

**EVALUATING INSTITUTIONAL PRISONERS' RIGHTS  
LITIGATION: COSTS AND BENEFITS AND FEDERALISM  
CONSIDERATIONS**

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I am grateful to the symposium sponsors for inviting me here today. I have been asked to comment on the costs and benefits of prisoner litigation looking especially at a recent class action, *Bowers v. City of Philadelphia*,<sup>1</sup> as a case study. My comments here are, in large part, based on my experiences as a criminal justice practitioner, as a government lawyer in *Bowers* who also represented state and local officials in prison conditions lawsuits, and as someone who has worked with criminal justice stakeholders to address major criminal justice policy issues.<sup>2</sup>

To determine whether litigation has benefits or costs requires value judgments. The parties in litigation usually have diametrically opposed points of view—plaintiffs see a large monetary verdict as a positive benefit; defendants see it as a cost. But prison litigation and its costs and benefits ultimately raise important public policy questions: what are our goals with prisons and the management of prisoners, and how can we best achieve them? In this context, is prison litigation the best and most cost-effective way to achieve important public

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I am grateful to my colleagues, Priya Travassos and Ronald Eisenberg, for their helpful comments. I am also grateful to my former colleague, Dr. Edwin Zedlewski, an economist with the National Institute of Justice, for his suggestions.

1 No. 06-CV-3229, 2007 U.S. Dist. LEXIS 5804 (E.D. Pa. Jan. 25, 2007) (this case settled as the Article went to press; the Article reflects the situation in place before the settlement).

2 Although I currently represent Lynne Abraham in litigation involving the Philadelphia jails, my statements in this Article are attributable solely to me and do not necessarily represent the official position of the District Attorney, the District Attorney's Office, or the City of Philadelphia.

policy goals? For this reason, we should attempt to understand and assess the forces that drive prisoner lawsuits, the various effects of litigation, and their costs and benefits in a public policy context.

In this Article, I will attempt to discuss these issues in the context of large institutional lawsuits involving prisons.<sup>3</sup> As I will explain later, I believe that there needs to be better public and financial accountability for the expenditure of state and local taxpayer funds that underwrite private rights of action. The types of government controls that usually apply to government programs are virtually nonexistent for attorney fee awards. Quite simply, the standards for awarding fees against state and local governments do not take into account fundamental economic questions that need to be asked. Without this type of analysis, we fail to ensure that our system protects constitutional rights in a cost-effective way that allows government resources to achieve their greatest social utility.

### I. GENERAL PUBLIC POLICY AND ECONOMIC ANALYSES

With most public policy choices, public officials engage in various forms of analysis—some very formal and others more intuitive. Described simply, they make a value judgment about what goals government should try to achieve, identify operational alternatives for achieving a particular goal, weigh the pros and cons of those alternatives, and (ideally) choose the best option (or combination of options).

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<sup>3</sup> In this Article, I am focusing on institutional prisoner litigation. These lawsuits are usually filed by attorneys and are often pursued as class actions. Commonly, these large lawsuits seek monetary damages, injunctions (preliminary and permanent), declaratory judgments, and attorneys' fees. Major class actions seeking systemic prison reforms are often filed by groups of lawyers experienced in prisoner litigation.

Common institutional claims often arise under the Eighth Amendment. These claims, which can be raised by sentenced prisoners, frequently involve conditions of confinement, the failure to protect, medical treatment, and use of force. Claims by pretrial detainees (who have not been convicted of a crime) are often similar but arise under the Due Process Clause of the Fifth Amendment. *See Bell v. Wolfish*, 441 U.S. 520 (1979). Other common prisoner claims involving state or local correctional facilities include: (1) Fourteenth Amendment claims under due process (substantive or procedural) or equal protection theories; (2) free exercise claims under the First Amendment, *see, e.g.*, 42 U.S.C. § 2000cc-1 (2006) (protecting religious exercise for institutionalized persons under the Religious Land Use and Institutionalized Persons Act of 2000); *Turner v. Safley*, 482 U.S. 78 (1987); (3) claims relating to free speech and retaliation, *see, e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999); (4) access to courts, *see, e.g.*, *Lewis v. Casey*, 518 U.S. 343 (1996); and (5) Fourth Amendment claims, *see, e.g.*, *Hudson v. Palmer*, 468 U.S. 517 (1984).

Because government officials inevitably face limited economic resources when they make these choices, there are various forms of economic analyses that have become a part of this process. In some public policy areas (such as health care and government programs subject to the federal regulatory process), there are very structured approaches to these issues.

For example, when the United States was faced with skyrocketing health care costs, economic analyses became a well-accepted manner for making difficult health care choices. While stakeholders certainly debated about what analyses to use, the need for ethical limits on the financial equations, and how to value particular outcomes, no one seriously questioned the need for assessing the costs and benefits of particular medical options and the need to determine whether more cost-effective options could be used to achieve the same positive results.

Economic analyses are also a part of our federal regulatory process. Federal regulations require federal agencies to undertake economic analyses as part of their rule-making process. We consider economic impact with regard to environmental regulation, work safety, and education.<sup>4</sup> While many legal scholars debate the fairness or wisdom of particular approaches, no one seems to seriously argue that the economic analyses are irrelevant to public policy choices.

These types of economic analyses are also making their way into criminal justice policy. The Home Office in Great Britain has a well-structured program for assessing the effectiveness of particular criminal justice interventions.<sup>5</sup> These assessments judge what interventions actually work to reduce crime. In addition, the Home Office routinely employs economic analyses to help guide policy makers about which interventions are the most cost-effective way to achieve crime reduction goals.<sup>6</sup> International criminology research is also focusing

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4 Henry M. Levin, *Waiting for Godot: Cost-Effectiveness Analysis in Education*, in EVALUATION FINDINGS THAT SURPRISE: NEW DIRECTIONS FOR EVALUATION, No. 90 (Richard J. Light ed., 2001), available at [http://www.cbse.org/media/download\\_gallery/Waiting%20for%20Godot.pdf](http://www.cbse.org/media/download_gallery/Waiting%20for%20Godot.pdf).

5 The Home Office has undertaken extensive efforts to assess the various economic issues relevant to criminal justice policy. See, e.g., SAM BRAND & RICHARD PRICE, BRIT. HOME OFFICE, HOME OFFICE RESEARCH STUDY 217: THE ECONOMIC AND SOCIAL COSTS OF CRIME (2000), available at <http://www.homeoffice.gov.uk/rds/pdfs/hors217.pdf>.

6 The Home Office provides standardized economic assessment tools relating to cost analysis. See Brit. Home Office, Crime Reduction Toolkits: Cost Analysis, <http://www.crime-reduction.homeoffice.gov.uk/toolkits/p0318.htm> (last visited Nov. 5, 2008). This economic analysis work has been used in a variety of contexts. See, e.g., ROGER BOWLES & RIMAWAN PRADIPTYO, BRIT. HOME OFFICE, REDUCING BURGLARY INITIATIVE: AN ANALYSIS

on these economic questions.<sup>7</sup> In addition, governments in the United States are also now moving towards the use of economic analyses to evaluate criminal justice policies and practices.<sup>8</sup>

These types of economic analyses can be used to assess legal services. For example, corporations needing legal services engage in these types of assessments.<sup>9</sup> The federal government likewise assesses the legal services supported by federal funds.<sup>10</sup>

## II. PROTECTING PRISONERS' CIVIL RIGHTS

For the most part, we accept that public tax dollars and government resources should be spent on prisons and offenders in order to support various public policy goals. For example, we accept that prisons are needed to support important public safety and the criminal justice system goals. Prisons are used for the detention of persons awaiting trial (to ensure their appearance for court hearings). We al-

OF COSTS, BENEFITS AND COST EFFECTIVENESS (2004), *available at* <http://www.homeoffice.gov.uk/rds/pdfs04/rdsolr4304.pdf> (using the analysis to assess burglary reduction initiatives); LESLIE DAVIDSON ET AL., BRIT. HOME OFFICE, REDUCING DOMESTIC VIOLENCE . . . WHAT WORKS? HEALTH SERVICES (2000), *available at* <http://www.homeoffice.gov.uk/rds/prgpdfs/health.pdf> (using the analysis in domestic violence reduction efforts); MARTIN GILL ET AL., BRIT. HOME OFFICE, TECHNICAL ANNEX: METHODS USED IN ASSESSING THE IMPACT OF CCTV (2005), *available at* <http://www.homeoffice.gov.uk/rds/pdfs05/rdsolr1705.pdf> (using the analysis to assess crime reduction technologies).

- <sup>7</sup> *See, e.g.*, BRANDON C. WELSH ET AL., COSTS AND BENEFITS OF PREVENTING CRIME (2001).
- <sup>8</sup> On the national level, the National Institute of Justice now supports some economic analyses of a variety of criminal justice programs. *See, e.g.*, SHELLY L. JACKSON, NAT'L INST. OF JUSTICE, A RESOURCE FOR EVALUATING CHILD ADVOCACY CENTERS, at app. A-1-3 (2004), *available at* <http://www.ncjrs.gov/pdffiles1/nij/192825.pdf> (presenting an economic analysis of child advocacy centers). On the state level, Washington has a sophisticated mechanism for evaluating criminal justice programs and the related economic questions through the Washington State Institute for Public Policy. *See* Washington State Institute for Public Policy, <http://www.wsipp.wa.gov/> (last visited Nov. 5, 2008).
- <sup>9</sup> For a discussion of the ways corporations can ensure cost-effective legal services, see Corporate Counsel Section of the New York State Bar Association, *Report on Cost-Effective Management of Corporate Litigation*, 59 ALB. L. REV. 263 (1995).
- <sup>10</sup> For example, the Legal Services Corporation ("LSC") was established by Congress to provide legal services for the poor. Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified as amended at 42 U.S.C. §§ 2996-2996l (2006)). LSC supports legal assistance in civil matters to low-income people throughout the United States by making grants to local legal service providers. LSC and its grantees are audited by the LSC Inspector General. *See* Legal Servs. Corp., LSC Office of the Inspector General, <https://www.oig.lsc.gov/> (last visited Nov. 5, 2008) (describing the work of the LSC Inspector General). In addition, the Government Accountability Office ("GAO") conducts assessments of LSC grants programs to ensure fiscal accountability and effectiveness. *See, e.g.*, U.S. GEN. ACCOUNTABILITY OFFICE, LEGAL SERVS. CORP.: IMPROVED INTERNAL CONTROLS NEEDED IN GRANTS MANAGEMENT AND OVERSIGHT (2007), *available at* <http://www.gao.gov/new.items/d0837.pdf>.

so use prisons as a sentencing option to incapacitate offenders (so they cannot commit future crimes in the community), to deter offenders (to deter the individual offender from committing more crime and to use the example of incarceration to deter others from committing crime), for rehabilitation (so offenders are less likely to offend again upon release), and retribution (to punish offenders for past misconduct). We have also moved toward using prisons to support restorative justice goals such as restitution collection and offender-victim encounters.<sup>11</sup> While there is often vociferous public debate about who should be in prison and for how long, federal, state, and local policymakers will usually support these general incarceration goals.

*A. Federal Efforts to Protect Constitutional Rights for Prisoners*

The federal government has repeatedly determined that state and local prisoners should be treated fairly and humanely, and that the constitutional rights of prisoners should be enforced. The federal government supports this important goal through a variety of means.

The federal government, for example, has provided financial support to professional organizations in corrections, such as the American Correctional Association, which has established a strong accreditation program for correctional institutions and the treatment of prisoners.<sup>12</sup> Through the National Institute of Corrections, the federal government supports extensive training and technical assistance for state and local corrections officials.<sup>13</sup> The federal government also supports corrections research through the National Institute of Justice.<sup>14</sup> Recently, Congress established the National Prison Rape Elimination Commission, which studies state and local government practices relating to sexual assaults in correction and detention facili-

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<sup>11</sup> There is no single commonly accepted definition of restorative justice. For a description of the variety of definitions encompassed by this term, see National Institute of Justice, Working Definitions of Restorative Justice, <http://www.ojp.usdoj.gov/nij/topics/courts/restorative-justice/definitions1.htm> (last visited Nov. 5, 2008).

<sup>12</sup> For a sample of the types of federal grants awarded, see American Correctional Association, Training, <http://www.aca.org/development/grants.asp> (last visited Nov. 5, 2008), which describes the federal grants for training and technical assistance for juvenile detention centers.

<sup>13</sup> The National Institute of Corrections website provides detailed information about its federally funded activities. National Institute of Corrections, <http://www.nicic.org> (last visited Nov. 5, 2008).

<sup>14</sup> For a detailed description of various research, publications, and training for state and local corrections agencies through the U.S. Department of Justice's National Institute of Justice, see National Institute of Justice, [www.ojp.usdoj.gov/nij](http://www.ojp.usdoj.gov/nij) (last visited Nov. 5, 2008).

ties, and makes recommendations designed to prevent rape in adult and juvenile facilities.<sup>15</sup> In addition, the federal government, through the Bureau of Justice Statistics, provides statistical information relating to state and local correctional facilities and prisoners.<sup>16</sup>

The United States Department of Justice also supports the civil rights of prisoners through the Civil Rights Division.<sup>17</sup> Under the Civil Rights for Institutionalized Persons Act (“CRIPA”), it conducts investigations and brings civil actions against prisons and jails that commit constitutional violations.<sup>18</sup>

For all of these federally supported efforts, there are measures of oversight. In addition to normal managerial oversight, there are a number of accountability measures designed to review the work and cost-effectiveness of these efforts. These include budget processes and other accountability measures. On the executive branch side, there are direct management supervision, budget processes, and external reviews.<sup>19</sup> In addition, Congress itself has significant control

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15 Congress created the National Prison Rape Elimination Commission through the Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (codified as amended at 42 U.S.C. §§ 15601–15608 (2006)). The activities of the Commission are described on its website. See National Prison Rape Elimination Commission, <http://www.nprec.us> (last visited Nov. 5, 2008).

16 The Bureau of Justice Statistics collects statistics on a wide variety of criminal justice topics. Some of its reports relate directly to issues involving inmate health and safety. See, e.g., CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, SUICIDE AND HOMICIDE IN STATE PRISONS AND LOCAL JAILS (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/shsplj.pdf>. To review the Bureau’s extensive statistical information relating to state and local corrections, see Bureau of Justice Statistics, Corrections Statistics, <http://www.ojp.usdoj.gov/bjs/correct.htm> (last visited Nov. 5, 2008).

17 As explained on its website, the Civil Rights Division of the U.S. Department of Justice was established in 1957 and enforces federal statutes prohibiting discrimination on the basis of race, sex, disability, religion, and national origin. U.S. Department of Justice, Civil Rights Division Activities and Programs (2006 Edition), <http://www.usdoj.gov/crt/activity.php> (last visited Nov. 5, 2008). These laws prohibit discrimination in a wide variety of areas including education, employment, credit, housing, public accommodations and facilities, and voting. See *id.*

18 The Civil Rights Division also has specific responsibilities relating to the civil rights of persons confined in state and local correctional facilities. Under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997–1997j (2006), the Attorney General is authorized to file civil actions seeking relief for adults and juveniles confined in prisons, jails, and juvenile facilities. The Civil Rights Division has also conducted investigations relating to the physical safety of inmates (including physical and sexual abuse by staff or inmates, fire-safety, sanitation, and the spread of dangerous communicable diseases, such as tuberculosis); medical care; mental health services; and access to courts. See Civil Rights Division, U.S. Department of Justice, <http://www.usdoj.gov/crt/split/jails.htm> (last visited Nov. 5, 2008).

19 For example, the Office of the Inspector General (“OIG”) is authorized to review activities of U.S. Department of Justice components, including the Civil Rights Division. The

over the priorities and budget of the executive branch. Congress must pass annual budgets that provide for funding and staffing these efforts. It also has the power to conduct oversight hearings and require reports from various agencies.<sup>20</sup> Both Congress and the executive branch have significant involvement in how much funding and staff should be allocated to these efforts and whether they will continue to support efforts that have neither demonstrated adequate performance nor been managed cost-effectively.

The Civil Rights Division, which is the federal entity directly responsible for enforcing the civil rights of prisoners, is subject to extensive oversight. As part of the oversight process, the Civil Rights Division provides annual reports to Congress on its CRIPA activities.<sup>21</sup> These reports must also address the financial impact of the Division's

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OIG conducts independent investigations, audits, and reviews to detect and deter waste and promote economy, efficiency, and effectiveness. See Office of the Inspector General, U.S. Department of Justice, Office of the Inspector General, <http://www.usdoj.gov/oig/> (last visited Nov. 5, 2008).

The normal federal budget development process likewise requires an accounting of work performed in these areas. For example, the Office of Management and Budget ("OMB") uses the "Program Assessment Rating Tool" ("PART") to assess and improve program performance. OMB explains the purpose of the PART review as follows:

A PART review helps identify a program's strengths and weaknesses to inform funding and management decisions aimed at making the program more effective. The PART therefore looks at all factors that affect and reflect program performance including program purpose and design; performance measurement, evaluations, and strategic planning; program management; and program results. Because the PART includes a consistent series of analytical questions, it allows programs to show improvements over time, and allows comparisons between similar programs.

Office of Management and Budget, Assessing Program Performance, <http://www.whitehouse.gov/omb/part> (last visited Nov. 5, 2008).

The general legal activities of the U.S. Department of Justice, which include civil rights enforcement through the Civil Rights Division, have been assessed using this tool. See ExpectMore.gov, Detailed Information on the Department of Justice General Legal Activities Assessment, <http://www.whitehouse.gov/omb/expectmore/detail/10003800.2005.html> (last visited Nov. 5, 2008).

<sup>20</sup> For examples of the types of oversight hearings Congress conducts to review the work of the Civil Rights Division, see Comm. on the Judiciary, Hearings for the 110th Congress, <http://judiciary.house.gov/hearings/legislation.html> (last visited Nov. 5, 2008) (listing scheduled oversight hearings, several of which involve the Civil Rights Division's anti-employment discrimination efforts), and *Modern Enforcement of the Voting Rights Act Before the S. Comm. on the Judiciary*, 109th Cong. 114-23 (2006) (prepared statement of Wan J. Kim, Assistant Att'y Gen., Civil Rights Division, Department of Justice), available at <http://www.access.gpo.gov/congress/senate/pdf/109hr/28342.pdf>.

<sup>21</sup> See 42 U.S.C. § 1997f (2006). To find the Civil Rights Division's Annual Reports to Congress ("CRIPA Reports") pursuant to 42 U.S.C. § 1997f, see Civil Rights Division, U.S. Department of Justice, Special Litigation Section: Documents and Publications, <http://www.usdoj.gov/crt/split/findsettle.php> (last visited Nov. 5, 2008).

work on state and local governments, as well as the types of assistance the Division has provided to state and local governments.<sup>22</sup>

As with all government resource allocations and policy choices, elected leaders are ultimately answerable to the electorate. If the voters do not accept the policy and funding decisions of the executive and legislative branches, they retain the right to elect new leaders with different priorities.

### III. FEDERALLY CREATED, BUT LOCALLY FUNDED, PRIVATE RIGHTS OF ACTION

In addition to the direct funding and support of efforts designed to ensure constitutional conditions in state and local correctional facilities, Congress also created private rights of action through the Civil Rights Act. By empowering private citizens to file such actions in federal courts, Congress hoped that they would act as “private attorney[s] general,” helping to ensure that state and local government officials complied with the Constitution.<sup>23</sup> To support this goal, Congress also provided powerful financial incentives: plaintiffs’ lawyers who prevailed in civil rights litigation would be entitled to reasonable attorneys’ fees. These fees, however, would not be paid by the federal government. Rather, they would be paid for by the state and local governments, and ultimately, the state and local taxpayers. In es-

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<sup>22</sup> See 42 U.S.C. § 1997f. This statutory provision specifically provides:

The Attorney General shall include in the report to Congress on the business of the Department of Justice prepared pursuant to section 522 of title 28—

(1) a statement of the number, variety, and outcome of all actions instituted pursuant to this subchapter including the history of, precise reasons for, and procedures followed in initiation or intervention in each case in which action was commenced;

(2) a detailed explanation of the procedures by which the Department has received, reviewed and evaluated petitions or complaints regarding conditions in institutions;

(3) an analysis of the impact of actions instituted pursuant to this subchapter, including, when feasible, an estimate of the costs incurred by States and other political subdivisions;

(4) a statement of the financial, technical, or other assistance which has been made available from the United States to the State in order to assist in the correction of the conditions which are alleged to have deprived a person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States; and

(5) the progress made in each Federal institution toward meeting existing promulgated standards for such institutions or constitutionally guaranteed minima.

*Id.*

<sup>23</sup> *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (per curiam) (discussing the “private attorney general” concept).

sence, attorneys' fees in civil rights actions were created as unfunded mandates.

Notably, this civil rights attorney fee system differs greatly from the system established by Congress to enforce the rights of prisoners confined in federal prisons. The Federal Tort Claims Act caps attorneys' fees at 25% of any judgment (20% if the case is settled).<sup>24</sup> Those legal fees are deducted from the plaintiff's recovery; the United States does not cover any part of a prevailing plaintiff's legal expenses.<sup>25</sup> There is no separate provision of attorneys' fees for civil rights claims filed as *Bivens* actions<sup>26</sup> or under the Equal Access to Justice Act ("EAJA").<sup>27</sup>

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24 The relevant provision of the Federal Torts Claims Act provides the following for actions filed under the Act:

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to [28 U.S.C. § 1346(b)] or any settlement made pursuant to [28 U.S.C. § 2677], or in excess of 20 per centum of any award, compromise, or settlement made pursuant to [28 U.S.C. § 2672].

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than \$2,000 or imprisoned not more than one year, or both.

28 U.S.C. § 2678 (2006).

25 For an explanation of these provisions, see *Johnson v. Daley*, 339 F.3d 582 (7th Cir. 2003) (en banc) (describing attorney fee system in civil rights cases).

26 These constitutional claims can be filed as "*Bivens* actions." See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (authorizing federal rights of action for constitutional violations committed by federal agents). However, plaintiffs filing *Bivens* actions are not entitled to attorneys' fees comparable to those awarded under 42 U.S.C. § 1988. See *Kreines v. United States*, 33 F.3d 1105, 1109 (9th Cir. 1994) (rejecting equity argument that the federal government should pay attorneys' fees in this *Bivens* action); *Hall v. United States*, 773 F.2d 703, 707 (6th Cir. 1985) (joining the "overwhelming majority of courts" in rejecting claims that federal government in *Bivens* action should be liable for attorneys' fees "to the same extent" that state and local governments are liable for attorneys' fees in civil rights actions); *Zehner v. Trigg*, 952 F. Supp. 1318, 1334 (S.D. Ind. 1997) ("The Constitution does not require that claims asserted under *Bivens* and those asserted under § 1983 [of the Civil Rights Act] be treated identically.").

27 28 U.S.C. § 2412 provides attorneys' fees for prevailing parties. The EAJA specifically excludes fees for tort cases. 28 U.S.C. § 2412(d)(1)(A) (2006). In addition, courts have uniformly held that this provision does not apply in *Bivens* actions against individual officers. *Kreines*, 33 F.3d at 1109 (holding that attorneys' fees are not available under the EAJA for *Bivens* action); *Hall*, 773 F.2d at 707 (same); *Premachandra v. Mitts*, 753 F.2d 635, 641 (8th Cir. 1985) ("Congress could have clearly made the United States liable for fees in constitutional deprivation actions but chose not to do so."); *Saxner v. Benson*, 727 F.2d 669 (7th Cir. 1984) (holding that attorneys' fees are not available for constitutional claims against defendants sued in their individual capacities).

A. *Attorneys' Fees in Prisoner Litigation Against State and Local Governments and Officials*<sup>28</sup>

The traditional "American Rule" provides that the parties in litigation bear their own litigation costs and attorneys' fees.<sup>29</sup> Congress changed this in civil rights actions when it directed courts to award "reasonable" attorneys' fees to the "prevailing party."<sup>30</sup> The Supreme Court required courts to award attorneys' fees to prevailing parties except in limited circumstances.<sup>31</sup> To determine whether an attorney fee request is "reasonable," courts compute a "lodestar figure" which represents the number of hours "reasonably expended" by the prevailing party's attorney on the case, multiplied by a "reasonable" hourly rate.<sup>32</sup> The lodestar figure can still be adjusted upwards for a variety of factors, such as payment delays<sup>33</sup> and the plaintiff's "level of success."<sup>34</sup> However, awards under the Civil Rights Act permitted plaintiffs' attorneys to receive fee awards greatly disproportionate to compensatory damages awards for related but unsuccessful claims, and based on "prevailing market rates" even where they usually billed at a lower rate.

Congress became concerned about the amount of attorneys' fees awarded in prisoner litigation and enacted new limitations in the Prison Litigation Reform Act ("PLRA").<sup>35</sup> It established a propor-

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28 For an excellent and succinct discussion of attorney fee awards under the Civil Rights Act and limits created by the Prison Litigation Reform Act, see Lynn S. Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Reform Act's Disparate Restrictions on Attorney's Fees*, 89 CAL. L. REV. 999 (2001).

29 The "American Rule" recognizes that the prevailing party in tort litigation must bear 100% of his own attorneys' fees. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975) (describing the "American Rule" practice).

30 42 U.S.C. § 1988 (2006).

31 *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

32 See *City of Riverside v. Rivera*, 477 U.S. 561, 568 (1986) (citing *Hensley*, 461 U.S. at 433–34).

33 *Missouri v. Jenkins*, 491 U.S. 274, 283–84 (1989).

34 *Hensley*, 461 U.S. at 434.

35 The relevant provision of the PLRA provides:

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under [42 U.S.C. § 1988], such fees shall not be awarded, except to the extent that—

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under [42 U.S.C. § 1988]; and

(B) (i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

tionality requirement, capped the rate of attorneys' fees, required prisoners receiving a monetary award to pay a percentage of the attorneys' fees, and eliminated attorneys' fees for related but unsuccessful claims.<sup>36</sup>

### B. Assessing Private Enforcement

Litigation expenses for prisoner lawsuits are much higher for state and local governments than for the federal government, given the vastly different systems for assessing attorneys' fees and costs. In addition, unlike federally supported efforts to enforce the constitutional rights of prisoners (through technical assistance, training, and government civil rights enforcement), private rights of action and the taxpayer-funded attorney fee system are not subject to similar accountability systems. In part, this is because those making the resource decisions have distinct motives and do not use the same assessment standards. Attorneys incurring fees have a financial incentive to receive the maximum monetary benefit.

In addition, federal judges awarding attorneys' fees use different accountability measures than those traditionally applied to government programs. For example, they examine the level of success the attorneys achieved for the individual plaintiff or the plaintiff class. They do not explicitly consider questions such as whether duplication of effort could be avoided, whether the result could have been achieved through less expensive means, or whether the attorneys

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(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under [18 U.S.C. § 3006A] for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to [42 U.S.C. § 1988].

42 U.S.C. § 1997e(d) (2006) (footnotes omitted). See generally Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 803(d), 110 Stat. 1321 (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

<sup>36</sup> For a discussion of the PLRA attorney fee limitations, see *Johnson v. Daley*, 339 F.3d 582 (7th Cir. 2003) (en banc) (upholding the constitutionality of the PLRA attorney fee limitations). See also H.R. REP. NO. 104-21 (1995), available at 1995 WL 56410, at \*28 (describing Congress's intent in crafting the attorneys' fees limits that were ultimately enacted in the PLRA).

made reasonable efforts to reduce the cost of the litigation. Nor do courts consider competing demands for the government resources when awarding government funds in prisoner claims. Quite simply, well-established government funding accountability standards relating to performance and cost-effectiveness are not considered. Without these tools, the taxpayer funds that underwrite private rights of action are unlikely to achieve the maximum public policy benefit in the most cost-effective manner.

There are many types of economic analyses that could be relevant to this question, but we do not collect the type of data that would allow full-scale economic analyses. However, there are bright lines that can be instructive. Where, for example, prisoner litigation ends or prevents an unconstitutional practice that endangers the lives of inmates, and has minimal litigation costs or adverse consequences, then one would clearly view the litigation outcome as beneficial to society—both in public policy and economic terms. Likewise, if the litigation achieves no positive changes but uses substantial government resources, this would be seen as a negative outcome. But how do we judge institutional prison litigation with outcomes that fall within the middle of these bright lines?

This begs the question: Should the taxpayer funding that supports prison civil rights litigation be immune from the same economic scrutiny we apply in other areas of public policy? I think not. Private civil rights litigation is funded virtually entirely by state and local taxpayers; they expect accountability and the government officials who represent them should support fiscal responsibility. In my view, the funding of private rights of action, like all public policy choices, can and should be assessed to determine: (1) whether it is achieving appropriate public policy goals; (2) whether the cost of the enforcement option is worth the benefits it obtains; (3) whether there are less costly ways to achieve those same benefits; and (4) whether there are more important public goals that could be achieved with those resources.

Quite simply, the costs incurred in prisoner litigation can be analyzed with commonly used economic concepts. Some relevant concepts include cost-benefit analysis, and cost-effectiveness analysis. While these terms do not have one universally accepted definition, they can be roughly summarized as follows:

- Cost benefit analysis (“CBA”): CBA is an economic analytic tool where one compares the net social benefit of a program or intervention to its costs.<sup>37</sup>
- Cost effectiveness analysis (“CEA”): This analytical tool compares two intervention options by assessing the costs and benefits of the two separate programs and then comparing them to each other.<sup>38</sup> The tool allows policy makers to compare the value of two intervention options designed to achieve a particular result. Simply expressed, a CEA gives a policy maker the information to determine where to get the best result for the money.

In addition, economic analyses often consider “opportunity costs.” Opportunity costs are “the value of the best forgone alternative use of the resources employed.”<sup>39</sup> While we do not collect the data that would permit a quantitative analysis of private civil rights actions, these analytical tools provide us with a starting point for considering these issues.

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37 CBA has been defined in the healthcare context as “[a]n analytic tool for estimating the net social benefit of a program or intervention as the incremental benefit of the program less the *incremental cost*, with all benefits and costs measured in dollars.” COST-EFFECTIVENESS IN HEALTH AND MEDICINE 395 (Marthe R. Gold et al. eds., 1996) [hereinafter COST-EFFECTIVENESS]. Alternatively, in the regulatory context it has been described as follows:

Cost-benefit analysis is a tool developed by economists and scientists to determine whether a proposed course of action is efficient compared to alternative courses of action. The costs of a project are typically the time, labor, material, and capital expended; the economic value of these resources is measured by their productivity if applied to their next best alternative uses (opportunity costs). The benefits of a project are typically defined as the gain in utility of the beneficiary population, often measured by the stated or observed willingness by the beneficiary population to pay for the results of the project. A project’s net benefits are defined as benefits minus costs as compared to a well-specified alternative.

Fred Anderson et al., *Regulatory Improvement Legislation: Risk Assessment, Cost-Benefit Analysis, and Judicial Review*, 11 DUKE ENVTL. L. & POL’YF. 89, 92 (2000) (emphases omitted).

38 CEA has been defined in the healthcare context as “[a]n analytic tool in which costs and effects of a program and at least one alternative are calculated and presented in a ratio of *incremental cost* to incremental effect. Effects are [program] outcomes . . . .” COST-EFFECTIVENESS, *supra* note 37, at 395. Alternatively, CEA has been explained as follows:

In a cost-effectiveness analysis, the cost of a project is divided by a quantitative (yet non-monetary) measure of effectiveness, such as the number of years of human life saved or tons of pollution removed. This produces a cost-effectiveness ratio, such as cost per year of life saved or per ton of pollution removed. Cost-effectiveness ratios can be used to maximize the number of life years saved (or pollution removed) for a given budget, but it does not inform the choice of the budget level. Cost-effectiveness analysis is used instead of cost-benefit analysis for many applications in public health and medicine.

Anderson et al., *supra* note 37, at 93 (citation omitted).

39 Verizon Commc’ns Inc. v. FCC, 535 U.S. 467, 499 n.17 (2002).

C. *Valuing the Benefits of Prison Litigation*

While we instinctively view constitutional rights as equal, they clearly are not. Based on my experience, meritorious constitutional issues are not weighted similarly in the public policy arena. The wide variation in jury verdicts awarding compensatory damages for civil rights violations necessarily implies that juries (as representatives of the citizenry) assign different values to different constitutional cases. In making monetary damages awards (for compensatory and punitive damages), juries can consider issues such as the nature of the egregiousness of the constitutional violation, the harm inflicted by it, the damages suffered by the plaintiff, and the likelihood that it will reoccur in the future.

In our system, juries inevitably make value judgments about the worth of the constitutional claim. In this context, it is likely, for example, that constitutional violations that severely affect the health and safety of inmates would tend to be viewed as more critical than, for example, issues involving prisoner privacy rights.<sup>40</sup> In addition, injunction litigation that is designed to prevent future constitutional violations for many prisoners would be viewed as more beneficial than a nominal damage claim for a one-time, non-recurring event.

For these types of constitutional issues, public policy considerations suggest that one would be willing to pay more money and suffer more adverse consequences (or costs) to achieve a litigation outcome that prevents future constitutional violations that affect health and safety issues. At the same time, high litigation costs and adverse operational effects of litigation would not seem to justify constitutional litigation that is unlikely to prevent future constitutional violations or which is disproportionate to the constitutional harm prevented. I believe that, as a matter of public policy, the public costs should not

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<sup>40</sup> It is not surprising that different values can be assigned to constitutional issues. In the difficult arena of healthcare and cost containment, experts have tried to assign quantitative values to the difficult issues surrounding health status and individual concerns and preferences. In 1993, the U.S. Public Health Service created a panel to address standardizing cost-effectiveness analyses in health and medicine. The panel recommended guidelines that capture various states of health, as well as the use of Quality-Adjusted-Life-Years ("QALYs") to rank various health interventions. In this context, "cost-utility analysis" ("CUA") was proposed to:

value[] health status in terms of health preferences, desires, or utilities; the QALY index combines preferences for length of life with those for quality of life. Like most utility measures, QALYs are based on the premise that utilities of different individuals and health conditions can compare on a single quantitative scale.

Jennifer Prah Ruger, *Health, Capability, and Justice: Toward a New Paradigm of Health Ethics, Policy and Law*, 15 CORNELL J.L. & PUB. POL'Y 403, 414 (2006).

greatly exceed the constitutional benefits obtained, the costs to attain that goal should be minimized (to the extent possible), and we must consider whether there are better uses for the resources spent on the litigation.<sup>41</sup>

*D. Forces that Affect Litigation Outcomes*

In my view, if one wants to understand the potential “costs” of prisoner litigation, then it is important to understand the forces that drive prison litigation, the likely outcomes of litigation, and the impacts of those outcomes. Clearly, the underlying merits of a particular civil rights claim will directly impact the likely outcome of prison litigation. Meritless claims are usually strongly defended. While nominal settlements can be a routine way for governments to end the case and save on litigation costs, sometimes prison agencies adopt restrictive settlement policies (based on the view that routine settlements in non-meritorious cases simply encourage more lawsuits and, in the long run, do not save the government money).

Where, however, a prison system is engaging in an unconstitutional policy or practice that affects many prisoners, this can often lead to a federal civil rights action filed as a class action by experienced prisoners’ rights lawyers. These institutional class actions usually seek substantive changes in how a prison system manages its prisoners. Sometimes, prison officials can successfully defend these actions and win outright. More often, however, the plaintiffs’ attorneys have chosen a strong case where they believe they can prove an unconstitutional practice or condition. When faced with a strong lawsuit challenging an unconstitutional practice, the prison officials usually fix the problem—they can choose to make changes during the course of the litigation, they can agree to the changes as part of a settlement, or they can be required to make changes by court order.

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<sup>41</sup> Although there are advocates who might argue that the public should underwrite any litigation necessary to prevent constitutional violations, such a proposal is unrealistic. Harms to individuals in our society, whether they be constitutional violations, criminal victimization, or torts, are necessarily ranked in our judicial system. Our civil justice system provides a process for assigning a monetary value for past civil harms, such as constitutional violations and torts. Thus in deciding compensatory damages, factfinders consider issues such as pain and suffering, loss of future earnings, loss of the ability to participate fully in life, and emotional injuries. In criminal cases, sentences can include loss of liberty, fines, and restitution based on considerations such as physical harm to the victim, emotional injuries, the intent of the criminal defendant, the need for specific and general deterrence, incapacitation, and retribution.

Courts can, and should, ensure that the prison practices are conforming to the constitutional minimum. However, sometimes the prison officials make changes that provide prisoners with more than is required by the Constitution. As will be discussed more fully later, this can occur in a variety of ways. To understand why this occurs requires one to assess the various forces that can drive particular outcomes in institutional litigation involving prisons.

#### *E. Litigant Goals*

In prisoner litigation, the basic goals of the litigation participants are easily understood. In the most simplistic terms, inmates may seek to improve prison conditions to prevent future harm from occurring to them or other inmates. They may seek the vindication of a court order confirming they were treated badly or punishment for the officials who they believe have done them wrong. They often seek financial compensation.

Defendants in litigation usually want to minimize financial losses from adverse judgments. As professionals, they usually do not want their reputations sullied by explicit judicial finding of wrongdoing. And they usually want to avoid the burdens of litigation—they do not want to testify and they want to reduce the litigation burdens on their institution.

#### *F. Other Litigation Participants*

But the named parties are not the only persons driving litigation. Attorneys representing both sides also have a substantial ability to affect the course of the litigation and its impact on prison policies and practices, as well as government resources. For example, government attorneys usually advise prison officials on ways to reduce future litigation risks or policy changes that can help reduce the likelihood of future injunctions.

In prisoner class actions, the underlying litigation goals for the plaintiff class are often driven by the attorneys. Institutional litigation can be used by advocates as a way to achieve benefits for prisoners that exceed the constitutional minimum and that could not be obtained through the state or local political process. While there are some limits on attorney decisions on behalf of the plaintiff class, there is still considerable leeway in the choice of issues to pursue and

whether to use strong plaintiff claims as a basis to negotiate for changes that are not constitutionally required.<sup>42</sup>

Judges, likewise, have a substantial impact on the litigation. Within the appropriate confines of their position, judges can exert considerable pressure on litigants to settle cases. The pressure of increasing dockets ensures that judges will seek to have parties settle cases or narrow issues before a trial. Court-supported alternative dispute resolution and mediation are a routine part of prison litigation. Inevitably, however, the settlement position of the parties depends upon their beliefs about the receptiveness of the judge (or jury) to their relative positions, and the potential costs and risk of future litigation.<sup>43</sup>

In addition to advocating on behalf of their clients, attorneys also have financial interests. Because the Civil Rights Act authorizes attorneys' fees for successful prisoner litigation, plaintiffs' attorneys understandably seek to be compensated for their time. Government attorneys, likewise, do not work for free. Attorneys for both sides usually try to obtain what is the best result possible while minimizing adverse impacts for their clients.

#### G. *Mixed Government Motives*

But plaintiffs and prison officials can have common interests. When institutional prison litigation was in its early stages, many prison officials who wanted to improve prison conditions saw the litigation as a means to obtain more resources for their institutions. Consent decrees, which were common in the 1970s and 1980s, allowed

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<sup>42</sup> There are, of course, limits on the settlement of class actions. *See* FED. R. CIV. P. 23 (setting rules for class actions).

<sup>43</sup> But judges can also have other impacts on cases. Judges, for example, exercise considerable discretion as to when to seek pro bono representation on behalf of a single prisoner or a group of pro se prisoners seeking class certification. Judges have the power to appoint counsel who can convert a small, easily defendable lawsuit into a massive class action with tremendous financial and operational consequences.

Judges, likewise, retain the ability to appoint special masters in prison litigation. The use of monitors and special masters has diminished somewhat since the passage of the PLRA, which limited special masters' roles and compensation. *See* 18 U.S.C. § 3626(f) (2006). However, the use of special masters and monitors still continues. These special masters and court monitors are usually paid on an hourly basis and can have a financial interest in the continuation of litigation. Corrections officials have complained to Congress that the PLRA has not done enough to curb problems with court-appointed monitors. *See* Letter from Martin F. Horn, Comm'r of the N.Y. Dep't of Corr. & Prob., to Chairman John Conyers and Rep. Lamar Smith, Comm. on the Judiciary of the U.S. House of Representatives (Apr. 10, 2008) (on file with author) (relating to House Report 4109 and proposed amendments to the PLRA).

government officials to agree to court orders requiring them to provide services or facility improvements. These agreements sometimes required prison officials to meet minimum constitutional standards. More often than not, the plaintiffs would give up claims for substantial damages in order to obtain long-term agreements for improved conditions. For the parties to the litigation, this was a solution that remedied the problem while ensuring that future government funding would be allocated for these improvements.

For prison officials, these agreements could be very helpful, certainly in the short term. The problems would be fixed, there would be no findings that the particular administrator had committed any wrongdoing, and the administrator now had a leg up in future internal government funding negotiations. Nothing ensured future funding better than the threat of federal contempt orders and fines.<sup>44</sup>

#### *H. Other Government Actors*

But for government officials who were not parties to the litigation, the agreements and court orders entered in prison litigation cases often proved problematic. New political administrations often found themselves saddled with agreements and court orders entered before they took office.<sup>45</sup> Consent decrees frequently contained provisions that exceeded the constitutional minimum, yet the new officials were saddled with the policy choices of the prior administration and obligated to fund these particular programs or facility enhancements. Agreements made during times of government surpluses might have looked good then, but when times and budgets became lean, government officials found themselves questioning whether they should be bound by the old agreements.

In addition to problems encountered by new political administrations, other government officials often expressed concerns about the impact of prison litigation. Legislators responsible for funding new construction, staff, or programs raised concerns about agreements that bound the appropriators to funding particular provisions. Sometimes prison administrators attempted to control prison popula-

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<sup>44</sup> For an excellent discussion of the factors that led many prison officials to enter into long-term consent decrees, see Gerald N. Rosenberg, *The Politics of Consent: Party Incentives in Institutional Reform in Consent Decrees*, in CONSENT AND ITS DISCONTENTS: POLICY ISSUES IN CONSENT DECREES 13–37 (Andrew Rachlin ed., 2006), available at <http://www.princeton.edu/prior/publications/docs/consent.pdf>.

<sup>45</sup> See Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295.

tions and fiscal costs by consenting to or acquiescing in orders prohibiting the housing of certain classes of inmates.<sup>46</sup> Prison officials required to take custody of these inmates often opposed these orders. Similarly, prosecutors would oppose orders releasing pretrial and sentenced inmates.

The issue becomes even more difficult when civil rights litigation is used to obtain policy changes that are not constitutionally required. There are all sorts of harms faced by the public at large that require difficult criminal justice policy choices by elected officials. A decision to reduce a police force can mean more violent crime suffered by the public, while a decision to increase a police force can mean less funding for offender education or drug treatment programs. The decision becomes even more complex when other public policy goals (outside of the criminal justice system) are considered. The government budget process involves difficult policy choices about whether to invest in criminal justice, schooling, transportation systems, medical treatment, services for the elderly, or economic improvements. Other government actors are thus likely to be concerned about the opportunity costs of prisoner litigation.

#### IV. EVALUATING COMPETING INTERESTS

Analyzing prisoner litigation from a public policy point of view requires one to look beyond the motivations of the individual litigants and participants. Institutional prisoner litigation that changes prison policies and procedures is ultimately underwritten by the taxpayer. Tax dollars always pay for the government lawyers, the time and effort of the prison officials to defend the litigation, the judge, and the court staff. In addition, tax dollars pay for the monetary damages, the attorneys' fees, and the costs of institutional changes resulting from the litigation.

Assessing the value of prisoner litigation from the public policy point of view requires one to assess the various effects of the litigation, whether those effects are viewed as desirable, and the relative costs and benefits of those changes. From the public policy perspective, government obviously should: (1) discourage negative effects of litigation; and (2) ensure compliance with the Constitution. However, this is not the end of the inquiry. Even if one determines that

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<sup>46</sup> See *Castillo v. Cameron County*, 238 F.3d 339 (5th Cir. 2001) (challenging successfully the county officials' agreement to an injunction limiting the number of state prisoners the county jail could detain).

litigation has led to constitutional compliance, the question then becomes whether this worthy goal was accomplished in a cost-effective manner that minimized collateral adverse consequences.

The more difficult question is whether, from a public policy view, it is desirable for federal civil rights litigation to lead to non-constitutionally required changes that benefit prisoners. This issue, too, involves balancing public policy and economic interests. In addition, prisoner litigation in the federal courts can result in inherently governmental decisions (with substantial policy, operational, and financial implications) being made outside of the normal governmental decision-making process. In these cases, there are substantial public policy questions about when, if ever, it is appropriate to circumvent the checks and balances of state and local governments or the decisions of democratically elected leaders.<sup>47</sup>

However, when assessing the ultimate value of such changes, one needs to identify the positive and adverse consequences of the change (costs and benefits), whether there were other options for achieving the positives and reducing the negatives (cost-effectiveness), and whether there were other, more important goals that could have been achieved with those government resources (opportunity costs).

#### A. *Positive Extra-Constitutional Changes*

Some positive policy and practice changes could, for example, reduce the risk of injuries to inmates or staff (through improved inmate classification, mental health treatment, or weapons detection) or reduce the risk of recidivism (through proven programs such as drug treatment or cognitive behavioral therapy). Viewed by themselves, these changes in policies or practices are certainly valuable to the prisoners, but they are also valuable to society as whole. At the same time, when such policies and practices exceed the constitutional minimum, there are legitimate questions about whether the cost of those changes is justified if there are other options for achieving the same benefit (cost-effectiveness), or if there are other, more important, uses for those government resources (opportunity costs).

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<sup>47</sup> For a detailed discussion of these issues, see ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003).

### *B. Adverse Consequences*

Adverse consequences negatively affect prison operations, prisoners, and the public. Adverse operational impacts can include, for example, whether the change will reduce the safety of correctional officers, whether it will reduce management flexibility in staff assignments, or whether staff will feel disempowered to suggest better ways to accomplish a goal.

At the same time, changes can have unintended negative effects on prisoners. For example, a change that protects inmate privacy issues may have the unintended effect of making it easier for predatory inmates to carry weapons. Changes designed to protect inmate religious practices can inadvertently make it easier for white supremacists organized under a religious banner to operate within the prison.<sup>48</sup>

Likewise, some operational changes can have negative effects on public opinion. Changes designed to give prisoners added benefits can negatively affect public opinion about the prison. If citizens believe that persons convicted of crimes should not enjoy the same privileges as law-abiding citizens, changes that excessively benefit prisoners will likely be viewed as inappropriate.<sup>49</sup> Negative public perceptions about the competence of a government institution can ultimately affect the programs run by that institution. In the criminal justice system, negative perceptions about a prison's administration can adversely affect its work, such as by creating hurdles for obtaining government funding for essential programs or reducing credibility with its parole recommendations.

In addition, in the analysis, one needs to consider the financial costs of the litigation itself. While the plaintiff and the attorney see monetary payments and attorney fee awards as a benefit, this is a negative on the public balance sheet. Tax dollars pay for virtually the entire cost of the litigation. Government staff resources are also required for the litigation.

Finally, settlements or injunctions can have additional economic consequences. These can include, for example, the cost of new con-

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<sup>48</sup> See MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 158 (2005) (describing prisoners seeking religious accommodations for racist literature).

<sup>49</sup> For example, when a television show aired about an inmate-led musical group, the prison system was inundated with public and media criticism. Following the criticism, the prison halted the musical group program. The inmates sued and eventually lost on all claims. *See Young v. Beard*, No. 04-2211, 2007 U.S. Dist. LEXIS 6950 (E.D. Pa. Jan. 31, 2007) (mem.). If prison officials had agreed to this program following the litigation, they certainly could have expected the same sort of outcry.

struction or physical plant renovations, staff costs (hiring, salaries, or overtime), or equipment purchases.

#### V. CASE EXAMPLE: THE *BOWERS* LITIGATION

The basic facts in the *Bowers* litigation are not in dispute. The Philadelphia prison population was at an all-time high. The population continued to rise. The Mayor's Office had rejected the Prison Commissioner's request for a new, 400-bed intake facility.

As a result, the Prison Commissioner initiated a policy he called "Operations Strategic Admissions" ("OSA") as a prison population control measure.<sup>50</sup> As an alternative to converting existing prison space into additional prison beds, he allowed the Intake Unit population to increase and then notified Philadelphia criminal justice stakeholders that there would be a delay in the admission of most newly arrested detainees who were awaiting transportation from temporary police detention facilities.<sup>51</sup>

This population control measure resulted in prisoners being housed for extended periods of time in the temporary detention facilities. In June and July of 2006, numerous detainees were packed into holding cells for several days with many other prisoners.<sup>52</sup> They were detained in those temporary detention cells for extended periods without beds, and with inadequate space to sit or lie down, no bedding, inadequate sanitation, and no hygienic supplies. Some inmates did not receive medical care. In addition to these conditions, many police detention facilities had fire safety problems, including blocked fire exits and inadequate fire safety equipment and evacuation procedures.<sup>53</sup>

On July 24, 2006, the plaintiffs filed a civil rights action against the police and prison officials, challenging the conditions of confinement in the police holding cells and prison intake areas.<sup>54</sup> The plain-

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<sup>50</sup> See Transcript of Record at 105–06, *Bowers v. City of Philadelphia*, No. 06-CV-3229, 2007 U.S. Dist. LEXIS 5804 (E.D. Pa. Jan. 25, 2007) [hereinafter *Bowers Docket*].

<sup>51</sup> *Id.* at 105–15.

<sup>52</sup> The extensive testimony relating to those actual holding cell conditions in the summer of 2006 is described in *Bowers*, 2007 U.S. Dist. LEXIS 5804, at \*23–60.

<sup>53</sup> The plaintiffs presented three expert witnesses: Glenn Corbett, who testified as to the current fire safety at the Police Administration Building, *Bowers Docket*, *supra* note 50, at 4–91; F. Warren Benton, who testified as to the general conditions (including sanitation) at the Police Administration Building and two police districts (the 24th/25th, and 9th), *id.* at 4–89; and Robert L. Cohen, who testified as to medical issues, *id.* at 5–55.

<sup>54</sup> See Complaint at 1, *Bowers*, 2007 U.S. Dist. LEXIS 5804 (No. 06-CV-3229). The plaintiffs named as defendants: the City of Philadelphia; Leon A. King, II, the Commissioner of

tiffs also sought a preliminary injunction.<sup>55</sup> With these filings, the plaintiffs claimed that the Philadelphia Prison System was “overcrowded,” causing specific unconstitutional conditions of confinement in the police detention facilities that housed persons newly arrested for criminal offenses and in the intake facilities at the Philadelphia Prison System. This complaint (and later amended complaint) sought monetary damages, declaratory relief, a preliminary injunction, a permanent injunction, and attorneys’ fees.<sup>56</sup>

The plaintiffs’ preliminary injunction also sought to address a wide range of issues, including medical care, screening, medication, access to legal counsel, “habitable” cells, showers, toilets, personal hygiene items, personal protection, and time limits for the length of stay.<sup>57</sup> Because the plaintiffs also sought prisoner releases and the restriction of cell capacities, the Philadelphia District Attorney successfully moved to intervene pursuant to the PLRA.<sup>58</sup>

On September 11, 2006, the OSA was halted by order of the City’s Managing Director.<sup>59</sup> One month later, the federal district court held an evidentiary hearing on the preliminary injunction request. In January 2007, the court issued a ninety-day preliminary injunction and a declaratory judgment. The court found that the defendants had committed constitutional violations in the confinement of the detainees.

The ninety-day preliminary injunction provided, among other things, for limitations on cell capacity and detention time for post-arraignment detainees in police facilities, and for cell capacity limits

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the Philadelphia Prisons; Sylvester Johnson, the Philadelphia Police Commissioner; and unknown police and prison officials (“City Defendants”). *Id.*

<sup>55</sup> See Plaintiff’s Motion for Preliminary Injunction at 1, *Bowers*, 2007 U.S. Dist. LEXIS 5804 (No. 06-CV-3229).

<sup>56</sup> See Amended Complaint at 18, *Bowers*, 2007 U.S. Dist. LEXIS 5804 (No. 06-CV-3229).

<sup>57</sup> See Plaintiff’s Memorandum of Law in Support of Motion for Preliminary Injunction at 1–2, *Bowers*, 2007 U.S. Dist. LEXIS 5804 (No. 06-CV-3229).

<sup>58</sup> See 18 U.S.C. § 3626 (2006). Under the PLRA, prosecutors have the right to intervene in prison conditions litigation that seeks a “prisoner release order.” *Id.* § 3626(a)(3)(F). A “prisoner release order” is broadly defined to include “any order . . . 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.” *Id.* § 3626(g)(4). Philadelphia District Attorney Lynne Abraham filed a motion to intervene under this section. See Motion of District Attorney Lynne Abraham to Intervene Pursuant to the Prison Litigation Reform Act at 1, *Bowers*, 2007 U.S. Dist. LEXIS 5804 (No. 06-CV-3229). Judge Surrick granted this intervention motion. *Bowers v. City of Philadelphia*, No. 06-CV-3229, 2006 U.S. Dist. LEXIS 64651 (E.D. Pa. Sept. 8, 2006).

<sup>59</sup> See *Bowers*, 2007 U.S. Dist. LEXIS 5804, at \*25.

at the PPS Intake Unit.<sup>60</sup> In addition, it required the City to undertake various fire safety improvements at the police districts. The preliminary injunction was later extended, with some modifications.<sup>61</sup> The court later recommended that the parties agree to a private settlement. After the plaintiffs and city defendants entered into a private settlement agreement, the court terminated the preliminary injunction.<sup>62</sup> While the case is still pending, there are currently no injunction orders or pending motions for injunctive relief.

#### A. *The Costs of the Bowers Litigation*

While it is difficult to quantify all of the “costs” that have resulted from the *Bowers* litigation, there are some clear costs to the public. From a financial point of view, taxpayers paid for:

- Direct Litigation Costs
  - Federal Court Resources: These would include a portion of the salary and benefits of the persons needed to manage and adjudicate the litigation. (This would include the federal judge, his law clerk, his courtroom deputy, the court reporter, the clerical staff, the staff in the Clerk’s Office, and the Marshall’s Office that provided courtroom and cell room security during the preliminary injunction hearing.)
  - The Legal Defense: City taxpayers would have paid for a portion of the salary and benefits for attorneys and clerical staff in the City Solicitor’s Office and the District Attorney’s Office. In addition, the City paid for outside attorneys to represent the City defendants.
  - The Plaintiffs’ Attorneys: The City paid out approximately \$300,000 in attorneys’ fees and costs.
  - The Monetary Settlements for Individual Plaintiffs: So far, all but two of the plaintiffs have settled their claims. The remaining plaintiffs seek significant monetary compensation.
  - Defendant Agency Litigation Costs: As part of the litigation, the Philadelphia Prison System and Police Department incurred costs in document production, facility tours, and depositions.
- Costs Resulting from Injunctions
  - Fire Safety Improvements (costing over \$1,000,000).
  - Prison Operational Costs (relating to intake processing and classification).

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60 *See id.* at \*122.

61 *See Bowers v. City of Philadelphia*, No. 06-CV-3229, 2007 U.S. Dist. LEXIS 75548 (E.D. Pa. Oct. 10, 2007).

62 *Id.*

- Benefits of Litigation
  - Compensation to Plaintiffs Whose Rights Were Violated.
  - Improved Fire Safety.
  - Stopping the OSA and Its Crowding (in PPS and police holding cells).
  - Preventing a Future OSA.

*B. Evaluating Bowers from a Cost-Benefit Analysis Perspective*

From a constitutional perspective, *Bowers* achieved two major goals. It directly led to the City making substantial improvements to Police Department holding cell facilities to ensure appropriate fire safety equipment, practices, and policies. At the same time, it directly led to the Managing Director ordering the Prison Commissioner to halt the OSA practice which had led to the unconstitutional conditions in the intake facilities and police holding cells. To achieve these goals, the *Bowers* litigation cost the taxpayers approximately \$3,000,000.<sup>63</sup>

*C. Evaluating Bowers from a Cost-Effectiveness Analysis Perspective*

Even presuming that the goals obtained in *Bowers* were worth \$3,000,000, the question becomes whether these same positive outcomes could have been achieved at a lower price. In my view, they could have. Most of the litigation costs here were incurred after the Managing Director halted the OSA practice. Despite this, there was extensive litigation of that issue. The practice did not resume after the preliminary injunctions ended.

The fire safety issues, however, persisted after the OSA ended. It is unclear whether the fire safety issue could have been settled without the preliminary injunction litigation. I suspect that it could have.

This also raises the question, from a government perspective, about whether the private litigation route was the most cost-effective way to achieve the public policy goals. From the City's perspective, there were other alternatives. Effective government leadership should have been able to identify the constitutional issues before they led to litigation. For example, competent correctional professionals should have known that it was unconstitutional to crowd the intake and holding cells for the purpose of limiting the overall prison population. In addition, police management certainly should have been

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<sup>63</sup> This estimate is based on my review of the various costs outlined above and my discussions with counsel for the City.

aware of the fire safety issues. From the City's perspective, investing in strong leadership to prevent such violations and litigation is the more cost-effective way to prevent these types of constitutional violations.

However, from an overall public policy perspective, there are times when effective government leadership fails and litigation is required to compel recalcitrant local officials to comply with the constitutional requirements. The issue then becomes whether there are less expensive ways to compel government compliance. This case shows that there are. In *Bowers*, the plaintiff's attorneys continued to bill the City at a rate as high as \$450 per hour for work relating to the OSA but undertaken after the OSA was halted.<sup>64</sup> This strongly suggests that these additional costs were not necessary to halt the constitutional violation.<sup>65</sup>

Candidly, the financial costs of the *Bowers* litigation are not as high as those reported by other jurisdictions. California has experienced huge costs relating to its class action litigation involving prisons. Even after the passage of the Prison Litigation Reform Act attorney fee limits, California has paid out over \$47,000,000 in just six class actions involving prisons.<sup>66</sup> Despite this whopping cost, California has very little control over the issues plaintiffs' attorneys choose to pursue, their post-judgment monitoring efforts, and it is unable to require them to pursue cost-effective strategies designed to save taxpayer dollars.

#### *D. Evaluating Bowers from an Opportunity Cost Perspective*

In addition, when one considers the costs involved in the litigation, one has to consider the lost opportunity costs for state and local governments. For example, in the *Bowers* litigation, the prisoners' attorneys received \$250,000 to litigate the preliminary injunction, and

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<sup>64</sup> The plaintiffs' attorneys contended that they were not bound by the PLRA attorney fee rate since the suit was filed by some non-prisoners.

<sup>65</sup> The plaintiffs' attorneys contended that the further litigation and continued orders were necessary to halt a recurrence of the constitutional violations. However, these constitutional violations did not resume after the preliminary injunction ended.

<sup>66</sup> Specifically, as of March 2008, California has paid \$18,491,763.23 in the *Armstrong* class action, \$6,664,070.64 in the *Valdivia* class action, \$6,627,422.61 in the *Clark* class action, \$6,437,144.70 in the *Plata* class action, \$5,501,464.76 in the *Madrid* class action (including special master fees), and \$3,600,744.23 in the *Farrell* class action. E-mail and attached spreadsheet from an attorney with the California Department of Justice to author (April 28, 2008) (on file with author).

more fees for monitoring the preliminary injunctions. In addition, the City incurred substantial costs in defending the litigation.

These legal fees could have been spent on other City purposes. For example, would the prisoners have received a greater benefit if the money had been spent on drug treatment? The money also could have also been spent for other criminal justice purposes. For example, at the very point when the prisoners' attorneys were seeking this \$250,000 payment, I was also seeking \$250,000 in funds to pay for City police investigators to solve 200 open rape cases. In each of these cases, a DNA profile had been extracted from evidence obtained from the rape victim's sexual assault examination. The City needed to pay for detective overtime to complete the investigations so that the perpetrators could be arrested. In the context of the *Bowers* attorney fee award, the City now lacked the \$250,000 for expenditures like those needed to solve those 200 rape cases.

#### VI. ARE THERE OPTIONS?

Overall, from the point of view of total taxpayer dollars (federal, state, and local), there may be more cost-effective ways to enforce these types of constitutional protections when faced with a recalcitrant state or local government. Certainly, various options have pros and cons. But, at the very least, we ought to be considering whether there are better and more fiscally responsible ways to achieve the benefits of institutional prisoner litigation. Given the vastly disparate attorney fees systems for federal prisoners versus state or local prisoners, there is certainly reason to reconsider this approach.

One should consider, for example, whether other enforcement mechanisms in large institutional class actions, such as technical assistance, investigation, and legal suit (if necessary) by the Civil Rights Division, would be as costly as the current system. I cannot imagine that the Civil Rights Division's work in this area would begin to approach the costs found in California. While the Civil Rights Division has a limited role in civil rights enforcement, this is, in part, because it counts on private rights of action. We need to consider whether a system of increased federal agency enforcement would be a more cost-effective way to enforce these rights in large institutional lawsuits.

This type of enforcement has additional benefits. The federal government is financially accountable through existing accountability measures. There is also political accountability over the types of actions they bring, which presumably should focus on the substantial constitutional issues. In addition, they are scrutinized by Congress over whether they are creating undue financial and operational bur-

dens for state and local governments. This type of accountability simply is not present in the private causes of actions.

In addition, are the different attorneys' fees systems for federal prisoners versus state and local prisoners achieving their desired goals? Are the federal fees too low and therefore failing to support litigation essential to protect the rights of federal prisoners? Are the state and local fees systems too high given the benefits obtained and cost-effectiveness considerations? Without any meaningful congressional oversight or data collection, these issues are difficult to resolve.

Alternatively, Congress could consider additional controls and oversight of attorneys' fees and costs in private rights of action. While Congress did much in this area with the PLRA attorney fee limitations, it could do more. It could, for example, require courts to consider cost-effectiveness issues and opportunity costs as part of the attorneys' fees award process.

In the meantime, Congress has created this unfunded mandate for expending state and local tax dollars without any systematic method of federal oversight. There are no reports required by the federal government on attorneys' fees awards (by court order or settlement) in prisoner cases. Nor are there oversight hearings or audits. Quite simply, the federal courts lack the standards or resources to ensure the level of accountability that one should expect with such large expenditures of taxpayer dollars. At the very least, Congress could start to get a handle on this issue by collecting information on the attorneys' fees and costs obtained from state and local governments pursuant to federal civil rights statutes. With data, Congress would have a much better understanding of the costs associated by its attorneys' fees statute and prisoner litigation against state and local governments.

## VII. CONCLUSION

Private rights of action have an important place in our current system. While we support the enforcement of constitutional rights for prisoners, we should not disregard the obligation we owe taxpayers to ensure fiscal accountability with public funds. These worthy goals are not mutually exclusive.