders, or the proportion of incarcerated population in those facilities, is greater than sixty percent.

46. See *infra* Technical App. at F-G.

The point is not that courts are no longer part of the prison and jail oversight ecosystem. In California (of all states) the contrary is obvious—numerous injunctive cases have transformed California’s criminal justice system,<sup>47</sup> and more changes are underway.<sup>48</sup> But the PLRA has made such cases far more rare.

#### CONCLUSION

In my view, court cases and court-enforceable regulation have since the 1970s been useful correctives to dysfunctions and abuses that frequently occur in our low-visibility jails and prisons. But the practice of prisoner litigation is susceptible to criticism, from the left, that prisoner access to courts offers the appearance but not the reality of justice,<sup>49</sup> and that court orders have both “contributed to mass incarceration,” by promoting the building of new prisons to reduce overcrowding,<sup>50</sup> and limited prisoner freedom by enhancing prison bureaucracy.<sup>51</sup> Simultaneously, the critics from the right who got the PLRA passed suggested that prisoner cases are usually frivolous and prison and jail decrees frequently overreaching.<sup>52</sup> This debate is far beyond the scope of this Article—but perhaps further research will be spurred by publication of these statistics, which demonstrate the kind of variance, over time and location, that researchers might use to shed additional light on how prisoner litigation actually functions. Whichever view is correct, the statistics set out below pose an enormous challenge to us as a polity. Litigation has receded as an oversight method in American corrections. It is vital that something take its place.

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47. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910 (2011); Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165 (2013).

48. For a description of the *Plata* litigation’s recent progress, see *Plata v. Brown*, 3:01-cv-01351 (N.D. Cal.), CIVIL RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=589> (last visited Nov. 1, 2014). For descriptions of other ongoing litigated interventions into California’s criminal justice system, see, for example, *Ashker v. Brown*, 4:09-cv-05796-CW (N.D. Cal.), CIVIL RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=12103> (last visited Nov. 1, 2014); *Gray v. County of Riverside*, 5:13-cv-00444 (C.D. Cal.), CIVIL RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=12729> (last visited Nov. 1, 2014).

49. Cf., e.g., DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* (1997) (presenting and analyzing this critique more broadly).

50. Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOC’Y REV. 731, 760 (2010).

51. Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications*, 24 PACE L. REV. 433, 466–75 (2004).

52. See, e.g., ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003); Dennis C. Vacco et al., Letter to the Editor, *Free the Courts from Frivolous Prisoner Suits*, N.Y. TIMES, Mar. 3, 1995, at A26 (letter from Attorneys General of New York, Nevada, Indiana, and Washington).

**TECHNICAL APPENDIX**

I have posted a compiled file containing state-by-state-by-year data:

- Jail population
- State prison population
- Federal prison population
- Federal court prisoner filings (by type of federal/non-federal defendant)

This full panel dataset is available at <https://www.law.umich.edu/facultyhome/margoschlanger/Pages/Trends.aspx>, and was used to produce Tables 1–2, and Figures A–E. This printed Technical Appendix includes more information about the sources that underlie that posted dataset, and also the data used for the remaining tables and figures.

Both federal and state prison populations are year-end counts, and are available for all years for all states. Jail population is entirely unavailable for 1971–1977 and 1979, and only national data are available for 1980–1982, 1984–1987, 1991–1992, and 1994–1999. Where available, the figure chosen is the average daily population (because that is the most consistently available data for state-by-state data). But for a few years when average daily population is not available, the mid-year count is used instead. Details are included in the data file itself.

*A. Federal Court Filings, Outcomes, and Other  
Characteristics (Tables 1–6, Figures A–E)*

Case filing, termination, and outcome figures in Tables 1–6 are derived from data by the Administrative Office of the U.S. Courts (the AO) and cleaned up by the Federal Judicial Center, the research arm of the federal court system. These data include each and every case “terminated” (that is, ended, at least provisionally) by the federal district courts since 1970. The Federal Judicial Center also publishes periodic reports on the data. My figures are not from these written reports, but are instead based on my compilation and manipulation of the raw data to eliminate duplicates, remands, etc. The Federal Judicial Center lodges this database for public access with the Inter-university Consortium for Political and Social Research (ICPSR), which maintains it at <http://www.icpsr.umich.edu>. I used the following datasets, pulling the “civil terminations” data from each. Unfortunately, I am unable to post actual data because the Bureau of Justice Statistics has instructed the ICPSR that the data be available only for restricted use. (By “prisoner civil rights” I mean cases with a “nature of suit” code equal to either 550 (prisoner civil rights) or 555 (prison conditions). I discern no clear distinction between these two codes.) A consolidated codebook for the resulting consolidated database is posted at <https://www.law.umich.edu/facultyhome/>

margoschlanger/Pages/Trends.aspx. It includes more details, such as the nature of suit codes used for the categories in Tables 3, 4, and 6.

- FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 1970–2000, ICPSR STUDY NO. 8429 (last updated Apr. 25, 2002).
- FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2001, ICPSR STUDY NO. 3415 (last updated June 19, 2002).
- FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2002, ICPSR STUDY NO. 4059 (last updated Oct. 8, 2004).
- FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2003, ICPSR STUDY NO. 4026 (last updated June 17, 2004).
- FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2004, ICPSR STUDY NO. 4348 (last updated Nov. 4, 2005).
- FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2005, ICPSR STUDY NO. 4382 (last updated Mar. 17, 2006).
- FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2006, ICPSR STUDY NO. 4685 (last updated Mar. 15, 2007).
- FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2007, ICPSR STUDY NO. 22,300 (last updated June 18, 2008).
- FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2008, ICPSR STUDY NO. 25,002 (last updated June 29, 2009).
- FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2009, ICPSR STUDY NO. 29,661 (last updated Nov. 26, 2012).
- FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2010, ICPSR STUDY NO. 30,401 (last updated Nov. 26, 2012).
- FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2011, ICPSR STUDY NO. 33,622 (last updated Jan. 8, 2013).
- FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2012, ICPSR STUDY NO. 34,881 (last updated Mar. 18, 2014).
- FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, APPELLATE AND CIVIL PENDING DATA, 2012, ICPSR 29,281 (last updated Mar. 19, 2014) (I used these data for pending civil cases).

### B. *Case Outcomes and Damages (Table 7)*

Table 7 began using information in the AO data described above, in the terminations data for Fiscal Year 2012. I made two lists of prisoner civil rights cases in that dataset. For the first column in the table, I took the thirty-six cases in which the disposition code indicated a trial judgment in plaintiff's favor (disp = 7, 8, or 9, and judgefor = 1 or 3). The second column includes other, non-trial, cases in which judgment was listed as in plaintiff's favor (judgefor = 1 or 3). For each case on either list, I examined the docket, available via the federal court's Public Access to Court Electronic Records system, and relevant court documents to

determine both whether the AO-coded outcome was correct and the actual damages awarded, if any. I was able to find all but one of the cases. Table 7 includes only cases in which the outcome was in fact a litigated plaintiffs' judgment, omitting many cases in which defendants won or the outcome was a settlement. I list the actual damages, which frequently differ from the AO-coded damages.

C. *State Prison Population (Tables 1 & 2, Figures A–E)*

- 1970: *Prisoners in State and Federal Institutions: 1968–1970*, NAT'L PRISONER STAT. BULL. (U.S. Dep't of Justice, D.C.), Apr. 1972, at 22, tbl. 10c (sentenced prisoners).
- 1971 to 1973: *Prisoners in State and Federal Institutions on December 31, 1974*, NAT'L PRISONER STAT. BULL. (U.S. Dep't of Justice, D.C.), June 1976, at 14, tbl. 1 (mostly sentenced prisoners).
- 1974: *Prisoners in State and Federal Institutions on December 31, 1974*, NAT'L PRISONER STAT. BULL. (U.S. Dep't of Justice, D.C.), June 1976, App. II, at 36, tbl. 1 (all prisoners).
- 1975: *Prisoners in State and Federal Institutions on December 31, 1975*, NAT'L PRISONER STAT. BULL. (U.S. Dep't of Justice, D.C.) Feb. 1977, App. II, at 36, tbl. 1 (all prisoners).
- 1976: *Prisoners in State and Federal Institutions on December 31, 1977*, NAT'L PRISONER STAT. BULL. (U.S. Dep't of Justice, D.C.) Feb. 1979, at 10, tbl. 1 (all prisoners).
- 1977: *Prisoners in State and Federal Institutions on December 31, 1978*, NAT'L PRISONER STAT. BULL. (U.S. Dep't of Justice, D.C.) May 1980, at 42, special tbl. (all prisoners, in custody).
- 1978 to 2012: *Corrections Statistical Analysis Tool (CSAT)—Prisoners*, U.S. DEP'T JUST., BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=nps> (follow "Quick Tables" hyperlink; then view "Inmates in custody of state or federal correctional facilities, excluding private prison facilities, December 31, 1978-2013," and "Inmates in custody of state or federal correctional facilities, including private prison facilities, December 31, 1999-2012"; [http://www.bjs.gov/nps/resources/documents/QT\\_custnopriv\\_tot.xlsx](http://www.bjs.gov/nps/resources/documents/QT_custnopriv_tot.xlsx), and [http://www.bjs.gov/nps/resources/documents/QT\\_custwpriv\\_tot.xlsx](http://www.bjs.gov/nps/resources/documents/QT_custwpriv_tot.xlsx) post the data).

D. *Federal Prison Population (Tables 1 & 2, Figures A–E)*

1. *National Population Only (Tables 1 & 2, Figures A–E)*

For national federal prison population, the sources are the same as for state prison population, Part C, *supra*.

2. *State-by-State Population (Table 2, Figures C–E)*

Federal prison state-by-state population is not average daily population; the data are for prisoner counts, usually for the end of September. Full details available with the dataset itself.

1970 to 1993: U.S. Dep't of Justice, Federal Bureau of Prisons, Statistical Report (annual)

Table	A-2	(1970–1986)
Table	10	(1987)
Table	12	(1988–1989)
Table	A13	(1990–1993)

1994 to 2012: BOP Inmate Population by Institution (includes privately managed institutions, but not community corrections). Federal Bureau of Prisons spreadsheet provided June 13, 2014, by Jennifer Batchelder, Supervisory Research Analyst, Office of Research and Evaluation, Federal Bureau of Prisons, on file with author.

E. *Jail Population (Tables 1–2, Figures A–E)*

Note: No data available for 1971 to 1977 and 1979. I assumed a jail population of 160,000 for 1971 to 1977, based on the figures in 1970 and 1978. I assumed a jail population of 170,000 in 1979, based on the figures in 1978.

1. *National Population Only*

1980 to 2000: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES (2002), *previously available at* <http://www.ojp.usdoj.gov/bjs/glance/sheets/corr2.wk1> (on file with author) (June 30 count for jails, Dec. 31 count for prisons, and Jan. 1 count for paroles).

1980 to 1994: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1994, at 5 (June 1996, NCJ 160091), *available at* <http://www.bjs.gov/content/pub/pdf/>



- cpius94a.pdf; *see also* <http://www.bjs.gov/content/pub/sheets/cpi94a.zip> (June 30 count).
- 1990 to 1996: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1996, at 20 (Apr. 1999, NCJ 170013), *available at* <http://www.bjs.gov/content/pub/pdf/cpius96.pdf> (June 30 count for all, and average daily population 1990–1993).
- 1997 to 1999: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2000, at 6, *available at* <http://www.bjs.gov/content/pub/pdf/pjim00.pdf> (June 30 count).
- 2000 to 2013: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2013—STATISTICAL TABLES at tbl.1 (May 2014, NCJ 245350), *available at* <http://www.bjs.gov/content/pub/pdf/jim13st.pdf> (June 30 count and average daily population).

## 2. *State-by-State Population*

- 1970: Mid-year jail population. LAW ENFORCEMENT ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE, NATIONAL JAIL CENSUS 1970, at 10 tbl.2 (1971) (March count).
- 1978, 1983, 1988, and 1993: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAIL INMATES, BY SEX, HELD IN LOCAL JAILS (1997), *previously available at* <http://www.ojp.usdoj.gov/bjs/data/corpop09.wk1> (on file with author) (June 30 count); *see also* Jail Censuses for those years (June 30 count and average daily population); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, THE 1983 JAIL CENSUS, at 2 (Nov. 1984, NCJ 95536); Part F., *infra*.
- 1983: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1985, at 5 (Dec. 1987, NCJ-103957), *available at* <http://www.bjs.gov/content/pub/pdf/cpus85.pdf> (June 30 count).
- 1989: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1989, at 5, 8 (Oct. 1991, NCJ-130445), *available at* <http://www.bjs.gov/content/pub/pdf/cpus89.pdf> (June 30 count).
- 1990: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1990, at 5 (July 1992, NCJ-134946), *available at* <http://www.bjs.gov/content/pub/pdf/cpus90.pdf> (June 29 count).
- 1993: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1993, at 7 (October 1995, NCJ-

156241), available at <http://www.bjs.gov/content/pub/pdf/cpop93bk.pdf> (Dec. 31 count).

1994 to 1999: Because state-by-state jail population is not available from 1994 to 1999, jail population for those years is calculated using a linear interpolation between the 1993 and 2000 figures for each state.

2000 to 2012: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000–2012—Statistical Tables, at 15 tbl. 11 (Oct. 2014, NCJ 247448), available at <http://www.bjs.gov/content/pub/pdf/mljsp0012st.pdf>; see also <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5115> (average daily population). Note: the figures for Tennessee and Oklahoma are adjusted in 2010, 2011, and 2012, and for New York in 2012, because Davidson County, Oklahoma City, and Erie County were omitted from published data in those years. Thanks to Daniela Golinelli, Chief, Corrections Unit, Bureau of Justice Statistics, for providing appropriate corrections.

#### F. Prison Censuses (Tables 8 & 9)

1984: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF STATE ADULT CORRECTIONAL FACILITIES, 1984, ICPSR STUDY NO. 8444 (last updated Apr. 22, 1997); see also <http://www.bjs.gov/content/pub/pdf/csacf84.pdf>.

1990: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 1990, ICPSR STUDY NO. 9908 (last updated Dec. 21, 2001); see also <http://www.bjs.gov/content/pub/pdf/csfcf90.pdf>.

1995: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 1995, ICPSR STUDY NO. 6953 (last updated Apr. 20, 1998); see also <http://www.bjs.gov/content/pub/pdf/Csfcf95.pdf>.

2000: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 2000, ICPSR STUDY NO. 4021 (last updated July 9, 2004); see also <http://www.bjs.gov/content/pub/pdf/csfcf00.pdf>.

2005: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 2005, ICPSR STUDY NO. 24,642 (last updated Oct. 5, 2010); see also <http://www.bjs.gov/content/pub/pdf/csfcf05.pdf>.

#### G. Jail Censuses (Tables 8 & 9)

1983: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL JAIL

- CENSUS, 1983, ICPSR STUDY NO. 8203 (last updated Feb. 13, 1997); *see also* <http://www.bjs.gov/content/pub/pdf/clj83-vol1.pdf>; <http://www.bjs.gov/content/pub/pdf/clj83-vol2.pdf>; <http://www.bjs.gov/content/pub/pdf/clj83-vol3.pdf>; <http://www.bjs.gov/content/pub/pdf/clj83-vol4.pdf>; <http://www.bjs.gov/content/pub/pdf/clj83-vol5.pdf>.
- 1988: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL JAIL CENSUS, 1988, ICPSR STUDY NO. 9256 (last updated June 24, 1997); *see also* <http://www.bjs.gov/content/pub/pdf/clj88-vol1.pdf>; <http://www.bjs.gov/content/pub/pdf/clj88.pdf>.
- 1993: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL JAIL CENSUS, 1993, ICPSR STUDY NO. 6648 (last updated July 13, 1996).
- 1999: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL JAIL CENSUS, 1999, ICPSR STUDY NO. 3318 (last updated Aug. 16, 2002); *see also* <http://www.bjs.gov/content/pub/pdf/cj99.pdf>.
- 2006: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF JAIL FACILITIES, 2006 ICPSR STUDY NO. 26,602 (last updated Jan. 6, 2010); *see also* <http://www.bjs.gov/content/pub/pdf/cjf06.pdf>.