

NOTES

GIVING PRECISE CONTENT TO THE EIGHTH AMENDMENT: AN ASSESSMENT OF THE REMEDIAL PROVISIONS OF THE PRISON LITIGATION REFORM ACT

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Congress passed the Prison Litigation Reform Act of 1995 (PLRA) in response to a deluge of inmate litigation and judicial micromanagement of penal institutions. Among other things, the Act limited injunctive relief in prison conditions cases to the minimum required by federal law. This change set Eighth Amendment cases apart from other constitutional violations by imposing special restrictions on equitable remedies.

This Note argues against hemming in courts' ability to correct Eighth Amendment violations. Drawing on the work of Professor Jeremy Waldron, this Note points out that the Eighth Amendment shares with laws against torture a respect for human dignity that distinguishes legal from other types of force. That commitment renders the Eighth Amendment (like torture bans) ill-suited to a "speed limit" model of enforcement—with the "cruel and unusual punishment" norm treated as an envelope that may be pushed or even marginally exceeded. Yet the PLRA, this Note argues, creates such a paradigm by inhibiting the type of remedy needed to address the systemic failures that often underlie Eighth Amendment violations.

This Note therefore joins the American Bar Association, former Third Circuit Chief Judge John J. Gibbons, and former U.S. Attorney General Nicholas de B. Katzenbach in supporting repeal of the PLRA's remedial restrictions. Alternatively, this Note proposes that Congress reword certain provisions, or, failing that, that courts read the statute in a manner embraced by the Ninth Circuit but rejected by other courts of appeals—as placing the burden of proof on defendants moving to terminate judicial supervision of prisons.

"This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising."¹

— Chief Justice Earl Warren

INTRODUCTION

Two years ago, Professor Jeremy Waldron argued that the Justice Department's "definitional shenanigans" had threatened the "absolute

1. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (Warren, C.J., plurality opinion).

prohibition on torture” in U.S. law.² Waldron was referring to a 2002 memorandum by Jay Bybee, then head of the Office of Legal Counsel in the Justice Department, that sought to define “torture” with precision.³ For Waldron, this endeavor treated the torture ban “as something like a speed limit which we are entitled to push up against as closely as we can and in regard to which there might even be a margin of toleration which a good-hearted enforcement officer, familiar with our situation and its exigencies, might be willing to recognize.”⁴

Waldron explained at length why the Bybee memorandum disturbed him. First and foremost was its potential to result in torture, albeit of “maybe only a few score” individuals in U.S. custody.⁵ But Waldron identified something more—something having to do with the iconic status of the torture prohibition: “[A]ny attempt to loosen” the ban “would deal a traumatic blow” to a “provision . . . emblematic of our larger commitment to nonbrutality in the legal system.”⁶

This Note applies Waldron’s lessons in the different, but related, context of the Eighth Amendment’s ban on cruel and unusual punishment.⁷ The Eighth Amendment has not faced the same tests as the torture ban; that is, no one has attempted to define cruelty out of existence or authorize its use as punishment in exigent circumstances. However, the ability of prison inmates to vindicate Eighth Amendment rights underwent a setback just over a decade ago when Congress passed the

2. Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 *Colum. L. Rev.* 1681, 1681, 1709 (2005). By “absolute prohibition on torture,” Waldron meant the antitorture provisions of U.S.-ratified international human rights instruments and implementing legislation that, “together with the protections that law routinely provides against serious assault and abuse, add up to an interlocking set of prohibitions on torture.” See *id.* at 1688–91; *infra* note 43.

3. See Memorandum from Office of the Assistant Att’y Gen. to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> (on file with the *Columbia Law Review*) [hereinafter *Bybee Memorandum*]; *infra* Part I.A.3.a. This Note follows Professor Waldron’s practice of identifying the memorandum as Bybee’s work, though John Yoo assisted in writing it. See Waldron, *supra* note 2, at 1704 n.97.

Controversy over Justice Department definitions of “torture” flared up again in recent months when press reports revealed the existence of classified opinions affirming the legality of such interrogation techniques as head-slapping, simulated drowning, and frigid temperatures—even when gauged under the rubric of “cruel, inhuman and degrading treatment,” as opposed to “torture.” See Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, *N.Y. Times*, Oct. 4, 2007, at A1. Michael B. Mukasey’s subsequent refusal to elaborate on his views of what constitutes torture briefly appeared to place his nomination as Attorney General of the United States in jeopardy. See Philip Shenon & David M. Herszenhorn, *Justice Nominee Gets 2 Key Votes from Democrats*, *N.Y. Times*, Nov. 3, 2007, at A1.

4. Waldron, *supra* note 2, at 1703.

5. *Id.* at 1737.

6. *Id.* at 1681.

7. See U.S. Const. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

Prison Litigation Reform Act of 1995⁸ (PLRA or the Act). The PLRA limits the relief courts can grant in Eighth Amendment cases and eases the process by which states can terminate judicial supervision of prisons.⁹

This Note argues that the PLRA's restrictions are troubling for the same reason Professor Waldron disapproved of the Bybee memorandum: Both developments undermine the law's commitment to nonbrutality. Part I lays the groundwork for this discussion by reviewing Professor Waldron's arguments and the principles forming the foundation of the Eighth Amendment. Part II asserts that the PLRA makes remediation of cruel and unusual prison conditions less likely and that this phenomenon is especially troubling given the principles grounding the Eighth Amendment.¹⁰ Part III proposes amending the PLRA or having courts interpret it in ways that limit its problematic effects. The latter discussion focuses on a circuit split over who bears the burden of proof when defendants move to terminate prison court orders.¹¹ This Note advocates placing the burden on defendants.

I. TAKING PRISONERS' RIGHTS SERIOUSLY: RESPONDING TO POSITIVISM AND SEEING THE EIGHTH AMENDMENT AS A MATTER OF PRINCIPLE

This Part examines the way broader ideals guide legal commands such as the torture ban and the Eighth Amendment. Part I.A traces the philosophical roots of this project by analyzing the criticisms of legal positivism¹² that underlie Waldron's reproof of the Bybee memorandum. Part I.B moves the discussion into a field of concern to prisoners by con-

8. Pub. L. No. 104-134, tit. 8, §§ 801-809, 110 Stat. 1321, 1321-66 to -77 (1996) (codified as amended in scattered sections of 18, 28, 42 U.S.C.).

9. See 18 U.S.C. § 3626 (setting out "[a]ppropriate remedies with respect to prison conditions"); *infra* Part II.

10. To be clear, I am not arguing that the PLRA runs afoul of the Eighth Amendment or any other constitutional provision. One court of appeals has noted (without resolving) a potential separation-of-powers issue, see *infra* note 139, but I limit my contentions to policy matters.

11. This Note deals with the PLRA's impact on "'court-order' cases—litigation in which groups of inmate plaintiffs, represented by counsel, seek court-enforceable orders to govern some general set of prison or jail practices." See Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1561 (2003) [hereinafter Schlanger, *Inmate Litigation*]. For a study of the Act's effects on individual suits for damages or accommodations, see generally *id.* *passim*.

12. Waldron does not define legal positivism *per se*; however, he builds on the work of Ronald Dworkin. See Waldron, *supra* note 2, at 1721 & n.177 (citing Dworkin). It follows that Waldron had in mind Dworkin's definition: "the theory . . . that the truth of legal propositions consists in facts about the rules that have been adopted by specific social institutions, and in nothing else." See Ronald Dworkin, *Taking Rights Seriously* vii (1977) [hereinafter, Dworkin, *Taking Rights Seriously*]; see also *infra* note 24 (discussing further Dworkin's account of positivism and of its fallacies). Accordingly, when "positivism" appears in this Note, Dworkin's definition is intended.

sidering the Eighth Amendment as an expression of the law's respect for human dignity.

A. *Starting Points: Waldron's Framework*

This section peruses three points, of which the first two are shortcomings Waldron perceives in positivism. The first is that law includes not only positive commands, but also background norms that have never been formally enacted. Waldron's second idea is that positivism overlooks the way provisions cohere to make up given areas of law. Parts I.A.1 and I.A.2 consider these two contentions. Part I.A.3 introduces a third notion: A society expresses its commitment to background legal principles not only through what it proscribes, but also through how it deals with those who operate on the margins of the proscription.

1. *Background Principles: "Law" as More than Meets the Positivist Eye.* — Professor Waldron's article¹³ can be read as a variation on the theme that precepts we refer to as "law" encompass a variety of subspecies. This approach to jurisprudence is apparent in such discussions as Henry Hart and Albert Sacks's taxonomy of rules, standards, policies, and principles.¹⁴ Another example is Cass Sunstein's identification of the eight items making up law's "toolbox."¹⁵

The details of these classification systems are not important for present purposes. What matters are the points Waldron makes about the elements that comprise the corpus juris. First, drawing on Ronald Dworkin, Waldron argues that positivism "fails to give adequate consideration to things other than rules—background principles, policies, purposes, and the like, which pervade the law as a whole even if they are not

13. Waldron, *supra* note 2.

14. See Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 139–43 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). For Hart and Sacks, a "rule," such as a speed limit, is "a legal direction which requires for its application nothing more than a determination of the happening or non-happening of physical or mental events—that is, determinations of *fact*." *Id.* at 139. A standard, such as the duty not to "drive 'at an unreasonable rate of speed,'" is "a legal direction which can be applied only by making, in addition to a finding of what happened . . . in the particular situation, a qualitative appraisal of those happenings in terms of their probable consequences, moral justification, or other aspects of general human experience." *Id.* at 140. A policy "is simply a statement of objective. *E.g.*, full employment, the promotion of . . . collective bargaining, national security, conservation of natural resources, etc. . . ." *Id.* at 141–42. A principle "asserts that [a given] result *ought* to be achieved and includes, either expressly or by reference to well-understood bodies of thought, a statement of *the reasons why* it should be achieved." *Id.* at 142. Examples of principles include the ideas that "agreements should be observed; no person should be unjustly enriched; etc. . . ." *Id.* See *infra* notes 19, 54 and accompanying text (discussing Dworkin's terminology for different types of legal precepts).

15. See Cass R. Sunstein, *Rules and Rulelessness* 3–11 (Univ. Chi. Law Sch. John M. Olin Law & Econ. Working Paper No. 27 (2d Series), 1994), available at http://www.law.uchicago.edu/Lawecon/WkngPprs_26-50/27.CRS.Rules.pdf (on file with the *Columbia Law Review*) (identifying untrammelled discretion, rules, rules with excuses, presumptions, lists of factors, standards, principles, and analogies as types of legal provisions).

explicitly posited by piecemeal enactments.”¹⁶ The vocabulary of “background principles, policies, and purposes” recalls Dworkin’s discussion—in a passage cited by Waldron¹⁷—of “principles, policies, and other sorts of standards.”¹⁸ Following Dworkin’s lead, Waldron uses these terms to evoke “norms and reasons” that

operate quite unlike rules [and] more like moral considerations. . . . [They] operate as background features which work behind the legal rules: pervading doctrine, filling in gaps, helping us with hard cases, providing touchstones for legal argument, and in a sense capturing the underlying spirit of whole areas of doctrine.¹⁹

Reference to a case clarifies how these norms operate. Dworkin uses the example of *Riggs v. Palmer*, in which a man who murdered his grandfather sought his inheritance under the grandfather’s will.²⁰ The court conceded that the statutes governing wills and property “if literally construed, and if their force and effect c[ould] in no way and under no circumstances be controlled or modified, g[a]ve [the] property to the murderer.”²¹ In other words, the positive law or “rules” dictated one outcome. But the court reached another: It denied the inheritance on the ground that “all laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong”²² The court thus “cited the principle that no man may profit from his own wrong as a background standard against which to read the statute of wills and in this way justified a new interpretation of that statute.”²³ This background standard did not thereby become a positive rule; the holding of the case was not “No man

16. Waldron, *supra* note 2, at 1721.

17. See *id.* at 1721 n.177 (citing Dworkin, *Taking Rights Seriously*, *supra* note 12, at 22–31).

18. Dworkin, *Taking Rights Seriously*, *supra* note 12, at 22.

19. Waldron, *supra* note 2, at 1721; cf. Dworkin, *Taking Rights Seriously*, *supra* note 12, at 22 (“[W]hen lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute, they make use of standards that do not function as rules, but operate differently”). For Dworkin, these non-rule norms, or “principles” (in a broad sense), include both “policies” and “principles” (in a narrow sense). *Id.* Dworkinian “policies” are “that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community”; a “principle” (in the narrow sense) is “a standard to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.” *Id.* For Dworkin, principles (in the broad sense) are distinct from rules in that the latter are “applicable in an all-or-nothing fashion,” *id.* at 24; in addition, principles “have a dimension that rules do not—the dimension of weight or importance,” *id.* at 26.

20. 22 N.E. 188, 115 N.Y. 506 (1889).

21. *Id.* at 189, 115 N.Y. at 509.

22. *Id.* at 190, 115 N.Y. at 511.

23. Dworkin, *Taking Rights Seriously*, *supra* note 12, at 28–29.

may profit by his own wrong,” but “One who kills his legator may not inherit under the will.” Yet the background maxim determined the case. Dworkin’s point is that positivism ignores this sort of interplay between background and foreground precepts by insisting that for anything to be called “law” it must be promulgated in a certain way.²⁴ Waldron likewise submits that positivism “fails to give adequate consideration” to background norms that “pervade the law” even though they fail the promulgation test.²⁵

2. *Unifying Themes and Legal Clusters.* — Waldron’s second point is that positivism “does not give enough attention to the importance of structure and system in the law—the way various provisions, precedents, and doctrines hang together, adding up to a whole that is greater than the sum of its parts.”²⁶ Waldron’s concern is not with “global holism at the level of the entire corpus juris,” but with “local holisms in particular areas of law.”²⁷ He gives as an example the way a piece of legislation with manifold provisions “is not just a heap of little laws. It operates as an integrated whole, from which we understand both the overarching aim of the statute and the organization of the elements that go into achieving that aim.”²⁸ Similar logic, Waldron explains, can be applied across a vari-

24. Dworkin thus takes aim at the tenet of positivism that legal rules are “special rules [that] can be identified and distinguished by specific criteria, by tests having to do not with their content but with their *pedigree* or the manner in which they were adopted or developed.” See *id.* at 17. This reasoning requires the positivist to do one of two things to make sense of a case like *Riggs*. First, the positivist can say that the maxim “No man may profit from his own wrong” is a legal standard; this approach necessitates fitting that maxim to a “test that all (and only) the principles that do count as law meet.” *Id.* at 39–41. This, Dworkin argues, is impossible, considering the number of variables that determine how a maxim like “No man may profit from his own wrong” applies in a given case and what weight it carries. See *id.* at 39–45 (“[W]e could not devise any formula for testing how much and what kind of institutional support is necessary to make a principle a legal principle, still less to fix its weight at a particular order of magnitude.”); cf. Waldron, *supra* note 2, at 1729 (discussing Dworkin’s point that “a test of pedigree will not work for the more diffuse principles and policies that we . . . are interested in”). Alternatively, the positivist can say that standards like the one to which *Riggs* appealed are not legal standards, but this is to say they are not binding on the judges who cite them. Dworkin, *Taking Rights Seriously*, *supra* note 12, at 34. Taking this tack is unsatisfactory, since it conflicts with the understanding that judges are not simply entrusted to act with discretion, even in hard cases, but have a duty “to reach an understanding, controversial or not, of what [the law] *require[s]*, and to act on that understanding.” *Id.* at 36 (emphasis added).

Dworkin’s points are best understood in dialogue with the legal positivism of H.L.A. Hart. See generally H.L.A. Hart, *The Concept of Law* 94–117 (2d. ed. 1994). For a summary of Hart’s philosophy in the context of Dworkin’s critique, see generally Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 *Mich. L. Rev.* 621, 624–30 (1987); see also *id.* at 623 n.5 (collecting sources on Hart-Dworkin disagreement).

25. Waldron, *supra* note 2, at 1721.

26. *Id.*

27. *Id.*

28. *Id.* at 1721–22; see also *Gustafson v. Alloyd*, 513 U.S. 561, 570 (1995) (explaining that Securities Act of 1933, “like every Act of Congress, should not be read as a series of unrelated and isolated provisions”).

ety of statutes, precedents and doctrines, as where “rules governing contract formation come together with rules about consideration, duty, breach, damages, and liability to add up to a more or less coherent package of market freedom and contractual responsibility.”²⁹

Individual rules thus form “clusters of law” united around some theme.³⁰ As Waldron phrases it, “We begin to see that together the provisions embody a certain principle, our seeing them in that way becomes a shared and settled background feature of the legal landscape, and we begin to construct legal arguments that turn on their coherence and their embodiment of that principle.”³¹ This formulation yields the insight that altering one component in a cluster can impact others by changing the overall makeup: Even though the other provisions have not changed, the unifying ideal has.³² Positivism overlooks this dynamic by classing as “law” only those items adopted through certain channels,³³ to the exclusion of Waldron’s organizing principles.³⁴

Waldron thus explains that law not only includes precepts other than positive enactments, but that the positive enactments unite around these other precepts. These observations are essential to understanding Waldron’s censure of the Bybee memorandum and, in turn, this Note’s dissatisfaction with the PLRA. To grasp how, it will first be necessary to consider another nuance of Waldron’s thinking: Understanding background norms requires more than asking what policies inform positive rules; it also means attending to the way authorities enforce those rules.

3. *Definitional Narrowing: A Case Study in Creating a “Margin of Tolerance.”* — Waldron upbraids the Bybee memorandum for treating the rule against torture as a provision with a “margin of tolerance.”³⁵ In the process, he reveals how a society’s willingness to recognize such margins signals its commitment (or lack thereof) to the norms underlying the positive rule in question. This subsection recounts his views.

a. *Defining Definitional Narrowing.* — Waldron identifies “narrowing or otherwise undermining the definition of torture” as a danger to the torture ban.³⁶ Definitional narrowing is distinct from efforts to weaken the prohibition directly, as through Alan Dershowitz’s proposal for judicial “torture warrants” in “ticking bomb” scenarios, where the immediate extraction of information is said to be necessary to save lives.³⁷

29. Waldron, *supra* note 2, at 1722.

30. *Id.*

31. *Id.*

32. See *id.* at 1721 (suggesting law is not “simply a heap or accumulation of rules, each of which might be amended, repealed, or reinterpreted with little or no effect on any of the others”).

33. See *supra* notes 12, 24 (describing positivism).

34. Waldron, *supra* note 2, at 1721.

35. *Id.* at 1703.

36. *Id.* at 1687.

37. See *id.* at 1685, 1714.

Dershowitz's plan undermines the rule against torture openly by carving out an exception.

Definitional narrowing works indirectly. It professes to maintain an absolute torture ban, but "so narrow[s]" the definition of torture as to "authorize[] [the practice] de jure in all but name."³⁸ The paragon of definitional narrowing is Jay Bybee's 2002 memorandum to the White House as head of the Justice Department's Office of Legal Counsel.³⁹ The memorandum argues that "torture" denotes only that level of pain that one would experience in cases of "death, organ failure, or serious impairment of bodily functions."⁴⁰ Waldron identifies the logical errors through which the memorandum derives this formulation from a health-care statute.⁴¹ But more importantly (at least for purposes of this Note), he takes issue with the very enterprise of "trying to pin down the prohibition on torture with a precise legal definition."⁴²

As Waldron observes, the memorandum proceeds from the premise that defining torture as the intentional infliction of "severe pain"⁴³ fails to tell government actors what they need to know: the exact point at which such pain is not allowed. Waldron offers the following metric for evaluating whether this approach makes sense:

One way of thinking about the need for precise definition [in a given area of law] involves asking whether the person constrained by the norm in question—state or individual—has a legitimate interest in pressing up as close as possible to the norm, and thus a legitimate interest in having a bright-line rule stipulating exactly what is permitted and exactly what is forbidden.⁴⁴

Failure to give precise guidance to a person with such an interest will "chill that person's exercise of liberty as he tries to avoid being taken by

38. *Id.* at 1719. Waldron also refers to the Bush Administration's "efforts to manipulate the definition of 'torture.'" *Id.* at 1686–87.

39. See Bybee Memorandum, *supra* note 3.

40. See *id.* at 6.

41. The statute uses the words "severe pain" in defining an emergency medical condition. See 42 U.S.C. § 1395w-22(d)(3)(B) (2000). Waldron explains that Bybee takes a definition of "emergency condition" (in which severe pain happens to be mentioned), reverses the causal relationship required between the emergency condition and organ failure, and concludes—on a matter as important as the proper definition of torture—that the law does not prohibit anything as torture unless it causes the same sort of pain as organ failure.

Waldron, *supra* note 2, at 1706–08.

42. Waldron, *supra* note 2, at 1687.

43. See 18 U.S.C. § 2340(1) (2000) (defining "torture" as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control"); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (defining "torture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person").

44. Waldron, *supra* note 2, at 1701.

surprise by enforcement decisions.”⁴⁵ Examples are the taxpayer who asks how much he may deduct as entertainment expenses and the driver who wants to know how fast she may go.⁴⁶ In contrast, Waldron posits a husband who wonders how much he may push his wife around before it becomes domestic abuse and a professor who inquires what overtures he may make to his students before he is sexually harassing them.⁴⁷ These examples demonstrate Waldron’s point that “[t]here are some scales one really should not be on.”⁴⁸

Included in this category is the scale that runs between intentionally inflicted pain and torture. That is, torture is not something an interrogator has any interest in approaching. Hence, Waldron concludes, implementing the Bybee memorandum would water down the torture prohibition by treating it as “something like a speed limit which we are entitled to push up against as closely as we can and in regard to which there might even be a margin of toleration.”⁴⁹

b. *Dangers of Definitional Narrowing.* — Definitional narrowing troubles Waldron for two reasons that bear mentioning here. First, the attempt to denote, as with a speed limit, the exact point at which a certain activity should be outlawed implies that nothing seriously wrong will have happened simply because the limit is transgressed. Thus, to stay with the driving example, a “good-hearted enforcement officer”⁵⁰ does not pull people over for going five, ten, or even fifteen miles over the speed limit, because at that point the driver has not hurt anyone and poses only a minimally greater risk of harm than when proceeding at the prescribed rate. Put another way, society’s recognition of the driver’s interest in finding out just how rapidly she may drive is the flip side of its failure to see great harm in her operating just on the other side of the line. The situation differs with regard to spousal abuse or sexual harassment, because in those instances the infraction is defined in terms of a harm society means to prevent: Every transgression is an injury.⁵¹

Second, definitional narrowing of offenses like sexual harassment or torture leads the prospective harasser/torturer to focus on the letter of the law: It prompts him to ask himself, “Have I done A, B, or C, or haven’t I?”—even when the same concerns underlying the prohibition of A,

45. *Id.* at 1699.

46. *Id.* at 1701.

47. *Id.*

48. *Id.*

49. *Id.* at 1703.

50. *Id.*

51. Waldron makes a similar point in distinguishing the “malum prohibitum” and “malum in se” species of crime. See *id.* at 1691–92. The former class outlaws activities, such as parking violations, that would not be considered wrong if not explicitly banned. *Id.* The latter consists of those “things [that] are just wrong, and would be wrong whether positive law prohibited them or not.” *Id.* Torture falls into the latter category. *Id.* at 1692–94.

B, and C would also apply to D, which he has done.⁵² This point recalls Waldron's argument that positivism neglects the organization of given areas of law.⁵³ Waldron's point was that the law's positive provisions coalesce so as to advance a given principle. The positive rules entail different subclasses, such as vague standards (e.g., the command to drive reasonably) or operationalized rules (e.g., speed limits),⁵⁴ and the law is willing to tolerate some shifting of directives from one subclass to another.⁵⁵ But the choice of forms and the extent of shifting are, or at least ought to be, guided by the goal of the body of law in question.⁵⁶ Thus, proscriptions of domestic abuse and sexual harassment form part of a body of law designed to promote, among other things, equality among the sexes. A man interested in figuring out what he can "get away with" short of breaking these laws probably does not have the healthiest respect for that value.⁵⁷ These restrictions should not be interpreted in ways that will encourage him to ignore the equality ideal, which society esteems but which he is disinclined to respect.

* * *

This section has put forth three ideas: that the corpus juris is suffused with unenacted but nevertheless *legal* principles, that constellations of positive law cohere around these principles, and that the stock a community puts by these principles comes across in how strictly it enforces the associated positive rules. So far, this Note has stated these points as general propositions. Their relevance vis-à-vis the PLRA, however, becomes clear only once they are applied in the Eighth Amendment con-

52. See *id.* at 1691 ("On the *malum prohibitum* approach, we may think about the text of a given legal provision as introducing a prohibition into what was previously a realm of liberty.").

53. See *supra* Part I.A.1.

54. These are the respective senses that the terms "standard" and "rule" bear in the parlance of Hart and Sacks, as distinguished from that of Dworkin, for whom "standard" is a generic term for which "precept" might be substituted. For Dworkin, "standards" break down into "rules" (meaning the entire class of discrete, positive legal commands) and "principles" (meaning non-rule background norms). Dworkin's "principles" in turn break down into "principles" (in a narrower sense) and "policies." See *supra* notes 14–19 and accompanying text (discussing different rule classification schemes).

55. See Waldron, *supra* note 2, at 1709 ("Changing the definitions of offenses or reinterpreting open-ended phrases is part of the normal life of any body of positive law.").

56. Cf. *id.* at 1722 ("We begin to see that together the provisions [of a cluster] embody a certain principle, our seeing them in that way becomes a shared and settled background feature of the legal landscape, and we begin to construct legal arguments that turn on their coherence and their embodiment of that principle.").

57. In contrast, a similar inference need not be drawn that someone who wishes to know how fast she may drive has little respect for road safety; otherwise, speed limits would probably not be the best idea.

It may also be useful to consider the example of the appellants to the European Court of Human Rights in *S.W. v. United Kingdom*, 335 Eur. Ct. H.R. (ser. A) 28 (1995). These men (unsuccessfully) contended they could not be convicted of raping their spouses since an English common law rule did not recognize rape within marriage, and no precedent or statute had yet overturned the rule. *Id.* at 42–45.

text. The next section begins that task by studying the background norms the Eighth Amendment expresses.

B. The Stakes: The Eighth Amendment and the Nonbrutality Principle

This section elaborates on the topics of principle and structure in the law discussed in Part I.A. It begins with the premise that the Eighth Amendment, like any provision of positive law, promotes certain principles. To understand what those principles are, it will help to recall Waldron's description of the corpus juris as consisting of "local holisms" or "clusters of law."⁵⁸ The idea is that within given areas of law, "[w]hat we might regard as distinct legal provisions interact to constitute a unified realm of legal meaning and purpose, a structured array of norms with a distinctive spirit of its own."⁵⁹ Applying this thinking to the torture ban, Waldron pronounces it a legal archetype, a provision that "sums up or makes vivid to us the point, purpose, principle, or policy of a whole area of law."⁶⁰ Waldron goes on to articulate the "policy, principle, or spirit" that the torture ban "embodies or conveys":

The prohibition on torture is expressive of an important underlying policy of the law, which we might try to capture in the following way: Law is not brutal in its operation. Law is not savage. . . . [W]here law has to operate forcefully . . . there will be an enduring connection between the spirit of law and respect for human dignity—respect for human dignity even in extremis, where law is at its most forceful and its subjects at their most vulnerable.⁶¹

The torture ban, that is, stands at the center of a family of legal provisions unified by the ideal that law "is not brutal" and maintains "respect for human dignity even in extremis."⁶²

Now, what propositions make up this family? Waldron furnishes an answer by highlighting references to the torture ban in Supreme Court interpretations of the Fifth and, significantly, Eighth Amendments.⁶³ One of the Eighth Amendment cases he cites mentions not only torture and cruelty, but also the values that make torture and cruelty unacceptable. That opinion, *Estelle v. Gamble*, observes that the Eighth

58. See Waldron, *supra* note 2, at 1721–22; see also *supra* Part I.A.2.

59. Waldron, *supra* note 2, at 1722.

60. *Id.* at 1723.

61. *Id.* at 1726–27.

62. *Id.*

63. See *id.* at 1729–34. Building on the work of Seth Kreimer, Waldron also posits that the torture ban informs substantive due process cases insofar as it protects "bodily integrity and autonomy interests." See *id.* at 1733–34. Kreimer's intuition is that the "pain of torture by design negates the vision of humanity that lies at the core of a liberal democracy. Justice Kennedy recently set forth the constitutional importance of the 'autonomy of self' Torture seeks to shatter that autonomy." See Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. Pa. J. Const. L. 278, 298 (2003) (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

Amendment “embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ,’ against which we must evaluate penal measures.”⁶⁴ The references to “dignity” and “decency” indicate the impact on *Estelle* of Chief Justice Warren’s opinion in the 1958 case *Trop v. Dulles*.⁶⁵ Warren wrote that the “basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”⁶⁶ The “words of the Amendment,” he elaborated, “are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁶⁷ These sentiments inform *Estelle*’s conclusion that deliberate indifference to a prisoner’s serious medical need violates the Constitution.⁶⁸ They also constitute a leitmotif of the Court’s Eighth Amendment jurisprudence over the past several decades,⁶⁹ including three decisions since 2002.⁷⁰ The prevalence of *Trop* in these opinions, with its invocation of

64. 429 U.S. 97, 102 (1976) (citation omitted) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)). Notably, *Estelle* identifies “physical ‘torture or a lingering death’” as “the evils of most immediate concern to the drafters of the [Eighth] Amendment.” See *id.* at 103 (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)). This characterization suggests that not only are the Eighth Amendment and the rule against torture part of the same cluster of laws, but also that the former may be identified with the latter. Be that as it may, the claim being advanced here—that the torture ban and the Eighth Amendment reflect common principles—stops short of requiring total or even partial identity between the torture and the two prohibitions.

65. 356 U.S. 86 (1958).

66. *Id.* at 100 (Warren, C.J., plurality opinion).

67. *Id.* at 100–01 (footnote omitted).

68. The influence was both direct and indirect: In addition to reiterating the Eighth Circuit’s *Jackson* opinion—which in turn relied on *Trop*, see 404 F.2d at 579—*Estelle* quoted the “evolving standards of decency” passage directly from Warren’s opinion. See 429 U.S. at 102.

69. See, e.g., *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (quoting “evolving standards of decency” passage); *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (quoting “evolving standards of decency” passage and referring to “fundamental human dignity that the Amendment protects”); *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (Stevens, J., plurality opinion) (quoting “evolving standards of decency” passage); *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (Stewart, J., plurality opinion) (same); *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring) (same); *id.* at 269–70 (Brennan, J., concurring) (quoting “dignity of man” and “evolving standards of decency” passages); *id.* at 327, 329 (Marshall, J., concurring) (quoting “evolving standards of decency” passage); *id.* at 383, 398 (Burger, C.J., dissenting) (same); *id.* at 409 (Blackmun, J., dissenting) (same); *id.* at 425, 429 (Powell, J., dissenting) (same). For the respective holdings of these cases, see *Hudson*, 503 U.S. at 4 (use of excessive force against prisoner may constitute cruel and unusual punishment even if significant injury does not result); *Ford*, 477 U.S. at 401 (Eighth Amendment bans execution if condemned is insane); *Roberts*, 428 U.S. at 336 (Stevens, J., plurality opinion) (finding statutorily mandated death sentence unconstitutional); *Woodson*, 428 U.S. at 305 (Stewart, J., plurality opinion) (same); *Furman*, 408 U.S. at 239–40 (per curiam) (holding petitioners’ death sentences unconstitutional).

70. In *Roper v. Simmons*, the Court cited *Trop* in striking down the capital punishment of juveniles. See 543 U.S. 551, 560–61 (2005) (quoting “evolving standards of decency” passage and stating that “Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons”). *Hope v. Pelzer* invoked *Trop* in its finding that tying

dignity and decency, supports the conclusion that the Eighth Amendment has as its principal concern the dedication to nonbrutality Waldron identifies with the torture ban.⁷¹

This conclusion gives rise to a further inference: If the torture ban and the Eighth Amendment are both related to the principle that law eschews brutality, then any willingness to allow a “margin of toleration” with regard to the Eighth Amendment should give us pause for the same reasons that apply concerning the torture ban. In either case, the failure to stamp out behavior that violates (or risks violating) the foreground rule threatens the background norm of the law’s respect for the humanity of those it coerces. It follows that to the extent the U.S. body politic holds this background norm in high regard, it will avoid conveying the sense that the Eighth Amendment is marked by a “margin of toleration.” The next Part of this Note argues that the PLRA nevertheless delivers just that message.

inmates to hitching posts violates the Eighth Amendment. See 536 U.S. 730, 738 (2002) (quoting “dignity of man” passage). *Atkins v. Virginia* quoted *Trop* in banning the execution of the mentally retarded. See 536 U.S. 304, 311–12 (2002) (quoting “dignity of man” and “evolving standards of decency” passages).

71. See Waldron, *supra* note 2, at 1726–27. Warren’s opinion in *Trop* itself had antecedents in the Court’s Eighth Amendment opinions. The statement about “evolving standards of decency,” 356 U.S. at 100–01, is an interpretation of *Weems v. United States*, 217 U.S. 349 (1910). *Weems* stated, “[The Eighth Amendment] . . . may acquire meaning as public opinion becomes enlightened by a *humane* justice.” 217 U.S. at 378 (emphasis added).

To be sure, the Court’s “evolving standards of decency” jurisprudence has provoked plenty of criticism, some of it from dissenting Justices. See, e.g., *Roper*, 543 U.S. at 608–09 & n.1 (Scalia, J., dissenting) (attacking majority for “ignor[ing] entirely the threshold inquiry in determining whether a particular punishment complies with the Eighth Amendment: whether it is one of the ‘modes or acts of punishment that had been considered cruel and unusual at the time the Bill of Rights was adopted’” (quoting *Ford*, 477 U.S. at 405)); Tom Stacy, *Cleaning up the Eighth Amendment Mess*, 14 *Wm. & Mary Bill Rts. J.* 475, 491–96 (2005) (noting inconsistencies in Court’s applications of *Trop*); Benjamin Wittes, *Pol’y Rev.*, Dec. 2005–Jan. 2006, at 15, 15 (calling *Trop* standard “perhaps the single most impressionistic test ever devised by the [C]ourt”). Whatever force these strictures have, however, they do not undermine the point that the Eighth Amendment reflects standards of *decency*, regardless of whether those standards evolve or how they are best discerned. This view of the Amendment’s moral content was shared by at least some individuals even in 1791, as a comment in the House ratification debate reflects. Representative Arthur Livermore of New Hampshire objected to the vagueness of the words “cruel and unusual punishments,” but conceded that “[t]he clause seems to express a great deal of *humanity*, on which account I have no objection to it.” 1 *Annals of Cong.* 782 (Joseph Gales ed., 1834) (emphasis added). Furthermore, in an apparent concession to humaneness, Justice Scalia himself has said, “[I]n a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.” See Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. Cin. L. Rev.* 849, 864 (1989).

II. THE PLRA PORTRAYS THE EIGHTH AMENDMENT AS “SOMETHING LIKE A SPEED LIMIT”

This Note began with the perception that the fabric of the law is woven from both positive rules and unenacted postulates. Part I.A traced how this theorem of Ronald Dworkin influenced Jeremy Waldron’s campaign against efforts to portray the torture ban as the type of provision it would be acceptable for government officials to “push up against as closely” as possible or even transgress.⁷² Part I.B shifted focus slightly by illustrating that the same background principles underlying the ban on torture in U.S. law also inform the Eighth Amendment. Part II takes the discussion one step further by showing how the PLRA weakens the Eighth Amendment in a way similar to that in which the Bybee memorandum sought to undermine the torture ban. Part II.A provides background on the origins of the PLRA, while Part II.B argues that the Act increases the likelihood of Eighth Amendment underenforcement.

A. *History and Content of the PLRA*

Congress passed the PLRA in 1996 out of two concerns. One was the burden imposed on federal courts and states by the tens of thousands of prisoner lawsuits being filed annually.⁷³ The other was the desire to “restrain liberal Federal judges who see violations of constitutional rights in every prisoner complaint and who have used these complaints to micromanage State and local prison systems.”⁷⁴ Toward these ends, the PLRA restricted prison litigation in a number of ways.⁷⁵ Measures aimed at reducing the number of claims included a requirement that prisoners

72. Waldron, *supra* note 2, at 1703.

73. Contemporaneous discussion of the PLRA in the Senate and the press indicates the frequency and cost of the litigation that spurred Congress to act. Figures quoted in the Senate put the number of inmate lawsuits filed in 1994 at more than 39,000. See 141 Cong. Rec. 26,548 (1995) (statement of Sen. Dole). According to one of the PLRA’s sponsors, Michigan Senator Spencer Abraham, that number grew to 65,000 in 1995. Editorial, *Criminal Oversight*, Wall St. J., June 10, 1996, at A18. Prisoner lawsuits accounted for twenty-three percent of civil filings in federal courts in 1993, and up to fifty percent in some states. Editorial, *Curbing Prison Litigation*, Wash. Post, May 13, 1996, at A16. Elected officials reported that prison litigation in 1994 accounted for forty percent of federal civil suits in Nevada, 141 Cong. Rec. 27,043 (statement of Sen. Reid), and forty-five percent of such suits in Arizona, *id.* at 26,548 (statement of Sen. Dole). The National Association of State Attorneys General submitted to Congress its estimate that inmate civil rights suits cost the states \$81.3 million per year, “the vast majority” of which the Association deemed “attributable to non-meritorious cases.” *Id.* at 26,553. Over ninety-four percent of prisoner claims were dismissed at the pretrial stage, according to figures quoted in the Senate. *Id.* (statement of Sen. Hatch). One Senator referred to “[a] report on ABC [that] suggests the cost of inmate litigation hindered the expansion of Head Start and the rebuilding after Hurricane Andrew.” *Id.* at 27,403 (statement of Sen. Reid).

74. 141 Cong. Rec. 27,042 (statement of Sen. Dole).

75. For a concise summary of the PLRA’s provisions, see generally John W. Palmer & Stephen E. Palmer, *Constitutional Rights of Prisoners* 353–70 (7th ed. 2004).

exhaust administrative remedies before filing suit;⁷⁶ a significant reduction in attorneys' fees for successful litigants;⁷⁷ a ban on claims based on mental or emotional suffering without physical injury;⁷⁸ the imposition of filing fees;⁷⁹ and the revocation of earned release credits of prisoners who file "malicious" suits.⁸⁰ The Act furthered the goal of "restrain[ing] liberal Federal judges" by boxing in the relief courts could grant in prison cases.⁸¹ This Note concentrates on the latter set of provisions.

1. *PLRA Restrictions on Judicial Relief.* — In order for a court to grant prisoners any remedy other than damages,⁸² the PLRA requires a finding "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."⁸³ Thus, no court can enjoin⁸⁴ a prison official to take or refrain from any action without determining that a federal right⁸⁵ has been violated and making sure that the remedy meets what has come to be known as the "need-narrowness-intrusiveness" test.⁸⁶ Furthermore, the PLRA gives parties the right to

76. 42 U.S.C. § 1997e(a) (2000).

77. *Id.* § 1997e(d).

78. *Id.* § 1997e(e).

79. 28 U.S.C. § 1915 (2000).

80. *Id.* § 1932.

81. 141 Cong. Rec. 27,042 (1995) (statement of Sen. Dole).

82. The Act uses the term "prospective relief," which means "all relief other than compensatory monetary damages." 18 U.S.C. § 3626(g)(7) (2000).

83. *Id.* § 3626(a)(1)(A).

84. Unless otherwise specified, this Note uses the terms "injunction," "decree," "order," "relief," "judicial supervision," "judicial oversight," and "remedy" synonymously with the definition of "prospective relief" given in § 3626(g)(7), that is, any type of judicially enforceable remedy other than damages.

85. The term "federal right" includes those arising under federal statutes, see *Handberry v. Thompson*, 446 F.3d 335, 344–45 (2d Cir. 2006) (describing plaintiffs' statutory claims), as well as the U.S. Constitution, see, e.g., *Skinner v. Uphoff*, 234 F. Supp. 2d 1208, 1217 (D. Wyo. 2002) (noting PLRA's applicability to Eighth Amendment violations). Mark Tushnet and Larry Yackle have suggested that inmates might claim, "albeit with some strain," that federal court orders existing at the time the PLRA took effect conferred additional "federal rights." 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, 62–63 (1997). One court of appeals has rejected this approach, however. See *Plyler v. Moore*, 100 F.3d 365, 375 (4th Cir. 1996) ("We . . . hold that the term 'Federal right' as used in [the PLRA] does not include rights conferred by . . . decrees to the extent those rights rise above the requirements of federal law.").

In any case, it suffices for purposes of this Note to observe that the PLRA's reference to "Federal right[s]" includes Eighth Amendment rights. See, e.g., *Skinner*, 234 F. Supp. 2d at 1217. Thus, this Note discusses the Act's effects on litigation involving "constitutional" or "Eighth Amendment" rights and violations, even though the PLRA does not mention the Constitution or the Eighth Amendment in terms.

86. The designation "need-narrowness-intrusiveness" test derives from the terms of the statute: Relief must "extend no further than *necessary*" (need), be "*narrowly drawn*" (narrowness), and be the "least *intrusive means*" of addressing the problem (intrusiveness). See 18 U.S.C. § 3626(a)(1)(A) (emphasis added). Courts commonly use the "need-

terminate any injunction after two years, even if its provisions have not been fulfilled, unless the court “makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right.”⁸⁷ The court must also perform a new need-narrowness-intrusiveness test.⁸⁸ If the court extends the injunction, parties may again move for termination one year later, and every year thereafter.⁸⁹ The same restrictions govern the court’s ability to continue the injunction at each interval.⁹⁰

To understand the design of these provisions, a thumbnail sketch of pre-PLRA prison litigation in this country is in order.

2. *The (Pre-PLRA) History of Prison Reform Litigation.* — Lawsuits became a vehicle for prison reform in the United States starting in the 1960s, when courts moved away from the policy of nonintervention that had theretofore prevailed.⁹¹ An exhaustive review of prison litigation between the mid-’60s and the mid-’90s is beyond the scope of this Note.⁹² Instead, this subsection highlights details that explain Congress’s wish to limit injunctive relief through the PLRA.

One point of interest is that before the PLRA, courts issued prison injunctions in one of two ways: without the parties having reached any agreement, or, if they had, in a consent decree. The first means of relief could be imposed against defendants’ will and involved a judgment by the court that conditions violated inmates’ rights.⁹³ The second type of

narrowness-intrusiveness” moniker. See, e.g., *Handberry*, 446 F.3d at 347; *Laube v. Campbell*, 333 F. Supp. 2d 1234, 1239 (M.D. Ala. 2004).

87. 18 U.S.C. § 3626(b)(1)–(3).

88. *Id.*

89. *Id.*

90. *Id.* These requirements also apply when a party moves to terminate a pre-PLRA injunction issued without an initial need-narrowness-intrusiveness test. *Id.* Unless the requirements are fulfilled, any such injunction is subject to immediate termination. *Id.*

91. Prior to 1965, the “dominant federal court approach to prison conditions cases” was the “so-called hands-off doctrine.” See Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons* 31 (1998) [hereinafter *Feeley & Rubin, Modern State*]. Factors contributing to the end of the hands-off era included the Supreme Court’s decision to apply the Eighth Amendment to the states in *Robinson v. California*, 370 U.S. 660 (1962), and its holding in *Monroe v. Pape*, 365 U.S. 167 (1961), that state officials could be sued under 42 U.S.C. § 1983 for abuses of authority that violated constitutional rights. See *Feeley & Rubin, Modern State*, *supra*, at 37. For an additional account of the hands-off era, see *Gilmore v. California*, 220 F.3d 987, 990–92 (9th Cir. 2000).

92. For fuller treatments of this history, see generally, e.g., *Feeley & Rubin, Modern State*, *supra* note 91, at 39–50; Charles F. Sabel and William H. Simon, *Destabilization Rights, How Public Law Litigation Succeeds*, 117 *Harv. L. Rev.* 1015, 1034–43 (2004); 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*].

93. See, e.g., *Coleman v. Wilson*, 912 F. Supp. 1282, 1323–24 & nn.61–62 (E.D. Cal. 1995) (ordering remedy of constitutional violations despite defendant’s objections that no violations existed and that proposed remedy imposed unreasonable time constraints and was “void for vagueness”).

relief resulted from an agreement between the parties—allowing them to avoid a trial—and required no finding of a constitutional violation,⁹⁴ but was nonetheless court-enforceable.⁹⁵ Together, these two methods facilitated reform of correctional institutions across the country: Malcolm M. Feeley and Edward L. Rubin remarked in 1998, “[A]t present, forty-eight of America’s fifty-three jurisdictions have had at least one facility declared unconstitutional by the federal courts, and the judicial intervention has produced direct effects of considerable significance in all but a handful of them.”⁹⁶

The intervention Feeley and Rubin describe had broad effects, not only geographically, but also in terms of the problems courts confronted:

The Eighth Amendment conditions cases affected virtually every facet of prison life and administration. The cumulative impact was that the federal courts developed a comprehensive code for prison administration, covering such diverse matters as residence facilities, sanitation, food preparation and dietary consideration, clothing, medical care, discipline, staff hiring, libraries, work and education.⁹⁷

Courts thus tackled a spectrum of prison issues. Indeed, some of the most influential orders addressed numerous fronts at once.⁹⁸ Further-

94. See Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. Chi. Legal F. 295, 298 (noting consent decrees do not require finding of violation or admission of wrongdoing); cf. Tushnet & Yackle, *supra* note 85, at 49 (observing that under PLRA consent decree provisions, “plaintiffs and prison administrators can no longer agree to address arguably unconstitutional conditions unless the administrators consent to the entry of an order that the conditions are indeed unconstitutional”).

95. See Shima Baradaran-Robinson, *Comment, Kaleidoscopic Consent Decrees: School Desegregation and Prison Reform Consent Decrees After the Prison Litigation Reform Act and Freeman-Dowell*, 2003 BYU L. Rev. 1333, 1336–38 (describing consent decrees as “hybrid between a judicial order and a settlement agreement or contract” and noting that “[a] consent decree resembles a judicial order in that courts can enforce the agreement between parties and modify it in certain circumstances”).

96. Feeley & Rubin, *Modern State*, *supra* note 91, at 40 (footnotes omitted); see also Ricardo Solano Jr., *Note, Is Congress Handcuffing Our Courts?*, 28 Seton Hall L. Rev. 282, 309 n.228 (1997) (noting that thirty states then had one or more prisons subject to supervision as the result of a court order or consent decree).

97. Edward L. Rubin & Malcolm M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. Pa. J. Const. L. 617, 657 (2003).

98. See, e.g., *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980) (iconic 118-page decision condemning conditions throughout Texas as unconstitutional and requiring comprehensive remedy); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970) (seminal prison conditions case condemning totality of conditions in Arkansas correctional system); see also Feeley & Rubin, *Modern State*, *supra* note 91, at 51–95 (detailing history of *Ruiz* and *Holt* from filing through termination of judicial supervision). Margo Schlanger has referred to the dominant model of prison reform litigation in the 1970s as the “kitchen-sink” approach and described *Ruiz* as resulting in the typical “wholesale kind of order.” See Schlanger, *Civil Rights Injunctions*, *supra* note 92, at 614–16.

more, the extent of the deficiencies meant courts ended up supervising prisons for the long haul.⁹⁹

3. *Judicial Supervision of Prisons in the Eyes of Congress.* — By the time Republicans won control of Congress in 1994, prison litigation had provoked politicians' ire in several respects. For one thing, a common response to overcrowding included population caps that courts enforced by releasing surplus inmates. During debate on the PLRA, Senator Orrin Hatch remarked that twenty-four corrections agencies were subject to caps, which he characterized as a vehicle for courts to jeopardize public safety by putting criminals back on the streets.¹⁰⁰ Senator Spencer Abraham, for his part, lambasted consent decrees as judicial overreaching, since they could be implemented without any finding of a constitutional violation and allowed for greater relief than a court could have ordered after a trial.¹⁰¹ Furthermore, they allowed authorities to bind their successors in office, meaning that newly elected officials and their appointees were stuck with obligations they had never approved.¹⁰² Finally, the fact that most prison supervision came from the U.S. judiciary, as opposed to state courts, raised federalism concerns.¹⁰³

The PLRA's sponsors complained that judicial meddling was making correctional institutions pleasant destinations.¹⁰⁴ Senator Abraham com-

99. Proceedings in *Holt* from the filing of the first complaint to the termination of judicial involvement spanned from 1965 to 1982. See Feeley & Rubin, *Modern State*, supra note 91, at 51–79. The corresponding timeframe for *Ruiz* ran from 1972 to 1990. See id. at 80–95.

100. 141 Cong. Rec. 27,042 (1995) (statement of Sen. Hatch). The PLRA imposed hurdles on courts' ability to issue prisoner release orders pursuant to population caps. See 18 U.S.C. § 3626(a)(3) (2000). These provisions, while relevant to the PLRA's effects on inmates' capacity to vindicate Eighth Amendment rights, are unfortunately beyond the scope of this Note.

101. 141 Cong. Rec. 26,554 (statement of Sen. Abraham); see also *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (“[A] federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.”). Senator Abraham illustrated his displeasure by referring to a consent decree under which federal courts monitored the brightness of the lights and the temperatures of the food, air, and water in Michigan prisons. 141 Cong. Rec. 26,554. “This would be bad enough if a court had ever found that Michigan’s prison system was at some point in violation of the Constitution, or if conditions there had been inhumane. But that is not the case.” *Id.*

102. See Tushnet & Yackle, supra note 85, at 12–13 (“Republican governors elected in the early 1980s found their options in addressing crime limited by restrictions federal courts had placed upon the operation of prison systems. . . . The governors were particularly bothered by consent decrees agreed to by their liberal predecessors . . .”).

103. See id. at 48 (“[S]tate courts have rarely micromanaged their own state’s prisons and jails, and the rhetoric of the PLRA’s sponsors never focused on problems they saw in state court litigation.”).

104. See 141 Cong. Rec. 27,045 (statement of Sen. Kyl) (“You do not have extra privileges when you go to prison. You certainly ought not to be treated any better than the average citizen.”); cf. Tushnet & Yackle, supra note 85, at 13 (asserting that during Reagan years, Republican politicians complained that “federal courts . . . were providing criminals with living conditions far better than many law-abiding people enjoyed”).

mented, “By interfering with the fulfillment of [incarceration’s] punitive function, the courts are effectively seriously undermining the entire criminal justice system. The legislation we are introducing today will return sanity and State control to our prison systems.”¹⁰⁵ The next part of this Note will elucidate the PLRA’s endeavor to rein in judges in prison cases.

B. *The PLRA’s Impact on Eighth Amendment Enforcement*

The PLRA does not purport to flesh out the Eighth Amendment (or, for that matter, any other source of inmate rights).¹⁰⁶ And yet, by delineating Eighth Amendment enforcement procedures, it does much to determine whether prison administrators will enjoy any “margin of toleration” where the Amendment is concerned: The more difficult enforcement becomes, the larger the margin.¹⁰⁷ Cognizant of these points, Part II.B takes a close look at the PLRA’s remedial provisions. Part II.B.1 probes the Act’s imposition of a need-narrowness-intrusiveness test on judicial prison supervision and its timetables for terminating supervision. Part II.B.2 assesses the extent to which these mandates create a “margin of toleration” with respect to the Eighth Amendment.

1. *Inhibiting Injunctive Relief.* — The PLRA establishes that courts may not enforce Eighth Amendment rights by injunction unless “such relief is narrowly drawn, extends no further than necessary to correct the violation of the . . . right, and is the least intrusive means necessary to correct the violation of the . . . right.”¹⁰⁸ This “need-narrowness-intrusiveness” test¹⁰⁹ must be repeated anytime a defendant moves for termination of relief, with supervision ending unless the court makes “written findings based on the record . . . [of] a current and ongoing violation.”¹¹⁰ Furthermore, the Act subjects any decree issued without a need-narrowness-intrusiveness test to immediate termination unless the court makes writ-

105. 141 Cong. Rec. 26,554 (statement of Sen. Abraham).

106. Cf. *Gilmore v. California*, 220 F.3d 987, 1002 (9th Cir. 2000) (“Congress is clearly without power to modify the underlying constitutional rights at stake in prison conditions cases. Congress cannot, for instance, declare whether certain prison conditions violate the Eighth Amendment’s prohibition against cruel and unusual punishment.”).

107. Cf. Frank H. Easterbrook, *Substance and Due Process*, 1982 Sup. Ct. Rev. 85, 112–13 (“Substance and process are intimately related. The procedures one uses determine how much substance is achieved, and by whom. Procedural rules usually are just a measure of how much the substantive entitlements are worth, of what we are willing to sacrifice to see a given goal attained.”); David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. Ill. L. Rev. 1199, 1201–02 (stating that maxim that every right must have remedy “provides a useful standard against which to gauge the nation’s commitment to the protection of rights and liberties”).

108. 18 U.S.C. § 3626(a)(1)(A) (2000).

109. See *supra* note 86 (explaining judicial use of term “need-narrowness-intrusiveness” test).

110. 18 U.S.C. § 3626(b)(1)–(3). See also *supra* notes 82–90 and accompanying text (describing PLRA conditions governing initial grants of injunctive relief and motions for termination).

ten findings of a current violation and performs a need-narrowness-intrusiveness assessment.¹¹¹

These rules make clear that judicial supervision of prisons must respond to a constitutional violation and do as little as possible to cure it.¹¹² In this regard, they appear merely to codify the limits on judicial power the Supreme Court has articulated in prison and school desegregation cases, at least where prison officials contest the injunction.¹¹³ Nevertheless, a closer inspection of the Act reveals that it may lead courts not to grant relief they otherwise would have ordered or to terminate relief they would have continued, to the detriment of inmates' Eighth Amendment rights.¹¹⁴ To understand these points, it will be helpful to consider the nature of the problems many prison cases pose.

a. *Polycentricity and Prophylaxis*. — The dysfunctions that result in unconstitutional prison conditions often have one or both of the following qualities: polycentricity and the need for prophylactic relief. As the court in *Plata v. Schwarzenegger* explained, polycentricity is “the property of a complex problem with a number of subsidiary problem ‘centers,’ each of which is related to the others, such that the solution to each depends on the solution to all the others.”¹¹⁵ A 2005 court order applied this concept to shortcomings in the California prison medical system.¹¹⁶ It described the situation as a “classic . . . ‘polycentric’ problem,” involving such “subsidiary problem centers” as the lack of an effective records

111. 18 U.S.C. § 3626(b)(2)–(3).

112. See, e.g., *Gilmore v. California*, 220 F.3d 987, 999 (9th Cir. 2000) (“[N]o longer may courts grant or approve relief that binds prison administrators to do more than the constitutional minimum.”); Baradaran-Robinson, *supra* note 95, at 1359 (“[T]he PLRA now prohibits all prospective relief dealing with prison conditions from exceeding the constitutional minimum.”).

113. See *Gilmore*, 220 F.3d at 1006 (noting that “[a]t least in the context of contested decrees,” PLRA “limits on federal court jurisdiction are essentially the same” as pre-PLRA restrictions under which courts could do “no more than necessary to correct the underlying constitutional violation”); Schlanger, *Civil Rights Injunctions*, *supra* note 92, at 594 & n.140 (“Application of [need-narrowness-intrusiveness] limits to litigated relief was not a major change from prior law.”); Tushnet & Yackle, *supra* note 85, at 52 (“Facially, [the need-narrowness-intrusiveness standard does not] do much more than restate existing law.”). For Supreme Court definitions of the limits on judicial remedies, see *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (prison case dealing with pre-PLRA injunction stating that “remedy must of course be limited to the inadequacy that produced the [constitutional] injury”); *Milliken v. Bradley*, 433 U.S. 267, 281–82 (1977) (school desegregation case invoking “well-settled principle that the nature and scope of the remedy are to be determined by the violation”); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (school desegregation case holding that “nature of the violation determines the scope of the remedy”).

114. See Tushnet & Yackle, *supra* note 85, at 85–86 (“A handful of prisoners who might have gotten some relief from unconstitutional conditions before the PLRA was enacted will not get it now.”).

115. No. C01-1351 TEH, 2005 U.S. Dist. LEXIS 43796, at *72–*74 (N.D. Cal. Oct. 3, 2005) (quoting William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 *Yale L.J.* 635, 645 (1982)).

116. *Id.*

system and the failure to hire qualified personnel.¹¹⁷ The court remarked that neither problem could be addressed in isolation: Competent personnel would not want to work in a system without effective recordkeeping, and an effective recordkeeping system could not be developed without competent personnel.¹¹⁸ Hence, an order seeking to ensure the delivery of effective healthcare needed to address both of these and any number of related areas.¹¹⁹

The need for prophylactic remedies is a second aspect of numerous prison cases. Tracy A. Thomas has provided a useful definition of prophylaxis as “(1) injunctive relief with a preventive goal, (2) that imposes specific measures reaching affiliated legal conduct that contributes to the primary harm.”¹²⁰ Thomas offers the example of sexual harassment in a company. The harassment constitutes the violation, “[y]et, affiliated conduct, such as the company culture, the corporate policies, and the corporate response, may all contribute to that harassment even though the lack of a policy or training itself does not violate the law.”¹²¹ This scenario is easily adapted to the prison context by replacing the word “corporate” with “correctional”—indeed, sexual harassment of prisoners is not unknown.¹²² Accordingly, courts might order such prophylactic relief as the adoption of new policies.¹²³

b. *Inhibiting Remedies for Complex Problems.* — Polycentricity and the need for prophylaxis help to explain the intricate remedies courts frequently ordered in prison cases before the PLRA.¹²⁴ Courts need not

117. *Id.* at *72–*73.

118. *Id.*

119. As it turns out, the court deemed the defects so widespread it appointed a receiver to run the California prison medical program. See *id.* at *2–*4.

120. Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 *Buff. L. Rev.* 301, 314 (2004).

121. *Id.* at 322–23.

122. See, e.g., *Women Prisoners of the D.C. Dep’t of Corr. v. District of Columbia*, 93 F.3d 910, 914 (D.C. Cir. 1996) (reporting district court’s findings of sexual harassment that “ranged from inappropriate remarks to invasions of privacy to violent sexual assaults”); Bob Herbert, *Op-Ed.*, *America’s Abu Ghraibs*, *N.Y. Times*, May 31, 2004, at A17 (describing allegations of male prisoners in Georgia being forced to strip and subjected to body cavity searches and orders to “lift their genitals, to squat, to bend over and display themselves, etc.” with “female prison staff members looking on, and at times laughing”).

123. See *Women Prisoners of the D.C. Dep’t of Corr. v. District of Columbia*, 968 F. Supp. 744, 745–47 (D.D.C. 1997) (defining sexual harassment policy to be adopted, requiring sexual harassment training for employees, and ordering establishment of confidential hotline for inmates to report harassment).

124. See Fletcher, *supra* note 115, at 646–49 (discussing polycentricity in context of prison decrees); Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 *Chi. J. Int’l L.* 435, 451 n.60 (2002) (describing judges who, prior to PLRA, “required prison systems to conform to quite detailed regulations of their housing and health care systems, believing that without such prophylactic requirements, the chances were too great that the prisons would revert” to unconstitutional conditions).

read the Act to prohibit such remedies,¹²⁵ and post-PLRA cases have generated orders reminiscent of the past.¹²⁶ Yet the logic of the need-narrowness-intrusiveness test is that of a restraint: “The court *shall not* grant . . . relief *unless*”¹²⁷ This language invites scrutiny of proposed relief with a presumption against it.¹²⁸ Moreover, the PLRA’s sponsors manifested concerns about judicial micromanagement.¹²⁹ Courts attending to their statements might apply the need-narrowness-intrusiveness test strictly¹³⁰ and refuse to order measures that, while necessary, resemble judicial micromanagement.¹³¹ Underenforcement of the Eighth

125. Thomas argues that prophylactic remedies are often “necessary” to “translate abstract rights into meaningful relief” and counteract the confusion and resistance on the part of defendants that would otherwise frustrate vindication of plaintiffs’ entitlements. See Thomas, *supra* note 120, at 323–24, 370–85; see also Skinner v. Uphoff, 234 F. Supp. 2d 1208, 1218 (D. Wyo. 2002) (“Of course, the remedy ordered by this Court ‘shall extend no further than necessary to correct the violation of the Federal right,’ but if it is necessary to enact systemic and prophylactic measures in order to correct the violations found to exist . . . , the Court may do so” (quoting 18 U.S.C. § 3626(a)(1)(A) (2000))); cf. Tushnet & Yackle, *supra* note 85, at 54 (arguing that “necessary” in PLRA should be interpreted not “in its strictest sense” but as meaning “‘most direct and simple’” or “‘convenient, or useful, or essential’” (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819))).

126. See, e.g., Laube v. Campbell, 333 F. Supp. 2d 1234, 1238–40, 1247–65 (M.D. Ala. 2004) (issuing injunction in accordance with PLRA ordering defendants to address living conditions, health and safety, and medical care issues by performing set of stipulations occupying nineteen pages of Federal Supplement); *Women Prisoners of D.C.*, 968 F. Supp. at 745–51 (entering order as modified pursuant to PLRA by D.C. Court of Appeals enjoining jail officials to adopt variety of detailed policies and practices addressing sexual harassment, obstetrical and gynecological care, programming, environmental health, and fire safety); see also Schlanger, *Civil Rights Injunctions*, *supra* note 92, at 625 (“[T]he substantive provisions of decrees written now simply do not seem qualitatively different from those in decrees written years ago.”). It may further be noted that the 2005 appointment of a receiver to run California’s prison medical system conformed to the PLRA. See *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2005 U.S. Dist. LEXIS 43796, at *70–*72 (N.D. Cal. Oct. 3, 2005).

127. 18 U.S.C. § 3626(a)(1)(A) (emphasis added).

128. See *Cason v. Seckinger*, 231 F.3d 777, 785 (11th Cir. 2000) (“[D]istrict court[s] should engage in a specific, provision-by-provision examination of . . . consent decrees, measuring each requirement against the statutory criteria.”); cf. *Gilmore v. California*, 220 F.3d 987, 1006 n.23 (9th Cir. 2000) (“[The PLRA] contain[s] narrow language emphasizing just how closely prospective relief must track the constitutional minimum in order to survive . . .”).

129. See *supra* Part II.A.3 (discussing legislative history of PLRA).

130. See Thomas, *supra* note 120, at 371 (“[The PLRA represents a] targeted attack [] on structural and prophylactic relief intended to eliminate the use of prophylactic remedies by requiring that any prospective relief . . . be ‘necessary’ to correct [] a constitutional violation. The implication is that prophylactic relief is not necessary to vindicate legal rights.”).

131. For example, it is possible, if unlikely, that a court could take notice of Senator Abraham’s complaint about courts monitoring prisons “to make sure air and water temperatures are comfortable” and consequently decline, at least initially, to order adequate relief in situations where air and water temperatures are relevant to a constitutional violation. See 141 Cong. Rec. 26,554 (1995) (statement of Sen. Abraham); cf. Elizabeth Alexander, Acting Dir., Nat’l Prison Project of the ACLU, Letter to the Editor, *Prison Suits Address Horrifying Conditions*, Wall St. J., July 12, 1996, at A13 (recounting

Amendment would result.¹³²

The need-narrowness-intrusiveness test further threatens remediation in prison cases by requiring courts to terminate relief even where relapse into unconstitutional conditions looms.¹³³ The PLRA requires that relief be “necessary to *correct* the violation of [a] Federal right.”¹³⁴ It says nothing about preventing infractions from recurring. This omission implies that any measures with a preventive goal are out of bounds, an inference confirmed by the Act’s termination provisions. These state that when a party moves to end relief, the court shall grant the motion unless it makes written findings that a violation persists and that the need-narrowness-intrusiveness test is met with regard to *that* violation.¹³⁵ Restricting the court’s purview to “current and ongoing” problems precludes acting with a view toward the future. Indeed, the Act originally read “current *or* ongoing.” “[O]r” became “and” in a 1997 amendment;¹³⁶ the Conference Report explained that the change

corrects the confusing use of the word “or” to describe the limited circumstances when a court may continue prospective relief in prison conditions litigation to make clear that a constitutional violation must be “current and ongoing”. These dual requirements are necessary to ensure that court orders do not remain in place on the basis of a claim that a current condition that does not violate prisoners’ Federal rights nevertheless requires a court decree to address it, because . . . government officials are “poised” to resume a prior violation of federal rights. If an unlawful practice resumes or if a prisoner is in imminent danger of a constitutional violation, the prisoner has prompt and com-

“systemic violence and cruelty [of California correctional] staff [that] included the scalding and scrubbing of one man until his flesh was torn off”).

132. The PLRA thus might be thought of as an inverse to the Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438–39 (codified as amended at 42 U.S.C. § 1973b (2000)), in which Congress exercised its power under Section 2 of the Fifteenth Amendment to bar the states from using literacy tests, which the Supreme Court had previously held legal, see *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50–53 (1959); see also *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (upholding Voting Rights Act despite Court’s holding in *Lassiter*). Through the Voting Rights Act, Congress went beyond the Court and reached secondary conduct to ensure the protection of a primary constitutional right. With the PLRA, Congress told courts to be chary of reaching secondary conduct and may have threatened the primary right. Cf. Thomas, *supra* note 120, at 335–37 (discussing Congress’s ability to enact prophylactic legislation under Fourteenth Amendment).

133. See David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 Colum. L. Rev. 2032, 2073 n.125 (2004) (characterizing *Parrish v. Ala. Dep’t of Corr.*, 156 F.3d 1128 (11th Cir. 1998), as case in which court dissolved injunction under PLRA “because defendants were not currently out of compliance, thus leaving defendants free to resume the practices that had been enjoined”).

134. 18 U.S.C. § 3626(a)(1)(A) (2000) (emphasis added).

135. *Id.* § 3626(b)(3).

136. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, § 123(a)(2), 111 Stat. 2440, 2470 (1997) (codified at 18 U.S.C. § 3626(b)(3)).

plete remedies through a new action filed in State or Federal court and preliminary injunctive relief.¹³⁷

Courts taking note of this history will rule out any consideration that relapse¹³⁸ might follow the removal of the specific deterrent of judicial enforcement.¹³⁹

Practically, this element of the Act may be of limited significance: The same steps that correct a violation tend to lessen the odds it will recur. This will be true especially to the extent the court's initial order addresses root causes. But the Act calls for supervision to terminate so long as conditions at the moment of a defendant's motion do not violate the Constitution, even if there is reason to believe they will revert to unacceptable levels after termination. For example, imagine an order dealing with healthcare that calls for experts to monitor the medical system for several years.¹⁴⁰ The experts may oversee improvements such that the delivery of services to inmates no longer violates the Constitution. But the institutional personnel may still lack the core competency of quality control, the experts having performed that function in the interim. Removing the experts now jeopardizes the progress to date and places inmates at risk of new violations. Yet the Act compels just that if defendants move to terminate.

Framing the matter in more general terms, prison injunctions under the PLRA may be compared to another body of institutional decrees, those involving school desegregation. The Supreme Court laid out the standards for dissolving desegregation injunctions in *Board of Education v. Dowell*.¹⁴¹ The Court conditioned termination on "a sufficient showing of

137. H.R. Rep. No. 105-405, at 133 (1997) (Conf. Rep.), as reprinted in 1997 U.S.C.C.A.N. 2941, 2984.

138. See *Cason v. Seckinger*, 231 F.3d 777, 783 (11th Cir. 2000) (rejecting interpretation of PLRA that would allow relief to continue in cases of "substantial and very real danger that a violation of rights will follow the termination of the injunction" (quoting *Parrish*, 156 F.3d at 1129)). *Cason* explained, "The legislative history of the enactment, which we did not have occasion to discuss in *Parrish*, clearly shows that Congress intended 'current and ongoing' to mean a presently existing violation, not a potential, or even likely, future violation." *Id.* at 783.

139. See Schlanger, *Civil Rights Injunctions*, *supra* note 92, at 625 (referring to prospect under judicial decree "that a noncompliant agency would have its feet held to the fire by a judge with the obligation to enforce the terms of [the] consent decree"); Schlanger, *Inmate Litigation*, *supra* note 11, at 1667 ("For a large number of prison and jail systems, the basic deterrent impact of litigation has been the *specific* deterrence of a court order, reached by litigation or negotiation, and enforceable by contempt or other judicial action if need be."). *Gilmore v. California* noted that the Act's apparent restriction on courts' "discretion to keep injunctive orders in place where reversion to past unlawful practice is indeed imminent" presented "a serious separation of powers claim," but did not find it necessary to resolve the issue. 220 F.3d 987, 1009 n.27 (9th Cir. 2000).

140. This is the model used, for example, in *Laube v. Campbell*. See 333 F. Supp. 2d 1234, 1244 (M.D. Ala. 2004) (discussing role of healthcare monitor in inspecting facilities and working with institution's quality assurance personnel).

141. 498 U.S. 237 (1991).

constitutional compliance.”¹⁴² It directed the district court on remand to ask, *inter alia*, whether the school board had “complied in good faith with the desegregation decree since it was entered.”¹⁴³ This requirement of good faith is conspicuously absent from the PLRA, and indeed, courts consulting the legislative history cannot mistake Congress’s admonition to terminate relief even if relapse is “imminent.”¹⁴⁴ If violations resurface, inmates will again have to go through the rigors of filing suit under the PLRA,¹⁴⁵ and a predictable and preventable violation of their rights will have occurred in the meantime.

The Act’s timetable for periodic review of remedies exacerbates this problem: Relief terminates on the motion of any party after two years (unless the court makes the requisite factual findings and performs the need-narrowness-intrusiveness evaluation), with parties able to seek termination on the same terms one year later and every year thereafter.¹⁴⁶ These rules link parties’ ability to get out from under a court order, or at least to compel judicial review, to a factor that in itself has nothing to do with whether judicial supervision is still necessary: time. That is, the passage of twelve or twenty-four months logically bears no relation to whether defendants have complied with the original order—drawn to “extend no further than necessary” to correct a constitutional violation¹⁴⁷—or to whether prison conditions have improved. Things may have gotten better, or they may not. If they have, the progress will warrant termination, not the time. If not, termination will be inappropriate anyhow. Either way, the change in circumstances (or lack thereof) is what counts.

The timing provisions thus seem calculated to give defendants an annual “check-up” to make sure no court order remains in place, however briefly, once conditions are no longer “cruel and unusual.”¹⁴⁸ As such, these rules dovetail with the PLRA’s other constraints on enforcement of the Eighth Amendment. The next subsection reflects on those constraints as a comment on the U.S. legal system’s commitment to justice without cruelty.

142. *Id.* at 249.

143. *Id.* at 249–50; *infra* notes 160–161 and accompanying text.

144. See *supra* notes 136–139 and accompanying text.

145. See *supra* Part II.B.1 (discussing obstacles to inmate suits under PLRA); see also *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 311 (4th Cir. 2001) (terminating desegregation plan implemented thirty years earlier following landmark Supreme Court approval of broad remedies in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)). Judge William Traxler remarked: “Nor do we turn over control to an indecisive and uncommitted school board. CMS currently operates under the firm guidance of an integrated school board which has clearly demonstrated its commitment to a desegregated school system.” *Id.* at 312.

146. See 18 U.S.C. § 3626(b)(1)(A) (2000).

147. *Id.* § 3626(a)(1)(A).

148. See *Super*, *supra* note 133, at 2073 (“[T]he PLRA provides severe limits on the relief that may be entered on [a prisoner’s] behalf and requires frequent reviews of whether that remedy may be dissolved.”).

2. *The Message in Allowing Prisons to Operate on the Margins of Cruelty.* — The preceding subsection argued that the PLRA enhances the odds of Eighth Amendment underenforcement: The Act inhibits the complex remedies necessary when prison conditions present polycentric problems or call for prophylaxis, and it dictates that relief terminate, even where it may be needed to prevent the recurrence of constitutional violations. Granted, underenforcement of the Eighth Amendment may or may not materialize.¹⁴⁹ The risks should not be exaggerated.¹⁵⁰

Nonetheless, there is reason to be concerned about taking such chances at all. In risking underenforcement of a legal norm, there is a suggestion to those to whom the norm is addressed—and to the rest of the community—that it is not that important, that transgressing it is not “that big a deal.” In the case of the Eighth Amendment, the PLRA tells state officials that once their prisons have degenerated into cruelty, the only remedy demanded will be one that gets them just back over the line. Furthermore, as soon as the line is crossed, courts will not ask whether a durable fix is in place. No showing of good faith need be made. Operating in the margin will not trigger further action. Frequent reviews will ensure oversight ends at the soonest possible moment. And all of this is assuming that inmates can get into court to prove a violation in the first place.¹⁵¹

With these points in mind, it may be asked what type of legal provision the Eighth Amendment appears to be when viewed through the prism of the PLRA. If the foregoing analysis is correct, the Amendment may well look something “like a speed limit which [prison officials] are entitled to push up against as closely as [they] can and in regard to which

149. Plaintiffs’ attorneys in a 2002 Washington, D.C., jail case said they did not oppose the lifting of a population cap at least in part because of the PLRA’s requirements for ongoing relief. Serge F. Kovaleski, D.C.’s Inmate Cap Likely to Be Lifted: Citing Improved Conditions at Jail, *Advocates Say They Won’t Oppose Motion*, *Wash. Post*, June 25, 2002, at B2.

150. See Schlanger, *Civil Rights Injunctions*, *supra* note 92, at 594–95 (calling PLRA restrictions on prospective relief “[r]ed herring” that has had little effect on rate of entry of court-ordered relief in prison conditions cases). But cf. *id.* (stating that PLRA relief provisions nonetheless “may be undermining the *effectiveness* of court-order regulation”). Consider, too, Tushnet and Yackle’s grim prediction:

A handful of prisoners who might have gotten some relief from unconstitutional conditions before the PLRA was enacted will not get it now. They will continue to live in conditions that may threaten their lives. And some of them will die from unconstitutionally inadequate medical care or unconstitutionally inadequate protection of personal security.

Tushnet & Yackle, *supra* note 85, at 85–86; see also *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2005 U.S. Dist. LEXIS 43796, at *3 (N.D. Cal. Oct. 3, 2005) (“Indeed, it is an uncontested fact that, on average, an inmate in one of California’s prisons needlessly dies every six to seven days due to constitutional deficiencies in the [state corrections department]’s medical delivery system.”).

151. The Act also makes this step more difficult. See *supra* notes 76–80 and accompanying text.

there might even be a margin of toleration.”¹⁵² Part III of this Note looks into ways to eliminate this margin.

III. AMENDING AND INTERPRETING THE PLRA TO KEEP CRUELTY OUT OF PRISONS

Part I of this Note outlined Professor Jeremy Waldron’s critique of attempts to authorize torture and then posited that the Eighth Amendment embodies a commitment by the U.S. legal system to abjure brutality. Part II explored how the PLRA erodes that commitment by increasing the likelihood of Eighth Amendment underenforcement. Part III now turns to the question of how best to counteract the PLRA’s pernicious tendencies. While acknowledging that repealing the Act would be ideal, this Part concentrates instead on two second-best strategies: Part III.A suggests amendments to the Act, while Parts III.B and III.C propose interpreting it to fend off any encroachment on the Eighth Amendment. The interpretive strategy focuses on a circuit split over who bears the burden of proof in terminating a prison conditions decree.

A. *Amending the PLRA*

Repealing the PLRA would neutralize the concerns this Note raises. But there is reason to doubt that will happen anytime soon: As Mark Tushnet and Larry Yackle put it, “Criminals are not popular. No politician in recent memory has lost an election for being too tough on crime.”¹⁵³ Repealing the PLRA would thus come at a political cost.¹⁵⁴ Such considerations probably explain why the Act remains on the books despite the litany of criticisms it has inspired.¹⁵⁵

152. See Waldron, *supra* note 2, at 1703.

153. Tushnet & Yackle, *supra* note 85, at 1; cf. Philip M. Genty, *Confusing Punishment with Custodial Care: The Troublesome Legacy of Estelle v. Gamble*, 21 Vt. L. Rev. 379, 394 (1996) (“Representation of prisoners is exceedingly difficult because prisoners are, by definition, probably the most despised client population.”).

154. Felon disenfranchisement laws make repeal still less likely by excluding from the polls a group of voters inclined to oppose the Act: people who have been to prison. Nearly every state disenfranchises felons while in prison, and a majority restrict voting rights for released convicts who remain on probation and parole. See David M. Adlerstein, Note, *In Need of Correction: The “Iron Triangle” of the Prison Litigation Reform Act*, 101 Colum. L. Rev. 1681, 1705–06 (2001); Charisse Jones, R.I. to Revisit Felons’ Voting Rights, *USA Today*, June 1, 2006, at 3A (documenting felon disenfranchisement laws by state and recent political momentum to ease restrictions).

155. See, e.g., Schlanger, *Inmate Litigation*, *supra* note 11, at 1697 (“[T]he PLRA is currently sufficiently flawed, even in its own context, that any borrowing from its provisions should proceed with care and skepticism.”); Super, *supra* note 133, at 2073 (noting that under PLRA, “[p]risoners . . . are largely set outside the protection of even the minimal laws that nominally apply to them, being denied effective recourse even when their most basic rights are violated”); Thomas, *supra* note 120, at 371 (criticizing PLRA as “[a] targeted attack[] on structural and prophylactic” remedies essential to vindication of important legal rights); Tushnet & Yackle, *supra* note 85, at 4 (calling PLRA legislative

If repeal is unlikely, however, reform remains realistic: Indeed, since 2006, calls to amend the PLRA have come from the American Bar Association,¹⁵⁶ as well as former Third Circuit Chief Judge John J. Gibbons and former U.S. Attorney General Nicholas de B. Katzenbach.¹⁵⁷ These developments indicate it is time to reevaluate Margo Schlanger's 2003 assessment that the "current political climate makes it unlikely that Congress will revisit the PLRA and solve its problems."¹⁵⁸

The question then becomes which reforms Congress might enact. The ABA proposal would address this Note's concerns by rescinding the restrictions on injunctive relief encoded in 18 U.S.C. § 3626.¹⁵⁹ This pro-

"pathology"); Adlerstein, *supra* note 154, at 1683 ("[T]he PLRA overvalues autonomy and cost control at the expense of prisoners' rights.").

156. See Am. Bar Ass'n House of Delegates, Executive Summaries, 2007 Midyear Meeting, Miami, Florida (2007), available at http://www.abanet.org/leadership/executive_summary/exec0207_20061221145533.pdf (on file with the *Columbia Law Review*) [hereinafter ABA House of Delegates, Executive Summaries] (including ABA Criminal Justice Section Resolution 102B, which asks ABA to "urge[] Congress to repeal or amend specified provisions of the Prison Litigation Reform Act"); Criminal Justice Section, Am. Bar Ass'n, Annual Report 2006–2007, at 5–6 (2007), available at <http://www.abanet.org/crimjust/annualreport2007.pdf> (on file with the *Columbia Law Review*) (noting that resolution was "approved" at midyear meeting in Miami, Florida, "as official ABA policy"). For the text of the Criminal Justice Section report accompanying the ABA resolution, see Criminal Justice Section, Am. Bar Ass'n, Resolution (Feb. 12, 2007), at <http://www.savecoalition.org/americanbar.htm> (on file with the *Columbia Law Review*) [hereinafter ABA Resolution].

157. See *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons* 84–87 (2006), available at http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf (on file with the *Columbia Law Review*) [hereinafter *Confronting Confinement*] (report of commission co-chaired by John J. Gibbons and Nicholas de B. Katzenbach recommending reforms to PLRA); Letter from Nicholas de B. Katzenbach & John J. Gibbons, Co-Chairs, Comm'n on Safety & Abuse in America's Prisons, to Karen J. Mathis & Laurel Bellows, Am. Bar Ass'n (Feb. 7, 2007), available at http://www.savecoalition.org/pdfs/ABA_PLRA_letter.pdf (on file with the *Columbia Law Review*) (encouraging ABA to adopt resolution proposing reforms of PLRA). Further calls for reform are collected on the website of the Stop Abuse and Violence Everywhere Coalition (SAVE Coalition), an organization of groups committed to amending the PLRA formed in December 2006. See SAVE Coalition, at <http://www.savecoalition.org/index.html> (last visited Oct. 28, 2007) (on file with the *Columbia Law Review*); E-mail from Jody Kent, Pub. Policy Coordinator, ACLU Nat'l Prison Project, to author (Oct. 1, 2007) (on file with the *Columbia Law Review*).

158. See Schlanger, *Inmate Litigation*, *supra* note 11, at 1697. Indeed, Schlanger herself has joined the chorus of reform advocates. See Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Prisons: The Case for Amending the Prison Litigation Reform Act 2–3* (2007), available at <http://www.acslaw.org/files/Schlanger%20Shay%20PLRA%20Paper%203-28-07.pdf> (on file with the *Columbia Law Review*) (asking Congress to address the PLRA's application to juvenile detention facilities, its requirement of physical injury as a condition for damages, and its dictate that inmates exhaust administrative remedies before filing suit).

159. See ABA House of Delegates, Executive Summaries, *supra* note 156 (proposing, in Criminal Justice Section Report 102B, that Congress "[r]epeal the restrictions on the equitable authority of federal courts in conditions-of-confinement cases"); ABA Resolution, *supra* note 156 (referencing various provisions of 18 U.S.C. § 3626 in report explaining

posal would be ideal. However, Congress may prefer subtler steps. It may not wish, for example, to repeal the prohibition on consent decrees that allow courts to award greater relief than the Constitution requires. A compromise solution would leave § 3626 intact but expand the definition of “necessary” to deal with the possibility of relapse to unconstitutional conditions. That is, wherever the statute says relief must “go no further than necessary to correct the violation of [a] Federal right,” Congress could add the words, “or to prevent the recurrence thereof.” This language would shore up judicial authority to remedy underlying problems giving rise to constitutional violations. It would also make clear that a court need not stay its hand in the face of an “imminent” return to unconstitutional violations.

A complementary change would require corrections officials to demonstrate good faith as a condition of terminating a prison injunction.¹⁶⁰ This modification would prevent a court from feeling obligated to look the other way if it had reason to believe defendants would allow unconstitutional conditions to recur following the removal of an injunction.¹⁶¹

Finally, Congress could dispense with timing restrictions on judicial relief.¹⁶² Doing so would ensure courts did not have to preside over further litigation in cases where defendants would rather “run out the clock” than implement lasting solutions to complex problems.¹⁶³

These changes would go a long way toward closing the “margin of toleration” the PLRA currently creates with regard to the Eighth Amendment in the event Congress were hesitant to repeal 18 U.S.C. § 3626 outright. However, they are not the only solution. This Note now turns to an alternative that has received scant attention: reading the

how PLRA undesirably restrains courts’ equitable authority); cf. *Confronting Confinement*, supra note 157, at 86 (advocating elimination of requirement imposed by 18 U.S.C. § 3626(c)(1) and (a)(1)(A) that “correctional agencies concede liability as a prerequisite to court-supervised settlement”); SAVE: Coalition to Stop Abuse and Violence Everywhere, *Protect Victims of Prison Rape and Other Abuses: Reform the Prison Litigation Reform Act 3*, available at http://www.savecoalition.org/pdfs/save_final_report.pdf (last visited Oct. 28, 2007) (on file with the *Columbia Law Review*) [hereinafter *SAVE Report*] (advocating “[r]epeal [of] the ‘prospective relief provisions’—18 U.S.C. § 3626”). For a summary of key provisions of § 3626, see supra notes 82–90 and accompanying text.

160. See, e.g., *SAVE Report*, supra note 159, at 4, 13 n.29 (arguing that prison injunctions “should be treated [no] differently from injunctions against other civil rights violations,” which can be terminated only on showing that defendants have complied with decree in good faith and are “unlikely [to] return to [their] former ways” (quoting *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247 (1991))); supra text accompanying notes 141–144 (discussing *Dowell* requirements).

161. See supra note 139.

162. See supra notes 146–148 and accompanying text.

163. See, e.g., *SAVE Report*, supra note 159, at 4 (noting that PLRA’s provision for frequent termination motions by defendants “burdens the courts with complicated proceedings that rehash issues the courts have often previously addressed”); infra note 184 and accompanying text.

PLRA to make it more difficult for state officials to terminate prison decrees.

B. Interpreting the PLRA to Narrow the Eighth Amendment Remedial Gap

Motions to terminate injunctive relief present courts with the question of whether a “current and ongoing violation” requires continued supervision.¹⁶⁴ Courts of appeals have divided over which party bears the burden of proving a continued violation,¹⁶⁵ with the Ninth Circuit placing the burden on defendants,¹⁶⁶ and the First¹⁶⁷ and Fifth¹⁶⁸ Circuits allocating it to plaintiffs. This section explores the debate, with the first subsection recounting each side’s arguments and the second advocating the Ninth Circuit approach.

1. *The Cases.* — Eight years ago, the Ninth Circuit became the first—and thus far only—court of appeals to rule that defendants bore the burden of proof when moving to terminate an injunction under the PLRA.¹⁶⁹ That case, *Gilmore v. California*, reversed and remanded a district court’s grant of defendants’ motion to terminate a 1972 court order.¹⁷⁰ The Ninth Circuit held the lower court erred in requiring plaintiffs to prove an ongoing constitutional violation: “[N]othing in the termination provisions can be said to shift the burden of proof from the party seeking to terminate the prospective relief.”¹⁷¹

The First Circuit reached the opposite conclusion one year later in *Laaman v. Warden*.¹⁷² Like *Gilmore*, *Laaman* reversed a district court decision to terminate a prison decree.¹⁷³ Unlike *Gilmore*, it stated that on remand plaintiffs would bear the burden of proof.¹⁷⁴ The court did not explain itself, though it did comment that the PLRA “sought ‘to oust the federal judiciary from day-to-day prison management’ and serve as a ‘last rite’ for many consent decrees,” an “‘ambient intent’ [that] provides the basis for the general unfriendliness of the PLRA toward existing consent decrees.”¹⁷⁵

164. 18 U.S.C. § 3626(b)(3) (2000). The relief terminates in the absence of such a violation. *Id.*

165. See *Smith v. Aiken*, No. 3:82-CV-526 AS, 2006 U.S. Dist. LEXIS 39934, at *9 (N.D. Ind. Mar. 24, 2006) (“As the parties have illustrated, there is a split of authority with regards to which party bears the burden of proving an ongoing violation . . .”).

166. See *Gilmore v. California*, 220 F.3d 987, 1008–09 (9th Cir. 2000).

167. See *Laaman v. Warden*, 238 F.3d 14, 20 (1st Cir. 2001).

168. See *Guajardo v. Tex. Dep’t of Criminal Justice*, 363 F.3d 392, 395–96 (5th Cir. 2004).

169. *Gilmore*, 220 F.3d at 1008–09.

170. *Id.* at 1008–10.

171. *Id.* at 1007–09.

172. 238 F.3d 14.

173. The First Circuit held the district court did not give plaintiffs an adequate opportunity to prove an ongoing violation. *Id.* at 16, 20.

174. *Id.* at 20.

175. *Id.* at 15 n.1 (quoting *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 655 (1st Cir. 1997)).

The *Laaman* approach received more elaborate treatment from the Fifth Circuit in *Guajardo v. Texas Department of Criminal Justice*:

[A] plain reading of the PLRA, including its structure, imposes the burden on the prisoners. Section 3626(b)(3) places a limitation on the termination of prospective relief under a consent decree if the court makes the requisite written findings based on the record; but the burden of proof to support these findings is obviously on the party opposing termination.¹⁷⁶

This reading emphasizes two details of the PLRA: 1) its use of the heading “Limitation” to introduce § 3626(b)(3), which explains the circumstances under which courts are to extend injunctive relief; and 2) its placement of § 3626(b)(3) after two other provisions, § 3626(b)(1)–(2), that describe circumstances under which relief is to terminate.¹⁷⁷ Under the *Guajardo* reading, termination under § 3626(b)(1)–(2) is the default, while extension under § 3626(b)(3) is the exception.¹⁷⁸ That exception requires the court to find something (namely, a constitutional violation) that only the party opposing termination would wish it to find; thus, “the burden of proof to support these findings is obviously” on plaintiffs.¹⁷⁹

176. 363 F.3d 392, 395–96 (5th Cir. 2004).

177. The best way to understand these details is perhaps to quote 18 U.S.C. § 3626(b)(1)–(3):

(b) Termination of relief.

(1) Termination of prospective relief.

(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener —

- (i) 2 years after the date the court granted or approved the prospective relief;
- (ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or
- (iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act [enacted April 26, 1996], 2 years after such date of enactment.

• • • •

(2) Immediate termination of prospective relief. — In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

(3) Limitation. — Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

18 U.S.C. § 3626(b) (2000).

178. *Guajardo*, 363 F.3d at 395–96.

179. *Id.*; see also *Smith v. Aiken*, No. 3:82-CV-526 AS, 2006 U.S. Dist. LEXIS 39934, at *10 (N.D. Ind. Mar. 24, 2006) (“[I]t would appear that since the statute talks about a finding of an ongoing and current violation, it would be the plaintiff’s burden to establish the existence of such an ongoing violation.”).

Courts have continued to debate the burden issue since *Guajardo*.¹⁸⁰ One case is noteworthy for its explication of the Ninth Circuit position. In *Jones 'El v. Schneider*, a district court in Wisconsin observed that the “general rule is that a party bringing a motion bears the burden of showing that his motion should be granted, seeking as he does some ruling in his favor, usually to the detriment of the opposing party.”¹⁸¹ *Jones 'El* found *Gilmore* consistent with this rule and applied it: “It is defendants who argue in favor of terminating the decree; therefore, they will bear the burden of convincing this court that they are not engaged in the violations plaintiffs allege.”¹⁸²

With this background in mind, the next subsection takes up the question of which side has the better of the argument.

2. *Courts Should Follow the Gilmore Approach.* — The *Lamaan-Guajardo* construction of the PLRA may seem a sensible way to ensure that judicial involvement with prisons is predicated on a violation of inmates’ rights. However, this reading is problematic in light of the concerns this Note has articulated: the need to protect the principles underlying the Eighth Amendment. This point applies most clearly to the example of a decree initially issued in accordance with the PLRA. In these cases, there is no question defendants have violated the Eighth Amendment.¹⁸³ An injunction issues only in the event of constitutional deficiencies. Under 18 U.S.C. § 3626(b)(1), such an injunction “shall be terminable” on defendants’ motion after two years. If all defendants must show is that two years have passed, and not that they have cured the original violations, there is a high risk that judicial supervision will terminate even though unconstitutional conditions persist. As noted above, there is no necessary connection between the passage of time and the amelioration of conditions, particularly where the time frame is short and the problem requires changes in institutional culture.¹⁸⁴

180. Compare *Smith*, 2006 U.S. Dist. LEXIS 39934, at *9, (placing burden on plaintiffs), with *Jones 'El v. Schneider*, No. 00-C-421-C, 2006 U.S. Dist LEXIS 53213, at *14–*16 (W.D. Wis. July 31, 2006) (placing burden on defendants).

181. *Jones 'El*, 2006 U.S. Dist. LEXIS 53213, at *15.

182. *Id.* at *16. It should be noted that defendants in this case had not moved for termination; the court moved *sua sponte*. *Id.* at *15. However, plaintiffs opposed the motion while defendants supported it. *Id.* The court determined that as the decree would continue in force but for the motion to terminate, it was defendants who supported changing the status quo and should bear the burden. *Id.* at *16.

183. See Tushnet & Yackle, *supra* note 85, at 49 (noting that under PLRA parties cannot enter into consent decrees “unless the administrators consent to the entry of an order that the conditions are indeed unconstitutional”).

184. See, e.g., *Skinner v. Lampert*, 457 F. Supp. 2d 1269, 1281–82 (D. Wyo. 2006) (discussing “culture of silence” with regard to inmate assaults and denying defendants’ motion to terminate relief); *Sabel & Simon*, *supra* note 92, at 1042 (“It takes more than two years of implementation to make major improvements in a prison with serious violations.”); *supra* Part II.A.1 (discussing possibilities for premature termination of injunctive relief under PLRA).

It may be argued that in any case plaintiffs have an opportunity to show a current constitutional violation. But placing the burden on them means that courts must terminate relief even where the evidence is in equipoise. In these situations, defendants have not disproved the court's last finding that a violation necessitated relief. It follows that plaintiffs should be entitled to have the relief continued, just as they are in non-prison decree cases.¹⁸⁵ A further consideration in the prison context is that "nothing less than the dignity of man" is at stake whenever the Eighth Amendment has been violated.¹⁸⁶

These points bear even on cases involving pre-PLRA consent decrees that lack admission of wrongdoing. Such decrees might not appear to warrant a presumption in plaintiffs' favor, since the court never found any violation. However, the failure to find a violation is not the same as a finding that no violation occurred—at least where a court can grant relief at the parties' behest without passing on the merits. The possibility of past—and continuing—violations in such situations recommends caution in dismantling relief, including giving plaintiffs the benefit of the doubt in even cases. The potential violations still relate to the "dignity of man."¹⁸⁷

For these reasons, courts would be well advised to have defendants bear the burden of persuasion on motions to terminate prison decrees. Yet this reasoning may elicit the rebuke that it would have courts place their vision of the best substantive outcome ahead of fidelity to the legislative will. The next Part answers this objection by exploring whether a coherent theory of statutory interpretation can justify the approach this Note advocates.

C. *Dworkinian Interpretation*

This section argues that Ronald Dworkin's understanding of statutory construction supports reading the PLRA to place the burden of persuasion on defendants. Part III.C.1 reviews Dworkin's framework, and Part III.C.2 applies it to the PLRA.

1. *Dworkin and the Virtue of Political Integrity*. — In *Law's Empire*, Ronald Dworkin describes the role of a judge called upon to resolve a statutory dispute. The judge's responsibility is not to "try[] to reach what he believes is the best substantive result,"¹⁸⁸ but to read the legislation in accord with four ideals that ought to guide a society's legal decisionmaking in general: fairness, justice, procedural due process, and political in-

185. See *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249 (1991) (placing burden on defendants to show constitutional compliance in school desegregation case).

186. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (Warren, C.J., plurality opinion).

187. *Id.*

188. Ronald Dworkin, *Law's Empire* 338 (1986) [hereinafter Dworkin, *Law's Empire*].

tegrity.¹⁸⁹ By the first three terms, Dworkin means, respectively, “the ideals of a fair political structure, a just distribution of resources and opportunities, and an equitable process of enforcing the rules and regulations that establish these.”¹⁹⁰ The fourth denotes a “commitment to consistency in principle valued for its own sake” that is for Dworkin “the life of law as we know it.”¹⁹¹ Political integrity is the “demand” the populace makes “of the state or community taken to be a moral agent, when [it] insist[s] that the state act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness really are.”¹⁹²

Dworkin breaks political integrity down into legislative and adjudicative dimensions,¹⁹³ the latter being of interest here. Dworkin describes integrity in adjudication thus:

[I]t asks those responsible for deciding what the law is to see and enforce it as coherent in that way. . . . It explains why judges must conceive the body of law they administer as a whole rather than as a set of discrete decisions that they are free to make or amend one by one, with nothing but a strategic interest in the rest.¹⁹⁴

Integrity in adjudication “requires our judges, so far as this is possible, to treat our present system of public standards as expressing and respecting a coherent set of principles, and, to that end, to interpret these standards to find implicit standards between and beneath the explicit ones.”¹⁹⁵

The mention of “implicit standards” here recalls Dworkin’s argument from *Taking Rights Seriously* (adapted by Waldron) that law includes not only positive enactments but also background norms like “No man may profit by his own wrong.”¹⁹⁶ Hence it is no surprise that Dworkin opens *Law’s Empire* with the story of *Riggs v. Palmer*.¹⁹⁷ In *Riggs*, the New York Court of Appeals held that a legatee who had murdered his grandfather could not inherit under the will, even though the applicable statutes,

189. *Id.* at 164–67; see also *id.* at 313 (noting that judges under this approach “will use much the same techniques . . . to read statutes” that they use “to decide common-law cases”).

190. *Id.* at 164.

191. *Id.* at 167.

192. *Id.* at 166.

193. *Id.* at 167. Dworkin defines the “principle of integrity in legislation” as one “which asks those who create law by legislation to keep that law coherent in principle.” *Id.*

194. *Id.*

195. *Id.* at 217.

196. See *supra* Part I.A.1 (discussing Dworkin’s concept of background norms as applied by Waldron).

197. 22 N.E. 188, 115 N.Y. 506 (1889); see Dworkin, *Law’s Empire*, *supra* note 189, at 15–20. This Note has already discussed *Riggs*, and some of the details mentioned before are recounted here. See *supra* Part I.A.1. The repetition is limited to background necessary to understand points not previously discussed.

“if literally construed,” prescribed that result.¹⁹⁸ The grandson argued that if the court denied him the property, it would be, in Dworkin’s words, “substituting its own moral convictions for the law.”¹⁹⁹ The court, however, found that the law itself precluded the inheritance: “[A]ll laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law.”²⁰⁰ One of these maxims—that “[n]o one shall be permitted to . . . take advantage of his own wrong”²⁰¹—applied to the matter at hand: It “controlled” the statute of wills and denied the murderer his legacy.²⁰²

The court’s logic leads Dworkin to the following insight: The *Riggs* justices were not choosing whether to “follow the law or adjust it in the interests of justice.”²⁰³ Rather, they were taking a position on “what the law was, about what the real statute the legislators enacted really said.”²⁰⁴ The legislation had to be read against “principles of justice assumed elsewhere in the law.”²⁰⁵ Two considerations supported this method:

First, it is sensible to assume that legislators have a general and diffuse intention to respect traditional principles of justice unless they clearly indicate the contrary. Second, since a statute forms part of a larger intellectual system, the law as a whole, it should be construed so as to make that larger system coherent in principle.²⁰⁶

What the *Riggs* majority did, then, was to interpret the statute as part of a quest for coherence in the law. That mission is the essence of political integrity.²⁰⁷

Equipped with this understanding, the next subsection offers a “political integrity” reading of the PLRA.

2. *The PLRA: A Dworkinian Interpretation.* — In the context of *Riggs v. Palmer*, political integrity meant construing the New York statute of wills in light of the maxim that no man should profit from his own wrong.²⁰⁸ But what premise should judges apply when the question is who bears the burden of proving an ongoing constitutional violation under the PLRA? Professor Waldron supplies a candidate in the principle that law, even in

198. 22 N.E. at 189, 115 N.Y. at 509. See also *supra* notes 20–24 and accompanying text.

199. Dworkin, *Law’s Empire*, *supra* note 189, at 16. According to the *Riggs* headnotes in the New York Reports, counsel for the appellant argued that it “does not lie with the court to enhance the pains, penalties and forfeitures provided by law for the punishment of crime, nor can it add any disability to those pains and penalties not expressly declared by the Constitution or laws.” 115 N.Y. at 508.

200. *Riggs*, 22 N.E. at 190, 115 N.Y. at 511.

201. *Id.*, 115 N.Y. at 511.

202. *Id.*, 115 N.Y. at 511.

203. Dworkin, *Law’s Empire*, *supra* note 189, at 20.

204. *Id.*

205. *Id.* at 19.

206. *Id.* at 19–20.

207. See *id.* at 217.

208. *Id.* at 19–20.

extremis, maintains respect for human dignity. Part I.B of this Note posited that this principle, which Waldron linked to the rule against torture, also illuminates the Eighth Amendment. Part III.B.2 then argued that placing the burden of proof on plaintiffs would loosen the law's commitment to this principle by ending judicial supervision despite defendants' inability to prove by a preponderance of the evidence that they had cured constitutional violations. The point of the last subsection was to show, by using Dworkin's methodology, that a judge who relies on general principles "elsewhere respected in the law"²⁰⁹ does not base her decisions on personal preferences. Rather, it is the law itself to which the judge looks.²¹⁰ In the case of the PLRA, a judge who interprets the Act to put the burden on defendants does no more than her job demands: She interprets the statute in a manner consistent with the ideal that law respects dignity even in extremis.²¹¹ She makes the "law as a whole" coherent.²¹²

Two objections to this argument might still be raised. The first is that Dworkin overlooks legislative history.²¹³ But Dworkin does not ignore this history. On the other hand, nor does he treat it as "evidence of the mental states of the . . . majority of legislators whose votes created the statute," blended into a "composite institutional intention" binding on the court.²¹⁴ Rather, he considers the statements that make up legislative history as "themselves political decisions."²¹⁵ As such, a judge committed to political integrity, who is dedicated to having the state "act in a principled way," will consider it his duty to give an account of the statute that "embraces" legislators' statements "as well as the more discrete decisions captured in statutes."²¹⁶ Such a judge "aims to make the legislative story as a whole as good as it can be; he would make the story worse if his interpretation showed the state saying one thing while doing another."²¹⁷

209. *Id.* at 352.

210. *Cf. id.* at 16 ("The judges [in *Riggs*] agreed that their decision must be in accordance with the law.").

211. For evidence that this principle is not confined to the Eighth Amendment, see Waldron, *supra* note 2, at 1690–91, 1731–34 (describing legislation and treaties making up prohibition of torture and arguing that this ban informs substantive and procedural due process jurisprudence).

212. Dworkin, *Law's Empire*, *supra* note 189, at 20.

213. This point will, of course, be of little moment to jurists inclined to disregard legislative history anyhow. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation* 3, 29–37 (Amy Gutmann ed., 1997) ("My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning.").

214. Dworkin, *Law's Empire*, *supra* note 188, at 314, 316.

215. *Id.* at 343.

216. *Id.*

217. *Id.*

Dworkin's judge recognizes "that legislation is seen in a better light, all else being equal, when the state has not misled the public."²¹⁸

Thus, the pivotal inquiry is whether a judge who interprets the PLRA to put the burden on defendants portrays the state as "saying one thing while doing another." The answer might seem to be "yes," if one accepts the historical account put forth by the First Circuit in *Inmates of Suffolk County Jail v. Rouse* and quoted in *Lamaan*. That portrayal concluded that the "ambient intent" of the PLRA was "to oust the federal judiciary from day-to-day prison management."²¹⁹ This reading, however, is problematic: First, it overlooks the detail that no part of the legislative history mentions the burden issue. Second, even the bill's proponents did not advocate ousting courts from managing prisons, *period*; they acknowledged the need for remedies for constitutional violations. Senator Abraham recognized, "[C]riminals . . . must be accorded their constitutional rights Obviously, they should not be tortured or treated cruelly."²²⁰ This concern for constitutional rights, along with the lack of any statement on the burden issue, suggests that reading the Act to place the burden on defendants would not result in the government having "misled the public."²²¹

This observation, however, leaves unaddressed a second objection, one made by *Guajardo*: A "plain reading" of the Act places the burden on plaintiffs.²²² Therefore, legislative history is irrelevant. So is the U.S. legal system's commitment to nonbrutality. These interpretive guides should enter the equation only when a statute's terms are unclear, and the PLRA is clear. That is the end of the matter.

218. *Id.* at 346.

219. See *Laaman v. Warden*, 238 F.3d 14, 15 n.1 (1st Cir. 2001) (quoting *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 655 (1st Cir. 1997)).

220. 141 Cong. Rec. 26,554 (1995) (statement of Sen. Abraham) (emphasis added); see also *id.* at 27,042 (statement of Sen. Hatch) ("[P]rison conditions that actually violate the Constitution should not be allowed to persist . . ."). That the Act's sponsors should treat as a matter of course the availability of an injunctive remedy for constitutional violations is no surprise: The legal culture in this country has long valued giving courts the power to enjoin constitutional violations, even where competing considerations militate against judicial action. See, e.g., *Ex Parte Young*, 209 U.S. 123, 149–50, 155–56 (1908) (holding that state sovereign immunity did not preclude injunctive suit to stop state officials from enforcing state law in violation of Constitution); Tracy O. Appleton, Note, *The Line Between Liberty and Union: Exercising Personal Jurisdiction over Officials from Other States*, 107 Colum. L. Rev. 1944, 1959–62 (2007) (discussing *Young's* exception to state sovereign immunity).

221. Dworkin gives a counterexample involving the statute of wills at issue in *Riggs*. See Dworkin, *Law's Empire*, *supra* note 189, at 346–47. This hypothetical supposes that "the legislative debates surrounding the statute of wills had been studded with uncontradicted statements that wills must be read" the way the grandson in *Riggs* had argued, as bearing their literal construction no *matter what the context*. *Id.* In that case, "the public would have received the statute, and wills might well have been drafted, under that assumption." *Id.* A judge committed to political integrity "would then count that fact as a strong, though not necessarily decisive, argument in favor of that construction." *Id.*

222. *Guajardo v. Tex. Dep't of Criminal Justice*, 363 F.3d 392, 395–96 (5th Cir. 2004).

Dworkin responds that linguistic ambiguity is not a precondition for using his model: “The description ‘unclear’ is the *result* rather than the *occasion* of [this] method of interpreting statutory texts.”²²³ Though Dworkin illustrates his method by applying it to hard cases, it “is equally at work in easy cases.”²²⁴ The difference is that “since the answers to the questions it puts are then obvious, or at least seem to be so, we are not aware that any theory is at work at all.”²²⁵ To take the example of the statute of wills from *Riggs*, Dworkin points out that the text makes no more mention of blue-eyed people than of murderers.²²⁶ Even so, no one considers the statute unclear with respect to whether blue-eyed people can inherit.²²⁷ “Why,” then, “is it different with murderers—or rather why was it different when [*Riggs*] was decided?”²²⁸ The answer is that “the case for excluding murderers . . . is a strong one, sanctioned by principles elsewhere respected in the law.”²²⁹ In other words, the search for integrity provides reason to doubt that murderers should be allowed to inherit, and the statute is therefore called ambiguous. This is not the case with respect to blue-eyed people because the search for integrity yields no “decent arguments for each of two competing interpretations” of the statute on this issue.²³⁰ Similarly, “[w]e think the question whether someone may legally drive faster than the stipulated speed limit is an easy one because we assume at once that no account of the legal record that denied that paradigm would be competent.”²³¹

This section has attempted to show that interpreting the PLRA to place the burden of persuasion on defendants is “competent”—that Dworkin’s method produces “decent arguments” for a “competing interpretation[]” of the statute too quickly dismissed by *Guajardo*.²³² Having made this attempt, this Note now offers concluding remarks on the themes discussed throughout.

CONCLUSION

This Note has posited that the PLRA threatens the ability of courts to address cruel and unusual prison conditions, and thus the right of inmates to be free from such treatment. As such, this Note has argued, the PLRA undermines U.S. law’s dedication to nonbrutality. It is hoped that these concerns prove compelling in themselves—that if the analysis prof-

223. Dworkin, *Law’s Empire*, *supra* note 188, at 352.

224. *Id.* at 354.

225. *Id.*

226. *Id.* at 351.

227. *Id.*

228. *Id.*

229. *Id.* at 352.

230. *Id.*

231. *Id.* at 354.

232. *Id.* at 352. The existence of the opinions in *Gilmore* and *Jones* *Et* might be taken as additional support for this claim. See *supra* notes 169–171, 180–182 and accompanying text.

ferred above is persuasive, the prospect of cruel and unusual treatment will be deemed to warrant some solution, be it one of those proposed in Part III or not.

To these considerations, one final point may be added. The inspiration for this Note was Professor Waldron's concern about the authorization of torture following September 11, 2001. Professor Waldron argued that whatever the benefits of using torture to fight terrorism might be, they were not worth the costs. This calculus underscores a distinction between Waldron's discussion of torture and this Note's analysis of cruel and unusual punishment. In the torture context, utilitarian questions came into play: What if torture were necessary to save thousands of lives? The Eighth Amendment context involves no such dilemmas: Treating criminals cruelly will save no one and serve no benefit. At least, that is what the Framers seemed to think. It is submitted that their views remain valid.