8-1-2016

Anti-Incarcerative Remedies for Illegal Conditions of Confinement

Margo Schlanger

Anti-Incarcerative Remedies for Illegal Conditions of Confinement

By Margo Schlanger*

INTRODUCTION 1
I. POPULATION CAPS OVER TIME 6
II. SOME PIONEERING ANTI-INCARCERATIVE ORDERS 9
A. Procedural (planning) anti-incarcerative orders 10
B. Substantive anti-incarcerative orders 14
III. SOLITARY CONFINEMENT ORDERS 17
A. Court orders or settlement provisions establishing alternatives to solitary confinement 21
B. Court orders or provisions narrowing/slowing the path into solitary confinement 22
C. Court orders or settlement provisions broadening/speeding the path out of solitary confinement 23
IV. *OLMSTEAD* ORDERS (MODERN DEINSTITUTIONALIZATION) 23
V. THE PLRA'S PRISONER RELEASE ORDER PROVISION 25
CONCLUSION 29

INTRODUCTION

Opposition to mass incarceration has entered the mainstream.[1] But except in a few states,[2] mass *de*carceration has not, so far, followed: By

* Henry M. Butzel Professor of Law, University of Michigan. My thanks to Ira Burnim and the Bazelon Center for Mental Health Law for convening the meeting that prompted me to write this paper, to the *University of Miami Race & Social Justice Law Review* for providing both an in-person and print forum for it, and to Sharon Dolovich and Sam Bagenstos for their comments. All remaining errors are mine. I also wish to acknowledge the generous support of the William W. Cook Endowment of the University of Michigan.

1 *See, e.g.*, Devan Kreisberg, *Tough on Criminal Justice Reform*, NEW AM. WKLY. (Sept. 17, 2015), https://www.newamerica.org/weekly/tough-on-criminal-justice-reform/.

the end of 2014 (the last data available), nationwide prison population had shrunk only 3% off its (2009) peak. Jail population, similarly, was down just 5% from its (2008) peak. All told, our current incarceration rate—7 per 1,000 population—is the same as in 2002, and four times the level in 1970, when American incarceration rates began their rise.[3]

Our bloated prisoner population includes many groups of prisoners who are especially likely to face grievous harm in jail and prison. In particular, well over half of American prisoners have symptoms of mental illness. And the most recent thorough analysis found that an astounding 15% of state prisoners and 24% of jail inmates "reported symptoms that met the criteria for a psychotic disorder."[4] In addition, 4 to 10% prisoners have a serious intellectual disability.[5] Prisoners with

---

[2] For information on New York, California, and New Jersey—the three states whose current prison population dropped about 25% off their respective peaks between 2006 and 2012—see MARC MAUER & NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, FEWER PRISONERS, LESS CRIME: A TALE OF THREE STATES (July 2014), http://sentencingproject.org/doc/publications/inc_Fewer_Prisoners_Less_Crime.pdf. Colorado, Connecticut, Hawaii, Michigan, Rhode Island, and Vermont each also "achieved double-digit reductions during varying periods within those years." *Id*. at 2.

[3] For correctional populations figures from 1980 to 2014, see BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, ESTIMATED NUMBER OF PERSONS SUPERVISED BY U.S. ADULT CORRECTIONAL SYSTEMS, BY CORRECTIONAL STATUS, 1980–2014 (2016), http://www.bjs.gov/content/keystatistics/excel/Correctional_population_counts_by_status_19802014.xlsx. For 1970, see U.S. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, NAT'L PRISONER STAT. BULL., NO. 47, NATIONAL PRISONER STATISTICS: PRISONERS IN STATE AND FEDERAL INSTITUTIONS FOR ADULT FELONS: 1968–1970, at 22, tbl.10c (Apr. 1972) (sentenced prisoners); for 1970, see LAW ENF'T ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE, NATIONAL JAIL CENSUS 1970, at 10 tbl.2 (1971). U.S. population data is from the U.S. Census. *See* POPULATION DIVISION, U.S. CENSUS BUREAU, HISTORICAL NATIONAL POPULATION ESTIMATES: JULY 1, 1900 TO JULY 1, 1999 (rev. June 28, 2000), https://www.census.gov/population/estimates/nation/popclockest.txt; *Population Estimates: National Intercensal Estimates (2000–2010)*, U.S. CENSUS BUREAU, https://www.census.gov/popest/data/intercensal/national/nat2010.html (last visited June 26, 2016); *Population Estimates: National Totals: Vintage 2015*, U.S. CENSUS BUREAU, https://www.census.gov/popest/data/national/totals/2015/index.html (last visited June 26, 2016).

[4] DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (rev. Dec. 14, 2006), http://www.bjs.gov/content/pub/pdf/mhppji.pdf; E. FULLER TORREY ET AL., THE TREATMENT ADVOCACY CTR., THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY (Apr. 8, 2014), http://tacreports.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf; KiDeuk Kim, Miriam Becker-Cohen & Maria Serakos, *The Processing and Treatment of Mentally Ill Persons in the Criminal Justice System: A Scan of Practice and Background Analysis*, URBAN INST. (Apr. 7, 2015), http://www.urban.org/research/publication/processing-and-treatment-mentally-ill-persons-criminal-justice-system/view/full_report.

[5] *See* Tammy Smith et al., *Individuals with Intellectual and Developmental Disabilities in the Criminal Justice System and Implications for Transition Planning*, 43 EDUC. AND TRAINING IN DEV. DISABILITIES 421, 422 (2008), http://www.daddcec.org/

mental disabilities face grave difficulties in prison and jail; they can have trouble adapting to new requirements and understanding what is expected of them, getting along with others, and following institutional rules. In the absence of treatment and habilitation, they are more likely both to be victimized and to commit both minor and major misconduct.[6] Prisoners with mental disabilities are not alone; there are other groups of prisoners who are similarly vulnerable—prisoners with serious chronic illnesses[7] and physical disabilities,[8] gay and transgender prisoners,[9] juveniles in adult facilities,[10] elderly prisoners,[11] minor offenders,[12] and so on. Each group faces higher-than-usual probabilities of victimization and harm behind bars.

In this symposium essay, I argue that when such difficulties are manifest, and create conditions of confinement that are illegal under the Eighth Amendment, Americans with Disabilities Act, or other source of law, plaintiffs should seek, and courts should grant, court-enforceable remedies diverting prisoners away from incarceration, in order to keep vulnerable populations out of jail and prison.

What's novel about this proposal is not the diversionary remedies themselves, but the connection of such programs to conditions of

---

Portals/0/CEC/Autism_Disabilities/Research/Publications/Education_Training_Development_Disabilities/2008v43_Journals/ETDD_200812v43n4p421-430_Individuals_With_Intellectual_Developmental_Disabilities_Criminal.pdf.

6 *See, e.g.*, Joan Petersilia, Cal. Research Policy Ctr., Doing Justice? The Criminal Justice System and Offenders with Developmental Disabilities 10–11 (2000), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.113.6433&rep=rep1&type=pdf; Morris L. Thigpen et al., Nat'l Inst. of Corrections, U.S. Dep't of Justice, Effective Prison Mental Health Services: Guidleines to Expand and Improve Treatment (2004), https://s3.amazonaws.com/static.nicic.gov/Library/018604.pdf.

7 Andrew P. Wilper et al., *The Health and Health Care of US Prisoners: Results of a Nationwide Survey*, 99 AM. J. PUB. HEALTH 666 (2009), http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2008.144279.

8 JENNIFER BRONSON, LAURA M. MARUSCHAK & MARCUS BERZOFSKY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DISABILITIES AMONG PRISON AND JAIL INMATES, 2011–12 (Dec. 2015), http://www.bjs.gov/content/pub/pdf/dpji1112.pdf.

9 ALLEN J. BECK, MARCUS BERZOFSKY & CHRISTOPHER KREBS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12: NATIONAL INMATE SURVEY, 2011–12, at 16 (May 2013), http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf; ALLEN BECK ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12-UPDATE: SUPPLEMENTAL TABLES (Dec. 9, 2014), http://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf.

10 E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2013, at 8 tbl.7 (Sept. 30, 2014), http://www.bjs.gov/content/pub/pdf/p13.pdf.

11 *Id.*

12 *See, e.g.*, RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA (Feb 2015), http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf.

confinement litigation. Diversionary programs are, in fact, increasingly familiar. Reformers in many states have implemented many different diversion methods. Some programs address prisoners with mental illness or intellectual disabilities in particular[13]; others focus on other populations—substance abusers, minor misdemeanant arrestees, veterans, etc. They include:

- Crisis intervention teams of officers linked to community mental health services and trained and supported in helping individuals with mental illness.[14]
- Deescalation techniques that avoid unnecessary arrests.[15]
- Substitution of citations for misdemeanor arrests.
- Diversion—sometimes by use of mental health courts that send offenders with mental illness to intensive treatment and supervision, but not jail or prison.
- Wraparound services that provide "treatment, rehabilitation, supportive services, and practical help" for people with severe and persistent mental illness.[16]

And prompted by jail and prison crowding, states, cities, and counties have likewise developed a menu of other reforms, less linked to particular populations, that seek to decrease incarceration,[17] including:

- Sentencing reform (replacing mandatory minimum sentences, limiting "three-strikes" coverage, reducing recommended sentences, etc.).
- Shifts in policing enforcement priorities.[18]

---

[13] For a national survey of mental-health diversion programs, see THE CTR. FOR HEALTH & JUSTICE AT TASC, NO ENTRY: A NATIONAL SURVEY OF CRIMINAL JUSTICE DIVERSION PROGRAMS AND INITIATIVES (Dec. 2013), http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diversion%20Report_web.pdf.

[14] *See* Randolph Dupont et al., *Crisis Intervention Team 10-Core Elements*, CRISIS INTERVENTION TEAM INT'L (Sept. 2007), http://www.citinternational.org/images/PDF/Core_Elements_Condensed.pdf; Letter from Jocelyn Samuels, Acting Assistant U.S. Att'y Gen. & Damon P. Martinez, Acting U.S. Att'y, Dist. of N.M., to Richard J. Berry, Mayor, City of Albuquerque (Apr. 10, 2014), http://www.clearinghouse.net/chDocs/public/PN-NM-0002-0001.pdf (criticizing absence of CIT).

[15] *See, e.g.*, POLICE EXEC. RESEARCH FORUM, CRITICAL ISSUES IN POLICING SERIES: AN INTEGRATED APPROACH TO DE-ESCALATION AND MINIMIZING USE OF FORCE (Aug. 2012), http://www.policeforum.org/assets/docs/Critical_Issues_Series/an%20integrated%20approach%20to%20deescalation%20and%20minimizing%20use%20of%20force%202012.pdf.

[16] *See, e.g.*, LEONARD I. STEIN & ALBERTO B. SANTOS, ASSERTIVE COMMUNITY TREATMENT OF PERSONS WITH SEVERE MENTAL ILLNESS (1998).

[17] For a calculator that shows the impact of various proposed policy reforms, see Ryan King et al., *Reducing Mass Incarceration Requires Far-Reaching Reforms*, URBAN INST. (Aug. 2015), http://webapp.urban.org/reducing-mass-incarceration/index.html.

- Bail reform, including "walk-through" arrangements under which arrestees are immediately released on bond.
- Parole reforms—improving risk-assessment processes, timeliness of hearings, and the tailoring of parole requirements to criminal histories.[19]
- Make earned and good-conduct reductions steeper, expand rehabilitation programs that offer sentencing credits.[20]

But only rarely have such initiatives—which I label "anti-incarcerative"—been imposed or negotiated as court-enforceable solutions for jail or prisons conditions problems. And when they have, it's mostly been to facilitate compliance with a court-ordered population cap. What I'm urging is a new generation of anti-incarcerative remedies in conditions lawsuits, unconnected to a population order, whose purpose is to keep vulnerable would-be prisoners out of harm's way by promoting workable alternatives to incarceration.

This essay proceeds as follows. In Part I, I describe the history of population caps in conditions of confinement lawsuits. These kinds of direct population limits—still available and valuable, in the right case—constituted a first generation of decarcerative conditions orders. They are important both historically and because they demonstrate that ordinary remedial law allows court orders that keep prisoners out of prison in order to avoid constitutional problems inside. I next highlight in Part II a few pioneering court orders that have specified anti-incarcerative remedies, hooked to alleged or proven unconstitutional conditions caused by crowding. Like the population caps, these orders have aimed explicitly at population reduction.

I move in Parts III and IV to two models for anti-incarcerative orders that are *not* premised on crowding. In Part III, I examine recent remedies addressing unconstitutional solitary confinement. Many of these recent orders have not simply barred prisons from imposing the solitary conditions plaintiffs allege are unconstitutional. Rather, they establish and regulate alternatives to solitary confinement. A final useful model,

---

[18] JAMES AUSTIN & MICHAEL JACOBSON, VERA INST. OF JUSTICE, HOW NEW YORK CITY REDUCED MASS INCARCERATION: A MODEL FOR CHANGE? (2012), http://www.brennancenter.org/sites/default/files/publications/How_NYC_Reduced_Mass_Incarceration.pdf.

[19] JUDITH GREENE & MARC MAUER, DOWNSCALING PRISONS: LESSONS FROM FOUR STATES, THE SENTENCING PROJECT (2010), http://www.sentencingproject.org/wp-content/uploads/2016/01/Downscaling-Prisons-Lessons-from-Four-States.pdf.

[20] *See, e.g.*, JULIE SAMUELS, NANCY LA VIGNE & SAMUEL TAXY, STEMMING THE TIDE: STRATEGIES TO REDUCE THE GROWTH AND CUT THE COST OF THE FEDERAL PRISON SYSTEM, URBAN INST. (Nov. 2013), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412932-Stemming-the-Tide-Strategies-to-Reduce-the-Growth-and-Cut-the-Cost-of-the-Federal-Prison-System.PDF.

which I examine in Part IV, can be found in ongoing deinstitutionalization remedies in cases, on the model of *Olmstead v. L.C,*[21] that enforce the Americans with Disabilities Act, which have focused more on provision of services in the community than on institutional exclusions. The orders in both Parts III and IV support my contention that the ordinary law of remedies allows entry of orders keeping prisoners out of a situation in which they would face unconstitutional harm.

Finally, in Part V, I explain why the Prison Litigation Reform Act's constraints on "prisoner release orders" should not obstruct a new generation of anti-incarcerative orders. The short answer is that—like solitary confinement and *Olmstead* orders—the anti-incarcerative orders I am advocating should not be considered "prisoner release orders" because they are not "reducing or limiting the prison population," in the way that Congress intended the PLRA to regulate.

Our national infatuation with incarceration has led to the damaging imprisonment of many vulnerable people in jails and prisons ill-equipped to house them safely—people with mental and physical disabilities, juveniles, the elderly, minor offenders, and others. When a particular facility or system is unable to provide these prisoners with lawful conditions of confinement, plaintiffs should seek, and federal courts should grant, anti-incarcerative orders that facilitate alternatives.[22]

I. POPULATION CAPS OVER TIME

In the first 25 years of jail and prison conditions-of-confinement litigation,[23] population caps were commonplace court-ordered remedies

---

[21] Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999).

[22] In an intriguing article, Professor Alex Reinert has made a quite different argument, but one that might sometimes lead to a similar outcome; he urges that conditions of confinement doctrine embrace a principle of proportionality, under which certain "conditions could be constitutionally imposed as punishment for some classes of prisoners, but not constitutionally imposed on a different class of prisoner, either because of their crime of incarceration or particular characteristics." Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory*, 36 FORDHAM URB. L.J. 53, 85 (2009).

[23] The Supreme Court opened the door to modern prison and jail conditions cases in Cooper v. Pate, 378 U.S. 546 (1964), *per curiam*, which allowed a religious discrimination case brought by a Black Muslim prisoner to proceed. *See* 382 F.2d 518 (7th Cir. 1967) for the outcome. Holt v. Sarver, 309 F.Supp. 362 (E.D. Ark. 1970), was the first large-scale case to walk through that door. For lots of information about Holt and its many-opinion life, see *Holt v. Sarver, No. 5:69-cv-00024-GTE (E.D. Ark)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=553 (last visited June 26, 2016).

for unconstitutional conditions of confinement.[24] When crowding created or exacerbated unsafe conditions behind bars, these orders attacked the problem by specifying the number of prisoners allowed to be housed, or setting per-prisoner space requirements (which works out to the same thing, absent construction), or designating a permissible percentage of some measure of capacity. They established various kinds of release mechanisms and procedures, to be used as needed to meet the caps.

But federal court-ordered population caps came under increasing attack. The Supreme Court was skeptical nearly from the start, emphasizing in 1979 (in *Bell v. Wolfish*) and again in 1981 (in *Rhodes v. Chapman*) that crowding alone—in particular, double celling (housing two prisoners in a cell meant for one by substituting a bunk bed for the planned single bed)—did not constitute cruel and unusual punishment.[25] The Court emphasized that "deprivations of essential food, medical care or sanitation," "increase[d] violence," or other "intolerable" conditions were, rather, what the Constitution forbids.[26] Crowding was unconstitutional, the Court insisted, only if it caused these kinds of conditions. (The Court emphasized the point in *Wilson v. Seiter*, holding that plaintiffs in Eighth Amendment challenges to prison conditions must identify particular "deprivation[s] of . . . identifiable human need[s] such as food, warmth, or exercise"; "[n]othing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists."[27])

Bell and *Rhodes* challenged but did not end population orders; caps continued to be entered in conditions of confinement cases addressing health, safety, sanitation, nutrition, and the like, for pretrial detainees and convicted offenders in jails and prisons. The theory was simple: when overpopulation of a prison stressed its capacity to safely house inmates, a

---

[24] *See* Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 165 (2013). For lists and information about dozens of prison and jail population caps, see the Civil Rights Litigation Clearinghouse; the collections are available at http://bit.ly/Prison-Pop-Caps, and http://bit.ly/Jail-Pop-Caps. Statewide population caps were imposed in Louisiana, Florida, and Texas. For a full procedural history and copies of the many opinions and crucial orders, see *Williams v. McKeithen, No. 71-cv-0098B (M.D. La. 1971)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=722 (last visited June 26, 2016); *Costello v. Wainwright, No. 72-cv-00109 (M.D. Fla. 1972)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=644 (last visited June 26, 2016); and *Ruiz v. Estelle, No. 78-cv-00987 (S.D. Tex. 1978)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=960 (last visited June 26, 2016).

[25] *See* Bell v. Wolfish, 441 U.S. 520, 540–43 (1979); Rhodes v. Chapman, 452 U.S. 337, 348–49 (1981).

[26] Rhodes v. Chapman, 452 U.S. at 348.

[27] Wilson v. Seiter, 501 U.S. 294, 305 (1991).

population cap was one appropriate tool to restore constitutional conditions of confinement. On that theory, court-ordered caps governed Louisiana's prison system from 1983 to 1996; Florida's from 1977 to 1992, and Texas's from 1981 to 2001.[28] Many more such orders were operative in jail systems and individual prisons across the nation.[29]

Defendants—sheriffs, wardens, corrections heads—frequently agreed to population orders, which empowered them in varied ways in their particular political milieus. But many law enforcement actors objected strenuously to the caps. When prosecutors in Philadelphia argued that the cap on Philadelphia's jail system led to thousands of releases and caused thousands of new crimes, that cap, in *Harris v. City of Philadelphia*, became the *cause célèbre*[30] for the sponsors of the Prison Litigation Reform Act (PLRA).[31] The PLRA, passed in 1996 as part of the Newt Gingrich *Contract with America*,[32] imposed numerous high substantive and procedural hurdles to the entry of new population caps.[33] The new statutory obstacles to population caps are not, it should

---

[28] *See* Order Approving Settlement, Williams v. McKeithen, No. 71-cv-0098B (M.D. La. Sept. 26, 1996), at 1–2, http://www.clearinghouse.net/chDocs/public/PC-LA-0001-0009.pdf; Celestineo v. Singletary, 147 F.R.D. 258, 264 (M.D. Fla. 1993); Ruiz v. Johnson, 154 F. Supp. 2d 975, 995 (S.D. Tex. 2001).

[29] *See supra* note 24.

[30] Brief for the State of Louisiana et al. as Amici Curiae in Support of Appellants, Schwarzenegger v. Plata, No. 09-1233 (U.S. 2011), at 27–32, http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0037.pdf. The lawsuit that looms the largest in the legislative history of the PLRA's population order provisions was Harris v. City of Phila., No. 82-1847 (E.D. Pa. filed Apr. 1982); *see generally* Harris v. Pernsley, 654 F. Supp. 1042 (E.D. Pa. 1987); *Harris v. City of Phila., No. 82-1847 (E.D. Pa.)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=231 (last visited June 26, 2016). For a summary of the role this case played in the PLRA's passage, *see* Brief for the State of Louisiana et al., *supra*, and sources cited.

[31] Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, §§ 801–10, 110 Stat. 1321-66 (1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A, 1932 (2006); 42 U.S.C. §§ 1997a–1997h).

[32] REPUBLICAN NAT'L COMM., CONTRACT WITH AMERICA: THE BOLD PLAN BY REPRESENTATIVE NEWT GINGRICH, REPRESENTATIVE DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 53 (Ed Gillespie & Bob Schellhas eds., 1994).

[33] *See* Part V, *infra*. The PLRA eliminated the authority of a single district judge to enter a population order, instead requiring convening of a three-judge district court. It expanded intervention rights to criminal justice stakeholders likely to object to an order. It disallowed population orders as a first-try remedy, allowing them only if a prior, less intrusive order "has failed to remedy the deprivation of the Federal right sought to be remedied." And it established as a prerequisite to a population order a finding, by clear and convincing evidence, that "crowding is the primary cause of the violation of a Federal right," and that "no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a).

be emphasized, insurmountable.[34] Even after the PLRA's enactment, population caps have been entered in both jail and prison cases, in settlements,[35] orders contested by intervenors,[36] and litigated orders (including the statewide California order upheld on appeal to the Supreme Court).[37] But the incidence of caps has declined precipitously.[38]

II. SOME PIONEERING ANTI-INCARCERATIVE ORDERS

In a few conditions cases addressing crowding, court orders have mandated—in addition to or instead of population caps—both processes for developing anti-incarcerative remedies and substantive anti-incarcerative terms.[39] In this part, I develop insights stemming from five cases that challenged conditions of confinement and led to anti-incarcerative remedies. They are *Carruthers v. Israel*, a case filed in 1976 that addresses conditions at the Broward County Jail, in Fort

---

[34] *See* Brown v. Plata, 563 U.S. 493, 502 (2011).

[35] *See U.S. v. Cook Cnty., No. 1:10-cv-02946 (N.D. Ill.)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=13145 (last visited June 26, 2016); Final Order of Three-Judge District Court, U.S. v. Cook Cnty., No. 1:10-cv-02946 (N.D. Ill. Mar. 29, 2011), http://www.clearinghouse.net/chDocs/public/JC-IL-0048-0006.pdf; *Duran v. Apodaca, No. 77-721 (D.N.M)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=834 (last visited June 26, 2016).

[36] *Roberts v. Cnty. of Mahoning, No. 4:03-cv-02329-DDD (N.D. Ohio)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=5507 (last visited June 26, 2016); Consent Judgment Entry with a Stipulated Population Order, Roberts v. Cty. of Mahoning, No. 4:03-cv-02329-DDD (N.D. Ohio May 17, 2007), at 9–11, http://www.clearinghouse.net/chDocs/public/JC-OH-0010-0007.pdf.

[37] Brown v. Plata, 563 U.S. 493, 541(2011); *Inmates of Occoquan v. Barry, No. 86-2128 (D.D.C)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=624 (last visited June 10, 2016); Opinion, Inmates of Occoquan v. Barry, No. 86-2128 (D.D.C. Dec. 22, 1986), at 634–35, http://www.clearinghouse.net/chDocs/public/PC-DC-0003-0023.pdf.

[38] For statistics, see Schlanger, *Plata v. Brown and Realignment*, *supra* note 24, at 198–99.

[39] In Ruiz v. Estelle, a crucial (and huge) early prison case, Judge William Wayne Justice ordered Texas prison officials to use good time credits, parole, work release, and community corrections to relieve overcrowding. Amended Decree Granting Equitable Relief and Declaratory Judgment, Ruiz v. Estelle, No. H-78-987 (S.D. Tex. May 1, 1981), at I.A., reprinted as appendix to Ruiz v. Estelle, 666 F.2d 854, 862 (5th Cir. 1982). However, the Court of Appeals reversed the order, finding that it "unnecessarily invade[d] the management responsibility of state officials." Ruiz v. Estelle, 679 F.2d 1115, 1148 (5th Cir. 1982), although in an opinion issued after a petition for rehearing, it emphasized that if the state failed to comply with the population cap entered in the case, "our order shall not preclude the direction of specific remedies." Ruiz v. Estelle, 688 F.2d 266, 268 (5th Cir. 1982).

Lauderdale, Florida[40]; *Carty v. Mapp*,[41] filed in 1994 and still reforming the Virgin Islands' Criminal Justice Complex, in St. Thomas; *McClendon v. City of Albuquerque*,[42] filed in 1995 against both city and county officials responsible for conditions in Albuquerque's jail; *Maynor v. Morgan County*, a case filed in 2001 about conditions at a small jail in Decatur, Alabama[43]; and the consolidated cases of *Plata v. Brown* and *Coleman v. Brown*,[44] the California prison litigations whose population cap the Supreme Court approved in 2011.[45]

A. Procedural (planning) anti-incarcerative orders

The most common anti-incarcerative remedies are procedural and indirect—courts require defendants to convene multiple criminal justice stakeholders and to develop a plan (or, even less muscular, to *try* to develop a plan) that will decrease the population in the challenged facility. For example, orders entered in 1994 and 2013 in *Carty*, the Virgin Islands jail case, required the defendants to "actively manage their prisoner population, including seeking pretrial detention alternatives and reduced bails." [46] Similarly, defendants were instructed in the latter order to "develop[] and implement[] memoranda of understanding to ensure timely transfers of seriously mentally ill prisoners in need of inpatient or intermediate care, or those in need of acute stabilization, to an appropriate hospital or mental health facility."[47] (More definitely, the

---

[40] *Carruthers v. Cochran (Jonas v. Stack), No. 0:76-cv-06086-WMH (S.D. Fla.)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=56 (last visited June 26, 2016).

[41] *Carty v. Farrelly, No. 3:94-cv-00078-SSB (D.V.I)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=979 (last visited June 26, 2016).

[42] *McClendon v. City of Albuquerque, 6:95-cv-00024-JAP-KBM (D.N.M)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=196 (last visited June 26, 2016).

[43] *Maynor v. Morgan Cnty., Ala., 5:01 -cv-00851-UWC (N.D. Ala.)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=10041 (last visited June 26, 2016).

[44] *Plata v. Brown, No. 3:01-cv-01351-TEH (N.D. Cal.)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=589 (last visited June 26, 2016); *Plata v. Brown/Coleman v. Brown Three-Judge Court, No. 3:01-cv-1351 (N.D. Cal)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net'/detail.php?id=12280 (last visited June 26, 2016); *Coleman v. Brown, No. 2:90-cv-00520-LKK-JFM (E.D. Cal.)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=573 (last visited June 26, 2016).

[45] Brown v. Plata, 563 U.S. 493, 545 (2011).

[46] Settlement Agreement, Carty v. DeJongh, No. 3:94-cv-00078-SSB-GWB (D.V.I May 13, 2013), at 3–4, http://www.clearinghouse.net/chDocs/public/PC-VI-0001-0026.pdf.

[47] *Id.* at 17.

order required the defendants—which included the governmental entity for which the prosecutors worked to "offer[] sentences of time served for prisoners charged with misdemeanor and non-violent offenses."[48])

More formally, in *Maynor*, the comprehensive challenge to conditions of confinement in an Alabama jail in Decatur Alabama, a settlement agreement reached after the Court granted a preliminary injunction included the following requirement of an anti-incarceration "task force":

Recognizing that overcrowding at the Jail affects all aspects of Jail operations, the County Defendants agree to organize a local task force to identify and review alternative programs and methods for reducing the Jail population and to make recommendations regarding the implementation of such programs and methods. The task force shall include, but is not limited to the following officers, if they agree to serve: the sheriff; one or more members of the County Commission; the presiding circuit court judge; the district attorney; the county attorney; a criminal defense attorney; a representative from probation; and at least two community representatives. The task force shall diligently investigate and explore alternative methods for reducing the Jail population, including the creation of a Community Corrections and Punishment Program, as provided for in § 15-18-170, et seq., Code of Alabama, 1975; the expansion and development of one or more work release programs as now or hereafter authorized by law; the diversion of inmates to other institutions with available bed space; the release of inmates on their personal recognizance; and other alternative means of securing their attendance through such other means and methods as may be available. In reviewing the possible alternatives for preventing overcrowding at the Jail, the task force will consult with the Alabama Association of Community Corrections. County Defendants will report to Plaintiffs' counsel each September 15 and March 15, and through other regular communications, regarding local efforts by the task force and others to prevent overcrowding at the Jail.[49]

This was an entirely procedural order: it encouraged and facilitated, rather than requiring, anti-incarcerative measures. Compliance was slow, but the task force proposed a community corrections program that finally got started five years after the settlement, in 2006,[50] and that continues to operate today.[51]

---

[48] *Id.* at 3–4.

[49] Consent Decree Applicable to the Plaintiff Class and the County Defendants, Maynor v. Morgan Cnty., Ala., 5:01-cv-00851-UWC (N.D. Ala. Sept. 25, 2001), http://www.clearinghouse.net/chDocs/public/JC-AL-0020-0002.pdf.

[50] Status Report Regarding Activities of Task Force, Maynor v. Morgan Cty., Ala., 5:01-cv-00851-UWC (N.D. Ala. May 23, 2006), http://www.clearinghouse.net/chDocs/

In a few cases, courts have brought in outside experts to assist or lead anti-incarcerative planning. For example, in the Broward County case, renewed crowding many years after initial litigation and settlement led the court in 2010 to appoint a "population management expert pursuant to Fed. R. Evid. 706," requiring him to "identif[y] and analyze[] the County's criminal justice processes and policies that affect the population level at the Broward County jail," "develop[] strategies and remedies to address those processes and policies so that the population level . . . can be reduced without significantly affecting public safety," and "identif[y] realistic options that have been successfully implemented in other jurisdictions that will reduce the need for current and future beds—especially for the pretrial felon population."[52] The expert's most recent report, completed in 2014, recommends a series of anti-incarcerative reforms, which could reduce jail population by about 20%. They include: filing criminal charges more promptly for people in jail[53]; a supervised release program for those unable to make their very low bails; allowing release on bail for some minor offenders currently barred from pretrial release; a community-supervision reentry program; community-based treatment for inmates with alcohol and drug treatment requirements; community-based mental health services for inmates declared incompetent to stand trial; and work release for inmates nearing the end of their sentences.[54] (It does not appear that the plaintiffs are pressing to make this plan court enforceable; they have the population

public/JC-AL-0020-0010.pdf; Affidavit of William E. Shinn Jr., Maynor v. Morgan Cty., Ala., 5:01-cv-00851-UWC (N.D. Ala. May 23, 2006), http://www.clearinghouse.net/chDocs/public/JC-AL-0020-0010.pdf.

51 *Community Corrections*, MORGAN CTY., ALA., http://www.co.morgan.al.us/communitycorrectionsindex.html# (last visited June 26, 2016).

52 Order, Carruthers v. Lamberti, No. 76-cv-06086-DMM (S.D. Fla. Sept. 30, 2010), http://www.clearinghouse.net/chDocs/public/JC-FL-0008-0016.pdf.

53 Under Florida law, persons arrested can be detained in jail for several weeks prior to being charged with a crime. Fla. R. Crim. P. 3.134.

54 James Austin, Ph.D., Evaluation of Broward County Jail Population: Current Trends and Recommended Options, Carruthers v. Lamberti, No. 76-cv-06086-DMM (S.D. Fla. Aug. 31, 2015), at 1 (finding population of 4,500 inmates), 26–30 (recommending and tallying population reduction measures), http://www.clearinghouse.net/chDocs/public/JC-FL-0008-0018.pdf.

cap already,[55] and these reforms are framed as ways to effectuate the cap, not as independent remedies.[56])

Similarly, in the Virgin Islands case, the Court appointed an expert—the same expert, as it happens—to conduct an assessment that:

(1) analyzes the Territory's criminal justice processes and policies that affect the population level at the Criminal Justice Complex (CJC) and CJC Annex [collectively, "the Jail"],

(2) includes strategies and remedies to address those processes and policies so that the population level at the Jail can be reduced without significantly affecting public safety,

(3) includes a baseline population forecast that would advise the territory on the impact of current criminal justice trends,

(4) identifies realistic options that have been successfully implemented in other jurisdictions that will reduce the need for future beds, and

(5) assesses the existing classification and disciplinary systems at the Jail and provides technical assistance to Defendants so they can make the best use of existing bed space to safely and appropriately house the prisoner population.[57]

After much litigation, the report is now underway.[58]

---

[55] Stipulation for Entry of Consent Decree, Carruthers v. Lamberti, No. 76-cv-06086-DMM (S.D. Fla. July 27, 1994), at 12, http://www.clearinghouse.net/chDocs/public/JC-FL-0008-0002.pdf; Docket, Jonas v. Stack, No. 76-cv-06086-DMM, at #671 (July 28, 1995) ("By separate order, the Court will designate release authority and direct the use of same to ensure that no more than 3,656 inmates are retained in the Broward County jail system.").

[56] *See* Plaintiffs' Motion for the Appointment of a Population Management Expert, Carruthers v. Lamberti, No. 76-cv-06086-DMM (S.D. Fla. Sept. 3, 2010), at 2, http://www.clearinghouse.net/chDocs/public/JC-FL-0008-0025.pdf ("This Court has entered a number of orders setting population caps or otherwise remedying conditions at the Broward County Jail that were caused or exacerbated by overcrowding.").

[57] Order, Carty v. Farrelly, No. 3:94-cv-00078-SSB (D.V.I June 21, 2011), http://www.clearinghouse.net/chDocs/public/PC-VI-0001-0033.pdf.

[58] *See* Plaintiffs' Motion to Enforce the Court's Order Appointing Dr. James Austin to Conduct a Population Management Assessment, or in the Alternative to Re-Appoint Dr. Austin, Carty v. Farrelly, No. 3:94-cv-00078-SSB (D.V.I June 2, 2015), http://www.clearinghouse.net/chDocs/public/PC-VI-0001-0031.pdf (seeking court enforcement of the 2011 requirement for a criminal justice assessment); Order, Carty v. Farrelly, No. 3:94-cv-00078-SSB (D.V.I Mar. 11, 2016), http://www.clearinghouse.net/chDocs/public/PC-VI-0001-0037.pdf (granting the motion for enforcement); Defendants' Opposition To Plaintiffs' Expedited Motion For Court Order Accepting Agreed Upon Quarterly Goals, Carty v. Farrelly, No. 3:94-cv-00078-SSB (D.V.I Mar. 23, 2016), at 3, http://www.clearinghouse.net/chDocs/public/PC-VI-0001-0038.pdf ("As their fourth quarterly goal, Defendants have chosen the following: launch criminal justice assessment.").

B. Substantive anti-incarcerative orders

When a federal court insists on a robust anti-incarcerative planning process, that improves the probability of a plan's development and even implementation. But occasionally, courts have gone further and imposed actual substantive anti-incarcerative remedies. The best-known example is in *Plata v. Brown* and *Coleman v. Brown*, the medical care and mental health care cases against the California prison system in which the District Court imposed, and the Supreme Court affirmed, a state-wide prison population cap of 137.5% of design capacity.[59] On remand from the Supreme Court, the state made substantial progress towards this population cap by means of shifting some prison population to jails, lessening the term of probation, and several other policy changes, together termed criminal justice "Realignment."[60] But population remained well over the limit until the District Court imposed several anti-incarcerative measures, including allowing several groups of inmates to more quickly accrue time off their sentences, and expanding parole for non-violent offenders, and medically incapacitated and elderly prisoners.[61] Each was made a fully enforceable court order.[62]

Less well known, but similarly joining a population cap[63] with anti-incarcerative orders is *McClendon v. City of Albuquerque*. *McClendon*

---

[59] Brown v. Plata, 563 U.S. 493, 541(2011).

[60] For a group of varied analyses of California's criminal justice Realignment, see *The Great Experiment: Realigning Criminal Justice in California and Beyond*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 221 (Charis Kubrin and Carroll Seron eds., Mar. 2016), http://ann.sagepub.com/content/664/1.toc.

[61] *See* Order Granting in Part and Denying in Part Defs' Request for Extension of Dec. 31, 2013 Deadline, Coleman v. Brown/Plata v. Brown, Nos. 2:90-cv-0520-LKK-DAD (PC) and C01-1351-TEH (E.D. Cal and N.D. Cal, Feb. 10, 2014), http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0105.pdf. For the background of this order, *see* Coleman v. Brown, 952 F. Supp. 2d 901, 935–36 (E.D. Cal. 2013); Defs.' Resp. to Apr. 11, 2013 Order Requiring List of Proposed Population Reduction Measures; Court-Ordered Plan, Coleman v. Brown/Plata v. Brown, Nos. 2:90-cv-0520 LKK JFM P and C01-1351 TEH (E.D. Cal and N.D. Cal, May 2, 2013), at 28, http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0117.pdf ("The following is the plan that has been compelled by the Court. Defendants do not believe that these measures are necessary or prudent at this time . . ."); Stipulation and Order in Response to Nov. 14, 2014 Order, Coleman v. Brown/Plata v. Brown, Nos. 2:90-cv-0520 KJM DAD (PC) and C01-1351 TEH (E.D. Cal and N.D. Cal, Dec. 19, 2014), http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0110.pdf.

[62] *See* Order Granting in Part and Denying in Part Defs' Request for Extension, *supra* note 61, at 2.

[63] Supplemental Order to Enforce Previously Ordered Population Limits at the BCDC Main Facility, McClendon v. City of Albuquerque, No. 6:95-cv-00024-JAP-KBM (D.N.M. June 27, 2001), at 2–3, http://www.clearinghouse.net/chDocs/public/JC-NM-0002-0026.pdf; Amended Order Resolving Two Motions and Order to Show Cause,

began in 1995 when inmates at the Bernalillo County Detention Center in Albuquerque filed a class action lawsuit alleging unconstitutional conditions of confinement caused by gross overcrowding. A subclass of inmates with mental disabilities was also declared, and separately represented.[64] In 1996, the court in *McClendon* entered a settlement agreement that included a procedural planning order.[65] But it also directly required the substantive anti-incarcerative remedy of civil commitment in circumstances where the defendants had sufficient authority to implement it without needing anyone else's agreement:

> Defendants shall instruct UNMHSC [the University of New Mexico Health Services Center] to establish formal policies and procedures requiring the initiation of civil commitment proceedings whenever an individual diagnosed as having a mental or developmental disorder requests placement in a residential treatment or evaluation facility, assuming the court imposed conditions of confinement are consistent with such placement. . . . Residents shall be released for day treatment or habilitation whenever appropriate.[66]

When plaintiffs sought contempt sanctions in 2001 for noncompliance with the earlier settlement, litigation again led to a combination of procedural and substantive anti-incarcerative settlement provisions. A stipulated order explained that many diversionary strategies were going untried in Albuquerque: for example, "Increased intensive mental health case management, crisis housing, and detox services, as well as a drop-in center for psycho-social rehabilitation, would reduce overcrowding at the jail."[67] The order accordingly required

---

McClendon v. City of Albuquerque, No. 6:95-cv-00024-JAP-KBM (D.N.M. Aug. 19, 2014), at 7, http://www.clearinghouse.net/chDocs/public/JC-NM-0002-0036.pdf.

64 Order Certifying a Class, McClendon v. City of Albuquerque, No. 6:95-cv-00024-JAP-KBM (D.N.M. Nov. 5, 1996), http://www.clearinghouse.net/chDocs/public/JC-NM-0002-0025.pdf.

65 Order Regarding the Prison Litigation Reform Act, McClendon v. City of Albuquerque, No. 6:95-cv-00024-JAP-KBM (D.N.M. Nov. 5, 1996), at 4, http://www.clearinghouse.net/chDocs/public/JC-NM-0002-0015.pdf ("officials from the City of Albuquerque will meet with officials from Bernalillo County to develop solutions to the continuing resident population pressures at BCDC, . . . [s]uch discussions will include at least possible expansion of the interim Westside facility, possible renovations to Montessa Park, and possible development of additional drug treatment and/ or mental health treatment facilities.").

66 Order, McClendon v. City of Albuquerque, No. 6:95-cv-00024-JAP-KBM (D.N.M. Nov. 5, 1996), at 10–11, http://www.clearinghouse.net/chDocs/public/JC-NM-0002-0024.pdf.

67 Supplemental Order to Enforce Previously Ordered Population Limits at the BCDC Main Facility, McClendon v. City of Albuquerque, No. 6:95-cv-00024-JAP-KBM (D.N.M. June 27, 2001), at 2–3, http://www.clearinghouse.net/chDocs/public/JC-NM-0002-0026.pdf.

four different planning sessions to bring together the various official and advocacy stakeholders to develop various anti-incarcerative approaches ("how to reduce the number of incarcerated individuals at BCDC who are awaiting resolution of probation or parole violation proceedings"; "how to include persons who do not have both a permanent address and a telephone in the Community Custody Program"; "how to implement an effective jail diversion program for persons with psychiatric or developmental disabilities"; and "how to expand the program for early resolution of criminal cases" [68]).

For each of the above plans, the cooperation of out-of-court parties was needed. By contrast, the defendants had unilateral authority with respect to policing. Accordingly, the same 2001 order included a more muscular substantive requirement, as well. The parties stipulated that:

Despite the efforts to date of the parties and the Court, 244 persons were brought into the jail by arresting officers in the month of March, 2001 and booked on petty misdemeanors, including, *inter alia*, shoplifting under $100, excessive sun screen material on vehicle windows, and unreasonable noise. Issuing citations for such non-violent petty offenses and using the jail's 'walk through procedure' for persons charged with such offenses would likely reduce unnecessary incarceration at BCDC."[69]

Accordingly, defendants agreed to entry of an order requiring them to "[p]rovide direction to law enforcement officials under the control of the City and/or the County to issue citations where appropriate and to use the 'walk through procedures,' rather than incarcerating individuals, where appropriate."[70] This set of requirements was strengthened in 2002, when the City Defendants entered into another stipulated order, that: "Defendants will continue to employ all existing population management tools."[71] Those "population management tools," included the "[p]re-trial services walk-through for misdemeanor warrants" described in 2001.[72] Other approaches were also added. For example, "APD officers have been instructed to obtain every possible phone number from people they stop and arrest or cite and release, and to write the phone number(s) on the face of the arresting/citing document."[73] Subsequent litigation

---

68 *Id.* at 4–6.
69 *Id.* at 2–3.
70 *Id.* at 5.
71 Stipulated Agreement, McClendon v. City of Albuquerque, No. 6:95-cv-00024-MV/DJS (D.N.M. Jan. 31, 2002), at 2, http://www.clearinghouse.net/chDocs/public/JC-NM-0002-0002.pdf.
72 Supplemental Order to Enforce Previously Ordered Population Limits at the BCDC Main Facility, *supra* note 67, Exhibit A at 2.
73 *Id.* at 10.

included various similar orders; the most recent settlement, reached in March 2016, collects and augments the scattered relevant provisions and sets them out again, with a requirement that a court-appointed expert audit.[74]

In sum, while anti-incarcerative orders have been very rare, they are not unheard of. Courts have entered both procedural orders mandating informal or formal anti-incarcerative planning, and substantive orders mandating particular anti-incarcerative programs.

III. SOLITARY CONFINEMENT ORDERS

As population caps have gone from routine to rare, a new type of order regulating particular types of incarceration—and barring particular types of prisoners from it—has developed. As American incarceration rates ballooned in the 1980s and 1990s, so too did our prisons' and jails' use of solitary confinement and other forms of restrictive housing. Increasing thousands of prisoners were confined to 22 or more daily hours of in-cell lockdown, with minimal chance for social interaction, programming, or occupation.[75] Advocacy efforts to reverse this trend have been intense and longstanding, and seem finally to be approaching fruition. President Obama recently wrote an op-ed in the *Washington Post* describing current practices as "an affront to our common humanity,"[76] and three Supreme Court justices have inveighed against solitary confinement in recent separate writing.[77] Many corrections leaders are themselves beginning to seek change: the national association of heads of state corrections departments last year released a report that begins "Prolonged isolation of individuals in jails and prisons is a grave problem drawing national attention and concern," and explicitly

---

[74] Settlement Agreement, McClendon v. City of Albuquerque, No. 6:95-cv-00024-JAP-KBM (D.N.M. Mar. 22, 2016), http://www.clearinghouse.net/chDocs/public/JC-NM-0002-0035.pdf; *id.*, Exhibit D ("Check-Out Audit Agreement No. 3: The Conditions of Confinement at the Bernalillo County Metropolitan Detention Center"), ¶¶ 2–3.

[75] Roy D. King, *The Rise and Rise of Supermax: An American Solution in Search of a Problem?*, 1 PUNISHMENT & SOC'Y 163 (1999); NAT'L INST. OF CORR., SUPERMAX HOUSING: A SURVEY OF CURRENT PRACTICE (March 1997), https://s3.amazonaws.com/static.nicic.gov/Library/013722.pdf.

[76] Barack Obama, *Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html.

[77] *See* Davis v. Ayala, 135 S.Ct. 2187, 2208–2211 (2015) (KENNEDY, J., concurring) ("[R]esearch still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price."); Glossip v. Gross, 135 S.Ct. 2726, 2765 (2015) (BREYER, J. dissenting; joined by GINSBURG, J.) ("[I]t is well documented that such prolonged solitary confinement produces numerous deleterious harms.").

"supports ongoing efforts to . . . limit or end extended isolation."[78] Litigation continues to be a key lever for reform in this area; lawsuits push for change, and both settlements and litigated orders have modeled what that change could look like.[79]

Much of the solitary reform effort has followed a "special populations" strategy. The idea has been to exclude from solitary confinement—entirely, or in all but the most exceptional circumstances—prisoners particularly vulnerable to harm there. This path was marked by District Judge Thelton Henderson in *Madrid v. Gomez*, in 1995. In that case, Judge Henderson explained that isolated conditions "will likely inflict some degree of psychological trauma upon most inmates confined [in Pelican Bay's Special Housing Unit, or SHU] for more than brief periods." But, he held, only for "certain categories of inmates" was the likely harm sufficiently severe to constitute a "per se violat[ion]" of the Eighth Amendment's Cruel and Unusual Punishments Clause:

> those who the record demonstrates are at a particularly high risk for suffering very serious or severe injury to their mental health, including overt paranoia, psychotic breaks with reality, or massive exacerbations of existing mental illness as a result of the conditions in the SHU. Such inmates consist of the already mentally ill, as well as persons with borderline personality disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression. For these inmates, placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe.[80]

Following Judge Henderson's approach, in case after case, plaintiffs' counsel have sought—and often won, by litigated or settled judgment—orders excluding prisoners in vulnerable categories like these from solitary confinement.[81] More recent court orders have covered not just

---

[78] ARTHUR LIMAN PUB. INTEREST PROGRAM & ASS'N. OF STATE CORR. ADM'RS, TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON i, iii (Aug. 2015), https://www.law.yale.edu/system/files/area/center/liman/document/asca-liman_administrativesegregationreport.pdf.

[79] For a timeline listing and linking to the key cases, and their settlements, *see* Amy Fettig & Margo Schlanger, *Milestones in Solitary Reform*, SOLITARY WATCH, http://solitarywatch.com/resources/timelines/milestones/ (last visited May 9, 2016).

[80] 889 F.Supp. 1146, 1265 (N.D. Cal. 1995).

[81] *See id.* at 1267; Stipulation to Enter Into Private Settlement Agreement Following Notice to the Class and Fairness Hearing, Ind. Prot. and Advocacy Serv. Comm'n v.

prisoners with mental illness and intellectual disabilities but other vulnerable populations: pregnant and youthful prisoners, for example.[82] (Only recently, in two settlements approved in 2016, has litigation more comprehensively narrowed the path into and widened the path out of solitary confinement.[83])

The special population orders have included simple bans. For example, in Wisconsin, first in a 2001 contested preliminary injunction,[84] and then in a 2002 settlement, prisoners with serious mental illness were barred from the Boscobel supermax prison: "No seriously mentally ill prisoners win be sent to SMCI nor will seriously mentally ill prisoners at the facility be permitted to remain there." [85] Similarly, in Mississippi, a settlement stated flatly: "After December 1, 2007, Unit 32 will not be used for long-term housing of prisoners with Severe Mental Illness, other

---

Comm'r, Ind. Dep't of Corr., No. 1:08-cv-01317 TWP-MJD (S.D. Ind. Jan. 27, 2016), at 10–13, http://www.clearinghouse.net/chDocs/public/MH-IN-0002-0013.pdf; Agreed Order, Rasho v. Baldwin, No. 1:07-CV-1298-MMM-JAG (C.D. Ill. May 8, 2013), at 4–5, http://www.clearinghouse.net/chDocs/public/PC-IL-0031-0008.pdf; Opinion and Order, Peoples v. Fischer, No. 1:11-cv-02694-SAS (S.D.N.Y. Mar. 31, 2016), at 12–13, http://www.clearinghouse.net/chDocs/public/PC-NY-0062-0014.pdf; Stipulation, Parsons v. Ryan, No. 2:12-cv-00601 (D. Ariz. Oct. 14, 2014), at 8–9, http://www.clearinghouse.net/chDocs/public/PC-AZ-0018-0028.pdf; Settlement Agreement and General Release, Disability Rights Network of Pa. v. Wetzel, No. 1:13-cv-00635-JEJ (M.D. Pa. Jan. 9, 2015), at 12, http://www.clearinghouse.net/chDocs/public/PC-PA-0031-0003.pdf; Consent Decree, United States v. Virgin Islands, No. 88-265 (D.V.I. Dec. 1, 1986), http://www.clearinghouse.net/chDocs/public/PC-VI-0002-0002.pdf; Settlement Agreement, Disability Law Ctr. v. Mass. Dep't of Corr., No. 07-10463-MLW (D. Mass. Dec. 12, 2011), at 5, http://www.clearinghouse.net/chDocs/public/PC-MA-0026-0004.pdf; Notice of Proposed Class Action Settlement, Presley v. Epps, No. 4:05-cv-00148-JAD (N.D. Miss. Apr. 28, 2006), at 3, http://www.clearinghouse.net/chDocs/public/PC-MS-0005-0005.pdf; Private Settlement Agreement, Disability Advocates v. N.Y. Office of Mental Health, No. 1:02-cv-04002-GEL (S.D.N.Y. Apr. 27, 2007), at 11–12, http://www.clearinghouse.net/chDocs/public/PC-NY-0048-0002.pdf. For a compilation of extant settlements, see *Special Collection: Solitary Confinement*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/results.php?searchSpecialCollection=40 (last visited May 9, 2016).

82 Opinion and Order, Peoples v. Fischer, *supra* note 81, at 13–14.

83 *Id.*; Settlement Agreement, Ashker v. Brown, 4:09-cv-05796-CW (N.D. Cal. Sept. 1, 2015), http://www.clearinghouse.net/chDocs/public/PC-CA-0054-0024.pdf.

84 *See* Jones'El v. Berge, 164 F.Supp.2d 1096, 1126 (W.D. Wis. 2001) ("If the mental health professionals determine that any of these inmates are seriously mentally ill, they should not be housed at Supermax Correctional Institution.").

85 Settlement Agreement, Jones'El v. Berge, No. 00-C-421-C (W.D. Wis. Jan. 24, 2002), at 5, http://www.clearinghouse.net/chDocs/public/PC-WI-0001-0003.pdf ("No seriously mentally ill prisoners win be sent to SMCI nor will seriously mentally ill prisoners at the facility be permitted to remain there.").

than those on Death Row."[86] Another Mississippi settlement, dealing with a private facility, stated in 2012, "MDOC will ensure that youth are never subjected to solitary confinement."[87] And in Indiana, following a court finding of unconstitutionality caused by the solitary confinement of prisoners with serious mental illness, a 2016 settlement provided, "no seriously mentally ill prisoners shall be placed in segregation/restrictive housing (including protective custody) if they are known to be seriously mentally ill prior to such placement."[88]

Thinking of solitary confinement units as "prisons within a prison," these exclusion orders are analogous to the first-generation prison population caps described in Part I[89]: they exclude people by way of negative commands. In addition, some solitary confinement orders—including some very recent ones that benefit prisoner plaintiffs beyond particularly vulnerable populations—take a more affirmative approach. They (1) establish or regulate housing that substitutes for solitary confinement; and they set out parameters for a variety of programs and procedures intended to (2) slow and narrow the path in, and (3) broaden and speed the path out. While these are useful interventions in their own right, I offer the details here to make an argument, by analogy, that structurally similar kinds of orders could be used to keep people with serious mental illness out of prison altogether.

Each of these approaches fits comfortably into the permissible scope of injunctive remedies in civil rights cases. Caselaw dictates that litigated injunctions—and settlements, in prison and jail cases[90]—be tied to

---

[86] Supplement Consent Decree on Mental Health Care, Use of Force and Classification, Presley v. Epps, 4:05-cv-00148-JAD (N.D. Miss. Feb. 15, 2006), at 1, http://www.clearinghouse.net/chDocs/public/PC-MS-0005-0008.pdf.

[87] Consent Decree, DePriest ex rel. C.B. v. Walnut Grove Corr. Auth., 3:10-cv-00663-CWR-FKB (S.D. Miss. Mar. 26, 2012), at 9, http://www.clearinghouse.net/chDocs/public/JI-MS-0007-0004.pdf.

[88] Stipulation to Enter Into Private Settlement Agreement Following Notice to the Class and Fairness Hearing, Ind. Prot. and Advocacy Serv. Comm'n v. Comm'r, Ind. Dep't of Corr., No. 1:08-cv-01317 TWP-MJD (S.D. Ind. Jan. 27, 2016), at 10, http://www.clearinghouse.net/chDocs/public/MH-IN-0002-0013.pdf.

[89] I am not suggesting that these orders *constitute* population caps, subject to the PLRA's tight procedural rules. For reasons similar to the ones explored in Part V, *infra*, I think that the PLRA's population order provision does not cover them.

[90] In most areas of law, settlements can extend well past what might permissibly be entered in litigated decrees. *See* Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 389 (1992); Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO, C.L.C. 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."). The terms of settlements are typically limited only by the mild constraints that they "spring from and serve to resolve a dispute within the court's subject matter jurisdiction . . . [,] 'com[e] within the general scope of the case made by the pleadings,' . . . further the objectives of the law upon which the complaint was

plaintiffs' injury,[91] but allows design of such remedies not just to stop unlawful conduct and repair the damage done[92] but to prevent further violations going forward[93] (as well as to facilitate oversight and enforcement of the more substantive terms[94]). Anti-incarcerative orders prevent further violations going forward.

A. Court orders or settlement provisions establishing alternatives to solitary confinement

Recent court orders in cases challenging the conditions of confinement in solitary have led to variously-named alternatives—secure housing in which prisoners receive therapeutic programming and substantial out-of-cell time. For example, a 2016 court order decrees Indiana's use of "mental health units" with additional therapeutic programming, group therapy, and other out-of-cell opportunities.[95]

---

based," and are not otherwise unlawful. *Id.* But the PLRA, 18 U.S.C. § 3626(a)(1)(A), somewhat restricts enforceable settlement terms in jail and prison cases. For discussion, *see* Margo Schlanger, *Prisoners' Rights Lawyers' Strategies for Preserving the Role of the Courts*, 69 U. MIAMI L. REV. 519, 526–29 (2015).

91 *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 357 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."); Milliken v. Bradley, 433 U.S. 267, 280 (1977) ("The remedy must therefore be related to the condition alleged to offend the Constitution . . ."") (internal quotation marks and citation omitted); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) ("[T]he nature of the violation determines the scope of the remedy.").

92 *See, e.g.*, United States v. Virginia, 518 U.S. 515, 547 (1996) ("A remedial decree . . . must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination].' . . . A proper remedy for an unconstitutional exclusion . . . aims to 'eliminate [so far as possible] the discriminatory effects of the past' and to 'bar like discrimination in the future.'").

93 *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 712–14 (1978) (approving a prophylactic injunction that limited solitary confinement to 30 days in light of poor conditions); Louisiana v. United States, 380 U.S. 145, 154–56 (1965) (holding that "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the [unlawful] effects of the past as well as bar like [illegality] in the future"; and citing "[t]he need to eradicate past evil effects and to prevent the continuation or repetition in the future of the [unlawful] practices shown to be so deeply engrained in the laws, policies, and traditions").

94 *See, e.g.*, Louisiana v. United States, 380 U.S. at 155–56 (upholding reporting requirements adopted to inform the court about defendant activity); Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 976 (1999).

95 Stipulation to Enter Into Private Settlement Agreement Following Notice to the Class and Fairness Hearing, Ind. Prot. and Advocacy Serv. Comm'n v. Comm'r, Ind. Dep't of Corr., No. 1:08-cv-01317 TWP-MJD (S.D. Ind. Jan. 27, 2016), at 14–15, http://www.clearinghouse.net/chDocs/public/MH-IN-0002-0013.pdf.

Recent landmark cases have extended this approach beyond prisoners with mental illness: a 2015 settlement in New York requires the creation of residential substance-abuse programs as "SHU-alternative[s] "for . . . inmates selected . . . who are serving confinement sanctions for non-violent substance abuse-related misbehavior," and other alternatives for youthful prisoners and those who have intellectual disabilities.[96] And in California, a 2016 consent decree requires use of a "restrictive custody general population housing unit" for members of gangs, as well as others.[97]

B. Court orders or provisions narrowing/slowing the path into solitary confinement

Court orders in solitary confinement cases use a variety of techniques to narrow or slow prisoners' path into solitary confinement. They implement mental health treatment, to avoid the need. In the Virgin Islands, for example, a 2012 order requires "[m]ental health care and treatment, including . . . (ii) adequate mental health programs for all prisoners with serious mental illness; . . . and (v) ceasing to place seriously mentally ill prisoners in segregated housing or lock-down as a substitute for mental health treatment."[98] They substitute other approaches to prison discipline. So in Mississippi, in 2012: "MDOC will develop a behavior management policy that incorporates positive behavior intervention and supports for youth."[99] They moderate the sanctions applicable to various kinds of misconduct. In New York, under a 2015 consent decree, only the most serious misconduct can lead to a term in solitary.[100]) And they centralize decisionmaking, to undercut the ability of dissenting officials to stymie reform. In a 2007 Mississippi consent decree, for example,

The process for admission to and release from administrative segregation will be centralized. A Warden who wishes to recommend that an inmate be housed in administrative segregation must submit to

---

96 Settlement Agreement, Peoples v. Fischer, No. 1:11-cv-02694-SAS (S.D.N.Y. Dec. 16, 2015), at 11, 21, 23, http://www.clearinghouse.net/chDocs/public/PC-NY-0062-0011.pdf.

97 Settlement Agreement, Ashker v. Brown, 4:09-cv-05796-CW (N.D. Cal. Sept. 1, 2015), at 10–11, http://www.clearinghouse.net/chDocs/public/PC-CA-0054-0024.pdf.

98 Settlement Agreement, United States v. Virgin Islands, No. 1:86-cv-00265-WAL-GWC (D.V.I. Aug. 31, 2012), at 11, http://www.clearinghouse.net/chDocs/public/PC-VI-0002-0020.pdf.

99 Consent Decree, DePriest ex rel. C.B. v. Walnut Grove Corr. Auth., 3:10-cv-00663-CWR-FKB (S.D. Miss. Mar. 26, 2012), at 12, http://www.clearinghouse.net/chDocs/public/JI-MS-0007-0004.pdf.

100 Settlement Agreement, Peoples v. Fischer, No. 1:11-cv-02694-SAS (S.D.N.Y. Dec. 16, 2016), at 42–44, http://www.clearinghouse.net/chDocs/public/PC-NY-0062-0011.pdf.

the Central Classification Office for review a referral form documenting the reason for the referral. If the Central Classification Office agrees with the recommendation, it will forward the referral form to the Commissioner or his designee for final review and approval.[101]

C. Court orders or settlement provisions broadening/speeding the path out of solitary confinement

Finally, settlements in solitary confinement conditions cases have opened or eased prisoners' route out of solitary. Cases have set up review processes, both retrospective (to clear out some of the existing population)[102] and prospective, to speed future releases.[103] And they have implemented "step-down" programs and housing units, "with the aim of returning inmates who successfully complete the program back to general population."[104]

IV. *OLMSTEAD* ORDERS (MODERN DEINSTITUTIONALIZATION)

I move in this Part to a third and final analogy to the anti-incarcerative orders I am urging. In 1999, the Supreme Court held in *Olmstead v. L.C. ex rel. Zimring*[105] that unjustified institutionalization of people with disabilities violates the Americans with Disabilities Act (ADA). The Court explained that "unjustified institutional isolation of persons with disabilities is a form of discrimination," because it "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and it "severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."[106]

In the years since the *Olmstead* decision, advocates have brought a wave of deinstitutionalization litigation to enforce it. As Professor Sam Bagenstos explains, deinstitutionalization advocates have used litigation implementing the Olmstead approach to work towards "the twin goals of . . . enabling people with disabilities to move out of institutional

---

101 Supplement Consent Decree on Mental Health Care, Use of Force and Classification, Presley v. Epps, *supra* note 86, at 8.

102 *E.g.*, Settlement Agreement, Ashker v. Brown, *supra* note 83, at 8–10.

103 *Id.* at 11.

104 *E.g.*, Settlement Agreement, Peoples v. Fischer, *supra* note 96, at 10.

105 527 U.S. 581 (1999).

106 *Id.* at 600–01.

settings and promoting high-quality community services."[107] Since 2000, the population in large institutions for people with intellectual/developmental disabilities is down over a third[108]; the number of residents in state and county mental hospitals is down about a quarter.[109] Olmstead orders are far from the only driver of this population decline, but they have contributed by setting out "extensive and detailed provisions governing the types of services the states must provide in the community to those who have been institutionalized or are at risk of institutionalization, the number of individuals who must receive those services, and timetables specifying when those services must be provided."[110]

Under *Olmstead*, the ADA doesn't require states to provide services to people with disabilities, but it does require that *when* services are provided, the setting be as integrated as practicable. In keeping with this integration insight, *Olmstead* orders are typically not exclusionary. That is, they bolster the alternatives to institutions, rather than barring admission to the large facilities that used to dominate service provision. For example, in *United States v. Delaware*, the 26-page settlement between the U.S. Department of Justice and the state of Delaware provided for statewide crisis services to "[p]rovide timely and accessible support to individuals with mental illness experiencing a behavioral health crisis, including a crisis due to substance abuse."[111] It detailed numerous items that would form a "continuum of support services intended to meet the varying needs of individuals with mental illness," including Assertive Community Treatment teams—multidisciplinary groups including a psychiatrist, a nurse, a psychologist, a social worker, a substance abuse specialist, a vocational rehabilitation specialist and a

---

[107] Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 39 (2012).

[108] Sheryl A. Larson, *FY 2013 Residential Information Systems Project Highlights*, RESIDENTIAL INFORMATION SYSTEMS PROJECT, slide 20 (Feb. 11, 2016), https://risp.umn.edu/media/download/cms/media/risp/RISP_FY_2013_Highlights.pdf.

[109] Data provided by Ted Lutterman, Senior Director, Government & Commercial Research, National Association of State Mental Health Program Directors Research Institute. Email on file with author (Mar. 24, 2016). Data for 2000 comes from NIMH and Substance Abuse and Mental Health Services Administration (SAMHSA), Additions and Resident Patients at End of Year, State and County Mental Hospitals, by Age and Diagnosis, by State, United States, which is reported, as well, in Ronald W. Manderscheid et al., *American Mental Health Services: Perspective Through Care Patterns for 100 Adults, with Aggregate Facility, Service, and Cost Estimates*, *in* PUBLIC MENTAL HEALTH 383 (William W. Eaton ed., 2012). Data for 2014 is from NASMHPD Research Institute (NRI) State Mental Health Agency Profiles System, 2015.

[110] Bagenstos, *supra* note 107, at 34.

[111] Settlement Agreement, U.S. v. Delaware, No. 11-cv-591 (D. Del. July 6, 2011), at 3, http://www.clearinghouse.net/chDocs/public/PB-DE-0003-0002.pdf.

peer specialist—to "deliver comprehensive, individualized, and flexible support, services, and rehabilitation to individuals in their home and communities,"[112] and various kinds of case management. And it provided for supported housing ("an array of supportive services that vary according to people's changing needs and promote housing stability") and employment ("integrated opportunities for people to earn a living or to develop academic or functional skills"). Other *Olmstead* decrees contain similar provisions.[113]

As with Part II's solitary confinement orders, these *Olmstead* orders are offered here in support of an analogy, as useful models for conditions of confinement litigation. They remind us, structurally, that to solve a problem *inside* an institution it may be necessary to direct enforcement effort *outside*. In addition, they can serve as "go by's" for the design and drafting of key elements of crisis intervention and other anti-carcerative approaches.

V. THE PLRA'S PRISONER RELEASE ORDER PROVISION

So far in this essay, I've tried to demonstrate that anti-incarcerative orders would be a useful remedy for unlawful conditions of confinement, and that several types of analogous remedies are ready models for them. But, you should be asking (as always in jail and prison litigation) what about the Prison Litigation Reform Act? Does it stand in the way? As Part I describes,[114] population caps have since 1996 been tightly regulated by the Prison Litigation Reform Act—hence their sharp recent decline. All new court orders in prison and jail conditions cases are constrained by the PLRA's requirements of demonstrated need and narrow tailoring.[115] But are anti-incarcerative orders subject to the PLRA's particularly sharp "prisoner release order" constraints? In this Part, I argue that they are not.

The PLRA sets several onerous prerequisites for entry of "a prisoner release order," even on consent. Such an order is not allowed "unless" a prior order "for less intrusive relief . . . has failed,"[116] "crowding is the primary cause of the violation of a Federal right; and . . . no other relief will remedy the violation of the Federal right."[117] Even then, only a

---

112 *Id.* at 6.

113 *See* cases listed at *Special Collection: Olmstead Cases*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/results.php?searchSpecialCollection=7 (last visited May 9, 2016).

114 *See supra* note 33 and accompanying text.

115 18 U.S.C. § 3626(a)(1).

116 18 U.S.C. § 3626(a)(3)(A)(i).

117 18 U.S.C. § 3626(a)(3)(E).

specially convened three-judge panel can enter the order.[118] What counts as a "prisoner release order"? The statute defines the term to "include[] any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison."[119] Do anti-incarcerative remedies designed to keep vulnerable populations out of jail and prison fit this definition? I think the answer is no.

In a particular case, anti-incarcerative remedies *could* have the "purpose . . . of reducing or limiting the prison population." Indeed, in several of the cases highlighted in Part II, they do have that purpose. Consider for example, the Virgin Islands case mentioned in Part II. Recently the plaintiffs explained the basis of what they labeled the "population reduction remedy":

This population reduction remedy is foundational; compliance with it makes it easier to reach compliance with all other substantive provisions of the Agreement. The fewer prisoners there are at the Jail, the easier it is to supervise them appropriately, to house them safely, to separate known enemies, and to provide them with all services required under the Agreement. The fewer seriously mentally ill prisoners who are housed at the Jail, the easier it is to adequately treat and safely house the remaining mentally ill prisoner population.[120]

In this particular case, the point of the remedies in question is to assist in implementing a long-standing population cap.

But in this essay, I've been arguing for anti-incarcerative remedies with a quite different goal—a purpose not of population *reduction* but population *protection*, minimizing the admission to prison or jail of particularly vulnerable would-be prisoners—people with disabilities, the young, the old, non-violent offenders, LGBT people, etc. The success or failure of the anti-incarcerative order would not turn on the affected jail or prison's population count. Such programs don't dictate who can or cannot be admitted to prison, and an anti-incarcerative order that imposes them would not be violated if a facility's population grows. Accordingly, I think it would be a stretch to consider this kind of order, with this kind of purpose, a PLRA-covered "prisoner release order."

Textually, such an order clearly lacks the "purpose . . . of reducing or limiting the prison population." And it does not "direct[] the release from or nonadmission of prisoners to a prison." The textual question thus

---

118 18 U.S.C. § 3626(a)(3).

119 18 U.S.C. § 3626(g)(4).

120 Plaintiffs' Motion to Enforce the Court's Order, Carty v. Farrelly, *supra* note 58, at 4–5, http://www.clearinghouse.net/chDocs/public/PC-VI-0001-0031.pdf.

comes down to whether anti-incarcerative orders with a non-population-reduction purpose should nonetheless be deemed to have the "*effect* of reducing or limiting the prison population"—if, in fact, such a reduction takes place, which it might or might not. As I now develop, I think it's implausible to read the statutory word "effect" to reach so broadly; Congress's evident purpose for the "prisoner release order" provision was to cover population caps and orders that function like population caps. And the kind of broad reading of "effect" that would encompass anti-incarcerative orders would similarly sweep in orders that are even farther away from Congress's concerns.

The legislative history of the PLRA is fairly sparse: the statute was passed after just one hearing. Nonetheless, it sheds real light on Congress's intent. The prisoner release order provision was mentioned quite a few times—throughout that one hearing, in the only committee report, and on the floor of the House and Senate. Each and every time, both the bill's supporters and its opponents make clear that the targets of the provision were jail and prison population caps and orders—for example, requirements to hold vacant a particular percentage of cells—functioned, like population caps, to compel the release or non-admission of prisoners. For example,

- The House Committee report noted: "Population caps are a primary cause of 'revolving door justice.'"[121]
- Congressman Bill McCullom, when he began debate on the bill that became the PLRA: "[F]ew problems have contributed more to the revolving door of justice than Federal court-imposed prison population caps. Cities across the United States are being forced to put up with predators on their streets because of this judicial activism."[122]
- Congressman Charles Canady, as he spoke in support of the bill: "it will make clear that imposing a prison or jail population cap should absolutely be a last resort"[123]
- Congressman Bill Young, in the same debate: the bill "prevents judges from placing arbitrary caps on prison populations."[124]
- Senator Orrin Hatch, in his prepared statement opening the only Senate hearing on the PLRA: "Prison population caps, which result in revolving door justice and the commission of untold

---

[121] Violent Criminal Incarceration Act of 1995, H.R. 667, 104th Cong. tit. IV (Enhancing Protection Against Incarcerated Criminals) (Jan. 25, 1995).

[122] 141 Cong. Rec. H1479 (daily ed. Feb. 9, 1995) (Statement of Rep. Bill McCollum).

[123] 141 Cong. Rec. H1480 (daily ed. Feb. 9, 1995) (Statement of Rep. Charles Canady).

[124] 141 Cong. Rec. H1485 (daily ed. Feb. 9, 1995) (Statement of Rep. Bill Young).

numbers of preventable crimes, should be the absolute last resort."[125]

- Senator Kay Bailey Hutchison, at the same hearing, explained that her motivation for drafting the prisoner release order provision, was the murder of a friend of hers: "The murderer was on early release because of a case, the *Ruiz* case in Texas, that requires us to release prisoners if we go above an 11-percent vacancy rate."[126] Therefore, "[m]y bill also provides that the courts not impose limits or reduction in prison population unless the plaintiff proves that overcrowding is the primary problem and there is no other solution available."[127]
- And, at the same hearing, former Attorney General William Barr testified in favor of the bill: "Even more troublesome . . . is many decrees impose quite arbitrary population caps and space requirements"[128]

These quotes (and I could triple their number without changing their content) evidence Congress's clear goal for the statutory language it chose. "Purpose or effect of reducing or limiting the prison population" is language intended to reach both explicit population caps and requirements—about space per prisoner or cell vacancy rate—that are population caps in effect. Population caps do precisely what Congress forbids: they either "reduc[e] or limit[] the prison population." And Congress's skepticism about population caps explains the PLRA's "purpose or effect" language, too. That language is necessary to keep parties or judges from evading the statutory hurdles by entering an order, like a per-prisoner space requirement or an order requiring a percentage of empty cells, that functions like—but isn't quite—a population cap.

But there is absolutely nothing in the PLRA's legislative history to suggest that Congress's "prisoner release order" language was trying to target the kinds of anti-incarcerative remedies featured here—which lead to non-incarcerative outcomes for some people, but do not release or bar incarceration for anyone and do not require a decrease in jail or prison population. Indeed, a reading of "effect of reducing or limiting the prison population" that is broad enough to cover the kinds of remedies canvassed here—mental health diversionary practices, for example—would sweep in court orders far indeed from Congress's concerns. Imagine, for example, that a case alleging discrimination against some

---

[125] Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing on S. 3, S. 38, S. 400, S. 866, S. 930, and H.R. 667 Before the S. Comm. on the Judiciary, 104th Cong. 3 (1995) (statement of Sen. Orrin G. Hatch).

[126] *Id.* at 9 (statement of Sen. Bailey Hutchison).

[127] *Id.* at 12.

[128] *Id.* at 30 (statement of former Att'y Gen. William P. Barr).

classes of prisoners (say, women or members of a particular race) results in an order equalizing plaintiffs' access to rehabilitative programming. Those new programming opportunities could well lead to earlier release of some prisoners, who are newly able to accrue sentencing credits, or newly attractive to parole boards. But surely that effect would not make the programming order a PLRA-limited "prisoner release order." Similarly, a court order in a due process case that regulates prison disciplinary hearings and causes fewer misconduct findings will similarly lead to the earlier release of some prisoners. Yet, again, it would extend the PLRA's restrictions far past Congress's intent to therefore consider such an order a "prisoner release order."

Thus it makes the most sense to conclude that when anti-incarcerative orders are about protection, not about population, they lack the "purpose or effect of reducing or limiting the prison population." Accordingly, like all court orders in jail and prison conditions cases, they may be entered only if they comply with the PLRA's ordinary requirements for entry of relief.[129] But the higher hurdles for "prisoner release orders" have no application.

CONCLUSION

When prisons and jails fail to comply with the laws that regulate them—when conditions of confinement violate prisoners' rights under the Eighth Amendment or the Americans with Disabilities Act, or some other legal provision—one solution would be to keep people particularly vulnerable to those violations out of harm's way, out of prison. Anti-incarcerative measures have gained track records in a variety of non-litigation settings. They deserve a more prominent place in the remedial toolbox for conditions of confinement litigation as well.

---

129 *See* 18 U.S.C. § 3626(a).