JUDGES BEHIND BARS: THE INTRUSIVENESS REQUIREMENT'S RESTRICTION ON THE IMPLEMENTATION OF RELIEF UNDER THE PRISON LITIGATION REFORM ACT

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Since its enactment, the Prison Litigation Reform Act of 1996 (PLRA) has obstructed prisoners from bringing suit in federal court. In the relatively uncommon cases where prison lawsuits do succeed under the PLRA, the statute authorizes courts to implement and enforce relief to curb the constitutional violation found in that case. In authorizing such judicial authority, the PLRA also requires any implemented relief to be "the least intrusive means necessary" to correct the violation. Representing an interest in balancing relief for prisoners with the penological autonomy of prison administrators, the precise meaning of that intrusiveness requirement remains unclear, and its potential to restrict judges in ensuring much needed relief for prison populations remains uncertain. This Note explores the parameters of the intrusiveness requirement in light of the limited number of cases to address it and offers a practical interpretation that will allow judges the flexibility to curb severe constitutional violations within America's prisons where they are found to exist.

INTRODUCTION

In June of 2012, prisoners at the nation's most secure federal penitentiary, Administrative Maximum Florence (ADX), in Florence, Colorado, filed a complaint against the Federal Bureau of Prisons (BOP) alleging Eighth Amendment violations concerning the treatment of mentally ill inmates.[1] The plaintiffs in *Cunningham v. Federal Bureau of Prisons*[2] all suffer from serious mental illness and claim that a lack of mental healthcare as well as extreme isolation has resulted in damaging behavioral issues given their mental conditions: "Major Depression, Schizophrenia, Bipolar Illness, Schizoaffective Disorder, various person-

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1. Complaint at 4, Cunningham v. Fed. Bureau of Prisons, No. 1:12-cv-01570 (D. Colo. June 18, 2012) [hereinafter *Cunningham* Complaint], available at http://www.supermaxlawsuit.com/Complaint-and-Exhibits-Bacote-v-Federal-Bureau-of-Prisons.pdf (on file with the *Columbia Law Review*) ("[T]he BOP turns a blind eye to the needs of the mentally ill at ADX and to deplorable conditions of confinement that are inhumane to these prisoners.").

2. The four named plaintiffs are Harold Cunningham, John W. Narducci, Jr., Jeremy Pinson, and Ernest Norman Shaifer. Id. at 1. There are five named "interested individuals": Jaison Leggett, Herbert Perkins, John Jay Powers, William Concepcion Sablan, and Marcellus Washington. Id. at 6.

ality disorders with significant functional impairments, Post-Traumatic Stress Disorder, mental retardation, and other chronic and serious mental conditions."[3] This lawsuit began only one month after the family of Jose Martin Vega sought money damages for Vega's allegedly wrongful death at the same facility.[4] Vega was the sixth mentally ill inmate to hang himself at ADX since its opening in 1994.[5] Consequently, the spotlight continues to shine on the BOP as Judge Richard Matsch considers both cases in federal court in Denver.[6]

If Judge Matsch does rule in favor of the prisoners at ADX, there is still a further step in rectifying potential constitutional violations: the issuance of relief. The Prison Litigation Reform Act of 1995 (PLRA) authorizes a court to implement and enforce relief to curb the violation of prisoners' constitutional rights,[7] but qualifies this authority by requiring that such relief be "the least intrusive means necessary" to do so.[8] The intrusiveness standard appears to represent a concern for balancing relief for prisoners with the penological interests of prison administrators.[9] What satisfies the standard remains unclear: The Supreme Court has given uncertain meaning to the standard and the circuit courts have var-

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3. Id. at 23; see also id. at 17 ("Correctional officials and mental health professionals have known for more than 200 years that extended periods of confinement in isolation can be psychologically damaging, and can be particularly harmful to individuals with preexisting mental illness.").

4. Complaint & Jury Demand at 3–11, Vega v. Davis, No. 1:12-cv-01144 (D. Colo. May 1, 2012), available at http://www.supermaxlawsuit.com/2012-05-01-Vega-Complaint-with-Date-Stamp.pdf (on file with the *Columbia Law Review*) (alleging deliberate indifference to Vega's mental illness at ADX).

5. *Cunningham* Complaint, supra note 1, at 38–39.

6. See, e.g., Andrew Cohen, Finally, Justice at Supermax? If Anyone Can Make the Right Call, It's This Judge, Atlantic (Jan. 3, 2013, 3:28 PM), http://www.theatlantic.com/national/archive/2013/01/finally-justice-at-supermax-if-anyone-can-make-the-right-call-its-this-judge/266722/ (on file with the *Columbia Law Review*) (summarizing cases). The plaintiffs allege that the placement of severely mentally ill prisoners in solitary confinement is not only particularly harmful to their health, but in violation of the BOP's own policies. *Cunningham* Complaint, supra note 1, at 4. The government asserts that there is insufficient evidence to indicate that prison officials deprived the prisoners of adequate medical care or that they had the requisite subjective intent. Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2) & 12(b)(6) at 1–2, *Cunningham*, No. 1:12-cv-01570 (Oct. 9, 2012). The government further argues, as with many prison litigation cases, that it has an interest in ensuring the safety of its staff and the public. See, e.g., Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the S. Subcomm. on the Constitution, Civil Rights & Human Rights, 112th Cong. 2 (2012) (statement of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons) ("In some instances, restricted housing may still be required for [seriously mentally ill] inmates, to ensure safety and security.").

7. See 18 U.S.C. § 3626 (2012) (authorizing preliminary and prospective relief in cases of violation of federal right).

8. Id. For an explanation of the relief provisions of the PLRA, see infra Part I.B.

9. See infra notes 67–69 and accompanying text (describing legislative history of PLRA and intrusiveness requirement).

ied in their approaches to resolving it.[10] The Eleventh Circuit considers relief orders on a provision-by-provision basis in determining whether they meet the intrusiveness requirement (e.g., whether a relief order to hire additional medical staff meets the intrusiveness requirement, and, separately, whether an order to reduce a prison's inmate population does so as well), whereas the Ninth Circuit considers them in the aggregate (e.g., whether the orders to hire more staff and reduce the population together meet the intrusiveness requirement).[11]

This Note argues that the intrusiveness requirement[12] under the relief provisions of the PLRA should be defined by what is necessary to correct the constitutional violation. Such a solution is appropriate in light of courts' established role in correcting constitutional violations where they are found to exist as well as the conditions of confinement contextualizing prison litigation today. Part I introduces the PLRA and specifies when the intrusiveness test applies in relieving constitutional violations in the prison system, as well as the legislative atmosphere that frames its passage. Part II addresses the Supreme Court's ambiguous commentary on the standard as well as the circuit courts' varied opinions on the issue, and lastly, Part III argues that judges should be given the discretion to interpret the standard according to what is necessary for them to correct the violation of a federal right.

I. GETTING INTO COURT: THE PRISON LITIGATION REFORM ACT

Congress passed the PLRA in 1996, amending and supplanting the U.S. Code in ways that limited litigation by prisoners in federal court.[13] The provisions of the Act fall into two broad categories: 1) prisoner liti-

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10. See infra notes 70–76 and accompanying text (discussing lack of clarity surrounding intrusiveness requirement).

11. See infra Part II.B–C (examining approaches of Eleventh and Ninth Circuits).

12. What this Note refers to as the "intrusiveness requirement" or the "intrusiveness test" has also been referred to as the "need-narrowness-intrusiveness" test given that, as this Note presents, courts have been inconsistent as to whether "need" and "narrowness" are characteristics of the intrusiveness requirement or whether they are three distinct requirements. See, e.g., Cason v. Seckinger, 231 F.3d 777, 784 (11th Cir. 2000) (referring to requirements collectively).

13. See, e.g., Know Your Rights: The Prison Litigation Reform Act (PLRA), ACLU (2011), available at https://www.aclu.org/files/assets/kyr_plra_aug2011_1.pdf (on file with the *Columbia Law Review*) (outlining requirements for filing prison lawsuit). The term "prisoner" is defined as any person incarcerated, detained, or subject to admission to any facility "who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 18 U.S.C. § 3626(g)(3); accord 28 U.S.C. § 1915A(c) (2012); 42 U.S.C. § 1997e(h) (2006). The term "prison" refers to any federal, state, or local facility "that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law." 18 U.S.C. § 3626(g)(5).

gation provisions that restrict civil actions brought by prisoners[14] and 2) relief provisions[15] that address institutional reform achieved through injunctive litigation. This Part first examines each of those categories, then concludes by discussing their purposes through consideration of the PLRA's legislative history.

A. *Category One: The Prisoner Litigation Provisions*

The PLRA contains three primary requirements for civil actions[16] brought by prisoners: 1) exhaustion, 2) a three-strikes provision, and 3) a physical-injury requirement.[17] The PLRA forbids a prisoner from bringing suit under 42 U.S.C § 1983, or any other federal law, until available administrative remedies are exhausted.[18] Prior to the passage of the PLRA, the law left courts with the discretion to determine whether imposing an exhaustion requirement was "appropriate and in the interests of justice."[19] Even then, exhaustion was only applicable[20] in cases involving administrative grievance systems certified as "plain, speedy, and effective."[21] Where it was applicable, it would result in a ninety-day stay of the case,[22] not automatic dismissal as it does now.[23] The Supreme Court has since confirmed that exhaustion of all "available" remedies[24] is mandatory for any prisoner seeking relief under the PLRA.[25] Furthermore, the

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14. 42 U.S.C. § 1997e (codifying PLRA's prison litigation provisions); accord 28 U.S.C. § 1915 (same).

15. See 18 U.S.C. § 3626 (codifying PLRA's relief provisions).

16. The term "civil action," with respect to prison conditions, is defined as "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." Id. § 3626(g)(2).

17. See generally John Boston, The Prison Litigation Reform Act 1 (Feb. 20, 2012) [hereinafter Boston, Prison Litigation] (unpublished manuscript), available at http://www.illinoislegaladvocate.org/uploads/8032theplra0312.pdf (on file with the *Columbia Law Review*) (providing complete explanation of prisoner litigation provisions).

18. 42 U.S.C. § 1997e(a). The failure of a state to adopt or adhere to administrative grievance procedures does not constitute a basis for action under § 1997. Id. § 1997e(b).

19. 42 U.S.C. § 1997e(a)(1) (1988) (amended 1996).

20. Id. § 1997e(a)(2) (stating exhaustion "may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards" defined by Attorney General).

21. Id. § 1997e(b)(1) (requiring Attorney General to promulgate minimum acceptable standards for systems resolving prisoners' grievances).

22. Id. § 1997e(a)(1).

23. 42 U.S.C. § 1997e(a) (2006) (prohibiting suits by prisoners where available administrative remedies have not been exhausted).

24. In *Booth v. Churner*, the Supreme Court affirmed that any remedy is presumptively available unless a court "lacks authority to provide any relief or to take any action whatsoever in response to a complaint." 532 U.S. 731, 736 (2001).

25. Woodford v. Ngo, 548 U.S. 81, 85 (2006).

Court has rejected a futility exception in cases where the administrative process authorizes some action, but not the remedial action an inmate demands, at the exclusion of all other forms of relief.[26]

The PLRA also bars prisoners from seeking relief if the prisoner has, on three or more occasions, brought an action or appeal that was dismissed on grounds of frivolousness, maliciousness, or failure to state a claim upon which relief may be granted.[27] There is an exception to this provision in cases where the prisoner is under "imminent danger of serious physical injury."[28]

Lastly, the PLRA restricts prisoners' claims by mandating that a showing of physical injury accompany any allegations of mental or emotional injury.[29] Though this requirement only applies to damages claims, and not to injunctive and declaratory relief,[30] it continues to cabin prisoners' rights to relief for intangible constitutional harms.[31] Courts are split on what constitutional allegations naturally constitute claims for mental or emotional injury; many find that the physical-injury requirement applies to all constitutional violations of a nonphysical nature, including violations of inmates' rights to religious freedom, speech, and due process.[32]

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26. See *Booth*, 532 U.S. at 741 ("[W]e think that Congress has mandated exhaustion clearly enough, regardless of the relief offered through administrative procedures.").

27. 28 U.S.C. § 1915(g) (2012). In addition to impacting plaintiffs' ability to bring future suits, a claim filed falsely, maliciously, or with the sole intention to harass a party may result in the court revoking a prisoner's earned good-time credits. Id. § 1932.

28. Id. § 1915(g).

29. 42 U.S.C. § 1997e(e) (2006); see also 28 U.S.C. § 1346(b)(2) (codifying Federal Tort Claims Act, which similarly requires prior physical injury before felons can bring mental or emotional injury claims against government employees).

30. See, e.g., John Boston, The Prison Litigation Reform Act: The New Face of Court Stripping, 67 Brook. L. Rev. 429, 435 (2001) (explaining courts interpret physical injury requirement as prerequisite to damages awards only and therefore decline to give prison officials carte blanche to impose mental and emotional injury on prisoners).

31. See, e.g., Stacey Heather O'Bryan, Note, Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners, 83 Va. L. Rev. 1189, 1193 (1997) ("Congress has arguably altered the scope of prisoners' intangible constitutional rights through legislative enactment.").

32. Compare Rowe v. Shake, 196 F.3d 778, 781–82 (7th Cir. 1999) (holding prisoner was entitled to judicial relief for violation of his First Amendment rights aside from any physical, mental, or emotional injury sustained), and Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998) (finding physical injury requirement did not apply to First Amendment claim), with Royal v. Kautzky, 375 F.3d 720, 722–23 (8th Cir. 2004) (asserting PLRA's physical injury requirement applied to First Amendment violations), Thompson v. Carter, 284 F.3d 411, 416 (2d Cir. 2002) (affirming prisoner cannot assert mental or emotional injury without prior showing of physical injury for constitutional claims), Searles v. Van Bebber, 251 F.3d 869, 876 (10th Cir. 2001) (applying PLRA's physical injury requirement to inmate's First Amendment claim), and Davis v. District of Columbia, 158 F.3d 1342, 1348–49 (D.C. Cir. 1998) (affirming dismissal of alleged violation of prisoner's right to privacy for failing to assert prior physical injury). Courts are also split on what

B. *Category Two: The Relief Provisions*

If an inmate successfully overcomes these threshold requirements, the PLRA provides a range of remedies, including prospective relief, preliminary injunctive relief, prisoner release orders, and settlements in the form of both consent decrees and private settlement agreements.[33] With the exception of private settlements, all forms of relief for violations of a federal right are required to meet an intrusiveness standard, which is the focus of this Note.[34]

1. *Prospective and Preliminary Injunctive Relief.* — Prospective[35] and preliminary injunctive relief may not be granted or approved "unless [a] court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."[36] The statute directs the court to give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief" in determining whether the intrusiveness standard is met.[37] It provides no further guidelines.[38]

A court may grant prospective relief in any civil action relating to prison conditions so long as the relief meets the intrusiveness test and does not permit government officials to exceed their authority under state or local law.[39] Courts may also enter a temporary restraining order or an order for preliminary injunctive relief under the PLRA that must

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constitutes sufficient harm to qualify as a physical injury. See, e.g., Herman v. Holiday, 238 F.3d 660, 662 (5th Cir. 2001) (finding exposure to potentially harmful environmental conditions did not entitle prisoner to relief); Liner v. Goord, 196 F.3d 132, 135–36 (2d Cir. 1999) (concluding alleged sexual assaults related to body searches qualified as physical injuries); Gomez v. Chandler, 163 F.3d 921, 924 (5th Cir. 1999) (holding excessive force claim requires prisoner to suffer more than de minimis physical injury); Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997) (requiring showing of physical injury that is more than de minimis, but need not be significant).

33. 18 U.S.C. § 3626 (2012) (articulating relief options and their limitations).

34. Id. § 3626(a)(1)(A), (a)(2), (a)(3)(A), (c)(1). This Note will focus on the inconsistent manner in which courts have applied that standard. Infra Part II. It will conclude by advocating for judicial independence in defining the intrusiveness standard by that which is necessary to correct the constitutional violation on a case-by-case basis. Infra Part III.

35. The term "prospective relief" is defined as "all relief other than compensatory monetary damages." 18 U.S.C. § 3626(g)(7).

36. Id. § 3626(a)(1)(A); see also id. § 3626(a)(2) (providing requirements for preliminary injunctive relief mirroring § 3626(a)(1)(A)'s conditions for prospective relief).

37. Id. § 3626(a)(1)(A).

38. Id.

39. The three exceptions to the requirement concerning state or local law are when 1) federal law requires the relief to be ordered, 2) the relief is necessary to correct the violation of a federal right, and 3) no other relief will correct the violation. Id. § 3626(a)(1)(B)(i)–(iii).

meet the same principles of comity.[40] Preliminary injunctive relief automatically expires ninety days after the date of its entry unless a court makes a finding for prospective relief and finalizes that order before the expiration of the ninety-day period.[41]

In proceedings where the court finds the remedial phase sufficiently complex, it may, and typically does, appoint a special master or agent of the court who is considered sufficiently disinterested, objective, and able to give due regard to public safety to conduct hearings on the record, prepare proposed findings of fact, or assist in the development of remedial plans.[42] When making the appointment, the court requests a list of up to five recommendations for special master from both the plaintiff and defendant institution.[43] Each party may remove up to three people on the opposing party's list, and any party may appeal the judge's selection on the ground of partiality.[44]

Prospective relief is terminable in any civil action upon motion by any intervenor, typically the state, two years after the date of approval of the prospective relief or one year after the date of denial of a previous request for termination.[45] The PLRA mandates immediate termination of prospective relief where relief was granted without meeting the intrusiveness test.[46] It forbids termination where a court makes written findings, based on the record, that prospective relief is still necessary to correct a current and ongoing violation and meets the requirements of need, narrowness, and intrusiveness.[47] The PLRA mandates that courts promptly rule on any motion to modify or terminate prospective relief.[48] After thirty days in the case of a motion filed under the PLRA, or 180

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40. Id. § 3626(a)(2); see also supra notes 35–39 and accompanying text (describing prospective and preliminary injunctive relief under PLRA).

41. 18 U.S.C. § 3626(a)(2).

42. Id. § 3626(f); see also Boston, Prison Litigation, supra note 17, at 24 (discussing use of special masters, monitors, or other court agents). The court reviews the special master, who may be removed at any time, every six months. 18 U.S.C. § 3626(f)(5), (6)(D). The special master is restricted from making findings or communicating ex parte. Id. § 3626(f)(6)(B).

43. Id. § 3626(f)(2)(A).

44. Id. § 3626(f)(2)(B)–(C), (3).

45. Id. § 3626(b)(1)(A). This does not preclude parties from privately agreeing to terminate or modify relief. Id. § 3626(b)(1)(B).

46. Id. § 3626(b)(2). Courts grant state officials a high degree of deference in implementing relief when it is first ordered. See, e.g., Brown v. Plata, 131 S. Ct. 1910, 1931 (2011) (discussing years of lack of judicial intervention before court ordered state to implement particular remedies). Typically, those officials later argue that a failure of the intrusiveness test (resulting from a deficiency in the prior court's analysis or changes in the order itself) necessitates termination of relief upon subsequent litigation. See, e.g., Cason v. Seckinger, 231 F.3d 777, 780–81, 784–86 (11th Cir. 2000) (determining whether termination of relief was permissible).

47. 18 U.S.C. § 3626(b)(3).

48. Id. § 3626(e)(1). For discussion of the placement of the burden of proof on the party requesting termination of the relief, see infra note 238 and accompanying text.

days in the case of a motion made under other law, the motion operates as a stay until the court enters a final order ruling on it.[49] The court may postpone the effective date of an automatic stay for up to sixty days for good cause.[50]

2. *Prisoner Release Orders.* — Prisoner release orders[51] are not held to the same intrusiveness test. The PLRA restricts courts from entering prisoner release orders unless the court has previously entered an order for "less intrusive" relief that has failed to remedy the deprivation and the defendant has had "a reasonable amount of time" to comply with court orders.[52] A prisoner release order may only be entered by a three-judge court[53] if it finds by clear and convincing evidence that crowding is the primary cause of the violation and no other relief will remedy it.[54] The PLRA grants standing to oppose such relief to any state or local official or unit of government whose jurisdiction includes the appropriation of funds for prison facilities or the prosecution or custody of persons to whom such prisoner release orders apply.[55]

3. *Consent Decrees.* — Consent decrees[56] constitute one of the two forms of settlements addressed by the PLRA. A consent decree may not be approved by a court unless it complies with the limitations of relief set forth for prospective and preliminary injunctive relief and prisoner release orders.[57] Those include the requirements regarding intrusiveness. Private settlement agreements may be entered into by parties without complying with those limitations if the terms of the agreement are not subject to court enforcement.[58]

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49. 18 U.S.C. § 3626(e)(2).

50. Id. § 3626(e)(3). Any order disallowing the operation of the automatic stay (other than by an order postponing its effective date) is appealable pursuant to 28 U.S.C. § 1292(a)(1) (2012). 18 U.S.C. § 3626(e)(4).

51. The term "prisoner release order" is defined as "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." 18 U.S.C. § 3626(g)(4).

52. Id. § 3626(a)(3)(A).

53. Id. § 3626(a)(3)(B). For full restrictions on convening the three-judge court, see 28 U.S.C. § 2284.

54. 18 U.S.C. § 3626(a)(3)(E).

55. Id. § 3626(a)(3)(F).

56. The term "consent decree" is defined as "any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements." Id. § 3626(g)(1).

57. Id. § 3626(c)(1) ("[T]he court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a)."); see also supra notes 35–44 and accompanying text (explaining prospective and preliminary injunctive relief under PLRA).

58. 18 U.S.C. § 3626(c)(2)(A).

C. *Turning to Congress: Why These Two Categories of Provisions?*

Congress considered the PLRA during a time when the Republican Party's *Contract with America* emphasized "taking back our streets."[59] Following a series of legislative acts targeting crime control and stricter sentencing, Republican representatives introduced the PLRA with the dual purpose of "limit[ing] the remedies for prison condition lawsuits and discourag[ing] frivolous and abusive prison lawsuits."[60] Congress ultimately passed the PLRA as part of an appropriations statute[61] and, in the course of doing so, incorporated into the PLRA language from several similar bills. Much of the legislative history that informs the PLRA's eventual passage constitutes discussion of those other proposed bills.[62]

When Senators Robert Dole and Jon Kyl first introduced the PLRA to the Senate, it did not contain relief provisions.[63] The Senators presented it in response to the "alarming explosion" of lawsuits filed by state and federal prisoners—39,000 in 1994 as compared to 6,600 in 1975.[64] They touted examples of frivolous lawsuits—grievances regarding insufficient storage space, being prohibited from attending a wedding anniversary party, and having to eat creamy instead of chunky peanut butter—in calling for redirection of valuable judicial and legal resources.[65] Their "bottom line [was] that prisons should be prisons, not law firms," and accordingly the Act called for prisoners to pay court fees and all other costs in full, exhaust all administrative procedures, demonstrate physical injury, and file claims for which relief could be granted.[66]

During this time, the language that currently constitutes the relief provisions of the PLRA was part of the proposed Prison Conditions Liti-

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59. Contract with America 37 (Ed Gillespie & Bob Schellhas eds., 1994) (vowing to protect Americans from violent criminals and calling for "tough punishment").

60. H.R. Rep. No. 104-378, at 166 (1995) (Conf. Rep.).

61. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to -77 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

62. See, e.g., Prisoner Lawsuit Efficiency Act of 1995, H.R. 2468, 104th Cong. (1995) (including language on exhaustion of administrative remedies); Prison Conditions Litigation Reform Act, S. 1275, 104th Cong. (1995) (containing language on requirements for prospective relief); Violent Criminal Incarceration Act of 1995, H.R. 667, 104th Cong. §§ 201–204 (1995) (stopping abusive prisoner lawsuits); Stop Turning Out Prisoners Act, S. 400, 104th Cong. (1995) (providing remedies for prison conditions); H.R. Rep. No. 104-21, at 8 (1995) ("Too often prisoners initiate suits which . . . clog the courts, waste law enforcement resources, and hinder localities in their efforts to fight crime."). See generally Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing Before the S. Comm. on the Judiciary on S. 3, S. 38, S. 400, S. 866, S. 930, and H.R. 667, 104th Cong. (1995) (discussing various crime control bills).

63. 141 Cong. Rec. 14,571–72 (1995).

64. Id. at 14,570.

65. Id. at 14,570–71 ("Frivolous lawsuits filed by prisoners tie up the courts, waste valuable judicial and legal resources, and affect the quality of justice enjoyed by the law-abiding population.").

66. Id. at 14,571 (statement of Sen. Robert Dole).

gation Reform Act.[67] That Act required the same standards of need, narrowness, and intrusiveness as the PLRA and was proposed with the intention of reducing both judicial interference in prison administration and the number of frivolous claims filed by prisoners.[68] When Senator Dole reintroduced the PLRA to the Senate—inclusive of the provisions regarding prospective and preliminary injunctive relief, prisoner release orders, and consent decrees—he characterized the statute as "tough new guidelines for Federal courts when evaluating legal challenges to prison conditions [that] will work to restrain liberal Federal judges who see violations on constitutional rights in every prisoner complaint."[69] In practice, these standards operate to restrain judges in this capacity, but what remains unclear is what constitutes the "least intrusive means necessary" to correct a federal violation, a question to which this Note now turns.

II. UNLOCKING THE INTRUSIVENESS REQUIREMENT

As the First Circuit has aptly stated, "The PLRA is not a paragon of clarity."[70] Prospective and preliminary injunctive relief under the PLRA must constitute "the least intrusive means necessary to correct the violation of a Federal right."[71] What constitutes "least intrusive" is not clear from reading the statute—aside from the fact that public safety should be a concern—and has become less clear through the case law that has addressed it.[72] Even the PLRA's legislative history raises skepticism about its utility.[73] Congress has structured the relief provisions to limit the authority of activist judges, but the data at the time of the PLRA's passage regarding the need to decrease frivolous lawsuits indicated that 94.7% of these suits were dismissed before the pretrial phase.[74] Only 3.1% were found to have enough merit to reach trial.[75] These numbers spawn the question of how courts are expected to respond to the least intrusive qualification. If the number of cases in which judges must consider relief

67. Prison Conditions Litigation Reform Act, S. 1275 (articulating requirements for prospective relief).

68. See 141 Cong. Rec. 26,449 (1995) (statement of Sen. E. Spencer Abraham) ("The legislation I am introducing today will return sanity and State control to our prison systems. It will do so by limiting judicial remedies in prison cases and by limiting frivolous prisoner litigation."); see also Porter v. Nussle, 534 U.S. 516, 524 (2002) (referencing PLRA's two purposes of reducing quantity and improving quality of prisoner lawsuits).

69. 141 Cong. Rec. 26,549 (1995) (statement of Sen. Robert Dole).

70. Inmates of Suffolk Cnty. Jail v. Rouse, 129 F.3d 649, 654 (1st Cir. 1997).

71. 18 U.S.C. § 3626(a)(1)(A) (2012); see also supra Part I.B (discussing restrictions of PLRA relief provisions).

72. See, e.g., Miller v. French, 530 U.S. 327, 357 (2000) (Breyer, J., dissenting) ("Where prison litigation is . . . complex . . . it may prove difficult for a district court to reach a fair and accurate decision about which orders remain necessary, and are the 'least intrusive means' available, to prevent or correct a continuing violation of federal law.").

73. See, e.g., supra Part I.C (discussing PLRA's legislative history).

74. 141 Cong. Rec. 14,626 (1995) (statement of Sen. Orrin Hatch).

75. Id.

is minimal, is there really a need to restrain judges?[76] Part II.A addresses *Brown v. Plata*, the Supreme Court's only case tackling this question.[77] Part II.B and II.C look to the circuit courts, which, having produced a motley set of opinions as to the substantive understanding of the requirement, are categorized by their split procedural approach to the issue: Some weigh relief orders against the intrusiveness requirement on a provision-by-provision basis, while others consider the provisions as a whole. Lastly, Part II.D concludes with a survey that examines whether a court's approach to the intrusiveness analysis is suggestive of its likely outcome.

A. *The Obscurity of the Supreme Court:* Brown v. Plata

Brown v. Plata consolidated two cases—*Coleman v. Schwarzenegger* and *Plata v. Schwarzenegger*—brought by California prisoners with serious mental disorders and medical conditions alleging inadequate health services due to prison overcrowding.[78] In both underlying cases the lower courts found constitutional violations amounting to cruel and unusual punishment under the Eighth Amendment.[79] On appeal, the Supreme Court addressed whether the prisoner release orders resulting from these cases were consistent with the PLRA's relief provisions, including the intrusiveness requirement.[80]

In *Coleman*, the district court appointed a special master to develop and implement a remedial plan within twelve years; in *Plata*, the Ninth Circuit approved a five-year consent decree and stipulated injunction.[81] Once the special master in *Coleman* reported deteriorating mental healthcare after twelve years, and the state failed to comply with the injunction in *Plata*, the plaintiffs in both cases requested the appointment of a three-judge court pursuant to the requirements of the PLRA.[82] The chief judge of the Ninth Circuit convened a three-judge court and consolidated the interrelated cases.[83]

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76. See infra Part III.B–C (arguing required showing of constitutional violation is sufficient judicial restraint).

77. 131 S. Ct. 1910 (2011).

78. Id. at 1917; see also Plata v. Schwarzenegger, 603 F.3d 1088, 1091–93 (9th Cir. 2010) (providing further background of *Brown v. Plata*); Coleman v. Schwarzenegger, 922 F. Supp. 2d 882, 890–908 (E.D. Cal. 2009) (same).

79. *Coleman*, 922 F. Supp. 2d at 891 (mandating defendants provide minimum level of medical care required by Eighth Amendment); see also *Plata*, 603 F.3d at 1090 (stating parties agreed to consent order to remedy Eighth Amendment deficiencies).

80. *Brown*, 131 S. Ct. at 1922 ("The appeal presents the question whether the remedial order issued by the three-judge court is consistent with requirements and procedures set forth in . . . the Prison Litigation Reform Act . . . .").

81. Id. at 1931.

82. See 18 U.S.C. § 3626(a)(3) (2012) (requiring party seeking prisoner release order to request three-judge court).

83. See *Brown*, 131 S. Ct. at 1922 (explaining procedural history).

At the time the three-judge court was convened, the record in the consolidated cases indicated that California's prison population was nearly double its design capacity of 80,000.[84] There was a 20% vacancy for surgeons and a 51.4% vacancy for psychiatrists, and the record further indicated that even if the necessary staff had been added, there would have been insufficient space for them.[85] There was a backlog of up to 700 prisoners waiting to see a doctor for physical care with a wait time of up to twelve months.[86] Suicide rates in California prisons were 80% higher than the national average, and 72.1% of those suicides were reported by special masters to be "foreseeable and/or preventable."[87] The overcrowding in one prison led fifty sick inmates to be held together for up to five hours in a space that was twelve feet by twenty feet.[88] In response, the three-judge court ordered the state to reduce its population to 137.5% of its design capacity within two years.[89]

The Supreme Court found that the requirements for issuing a prisoner release order, as mandated by the PLRA,[90] were met by the three-judge court: a court had previously entered an order for less intrusive relief,[91] the state had a reasonable amount of time to comply with those previous orders,[92] the evidence clearly and convincingly showed that crowding was the primary cause of the violations,[93] and no other relief would remedy the violation of the federal right.[94] The Court articulated the intrusiveness requirement as an additional qualification, applying the language of 18 U.S.C. § 3626(a)(1) to the remedial population order and finding that it was met.[95]

The Court undertook explaining the elements of the test, but left unclear whether intrusiveness was encapsulated in its discussion of need and narrowness, or whether the three elements are to be considered disjunctively. In regard to narrowness, the Court stated that a remedy did

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84. Id. at 1923.

85. Id. at 1918.

86. Id. at 1919, 1924.

87. Id. at 1924–25.

88. Id. at 1925.

89. Id. at 1928.

90. 18 U.S.C. § 3626(a)(3)(A), (E) (2012) (articulating requirements for three-judge court to issue prisoner release order).

91. *Brown*, 131 S. Ct. at 1930 (concluding appointment of Special Master in *Coleman* and approval of consent decree in *Plata* satisfied previous relief requirement).

92. Id. at 1930–31 (stating passage of twelve years in *Coleman* and five years in *Plata* gave state ample time to comply).

93. Id. at 1932 (deferring to three-judge court's conclusion overcrowding was primary cause).

94. Id. at 1937 (agreeing with three-judge court's conclusion that order limited to other remedies would not provide effective relief). For the statutory language limiting prisoner release orders under the PLRA, see 18 U.S.C. § 3626(a)(3).

95. *Brown*, 131 S. Ct. at 1929.

not fail to be narrowly tailored because it would have collateral effects.[96] Rather, it required a "fit between the [remedy's] ends and the means chosen to accomplish those ends."[97] The remedial judgment met this, according to the Court, so long as it was executed with the objective of releasing as few prisoners as possible in an effective manner. The Court said that an alternative remedy in which release was limited to the plaintiffs in the class—those currently suffering from inadequate mental health or medical care—would unduly restrain the state's ability to determine which prisoners should be released in accordance with public safety and which had the potential to harm future class members.[98]

The Court's line of inquiry regarding need bled into its discussion of narrowness. The Court went on to say that in not extending relief further than necessary to remedy the violation, the scope of the remedy must also be proportional to the scope of the violation.[99] The Court emphasized the sentence preceding the intrusiveness requirement in the relief provisions of the PLRA, repeating the need to correct the violation of the federal right, but "of a particular plaintiff or plaintiffs."[100] To the Court, this only requires that the relief implemented is determined with respect to the constitutional violations established by the plaintiffs before the court, not that the relief targets only those current members of the plaintiff class and thereby excludes future class members.[101] The Court also found that the order was not overly broad by pertaining to the entire prison system rather than ordering institution-specific population reductions.[102] The Court intended to leave state officials with the discretion to determine how populations would vary within each institution so long as the overall population reduction was met.[103]

Lastly, the Court stated that the order was not overly broad because it prevented the state from running its prisons in the manner it requested.[104] The Court found it significant that the ordered relief allowed the state to determine how to meet the population limit, encouraging courts to leave "sensitive policy decisions," such as the details of how to accomplish court-ordered relief, "to responsible and competent state of-

96. Id. at 1940.

97. Id. at 1939 (alteration in *Brown v. Plata*) (internal quotation marks omitted).

98. Id. at 1940.

99. Id.

100. Id.; see also 18 U.S.C. § 3626(a)(1)(A) (2012).

101. *Brown*, 131 S. Ct. at 1940 ("This case is unlike cases where courts have impermissibly reached out to control the treatment of persons or institutions beyond the scope of the violation . . . . Prisoners who are not sick . . . do not yet have a claim . . . but in no sense are they remote bystanders . . . .").

102. Id. at 1941.

103. Id. ("Leaving this discretion to state officials does not make the order overbroad.").

104. Id. ("While the order does in some respects shape or control the State's authority in the realm of prison administration, it does so in a manner that leaves much to the State's discretion.").

ficials."[105] This may have been the Court's way of defining the intrusiveness requirement, though it is not entirely clear: The Court never explicitly used or referred to the term "intrusive."

The Court's decision next turned to consideration of the order's potential impact on public safety.[106] The Court found that the three-judge panel sufficiently considered this impact by devoting nearly ten days of trial to the issue and giving it extensive attention in its opinion.[107] Furthermore, the Court did not require that courts certify that there be no possible adverse impact on the public.[108] The Court recognized that such a restriction could not be met in cases involving prisoner release orders where there is some likelihood that released prisoners will commit crimes once free. The Court articulated the requisite consideration of public safety as a factfinding inquiry that often relies on the expert testimony of prison administrators.[109] Since the three-judge court relied on the expertise of state prison officials in choosing how to reduce the population, the Court awarded it extreme deference.[110] The three-judge court found that different methods of reducing overcrowding had little impact on public safety. Expanding good-time credits, transferring low-risk offenders to community programs, and diverting persons in prison for violating technical terms of their parole to community programs would all reduce the population without releasing violent convicts.[111]

Ultimately, the three-judge court left the state with a great deal of flexibility in selecting among various means of reducing overcrowding. The state submitted a plan to the three-judge court to reduce its prison population, but later argued before the Supreme Court (once facing litigation) that the three-judge court had approved the plan without determining whether its specific measures would substantially harm public safety. Again, the Court found no wrong in this, stating, "Courts should presume that state officials are in a better position to gauge how best to preserve public safety and balance competing correctional and law enforcement concerns."[112] By leaving the details of implementation of remedial orders to state officials, the three-judge court was protecting

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105. Id. at 1943.

106. See 18 U.S.C. § 3626(a)(1)(A) (2012) (mandating courts give "substantial weight" to public safety in granting relief).

107. *Brown*, 131 S. Ct. at 1941.

108. Id. (indicating doing so would require "depart[ing] from the statute's text by replacing the word 'substantial' with 'conclusive'").

109. The three-judge court relied on expert witnesses who produced statistical evidence that prison populations had been reduced elsewhere without negatively affecting public safety. Id. at 1942.

110. Id. at 1943 (asserting state officials are best positioned to determine how to protect public safety).

111. Id. at 1943–44.

112. Id. at 1943.

public safety and presumably implementing the least intrusive means necessary to correct the Eighth Amendment violation.[113]

Though the Court made a blanket statement that the intrusiveness test was met in this case, it did not explain the relationship between giving substantial weight to public safety and successfully implementing the least intrusive means of remedying the violation.[114] It is also unclear whether a finding that a court has given substantial consideration to adverse impacts on public safety alone could be sufficient to meet the intrusiveness part of the test. The lack of explicitness would seem to imply that the Court was not going that far.[115]

Justice Scalia, in his dissent, attempted to make up for the opaqueness of Justice Kennedy's majority opinion by defining "the least intrusive means necessary" as meaning "no other relief is available."[116] In doing so, he pulled from the language of 18 U.S.C. § 3626(a)(3)(E), which prevents a court from entering a prisoner release order unless clear and convincing evidence indicates that crowding is the primary cause of the violation and no other relief will remedy it. Justice Scalia gave little reason for drawing this connection, but said in a footnote that "[a]ny doubt on this last score" should be eliminated by the statutory language itself.[117] Finding that other remedies were available, he concluded that the order violated the PLRA and allowed the three lower-court judges to exceed their Article III powers.[118] Justice Scalia separated his analysis regarding narrowness and intrusiveness[119] and, like the majority, emphasized deference to state officials, but did so through his own broad definition of intrusiveness.[120]

Justice Alito, in his dissent, blended the majority's emphasis on public safety with Justice Scalia's focus on the availability of alternative remedies. He made no reference to these considerations with respect to a distinctive intrusiveness requirement, but related them to the statutory lan-

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113. Id.

114. See, e.g., supra notes 106–111 and accompanying text (discussing Court's public safety analysis).

115. Cf., e.g., William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 373 (1991) (explaining inconsistency with which Supreme Court engages in statutory interpretation).

116. *Brown*, 131 S. Ct. at 1958 (Scalia, J., dissenting).

117. Id. at 1958 n.*.

118. Id. at 1950–51 (arguing Court "disregard[ed] stringently drawn provisions of the governing statute" and "ignore[d] bedrock limitations on the power of Article III judges" to "uphold the absurd").

119. Justice Scalia did not find the remedy narrowly tailored because the order affected the entire prison population, not just those prisoners who had already been denied medical care. Id.

120. Id. at 1956 ("'Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.'" (alteration in *Brown v. Plata*) (quoting Turner v. Safley, 482 U.S. 78, 84–85 (1987))).

guage as a whole.[121] Justice Alito disagreed with the majority's decision for three interrelated reasons: 1) the three-judge court improperly refused to consider evidence regarding current prison conditions, 2) the Court erred in holding that no remedy short of mass prisoner release would correct the violation, and 3) the Court gave inadequate consideration to public safety.[122] Justice Alito found that public safety concerns were not given due attention both because the Court did not distinguish between conditions that fell below a desirable level (as a matter of public policy) and the minimal level mandated by the Constitution, and because the Court rejected alternatives that would have provided immediate relief.[123] Without these errors, Justice Alito believed a "less drastic remedial plan could have been crafted."[124] Yet, the Justice did not make clear which part of the statute called for a less drastic remedial plan. Additionally, he did not discuss his qualms with the majority's decision by referring to the separate elements of need, narrowness, and intrusiveness, but seemed to consider all three elements as interrelated.[125]

Justice Alito remained unconvinced that reducing overcrowding was the only, or even a good, way of alleviating the problems in California's prisons.[126] Similar to Justice Scalia, Justice Alito wrote with a presumption that prisoner release orders did not meet the intrusiveness test when other alternatives existed.[127] He focused on the availability of other immediate and less costly forms of relief, including improving sanitary procedures; providing better training and monitoring of medical staff performance; and increasing medical supplies, equipment, and staff.[128] He even suggested that the violations could be more appropriately remedied by combining those types of changes with targeted reductions in the state's prison population through out-of-state transfers.[129] Concern for both overstepping judicial authority and public safety framed Justice Alito's inquiry into alternative forms of relief. Accordingly, he would

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121. Id. at 1959–68 (Alito, J., dissenting) (using any form of word "intrusive" only once).

122. Id. at 1959–60.

123. Id. at 1964 (criticizing, as one example, Court's dissatisfaction that intake exam areas were separated by folding screens rather than held in separate rooms).

124. Id.

125. See id. at 1962 ("These statutory restrictions largely reflect general standards for injunctive relief . . . .").

126. Id. at 1963. Justice Alito took issue with the fact that an overall population reduction could result in no members of the plaintiff class being released. Id. He also focused on expert testimony that suggested that a population reduction would leave the medical treatment problems largely unmitigated. Id.

127. Id. at 1964 ("[N]othing in the PLRA suggests that public safety may be sacrificed in order to implement an immediate remedy rather than a less dangerous one that requires a more extended but reasonable period of time.").

128. Id.

129. Id.

have given the three-judge court minimal deference.[130] This may not have been the case if, like the majority, he found the three-judge court to have properly deferred to the state. The fact that the lower court allowed state officials to determine how to achieve the population reduction was not satisfactory to Justice Alito because the state requested five, as opposed to two, years to reduce the population without unacceptably compromising public safety.[131]

The Court's decision in *Brown v. Plata* leaves jumbled the role of the intrusiveness requirement in the issuance and execution of relief orders under the PLRA. Aside from public safety, the majority seems to consider the requirement in light of the need to correct the federal violation as well as the deference awarded to prison administrators, but fails to clearly articulate the sufficiency of and relation between these factors. Justice Scalia states precisely that a remedy cannot constitute the least intrusive means if another remedy is available. This conclusion is perhaps logical in the context of prisoner release orders, but the same definition may be highly burdensome if applicable to all prospective relief where theoretically there is always an alternative. Justice Alito also fails to give particular meaning to the intrusiveness standard, combining the need, narrowness, and intrusiveness requirements into one standard, and finding that it was not met because neither alternative remedies nor adverse impacts on public safety were adequately considered.

With unclear direction from the Supreme Court, courts of appeals have approached the question differently. They vary widely in whether they consider the intrusiveness test distinctly, whether they consider it as a collective need-narrowness-intrusiveness test, or whether they consider the substantive definition of intrusiveness at all. They have, however, developed two distinct procedural approaches, and this Note organizes them into the resulting camps. Part II.B will address what this Note has termed the Eleventh Circuit approach, and Part II.C, the Ninth Circuit approach. The Eleventh Circuit approach requires a provision-by-provision analysis of the least intrusive requirement whereas the Ninth Circuit approach views the respective order of relief in the aggregate. Part II.D disaggregates the universe of case law addressing the intrusiveness requirement under § 3626 of the PLRA, placing cases into one of these two camps. Doing so reveals that regardless of the approach a court follows, it will rarely find that relief falls short of the intrusiveness requirement.

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130. Id. at 1966 ("[A] more cautious court, less bent on implementing its own criminal justice agenda, would have at least acknowledged that the [public safety] consequences of this massive prisoner release cannot be ascertained in advance with any degree of certainty . . . .").

131. Id. at 1967.

B. *The Eleventh Circuit Approach*

Cason v. Seckinger is the exemplary case of the Eleventh Circuit's approach to the intrusiveness requirement.[132] This appeal stemmed from a lawsuit filed sixteen years prior by all inmates then currently housed or to be housed at the Middle Georgia Correctional Complex.[133] The plaintiffs sought injunctive relief for numerous alleged constitutional violations and the lawsuit was settled by a series of consent decrees between the plaintiffs and the Georgia Department of Corrections from 1990 and 1996.[134] In 1998 the Department of Corrections sought to terminate, pursuant to the PLRA, those consent decrees that did not contain provisions for automatic termination.[135] The district court approved terminating the enforcement of the consent decrees, but did not vacate the substance underlying them.[136] It also denied the plaintiffs' request for an evidentiary hearing, in response to the motion to vacate, to determine whether the violations addressed in the consent decrees were still ongoing.[137] The Eleventh Circuit vacated the district court's order to terminate the consent decrees and remanded for an evidentiary hearing.[138]

Under the PLRA, prospective relief is terminable two years after its effective date unless the court finds that the relief remains necessary to correct a "current and ongoing violation."[139] The Eleventh Circuit found that the district court, by dismissing the plaintiffs' request for an evidentiary hearing and relying on the fact that there had been no formal complaints against the defendants in recent years, had prematurely decided the issue.[140] In remanding the case and directing the district court to hold an evidentiary hearing, the Eleventh Circuit expressed what met the "need-narrowness-intrusiveness" test.[141] The Eleventh Circuit did not refer to the intrusiveness standard solely on its own, but did so collectively with the requirements for need and narrowness.[142] The district court was

132. 231 F.3d 777 (11th Cir. 2000).

133. Id. at 778.

134. Id.

135. Fourteen consent decrees were ordered beginning in 1990. Id. at 779. Three of them contained provisions for automatic termination and were not addressed in the case. Id. The others concerned discipline and grievances; sanitation, food, use of force, classification, visitation, mail and postage, and receipt of funds; sexual abuse; counseling; physical restraints, seclusion, and stripping; training of employees; psychiatric assistance; and mental health staff. Id. at 779 n.4.

136. Id. at 778–79.

137. Id.

138. Id. at 787. Plaintiffs also requested, and were denied, amendment of their complaint. Id.

139. 18 U.S.C. § 3626(b)(3) (2012); see also supra notes 45–50 and accompanying text (explaining procedures for termination of relief under PLRA).

140. *Cason*, 231 F.3d at 782–83 (vacating portion of district court's order and remanding with instructions to hold evidentiary hearing).

141. Id. at 784–85 (evaluating district court's treatment of test).

142. Id. at 784.

ordered to determine whether the test had been met if the evidentiary hearing revealed current and ongoing violations that warranted the continuation of prospective relief.[143]

The Eleventh Circuit made two primary articulations regarding the intrusiveness test. The first was that the analysis should pertain to the violations at the time when the motion for termination was filed, not when the initial relief was entered.[144] By doing so the court made clear that the test applied to current and ongoing violations.[145] The implication of this is that the denial of any motion to terminate relief under § 3626(b)(3) of the PLRA requires a *new* finding that the intrusiveness test has been met. The court's second articulation was that the statute should be read "as requiring particularized findings, on a provision-by-provision basis, [to ensure] that each requirement imposed by the consent decrees satisfies the need-narrowness-intrusiveness criteria."[146] The Eleventh Circuit advised the district court, on remand, not to summarily conclude that the consent decrees satisfy the test,[147] but to find each singular requirement of each consent decree necessary to correct the ongoing violation, narrowly drawn, and the least intrusive means to correct the violation.[148] The Eleventh Circuit provided no further guidance.

The Fifth and Second Circuits have followed the Eleventh Circuit's approach to the intrusiveness test, citing *Cason* in their leading decisions on the issue. In *Ruiz v. United States*, Texas prison officials appealed the district court's denial of their motion to terminate a judgment that found aspects of the state's prison system in violation of prisoners' Eighth Amendment rights.[149] In 1974, the district court consolidated claims by David Ruiz and other inmates against the director of the Texas Department of Corrections.[150] The district court issued a consent decree in 1981 that the Fifth Circuit affirmed a year later.[151] The parties continued to modify the remedial order, and in 1992 the district court approved a final judgment that replaced all previous orders and compliance plans and terminated the district court's jurisdiction in some substantive areas.[152] The defendants filed a motion to vacate the 1992 judgment in 1996.[153] A month later Congress enacted the PLRA and

143. Id.; cf. 18 U.S.C. § 3626(b)(2) (stating defendant is entitled to immediate termination of prospective relief if intrusiveness test is not met).

144. *Cason*, 231 F.3d at 784.

145. Id.

146. Id. at 785.

147. Id. ("It is not enough to simply state in conclusory fashion that the requirements of the consent decrees satisfy those criteria.").

148. Id.

149. 243 F.3d 941 (5th Cir. 2001).

150. Id. at 943.

151. Id.

152. Id.

153. Id.

those parties filed a new motion to terminate the 1992 consent decree under the law's termination of relief provisions.[154] Two years later the defendants filed another motion to terminate under the PLRA.[155] The district court ruled that the termination provisions of the PLRA were unconstitutional as a matter of due process and separation of powers principles.[156] In the event that the Fifth Circuit did not make the same finding, the district court found that there were constitutional violations in the areas of inmate protection, use of force, and administrative segregation, but not in medical and psychiatric care.[157] The defendants, including the United States, challenged the district court's findings that the termination provisions were unconstitutional and that systemic constitutional violations existed.[158]

In concluding that the termination provisions of the PLRA were constitutional,[159] the Fifth Circuit addressed the intrusiveness test in light of the 1992 consent decree. It cited the language of *Cason* word for word in stating that the analysis requires particularized findings on a provision-by-provision basis.[160] Referring to the limitation of § 3626(b)(3) that relief cannot be terminated if the court makes a finding that relief is necessary to correct current and ongoing violations, the Fifth Circuit stated that each party must first be given the opportunity to present evidence regarding existing conditions at the institution subject to relief.[161] The Fifth Circuit stated that courts should then review the record and make determinations regarding the existence of ongoing and constitutional violations and the need of each provision of the consent decree in light of those violations.[162] The Fifth Circuit gave two examples: If there is a constitutional violation concerning inmate protection, a section of the consent decree regarding staffing may be relevant if staffing is contributing to the violation; if excessive force is the constitutional violation,

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154. Id. at 944; see also 18 U.S.C. § 3626(b)(2) (2012) (providing for termination of prospective relief where there is no finding by court that relief meets intrusiveness test).

155. *Ruiz*, 243 F.3d at 944; see also 18 U.S.C. § 3626(b)(1)(A)(ii) (noting termination of relief available upon motion one year after order denying termination).

156. *Ruiz*, 243 F.3d at 944.

157. Id.

158. Id.

159. Id. at 945–50. The court cited sister circuits' decisions upholding the constitutionality of PLRA's termination provisions, including Gilmore v. California, 220 F.3d 987 (9th Cir. 2000); Berwanger v. Cottey, 178 F.3d 834 (7th Cir. 1999); Nichols v. Hopper, 173 F.3d 820 (11th Cir. 1999); Benjamin v. Jacobson, 172 F.3d 144 (2d Cir. 1999) (en banc); Imprisoned Citizens Union v. Ridge, 169 F.3d 178 (3d Cir. 1999); Hadix v. Johnson, 133 F.3d 940 (6th Cir. 1998); Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997); Inmates of Suffolk Cnty. Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997); Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997); and Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996).

160. R*uiz*, 243 F.3d at 950.

161. Id.

162. Id. at 950–51.

then a provision regarding crowding may not be necessary.[163] After a court has made its determinations regarding need, the Fifth Circuit stated it should determine whether those provisions of the relief order were narrowly drawn and the least intrusive means to correct the violation.[164]

Differing slightly from the Eleventh Circuit, the Fifth Circuit only lumped together its analysis for narrowness and intrusiveness, excluding need.[165] The court again used an example regarding an inmate protection violation to give meaning to these requirements: If the staffing provision remains necessary, "it might not involve relief that is narrowly drawn;" it is nonintrusive "if it covers positions that are not commonly associated with the protection of inmates," like administrative positions.[166] Finding that the case did not reach the level of particularized findings required by § 3626(b)(3)—one of the few to have failed to do so[167]—the court remanded the case for further evidence gathering regarding the ongoing constitutional violations.[168]

Benjamin v. Schriro provides the Second Circuit's current doctrine on the intrusiveness standard.[169] In this case, the state appealed an order from the Southern District of New York directing it to comply with an earlier relief order by enacting a comprehensive remediation plan for the ventilation systems in the city's jails.[170] The Second Circuit held that the state's untruthfulness, noncompliance, and inaction with respect to the prior order constituted sufficient justification for the intrusiveness of the new order.[171] In making its determination in *Benjamin v. Schriro*, the Second Circuit relied heavily on earlier decisions in the same litigation, primarily *Benjamin v. Fraser*.[172] In that case, defendants first moved at the trial court level to terminate a twenty-one-year-old consent decree originally entered in a class action brought by pretrial detainees alleging that the conditions of the city's jails[173] amounted to constitutional viola-

163. Id. at 951.

164. Id.

165. See, e.g., supra note 142 and accompanying text (explaining Eleventh Circuit's application of intrusiveness test).

166. *Ruiz*, 243 F.3d at 951.

167. See, e.g., infra notes 249–250 (surveying cases in which relief orders failed to meet intrusiveness standard).

168. *Ruiz*, 243 F.3d at 952–53.

169. 370 F. App'x 168 (2d Cir. 2010).

170. Id. at 169.

171. Id. at 171.

172. Compare id. at 171 (citing department's untruthfulness and noncompliance as justifications for intrusiveness of new order), with Benjamin v. Fraser, 343 F.3d 35, 52–55 (2d Cir. 2003) (holding some conditions in jail satisfied need-narrowness-intrusiveness test, while others did not), overruled on other grounds by Caiozzo v. Koreman, 581 F.3d 63 (2d Cir. 2009).

173. The consent decree applied to the following fourteen New York facilities: the Adolescent Reception and Detention Center, the Anna M. Kross Center, the George

tions.[174] The district court made two holdings related to the needs-narrowness-intrusiveness requirement in this case: 1) that the actions of the monitoring agency did not constitute prospective relief under the PLRA and were therefore not subject to the intrusiveness test[175] and 2) that the remedial measures previously ordered to address sanitation and other problems satisfied the test.[176]

The court began by citing *Cason* and *Ruiz* in stating that it was not enough for a court to make a conclusory statement that the test was met, but that it must make particularized findings that each provision of the order satisfies the criteria of need, narrowness, and intrusiveness.[177] Judge Baer applied the precedent of the Eleventh and Fifth Circuits, but included in his opinion his personal belief that the approach should be one of generalized findings.[178] In acknowledging that the statute is ambiguous regarding the issue,[179] he stated that the Eleventh Circuit approach "elevate[d] formalism over substance and construe[d] the PLRA as devising pitfalls for conscientious courts who have convened hearings, weighed extensive quantities of evidence, rendered detailed opinions, and drafted narrow and specific remedial orders."[180] Though he proceeded with the application of the precedents of *Cason* and *Ruiz*, Judge Baer found that in doing so he was allowing already-addressed constitutional violations to be relitigated.[181]

The court defined a provision, for the purposes of its analysis, as that which concerns a specific environmental condition in the city's jails.[182]

Motchan Detention Center, the Rose M. Singer Center, the James A. Thomas Center, the George R. Vierno Center, the North Infirmary Command, the Otis Bantum Correctional Center, the Manhattan Detention Center, the Brooklyn House of Detention, the Queens Detention Center, the West Facility, the Vernon C. Bain Center, and the Bronx Detention Center. *Fraser*, 156 F. Supp. 2d at 334 n.1.

174. Id. at 335–36.

175. Id. at 342 (stating monitoring simply informs court and parties about status of ordered relief).

176. Id. at 345–55 (analyzing previously ordered relief on provision-by-provision basis).

177. Id. at 341.

178. Id. at 342. This suggested approach is similar to the Ninth Circuit's discussed infra Part II.C.

179. *Fraser*, 156 F. Supp. 2d at 342 ("It cannot be said that § 3626(a)(1) is unambiguous, or clearly expresses Congress' intent to depart from the traditional standard—findings sufficient to allow a 'clear understanding' of the ruling—in favor of . . . findings on a paragraph by paragraph, or even sentence by sentence basis.").

180. Id.

181. Id. ("[M]uch of what the parties . . . submitted . . . represents little more than an effort to regain what they lost at the hearing. However, in light of some, in my view, unfortunate appellate rulings, and to avoid yet more delay in the remediation of truly depressing environmental conditions, I will so proceed.").

182. Id. at 343–44 ("[T]o conclude otherwise would either condition the adequacy of a court's findings upon the paragraph structure of the remedial order, or, at its logical

The court considered the following environmental conditions: cleaning of cells, mattresses, janitor's closets, food storage containers, ventilation, operational windows, heating, and lighting.[183] Three principles guided the court's determination of whether the provisions of the order met the intrusiveness test.[184] The first was the degree of agreement among the parties.[185] The court found agreement to constitute strong evidence that the test was met.[186] Since the defendants agreed to the portions of the order mandating the cleaning of cells upon vacancy, the sanitizing of mattresses, the cleaning of light shields and ventilation registers, and the repairing of radiators, the court found that those provisions met the intrusiveness requirement.[187] The second principle was that requiring the Department of Corrections to follow its own rules was neither too broad nor too intrusive.[188] Provisions of relief regarding the replacement of mattresses were found to have met the intrusiveness requirement because "the Department's own housekeeping manual state[d] that any mattresses with holes, rips, or tears should be replaced."[189] The third principle was that a court cannot determine that a deadline is not narrowly drawn and unobtrusive unless the defendants produce clear counterarguments and alternative dates for achieving the mandated relief.[190] In response to the defendants' complaint that such a principle shifted the burden of meeting the intrusiveness test onto them, the court justified doing so by stating that in allowing the defendants to implement relief any time, the defendants eluded responsibility for the constitutional violations.[191]

Despite its application of these three principles to some provisions of the relief order, the court made less conclusive statements regarding the intrusiveness standard's application to the remaining five provisions, only one of which the court found fell short of the intrusiveness standard.[192] The court first found that the ventilation provisions met the intrusiveness requirement. Those provisions required annual inspection of the ventilation systems, completion of repairs to restore the functionality of systems by certain dates, adequate ventilation in the bathroom and shower areas, and bed placement so that prisoners' heads were at least

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extreme, force the court into the absurd position of having to make a separate analysis for every word in the order.").

183. Id. at 345–46, 348.

184. Id. at 343–45.

185. Id. at 344.

186. Id. The court did not state that agreement or stipulation among the parties was sufficient to meet the test. Id.

187. Id. at 347.

188. Id. at 344.

189. Id. at 347.

190. Id. at 344.

191. Id.

192. E.g., id. at 347 (stating it was "self-evident" cleaning of cells was not intrusive).

six feet apart.[193] The court also found the requirement to restore windows to operational form "not overly intrusive" because the relief constituted a routine building task that only required repairing what was not working.[194] Lastly, the court found that the lighting provisions met the requirement[195] as did the heating provisions, which called for annual testing of heating systems, maintaining radiators and radiator covers, and ensuring that windows were fully operational prior to winter.[196] The only provisions the court found to be unduly intrusive were those regarding janitors' closets and food storage containers. The court rejected the plaintiff's proposal that the court specify what kinds of supplies should be kept in each area and adopted the defendants' version, which required general maintenance of sanitary practices.[197] The Southern District did not explain its rationale with regard to these two matters. The Second Circuit affirmed all these findings except for the bed spacing[198] and lighting requirements,[199] for which it gave little explanation.

C. *The Ninth Circuit Approach*

The Ninth Circuit has taken an almost opposite approach to the Eleventh, Fifth, and Second Circuits' by considering the extent to which a relief order is intrusive *in the aggregate*. It has also gone a step further by defining intrusiveness as the degree to which a relief order intrudes on the operations of the prison system. *Armstrong v. Schwarzenegger*[200] and *Plata v. Schwarzenegger*[201] provide the court's most recent decisions on the issue. In *Armstrong*, a class of disabled prisoners and parolees sought an

193. Id. at 349–51.

194. Id. at 350. The court stated that this form of relief was less intrusive relative to the court making window-by-window determinations about whether sufficient ventilation was being provided. Id.

195. The lighting provisions required ensuring that twenty foot-candles of light be provided at bed or desk level in dormitories and cells (the court found that this was less intrusive than requiring bulbs of a particular wattage), providing no less than thirty foot-candles of general lighting and 100 foot-candles of task lighting in designated areas, cleaning all light shields, and not housing prisoners in cells with lights that do not work. Id. at 352–54.

196. Id. at 351–52.

197. Id. at 347.

198. Benjamin v. Fraser, 343 F.3d 35, 53 (2d Cir. 2003) ("There is no constitutional requirement that pretrial detainees have six feet of breathing room."), overruled on other grounds by Caiozzo v. Koreman, 581 F.3d 63 (2d Cir. 2009).

199. Id. at 55 ("[W]e cannot be sure whether the . . . remedy [was] made because of the actual lighting conditions . . . or because of the court's belief that the ten foot-candle standard violates the Constitution. The latter course would have been impermissible, as the Constitution does not mandate any particular foot-candle standard . . . .").

200. 622 F.3d 1058 (9th Cir. 2010).

201. 603 F.3d 1088 (9th Cir. 2010).

order, in the remedial phase of litigation,[202] which would require state officials to track and accommodate the needs of the disabled housed in county jails and provide them with a workable grievance procedure in accordance with the American Disabilities Act (ADA).[203] The state was housing prisoners and parolees in county jails in a number of circumstances: after a prisoner's parole had been revoked, between the placement of a parole hold and an individual's revocation hearing, and for drug treatment programs.[204] The district court granted the plaintiffs' motion and the Ninth Circuit affirmed the decision, holding that 1) the defendants were responsible for providing disabled prisoners and parolees with reasonable accommodations and 2) the district court made the required findings regarding need, narrowness, and intrusiveness.[205]

The defendants argued that the intrusiveness test was not met for two reasons—the district court did not make its findings on a provision-by-provision basis, and the plan was neither narrowly drawn nor minimally intrusive.[206] The court responded to the first contention by stating that the language of the PLRA does not indicate that Congress intended relief orders to be read on a provision-by-provision basis.[207] Since the statutory text is ambiguous as to whether relief refers to a remedial order as a whole or each individual element of an order, the court saw no practical reason for reading a provision-by-provision analysis into the statute.[208] In fact, the court said from a semantic standpoint that it made as much sense to read "relief" as referring to an order in its entirety.[209] The Ninth Circuit believed the complexity of prison administration necessitated consideration of the order in the aggregate because multiple elements worked together to correct the constitutional violations.[210] The

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202. The district court had previously ordered the California Department of Corrections and Rehabilitation to produce a remedial plan and enforce it. *Armstrong*, 622 F.3d at 1063.

203. Id. at 1062–63.

204. Id. at 1064.

205. Id. at 1063. The defendants were ordered to develop and issue their own plan in compliance with the ADA that entailed notifying jails when the state was sending them a class member and ensuring class members in county jails had access to an adequate ADA grievance procedure. Id. at 1064.

206. Id. at 1070.

207. Id. ("'[I]t cannot be said that § 3626(a)(1) is unambiguous, or clearly expresses Congress' intent to depart from' . . . what [the courts] have always done when determining the appropriateness of relief ordered: consider the order as a whole." (citation omitted) (quoting Benjamin v. Fraser, 156 F. Supp. 2d 333, 342 (S.D.N.Y. 2001), aff'd, 343 F.3d 35 (2d Cir. 2003), overruled on other grounds by Caiozzo v. Koreman, 581 F.3d 63 (2d Cir. 2009))).

208. Id.

209. Id. ("[I]t is, after all, the order as a whole that redresses the violation of federal law, and not any individual measure on its own.").

210. Id. at 1070–71 ("This is all the more true when relief must be . . . minimally intrusive: courts . . . must order defendants to make changes in several different areas of

court also feared that it would face unwarranted challenges if courts were required to provide the level of detail mandated by a provision-by-provision analysis.[211] In finding that individual provisions of relief orders cannot be considered in isolation, the Ninth Circuit rejected the Eleventh Circuit approach.[212]

The Ninth Circuit took its analysis one step further in characterizing the intrusiveness standard by the extent to which judicial authority encroaches on state authority.[213] The court found that because the defendants did not offer an alternative remedy that would meet the relief requirements, they failed to show that the order was not the narrowest, least intrusive relief possible.[214] The court admitted that this was a very hard showing for the defendants to make because, as is often the case, courts grant state officials a high degree of discretion to implement remedial orders.[215] The defendants' argument regarding intrusiveness emphasized the burden the court's order placed upon the state.[216] This was beside the point for the court, which distinguished between burdensomeness and intrusiveness.[217] Proving that an order is burdensome does not prove that it is not minimally intrusive.[218] The critical inquiry for the court was whether the district court was "'enmeshed . . . in the minutiae of prison operations' beyond what is necessary to vindicate plaintiffs' federal rights."[219] The court stated that the evaluation does not concern expense or the difficulty of correcting the violation, but whether the correction could be achieved with less direction by the court.[220] This emphasis on judicial restraint is reminiscent of the Supreme Court's attention to state discretion in implementing relief in *Brown v. Plata*.[221] The state made a final argument in *Armstrong* that the remedial order was not necessary because class members had the alternative remedy to sue jails.[222] In response, the Ninth Circuit clarified that a lawsuit against another party

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policy and procedure in order to avoid interjecting themselves too far into any one particular area of prison administration.").

211. Id. at 1071.

212. Cf. supra Part II.B (detailing Eleventh Circuit approach).

213. *Armstrong*, 622 F.3d at 1071 (discussing importance of relief having "minimal impact possible on defendants' discretion over their policies and procedures").

214. Id. ("[Defendants] do not suggest any means to protect class members' rights . . . that are more narrow or less intrusive than those ordered by the district court.").

215. Id.

216. Id.

217. Id.

218. Id. ("With Congress having made the decision to recognize the rights of disabled persons, the question is not whether the relief . . . ordered to vindicate those rights is expensive, or difficult to achieve . . . .").

219. Id. (quoting Lewis v. Casey, 518 U.S. 343, 362 (1996)).

220. Id.

221. See, e.g., supra notes 103–105 and accompanying text (discussing discretion left to prison administrators in implementing prisoner release order in *Brown v. Plata*).

222. *Armstrong*, 622 F.3d at 1072.

with the potential to bring about additional relief does not preclude the current order from being narrow or the least intrusive form of relief.[223]

In the same year as *Armstrong*, the Ninth Circuit considered another relief order regarding medical care in California's prisons in *Plata v. Schwarzenegger*.[224] In this case, a receiver was given custodial responsibility over the California Department of Corrections and Rehabilitation (CDCR) in administering and improving its prisoner healthcare after the state failed to comply with previous consent decrees.[225] Those consent decrees had been issued in response to a class action brought on behalf of all inmates in the California prison system alleging inadequate medical care in violation of the Eighth Amendment and the ADA.[226] After years of negotiation, the parties entered into a stipulation and order for injunctive relief that required the state to implement remedial measures on a rolling basis.[227] After two years of little accomplishment, the court approved a second relief order to ensure the competency of medical staff and establish a system for identifying and treating high-risk medical patients.[228] After three years, the district court found that not one prison had adequately implemented the remedial procedures even in light of the fact, which the state acknowledged, that a "significant number" of inmates died from substandard medical care.[229] The district court appointed a receiver, finding that this relief passed the intrusiveness test.[230] The order required the receiver to prepare a plan of action for remedying all constitutional violations and to file regular progress reports with the court.[231] The state was responsible for all costs and filed no opposition to the receivership at the time of its entrance.[232]

The state, however, later challenged the imposition of the receiver after the receiver developed a remedial plan for constructing additional prison facilities.[233] As part of its holding, the Ninth Circuit concluded

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223. Id.

224. 603 F.3d 1088 (9th Cir. 2010). Since the Supreme Court did not overrule this decision in *Brown v. Plata*, it is a useful case to consider for Ninth Circuit precedent. Cf. supra Part II.A (discussing *Brown v. Plata*).

225. 603 F.3d at 1091–92.

226. Id. at 1091.

227. Id.

228. Id.

229. Id. (internal quotation marks omitted).

230. See id. at 1092 ("'[I]f the system is not dramatically overhauled' . . . an 'unconscionable degree of suffering and death is sure to continue.'" (first alteration in original) (quoting Plata v. Schwarzenegger, No. C01-1351 TEH, 2005 WL 2932253, at *1 (N.D. Cal. Oct. 3, 2005))).

231. Id.

232. Id.

233. Id. at 1090. The receiver filed numerous motions and revised plans of action over a fourteen-month period that the state approved or acquiesced to, including a plan calling for the provision of 10,000 new beds. In July of 2008 the receiver requested $204.6

that the receivership placed on CDCR was the least intrusive means of remedying the inadequate medical care in California prisons.[234] As in *Armstrong*,[235] the court framed the purpose of the intrusiveness requirement as limiting the role of the judiciary in prison administration.[236] The state relied on the fact that the PLRA makes specific reference to the appointment of special masters in arguing that the placement of a receivership was a more drastic measure and, consequently, not the least intrusive means of remedying the violations.[237] The court placed the burden of showing that something less than a receivership would have remedied the prisoner healthcare deficiencies on the state: "The State never suggested how it could, through its own machinery, comply with those orders or otherwise rectify the constitutional deficiencies in its prison health care."[238] The court supported its conclusion that the receivership met the intrusiveness standard by citing the fact that the district court attempted prior remedies and found, after periods of working closely with the state, that different action was needed to bring the state into compliance.[239] The state additionally argued that the receiver went beyond what was required to remedy the constitutional violations, including excessive expenditures. The court dismissed these complaints as individual and irrelevant to the legal question of intrusiveness.[240]

D. *The Others: A Survey of Courts' Approaches and Their Practical Import*

Having examined the scattered circuit approaches to the intrusiveness requirement and the Supreme Court's haziness in defining it, this Note turns to surveying whether those courts' preference for one procedural approach over another affects the outcome of the test or demonstrates any other trends. The following tables encompass a compilation of

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million in previously appropriated funds from the state to implement its final plan; after the state refused to fulfill this request, the court ordered it to do so. Id. at 1092.

234. Id. at 1096–98.

235. See, e.g., supra notes 202–223 and accompanying text (discussing *Armstrong v. Schwarzenegger*).

236. *Plata*, 603 F.3d at 1095.

237. Id. at 1097.

238. Id. The state contended that the district court wrongly placed the burden on the state to prove that the receivership was not the least intrusive form of relief. The Ninth Circuit refused to address this issue "because, regardless of the burden of proof, overwhelming evidence in the record supports the district court's finding that termination of the receivership and appointment of a special master would not remedy the constitutional violations." Id. at 1098 n.5.

239. Id. at 1097.

240. Id. at 1098 ("Whether the Receiver has violated instructions or gone beyond his mandate in any given instance . . . is a matter that must be addressed to the district court, and be resolved in an evidentiary hearing . . . ."). This Note does not discuss other circuits' use of the Ninth Circuit approach because of the lack of circuits to have done so. Only the First Circuit, in *Morales Felicano v. Rullán*, has applied the Ninth Circuit approach to relief entered for prisoners in Puerto Rican facilities. 378 F.3d 42, 60 (1st Cir. 2004) (approving district court's relief order in its entirety).

the remaining case law (inclusive of those cases already described in Part II) addressing the issue of intrusiveness under the PLRA's relief provisions of § 3626.[241] Table 1 categorizes the cases by the types of relief provided for in § 3626, including termination of relief. Since there is inevitable overlap between the categories of prisoner release orders, consent decrees, and other prospective relief, the cases were assigned in that order. For example, if relief in a case constituted a prisoner release order, it was categorized as such, even if it was also a consent decree. If a consent decree stipulated to other prospective relief, it was categorized as a consent decree.

Table 2 divides the cases into two camps—the Eleventh Circuit approach and the Ninth Circuit approach.[242] The total number of cases accounted for in Table 1 is not accounted for in Table 2, indicating that

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241. See Brown v. Plata, 131 S. Ct. 1910, 1922 (2011) (addressing lack of medical treatment in California prisons); Fields v. Smith, 653 F.3d 550, 552 (7th Cir. 2011) (considering cross-gender identification among inmates); Armstrong v. Schwarzenegger, 622 F.3d 1058, 1062 (9th Cir. 2010) (examining lack of accommodations for disabled prisoners); Thomas v. Bryant, 614 F.3d 1288, 1293 (11th Cir. 2010) (regarding use of chemical agents on prisoners); *Plata*, 603 F.3d at 1091 (addressing lack of medical treatment in California prisons); Benjamin v. Schriro, 370 F. App'x 168, 169 (2d Cir. 2010) (discussing ventilation problems in New York facilities); Handberry v. Thompson, 446 F.3d 335, 339 (2d Cir. 2006) (concerning lack of educational services in prisons); *Morales Feliciano*, 378 F.3d at 46 (addressing lack of medical care in Puerto Rico's prisons); Clement v. Cal. Dep't of Corr., 364 F.3d 1148, 1150 (9th Cir. 2004) (examining First Amendment rights of prisoners); Ashker v. Cal. Dep't of Corr., 350 F.3d 917, 920 (9th Cir. 2003) (examining First Amendment rights of prisoners); Johnson v. Breeden, 280 F.3d 1308, 1312 (11th Cir. 2002) (discussing prisoners' abuse of discretion claims); Ruiz v. United States, 243 F.3d 941, 943 (5th Cir. 2001) (remedying use-of-force violations in Texas prisons); Cason v. Seckinger, 231 F.3d 777, 779 (11th Cir. 2000) (considering prison conditions amounting to cruel and unusual punishment); Gilmore v. California, 220 F.3d 987, 993 (9th Cir. 2000) (regarding prisoners' lack of access to legal resources); Henderson v. Thomas, 891 F. Supp. 2d 1296, 1300 (M.D. Ala. 2012) (discussing segregated isolation of HIV-positive inmates); Kosilek v. Spencer, 889 F. Supp. 2d 190, 196 (D. Mass. 2012) (considering treatment of cross-gender identifying prisoner); Nagast v. Dep't of Corr., No. ED CV 09-1044-CJC(PJW), 2012 WL 1458241, at *1 (C.D. Cal. Feb. 28, 2012) (addressing overcrowding in California prisons); Coleman v. Schwarzenegger, No. 2:-90-cv-0520-LKK-JFM (PC), 2011 WL 2946707, at *1 (E.D. Cal. July 21, 2011) (regarding treatment of mentally ill prisoners); Pierce v. Cnty. of Orange, 761 F. Supp. 2d 915, 920 (C.D. Cal. 2011) (examining conditions of mobility-impaired detainees); Robinson v. Delgado, No. CV 02-1538 NJV, 2010 WL 3448558, at *1 (N.D. Cal. Aug. 31, 2010) (considering excessive force claims); Gammett v. Idaho State Bd. of Corr., No. CV05-257-S-MHW, 2007 WL 2684750, at *1 (D. Idaho Sept. 7, 2007) (addressing treatment of inmate's medical disorder); Skinner v. Lampert, 457 F. Supp. 2d 1269, 1274 (D. Wyo. 2006) (regarding prisoners' right to be free from excessive use of force); Balla v. Idaho Bd. of Corr., No. CV81-1165-S-EJL, 2005 WL 2403817, at *1 (D. Idaho Sept. 26, 2005) (challenging living conditions in Idaho's prison facilities); Laube v. Campbell, 333 F. Supp. 2d 1234, 1236 (M.D. Ala. 2004) (discussing denial of female prisoners' rights); Benjamin v. Fraser, 156 F. Supp. 2d 333, 345–55 (S.D.N.Y. 2001) (discussing environmental health problems in New York facilities), aff'd, 343 F.3d 35 (2d Cir. 2003), overruled on other grounds by Caiozzo v. Koreman, 581 F.3d 63 (2d Cir. 2009).

242. See, e.g., supra Part II.B–C (detailing Eleventh and Ninth Circuit approaches).

some cases do not fall into either camp because the court did not address the process by which to analyze the relief order.[243] Table 3 indicates whether the court in each case found that the intrusiveness standard was met. If a court applied a provision-by-provision analysis and found a single provision did not meet the intrusiveness requirement, the case was categorized as not having met the requirement. As Table 3 shows, in eight of the twenty-five cases, the court found that the relief did not meet the intrusiveness standard. This figure is somewhat deceptive, however, because in six of those cases the intrusiveness standard could not be met because the court either remanded the case for further factfinding or considered multiple proposals of relief by parties, which subsequently required the court to find one of those proposals not to be the least intrusive.[244]

This survey suggests that the approach a court takes does not significantly alter a case's outcome.[245] Regardless of which approach a court follows, it is more often than not going to find that the intrusiveness requirement has been met.[246]

TABLE 1: TYPE OF RELIEF

	Prisoner Release Order	Consent Decree	Other Prospective Relief	Termination of Relief
Supreme Court	1	0	0	0
Appellate Court	0	2	5	5
District Court	1	1	8	2

243. These cases are Fields v. Smith, 653 F.3d 550, Henderson v. Thomas, 891 F. Supp. 2d 1296, Kosilek v. Spencer, 889 F. Supp. 2d 190, and Skinner v. Lampert, 457 F. Supp. 2d 1269.

244. See, e.g., infra notes 249–250 (indicating which cases were remanded and which considered multiple proposals).

245. Cf. infra Table 3 (disaggregating number of cases finding intrusiveness standard not met).

246. The intrusiveness standard was met in seventeen of the twenty-five cases: Brown v. Plata, 131 S. Ct. 1910; Fields v. Smith, 653 F.3d 550; Armstrong v. Schwarzenegger, 622 F.3d 1058; Benjamin v. Schriro, 370 F. App'x 168; *Plata*, 603 F.3d 1088; Thomas v. Bryant, 614 F.3d 1288; Handberry v. Thompson, 446 F.3d 335; Clement v. Cal. Dep't of Corr., 364 F.3d 1148; *Morales Feliciano*, 378 F.3d 42; Ashker v. Cal. Dep't of Corr., 350 F.3d 917; Kosilek v. Spencer, 889 F. Supp. 2d 190; Pierce v. Cnty. of Orange, 761 F. Supp. 2d 915; Coleman v. Schwarzenegger, 2011 WL 2946707; Gammett v. Idaho State Bd. of Corr., 2007 WL 2684750; Skinner v. Lampert, 457 F. Supp. 2d 1269; Balla v. Idaho Bd. of Corr., 2005 WL 2403817; and Laube v. Campbell, 333 F. Supp. 2d 1234.

TABLE 2: ELEVENTH VS. NINTH CIRCUIT APPROACHES

	Provision-by-Provision Findings[247]	General Finding[248]
Supreme Court	0	0
Appellate Court	6	6
District Court	3	6

TABLE 3: INTRUSIVENESS TEST MET OR NOT

	Least Intrusive Means Necessary	Not the Least Intrusive Means Necessary
Supreme Court	1	0
Appellate Court	8	4[249]
District Court	8	4[250]

247. "Provision-by-provision findings" are what this Note terms the Eleventh Circuit Approach. Supra Part II.B.

248. A "general finding" is what this Note terms the Ninth Circuit Approach. Supra Part II.C.

249. In all of these cases the court did not find whether the relief was the least intrusive means necessary to correct the federal violation, but instead remanded the issue for further factfinding. See Johnson v. Breeden, 280 F.3d 1308, 1326 (11th Cir. 2002) ("This conclusory language was not enough . . . . [T]he court should . . . enter findings that are as specific to the case as the circumstances permit."); Ruiz v. Texas, 243 F.3d 941, 953 (5th Cir. 2001) ("[T]he district court failed to make the requisite findings under § 3626(b)(3) . . . [a]ccordingly, we reverse and remand . . . ."); Cason v. Seckinger, 231 F.3d 777 (11th Cir. 2000) ("On remand, rather then [sic] summarily concluding that all of the consent decrees satisfy all of the requirements of § 3626(b)(3), the district court should engage in a specific, provision-by-provision examination of the consent decrees, measuring each requirement against the statutory criteria."); Gilmore v. California, 220 F.3d 987, 1010 (9th Cir. 2000) ("[T]he district court was required to do more than merely examine the record for 'findings.' . . . Accordingly, we reverse the termination of prospective relief in both cases and remand . . . .").

250. In one case, the court found that some provisions met the intrusiveness test and others did not. Benjamin v. Fraser, 156 F. Supp. 2d 333 (S.D.N.Y. 2001), aff'd, 343 F.3d 35 (2d Cir. 2003), overruled on other grounds by Caiozzo v. Koreman, 581 F.3d 63 (2d Cir. 2009). In the second case, the court had not yet approved any form of prospective relief. It was considering the plaintiffs' proposals for preliminary injunctive relief concerning religious diet claims and found that the creation of a separate meal program did not meet the intrusiveness test. Robinson v. Delgado, No. CV 02-1538 NJV, 2010 WL 3448558 (N.D. Cal. Aug. 31, 2010). In the third case, the court found the plaintiff's request for individual release because of prison overcrowding did not meet the intrusiveness requirement. Nagast v. Dep't of Corr., No. ED CV 09-1044-CJC (PJW), 2012 WL 1458241 (C.D. Cal. Feb. 28, 2012). In the fourth case, the court did not make a determination regarding the intrusiveness test, but instead dismissed the case for failure to state a claim for which relief can be granted. Henderson v. Thomas, 891 F. Supp. 2d 1296 (M.D. Ala. Sept. 5, 2012).

III. TAKING THE CUFFS OFF JUDGES: HOW THE INTRUSIVENESS REQUIREMENT SHOULD BE INTERPRETED

As the case law demonstrates, a large degree of ambiguity surrounds the PLRA's intrusiveness requirement.[251] First, courts are unclear and divergent as to what factors to take into account when making intrusiveness determinations, particularly with respect to the extent the statutory language regarding need and narrowness should be encompassed. Second, courts are split on how to conduct their analysis, whether by considering the relief at issue in its entirety or on a provision-by-provision basis.[252] This Note argues that the intrusiveness standard is best defined and procedurally applied on a case-by-case basis depending on what is necessary to correct the particular constitutional violation.[253] Part III.A and III.B examine two factors courts have considered regarding the intrusiveness standard—public safety and deference to prison administrators—and deem both insufficient to reconcile the statutory language. Part III.C looks at statistics on current conditions of confinement and suggests that in light of these, and because prospective relief cases have already passed constitutional muster, the intrusiveness standard should be read to allow judges the independence to implement whatever relief is necessary to correct violations of prisoners' federal rights.

A. *Balancing the Concern for Public Safety*

A first possible reading of the intrusiveness requirement is to define it solely by the PLRA's mandate that public safety be a consideration. With regard to public safety, the text of the PLRA merely states that in concluding that relief meets the need, narrowness, and intrusiveness requirements, a court should give "substantial weight to any adverse impact on public safety."[254] The use of the word "weight" suggests that Congress intended the analysis to be a balancing of sorts, supporting the Supreme Court's suggestion in *Brown v. Plata* that something other than public safety must be at play.[255] It seems that the Supreme Court would agree

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251. See, e.g., supra note 72 and accompanying text (discussing lack of guidance for courts in determining what constitutes least intrusive means necessary); see also Benjamin v. Fraser, 156 F. Supp. 2d at 343 ("The decision to engage in . . . needs-narrowness-intrusiveness analysis leads the court into uncharted waters. Neither the PLRA itself nor the appellate courts that have construed it provide guidance as to how, specifically, a court should go about [its] finding . . . .").

252. See, e.g., supra Part II.B–C (detailing circuit split).

253. 18 U.S.C. § 3626(a)(1)(A) (2012) ("[A] court shall not grant . . . relief unless the court finds that such relief is . . . the least intrusive means *necessary to correct the violation of the Federal right*." (emphasis added)).

254. Id.

255. See, e.g., supra notes 106–111 and accompanying text (discussing Supreme Court's consideration of public safety in *Brown v. Plata*); see also Donald Specter, Everything Revolves Around Overcrowding: The State of California's Prisons, 22 Fed. Sent'g Rep. 194, 195 (2010) (suggesting public safety concerns be balanced against

that it is not enough to say that because the impacts on public safety are not so adverse, that the intrusiveness test is met. The problem is a circular one. The text makes clear that the effects on public safety are to be countered by the appropriate level of need, narrowness, and intrusiveness for judges to correct the federal violations,[256] but the statute does not indicate any additional factors or means of factfinding to determine what those requirements entail.[257]

Alternative ways of reading the text could include using "narrowly tailored" to inform the meaning of "least intrusive";[258] defining "least intrusive" in light of what is necessary to remedy the constitutional violation;[259] or considering all three collectively to define one another as in *Cason*.[260] The Supreme Court did something similar to the first alternative in blending its narrowness and intrusiveness inquiry in *Brown v. Plata*,[261] but that approach presents a problem similar to the one addressed here—the statutory language and case law do not define narrowness any more clearly than intrusiveness.[262] Any approach that defines intrusiveness as that which is narrowly tailored would still leave unaddressed what each of those terms means or what is sufficient to conclude that they have been met.[263] As this Note advocates, defining "least intrusive" simply by what is *necessary* to remedy the constitutional violation in each case will more ably accomplish the goal of the prospective relief provisions—correcting those violations.[264] Though this approach arguably presents issues as to what is *necessary* to correct the violation, it is more entrenched in factfinding and expert testimony as opposed to policy decisions about whether relief extends beyond judges' authority and into the realm of prison administrators.

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protection of state and local governments from interference by judiciary); id. at 196 (implying PLRA requires courts to balance public safety with dire prison conditions).

256. 18 U.S.C. § 3626(a)(1).

257. Id. § 3626(a)(1)(A).

258. See, e.g., Valdivia v. Brown, No. CIV. S-94-671 LKK/GGH, 2012 WL 219342, at *7 (E.D. Cal. Jan. 24, 2012) (discussing injunctive relief only in terms of narrowness requirement).

259. See Valdivia v. Schwarzenegger, 599 F.3d 984, 995 (9th Cir. 2010) (indicating, unless injunction is necessary to remedy constitutional violation, state law should prevail).

260. See, e.g., supra notes 141–148 (discussing need-narrowness-intrusiveness test applied by Eleventh Circuit).

261. See, e.g., supra notes 96–98 and accompanying text (explaining Supreme Court's statement of intrusiveness as one of narrowness).

262. Cf., e.g., Boston, Prison Litigation, supra note 17, at 16 ("[T]he practical meaning of 'narrowly drawn' and 'least intrusive' is not always clear, and many decisions address the subject on an *ad hoc* basis without stating any general principles." (footnote omitted)).

263. See supra notes 165–166 and accompanying text (discussing incompleteness of Fifth Circuit's combined narrowness and intrusiveness analysis).

264. Cf. 18 U.S.C. § 3626(a) (2012) (highlighting that forms of relief are restricted by need to correct violation of federal right).

The violations within these cases almost always arise under Eighth Amendment claims of cruel and unusual punishment.[265] In *Estelle v. Gamble*, its leading case on what constitutes a cognizable Eighth Amendment claim of cruel and unusual punishment, the Supreme Court considered constitutional violations that arose from inadequate medical care.[266] In its opinion, the Court stated that the constitutional protection against cruel and unusual punishment was not only about preventing torturous and barbarous punishments, but embodied "'broad and idealistic concepts of dignity, civilized standards, humanity, and decency.'"[267] These include the "'unnecessary and wanton infliction of pain'"[268] and punishments that contradict "'the evolving standards of decency that mark the progress of a maturing society.'"[269] As this precedent shows, the Court has broadened the definition of cruel and unusual punishment to encompass evolving societal beliefs about the treatment of prisoners. Where such violations are found—and courts are regularly finding these violations under the Eighth Amendment case law—the Court intends them to be corrected.[270] The Supreme Court has said it is not going to read the PLRA in a way that leaves prisoners without a remedy for violations of their constitutional rights.[271] This should serve as significant precedent in relief cases where constitutional violations have already been established and found wrongful in light of any potential harms to public safety.[272]

B. *Righting the Wrongs of Prison Administrators*

Courts and legislatures understand that the intrusiveness requirement exists not only to protect public safety, but also to limit the author-

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265. See, e.g., Helling v. McKinney, 509 U.S. 25, 33 (1993) ("That the Eighth Amendment protects against future harm to inmates is not a novel proposition."); see also Sharon Dolovich, Cruelty, Prison Conditions, and the Eighth Amendment, 84 N.Y.U. L. Rev. 881, 884 (2009) (explaining Eighth Amendment constrains administration of criminal sentences).

266. 429 U.S. 97, 98–101 (1976).

267. Id. at 102 (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).

268. Id. at 103 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion)).

269. Id. at 102 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

270. See Brown v. Plata, 131 S. Ct. 1910, 1928 (2011) (noting if prisoners are deprived of basic sustenance, "courts have a responsibility to remedy the resulting Eighth Amendment violation"); see also Furman v. Georgia, 408 U.S. 238, 241 (1972) (Douglas, J., concurring) ("It is also settled that the proscription of cruel and unusual punishments forbids the judicial imposition of them . . . .").

271. *Brown*, 131 S. Ct. at 1937 (concluding that finding population limits are not available under PLRA would leave prisoners without remedy and raise serious constitutional concerns).

272. See, e.g., supra note 241 and accompanying text (describing constitutional violations in prospective relief cases).

ity of federal judges to interfere with prison administration.[273] Since prison administrators are responsible for delineating the goals of their correctional systems, as well as the most appropriate means of implementing those goals, courts duly defer to them.[274] However, in prospective relief cases where courts have already found a state's prison administration to have resulted in constitutional violations,[275] it makes little sense to continue according states that same deference. Prisoner relief cases differ fundamentally in this one respect—courts have already verified a violation and therefore have already rejected penological interests as justifying those violations. Accordingly, the intrusiveness requirement should be defined by its need to correct the constitutional violation.[276]

The current state of America's prison systems and the types of allegations that are giving rise to prison lawsuits further inform this argument. The PLRA may have been passed with the purpose of removing frivolous lawsuits from America's courts,[277] but these "frivolous" lawsuits are not the types of complaints presently being addressed by court-ordered relief.[278] These are not cases where there is concern that an inmate will be granted relief because personal belongings were damaged or taken away, a dental appointment for a toothache was delayed, the inmate was forced to listen to a unit manager's country music, or the Department of Corrections allegedly failed to properly rehabilitate the inmate.[279] They are cases where a lack of medical care has resulted in the preventable deaths of inmates,[280] the disabled were deprived of reason-

273. See H.R. Rep. No. 104-21, at 24 n.2 (1995) (Conf. Rep.) ("By requiring courts to grant . . . relief constituting the least intrusive means of curing an actual violation . . . the provision stops judges from imposing remedies intended to effect an overall modernization of local prison systems or provide an overall improvement in prison conditions."); see also *Brown*, 131 S. Ct. at 1928 ("Courts must be sensitive to . . . the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals.").

274. See, e.g., Overton v. Bazzetta, 539 U.S. 126, 132 (2003) (giving deference to prison administrators who asserted legitimate penological interest in denying prisoners' First Amendment rights); Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.").

275. See, e.g., supra note 241 (listing prospective relief cases considering various constitutional violations).

276. See, e.g., infra Part III.C (arguing for defining intrusiveness standard by what correcting federal violation necessitates).

277. See, e.g., 141 Cong. Rec. 20,991–92 (1995) (statement of Sen. Harry M. Reid) (discussing frivolous lawsuits made by prisoners from around country).

278. See, e.g., supra note 241 (listing case law addressing relief under PLRA).

279. 141 Cong. Rec. 27,044–45 (1995) (statement of Sen. Jon L. Kyl) (discussing top ten frivolous lawsuits in Arizona and nation).

280. See, e.g., supra text accompanying notes 78–88 (discussing facts of *Brown v. Plata*).

able accommodations,[281] and female inmates were in substantial risk of physical violence while imprisoned.[282] Granted, frivolous cases may not be arising because the PLRA has achieved its intended effect,[283] but that does not detract from the argument that federal judges do not need to be tempered in the way that Congress originally intended because a different landscape now contextualizes prison litigation.

If anything, the success of the PLRA's gatekeeping provisions should cut against further limitations of the judicial role in cases that have successfully reached the remedial stage. By the time cases have reached the point of court-issued relief, they have already overcome two filters—the prison litigation provisions of the PLRA and judicial determination of the merits of the constitutional claim. A strict intrusiveness standard should not interfere with these types of cases. For example, in *Thomas v. Bryant*, the Eleventh Circuit considered prospective relief after finding that the nonspontaneous spraying of mentally ill inmates with chemical agents constituted cruel and unusual punishment.[284] The case concerned the Florida State Prison in Starke, which housed a large number of seriously mentally ill inmates.[285] Those who were particularly difficult to control were housed in closely managed nine-by-seven-foot cells with a solid steel door containing a small window for passing food and medication.[286] The Department of Corrections' use-of-force policy permitted officers to release chemical agents through the small window as a disciplinary measure against disruptive prisoners.[287] The Eleventh Circuit only considered the appropriateness of injunctive relief after it confirmed that the district court did not err in finding an Eighth Amendment violation.[288] In

281. See, e.g., supra notes 202–204 and accompanying text (discussing facts of *Armstrong v. Schwarzenegger*).

282. See Laube v. Campbell, 333 F. Supp. 2d 1234, 1236–37 (M.D. Ala. 2004) (approving settlement of suit claiming state officials were "deliberately indifferent to the denial of female prisoners' basic human needs").

283. Margo Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1555, 1559–60 (2003) (stating filings by inmates decreased 40% between 1995 and 2001 while prison population increased 23%). The University of Michigan Law School's Civil Rights Litigation Clearinghouse has collected and coded 648 prison condition related cases across the United States. Of those, at least 200 were filed after the passage of the PLRA. Civil Rights Litigation Clearinghouse, http://www.clearinghouse.net/index.php (on file with the *Columbia Law Review*) (last visited Feb. 28, 2014). The Clearinghouse compiles and analyzes information and documents about civil rights cases across the United States in various categories, including prison conditions. Some cases are historical, but most are current, and all concern injunctive rather than monetary relief.

284. 614 F.3d 1288, 1294 (11th Cir. 2010).

285. Id. at 1295.

286. Id. at 1296.

287. Id. Corrections officers were permitted to spray three one-second bursts into cells to force compliance with their orders. Id. at 1296–97. The district court found that the use of chemical agents could cause physical and psychological injury beyond its immediate sensations, especially where ventilation was limited. Id. at 1298.

288. Id. at 1310–11.

Gilmore v. Lynch, a case with a very different set of facts, prisoners challenged a regulation that restricted their access to legal materials in preparing their legal filings.[289] The court enjoined the regulation, voicing equal protection concerns that poorer prisoners' reasonable access to courts would be obstructed.[290] The courts in both of these cases could only grant relief if they concluded that the plaintiffs met the PLRA's prison litigation requirements[291] and that their allegations of constitutional violations were meritorious.[292] Since this two-step process provides protections against prisoners raising frivolous claims and courts intruding on the authority of state officials, the PLRA's statutory scheme should not be read to place another restriction on judges at the remedial stage.

C. *Judicial Flexibility Is Good Policy*

Defining the intrusiveness standard only by its modifying clause in the statute, that which is "necessary to correct the violation of the Federal right,"[293] makes for good policy. Given that judges have already found constitutional violations by the time they consider relief, the focus should be on correcting the violations with respect to the specific facts of each case. The First Circuit made a similar suggestion in *Morales Feliciano v. Rullán*, stating that the intrusiveness criterion is somewhat "self-explicating" but that "[t]he application . . . is case-specific."[294]

The current conditions of confinement of America's prisons reveal the need for judges to have the power to correct serious failings in the provision of rights to prisoners. The most recent report by the Commission on Safety and Abuse in America's Prisons reveals severe deficiencies in American prisons.[295] Violence, inadequate medical care, and the nature of segregation particularly influence the conditions of confinement in America's prisons.[296] Crowding and the immense prison populations that underlie it contribute to violent prison environments.[297]

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289. 319 F. Supp. 105, 107 (N.D. Cal. 1970).

290. Id. at 111.

291. Cf. supra Part I.B.2 (describing PLRA's prisoner release provisions).

292. See *Thomas*, 614 F.3d at 1303 (affirming district court's permanent injunction based on findings of Eighth Amendment violations); Gilmore v. California, 220 F.3d 987, 1010 (9th Cir. 2000) (remanding to district court for reconsideration of alleged constitutional violation).

293. 18 U.S.C. § 3626(a)(1)(A) (2012).

294. 378 F.3d 42, 54 (1st Cir. 2004).

295. Vera Inst. of Justice, The Comm'n on Safety & Abuse in America's Prisons, Confronting Confinement 1, 6 (2006) [hereinafter Confronting Confinement], available at http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf (on file with the *Columbia Law Review*).

296. E.g., id. at 6 ("[T]here is still too much violence in America's prisons and jails, too many facilities that are crowded to the breaking point, too little medical and mental health care, [and] unnecessary uses of solitary confinement and other forms of segregation . . . .").

297. Id. at 23.

For instance, data available from 2000 indicate that there were 34,355 reported assaults among prisoners in state and federal facilities that year.[298] The first wave of data collection mandated by the Prison Rape Elimination Act in 2004 documented 4,252 recorded allegations of sexual assault, misconduct, and harassment by prisoners and staff from 1,840 adult prisons and jails nationwide.[299]

The fact that prisoners require significantly more healthcare than most Americans because of poverty and substance abuse compounds the deficiencies in the nation's prisons.[300] At least 200,000 to 300,000 prisoners have serious mental illnesses, three times the population of all state mental hospitals.[301] In California, as of October 2005, a prisoner was found to be dying from medical malpractice or neglect every six to seven days.[302] California prisons have as many as 4,000 to 5,000 inmates for every two or three doctors.[303] Prison medical care is at times delivered by unlicensed doctors or physicians without training or experience.[304] With the high prevalence of communicable diseases among prisoners, including tuberculosis, hepatitis, and HIV, proper treatment and screening are vitally important.[305]

Statistics also reveal that segregation has become a "'regular part of the rhythm of prison life.'"[306] The Bureau of Justice Statistics' census data from 1995 and 2000 indicate the segregated prison population grew 40% as compared with only 28% for the overall prison population.[307] This equated to a 68% increase in the disciplinary segregation population, an 8% increase in the protective custody segregation population, and a 31%

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298. Id. at 24.

299. Id.

300. See, e.g., James W. Marquart et al., Health Conditions and Prisoners: A Review of Research and Emerging Areas of Inquiry, 77 Prison J. 184, 185 (1997) (suggesting increased healthcare needs of urban poor and HIV-positive drug users will impact prison costs).

301. Paula M. Ditton, Dep't of Justice, Bureau of Justice Statistics, NCJ No. 174463, Mental Health and Treatment of Inmates and Probationers 1 (1999), available at http://www.bjs.gov/content/pub/pdf/mhtip.pdf (on file with the *Columbia Law Review*); Human Rights Watch, Ill-Equipped: U.S. Prisons and Offenders with Mental Illness 1 (2003), available at http://www.hrw.org/reports/2003/usa1003/usa1003.pdf (on file with the *Columbia Law Review*).

302. Plata v. Schwarzenegger, No. C01-1351 TEH, 2005 WL 2932253, at *1 (N.D. Cal. Oct. 3, 2005).

303. Confronting Confinement, supra note 295, at 40.

304. Michael S. Vaughn & Leo Carroll, Separate and Unequal: Prison Versus Free-World Medical Care, 15 Just. Q. 3, 20 (1998).

305. E.g., Laura M. Maruschak, Dep't of Justice, Bureau of Justice Statistics, NCJ No. 210696, Medical Problems of Jail Inmates 1, 2 (2006), available at http://www.bjs.gov/content/pub/pdf/mpji.pdf (on file with the *Columbia Law Review*).

306. Confronting Confinement, supra note 295, at 53 (quoting lawyer, scholar, and prison monitor Fred Cohen).

307. Id.

increase in the administrative segregation population.[308] Prisoners are more often being placed in segregation as a disciplinary measure for behavior that poses little threat to the order and safety of a facility.[309] Such disciplinary segregation is also likely to last for months or even years, not weeks or days.[310] As one example, a young prisoner found with contraband—seventeen packs of cigarettes—was given fifteen days in solitary confinement for each pack of cigarettes, totaling over eight months.[311] A study of Virginia's prisons showed that half the recorded incidents of self-mutilation in a particular year took place in its segregation units.[312] In 2005, a record forty-four prisoners in California committed suicide; 70% of those occurred in disciplinary segregation units.[313]

These statistics serve not to suggest that these conditions of confinement amount to constitutional violations, but rather indicate the gravity of the problems courts are addressing through prospective relief in those incidents where they have already found constitutional violations. The first part of courts' examinations—as to the violation of federal rights—is where states are most deserving of deference in assuring that their penological interests in protecting their staff and the public are balanced against prisoners' rights.[314] Since courts only find constitutional violations where there is not a strong countervailing public interest, the intrusiveness requirement need not restrain judges from serving that interest.

In fact, this may have been part of what the majority in *Brown v. Plata* was suggesting. In that case, the Supreme Court emphasized the need to determine relief only with regard to the constitutional violations brought by the plaintiffs before the court.[315] In finding it permissible that the

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308. Id. at 56 fig.

309. E.g., id. at 53 (explaining use of disciplinary segregation before considering less extreme punishment for offenses like possessing tobacco or talking back to officers). Correctional officers place prisoners in one of two types of segregation: disciplinary segregation for breaking prison rules or administrative segregation because they need to be protected from other prisoners or pose a threat to others. Id. In its most severe form, segregation requires individuals being locked down twenty-three or twenty-four hours a day in small cells with no natural light, no view outside of the cells, and no contact with anyone but staff. Id. at 57.

310. E.g., Corr. Assoc. of N.Y., Lockdown New York: Disciplinary Confinement in New York State Prisons 2 (2003), available at http://www.correctionalassociation.org/wp-content/uploads/2012/05/lockdown-new-york_report.pdf (on file with the *Columbia Law Review*).

311. Confronting Confinement, supra note 295, at 54.

312. Craig Haney & Mona Lynch, Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement, 23 N.Y.U. Rev. L. & Soc. Change 477, 525 (1997).

313. See, e.g., Confronting Confinement, supra note 295, at 59.

314. See, e.g., supra text accompanying notes 112–113 (discussing value of deference to prison administrators).

315. See, e.g., supra text accompanying note 100 (discussing Supreme Court's analysis of relief order in *Brown v. Plata*).

relief order would affect present and future inmates who were not part of the class with specific mental health and medical concerns, the Court presented an underlying tone of validity to that which is necessary to correct the constitutional violation. Though the Court also emphasized deference to state prison administrators, it was only with regard to implementing a very specific order mandated by the lower court—reducing the prison system's population. For all practical purposes, the state had very little discretion in rectifying its constitutional violation.

CONCLUSION

In addition to arguing that the intrusiveness standard should be defined by what is necessary to correct the constitutional violation, this Note suggests that whether courts approach the analysis on a provision-by-provision basis or generally is irrelevant in practice. According to the small universe of cases that have addressed this issue under § 3626 of the PLRA, courts almost never find that relief fails the intrusiveness test.[316] Though this may result from the fact that the judges determining whether relief meets the PLRA's requirements may have been the same judges who found the constitutional violation, the point remains the same: The intrusiveness requirement has thus far not served as an impediment to courts' ability to correct constitutional violations and should remain that way. By allowing judges the discretion to implement relief necessary to correct an established constitutional violation, America's inmate population can receive the improvements to their conditions of confinement to which they are legally entitled.

316. But see supra notes 249–250 (discussing few cases finding intrusiveness requirement was not met).