

Paying for Prisoner Suits: How the Source of Damages Impacts State Correctional Agencies' Behavior

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This Note addresses an often overlooked issue facing state prisoners suing for federal civil rights violations: the impact of rules about the source of a monetary judgment or settlement on correctional agencies' litigation strategies. Using empirical data for fifteen states, it confronts traditional assumptions about government liability and practice and adds to the scholarly debate in at least two dimensions. First, it undercuts the view that state agencies do not pay damages from their budgets and are therefore unaffected by litigation or its threat. In fact, states take a variety of approaches to paying claims against their agencies — ranging from a state-wide judgment fund to charging the agency budget. Second, it analyzes the impact of such state-by-state budgeting differences on litigation behavior ex ante and ex post. Broadly, the data suggest that when correctional agencies pay damages directly, they may internalize costs better but also settle less often than when agencies pay from a general judgment fund. The data also reveal considerable differences state to state, even within groups with similar policies for sourcing damages payments. No conclusive relationship exists between a state agency's source of damages payments and litigation outcomes. These mixed results suggest that making agencies pay damages from their budgets may not affect government behavior in the way past commentators suggested or hoped. Moreover, although a desire for uniform national standards originally motivated federal courts to intervene in state prisoner suits, the inconsistent findings lead this Note to caution against any broad-brush policies to be applied to all states.

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I. INTRODUCTION

When litigants sue a state agency or its officers for money damages, they face enormous obstacles. Sovereign immunity guards the states,¹ while doctrines of qualified immunity protect state officials.² Moreover, underlying standards can hamper litigants' ability to establish liability. Constitutional values and federal rights contend with concerns about sovereign dignity and fears of chilling government conduct.³ For state prisoners suing a Department of Corrections or its officers, the challenge is even greater. The Prison Litigation Reform Act (PLRA)⁴ imposes substantial procedural and remedial restrictions on prisoners.⁵ There are also considerable functional constraints — some are a byproduct of being incarcerated others while others reflect the unique culture of prison litigation.⁶ This landscape is well known to scholars, practitioners, and inmates.

This Note addresses an additional, and often overlooked, issue facing prisoner litigants: the impact of rules about the source of a monetary judgment or settlement on agency litigation strategies. Perhaps the impact is overlooked because traditional assumptions about suing state agencies are fairly well-established. First, commentators frequently assume that state agencies do not pay money damages from agency budgets.⁷ Under that assumption, many suggest that agencies and their officers care little about the threat of liability because they do not feel its effects.⁸ If agency budgets were charged for payment, many commentators believe that agencies would respond more to the threat of liability *ex ante* by internalizing the costs of unconstitutional behavior.⁹

1. See *infra* note 66 and accompanying text.

2. See *infra* notes 76–77 and accompanying text.

3. See, e.g., *Richardson v. McKnight*, 521 U.S. 399, 407–08 (1997); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 268, 287–88 (1997); *Forrester v. White*, 484 U.S. 219, 223–24 (1988).

4. 11 U.S.C. §523 (2006); 18 U.S.C. §§ 3624, 3626 (2006); 28 U.S.C. §§ 1346, 1915, 1915A (2006); 42 U.S.C. §§ 1997-1997h (2006).

5. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1627–33 (2003); *infra* note 54 and accompanying text.

6. For example, they are often *pro se* and defendants are repeat players. See *infra* notes 29–32.

7. See *infra* note 99 and accompanying text.

8. *Id.*; see also *infra* note 93 and accompanying text.

9. See *infra* Part II.B.2.

Moreover, once sued, agencies forced to make budgetary outlays for damages should be more risk averse and therefore more willing to settle.¹⁰ Empirical evidence addressing these issues, however, is lacking.¹¹

Using data about state practice and prison case filings and outcomes, this Note makes an initial attempt to confront these traditional theories.¹² The empirical evidence suggests problems with several assumptions. Looking at only fifteen states, the evidence indicates that states take a variety of approaches to paying claims against their agencies — ranging from a statewide judgment fund to charging the agency budget.¹³ With such variation, usual theories of liability correctly predict that litigation trends should also vary across states, but the trends do not always vary in the predicted direction. Specifically, to the extent that the data are generalizable,¹⁴ agencies appear to internalize costs better ex ante if faced with budgetary outlays for damages. In litigation, however, plaintiffs are generally less successful against states paying from agency budgets. As such, state-to-state variation may present another issue, depending on an inmate's location, that could hamper access to damages for state agencies' constitutional wrongs.

This Note argues that the current scholarly theories concerning the enforcement of constitutional rights through suits against state agencies do not always capture the empirical reality and that, in turn, the mixed results suggest that theories advocating changes in how agencies pay damages as a way to affect agency behavior may be flawed. The Note consists of three parts. Part II

10. See *infra* Part II.B.3.

11. See, e.g., James E. Pfander, *Once More unto the Breach: Eleventh Amendment Scholarship and the Court*, 75 NOTRE DAME L. REV. 817, 837–38 (2000) (stating that “one finds no evidence of empiricism, casual or otherwise, in the Court’s selective approach to entity liability”).

12. Although this Note analyzes state correctional agencies, the initial hope was to make a broader claim about suing state agencies generally. State prisoner litigation was chosen because plaintiffs sue frequently in federal court (for which data is available) and under federal civil-rights law. Prisoner litigation, however, is unique for many reasons detailed below, thus making extrapolation questionable. Moreover, agency incentives change depending on the business they run. See *id.* at 836–37 (describing how liability and immunity incentives may differ amongst agencies). Nonetheless, many state policies for paying claims are consistent across agencies, and thus perhaps there is some basis for a more general claim.

13. See *infra* Part III.A.1.

14. As noted throughout this Note, differences within groups of states are significant.

describes prisoner suits against government agencies for money damages, lays out theories of governmental reaction to liability, and hypothesizes that different sources of damages payments should yield different litigation behavior. Part III presents the empirical evidence, comparing plaintiff filing rates and success rates in constitutional rights litigation across fifteen states with various payment policies. Part IV considers the impact of empirical evidence on traditional scholarship about government liability and suggests future work.

II. SUING STATE CORRECTIONAL AGENCIES: HISTORY, MECHANISM, AND THEORY

This Part addresses several bodies of law. Section A discusses the unique characteristics, case outcomes, and history of prisoner litigation. Section B outlines both the process through which prisoners sue to collect damages and how the agents and agencies they sue react to damages liability. It then presents a hypothesis, to be examined in Part III, about how agencies act under different budgetary policies for paying damages.

A. PRISONER SUITS: HISTORY AND THE CURRENT LANDSCAPE

This section covers the background of prisoner litigation. Subsection 1 addresses prisoner case outcomes, and Subsection 2 traces federal reform and how constitutional standards evolved.

1. *Prisoner Case Outcomes*

In general, prisoners fare notably worse than other civil litigants under all measures of success.¹⁵ Prior to the passage of the PLRA, over eighty percent of federal cases were dismissed before trial.¹⁶ Inmates settled about one-sixth as often as other plaintiffs.¹⁷ At trial, prisoners won only ten percent of the time.¹⁸

15. See, e.g., Schlanger, *supra* note 5, at 1563, 1591 n.102, 1598; LYNN S. BRANHAM, LIMITING THE BURDEN OF *PRO SE* INMATE LITIGATION: A TECHNICAL ASSISTANCE MANUAL FOR COURTS, CORRECTIONAL OFFICIALS AND ATTORNEYS GENERAL 42–43 (1997).

16. Schlanger, *supra* note 5, at 1594.

17. *Id.* at 1598–99.

18. *Id.*

Overall, in the five years leading up to the passage of the PLRA, prisoner plaintiffs succeeded in about fifteen percent of cases.¹⁹ Even if they won, awards were small compared to the awards paid to non-prisoner plaintiffs.²⁰ There was one “bright spot” for prisoners: when they won compensatory damages, they also won punitive damages more than one-fifth of the time.²¹

The PLRA was passed in 1996 to cabin prisoner litigation²² and has done just that. As of 2001, prisoners continued to fare worse than other litigants even as prisoner-initiated civil-rights lawsuits declined.²³ Settlement rates fell, even among cases that survived pretrial adjudication.²⁴ At trial, however, plaintiffs won as much or perhaps more than before, but not enough to make up for the drop in settlements.²⁵

There are several explanations for why prisoners fare so poorly in court. In part, the subject matter of prisoner litigation drives the outcomes. Specifically, inmates’ failure in litigation is sometimes attributed to an allegedly high number of frivolous suits filed.²⁶ The prevailing view in the scholarship, however, is that accusations of frivolousness are overblown.²⁷ Many prisoners have legitimate claims but nonetheless rarely succeed.²⁸

Additional unique characteristics of inmate suits also help to explain the lack of success. Prisoners are usually not represented by counsel — 95.6% of inmate civil-rights suits terminated in

19. *Id.*

20. *Id.* at 1603. *But see* ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEP’T OF JUSTICE, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 36–37 (1994) (noting that prisoners’ awards “are not unusually small” in light of the media’s tendency to overstate the typical award in civil cases).

21. Schlanger, *supra* note 5, at 1603.

22. *Id.* at 1565–66.

23. *Id.* at 1658.

24. *Id.* at 1661.

25. *Id.* at 1663.

26. The most well-known example is the top ten list that states circulated in 1995, which included a suit complaining that a prisoner received creamy peanut butter instead of the chunky he had ordered. BRANHAM, *supra* note 15, at 41–42.

27. *See, e.g.*, Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 538 (1982) (“[M]ost prisoner section 1983 complaints were not plainly trivial assertions implicating little or no federal interest.”); Schlanger, *supra* note 5, at 1573 (“[T]he best evidence available demonstrates that the . . . major accusation — that typical inmate complaints were, on their face, trivial, laughable, and obviously undeserving of serious concern, much less legal accountability — was incorrect.”); BRANHAM, *supra* note 15, at 41–42.

28. *Id.*

2000 were pro se, compared to an average of 10.1% of the remainder of the federal civil docket.²⁹ A Department of Justice study found that prisoners alleging civil-rights violations were most likely to sue pro se and that state prisoners were unrepresented more frequently than federal prisoners.³⁰ In 2000, prisoners with an attorney were three times more likely to settle, two-thirds more likely to go to trial, and two-and-a-half times more likely to win at trial because attorneys typically take on more meritorious claims and litigate better.³¹ Other explanations for inmates' low success rates include repeat-player defendants with superior resources, prisoners' low costs for filing and unrealistic expectations, the perceived cost of settling to defendants if it encourages more suits, and an oppositional culture in corrections litigation.³² The low damages that inmate litigants receive can be explained by traditional rules of tort compensation — prisoners, for example, typically have no wages or medical expenses to be reimbursed.³³

2. *Toward Uniform Standards: Federalism and the Prison Reform Movement*

Although states traditionally governed prisoner rights, the federal government intervened during the middle of the twentieth century through the development of federal civil-rights law and 42 U.S.C. § 1983.³⁴ As one commentator wrote, “[t]he combi-

29. Schlanger, *supra* note 5, at 1609.

30. JOHN SCALIA, U.S. DEP'T OF JUSTICE, PRISONER PETITIONS IN THE FEDERAL COURTS, 1980–96 2 (1997) [hereinafter SCALIA, PRISONER PETITIONS 1997], <http://bjs.ojp.usdoj.gov/content/pub/pdf/ppfc96.pdf>.

31. Schlanger, *supra* note 5, at 1610–11.

32. *Id.* at 1592, 1614–21.

33. *Id.* at 1622.

34. Section 1983 reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

nation of social recognition of the importance of fundamental rights and judicial willingness to intervene in state cases violating these rights led to a fundamental shift in the relationship between federal and state power in criminal and penal affairs.”³⁵

For many years, the “hands-off” doctrine, rooted in federalism concerns,³⁶ governed prisons. The federal government did not interfere, regardless of how harshly state prisoners were treated.³⁷ Although some prisoners got their day in court,³⁸ such cases were the exception and federal courts heard virtually no cases.³⁹

Federal judges, however, began to find injustice in this model, especially in the south.⁴⁰ Rejecting the federalism constraint that had symbolized the hands-off doctrine, courts began to impose national standards derived from the Federal Bureau of Prisons and other national institutions.⁴¹ Federal courts in Alabama and Arkansas, for example, systematically imposed standards on state prisons.⁴² Simultaneously, the Supreme Court rapidly expanded prisoner rights. It anchored new universal rights like medical care and freedom from excessive force in the First,⁴³

42 U.S.C. § 1983 (2006).

35. JIM THOMAS, PRISONER LITIGATION: THE PARADOX OF THE JAILHOUSE LAWYER 45 (1988).

36. Other justifications included separation of powers, lack of judicial expertise, and fear of chilling prison officers. LYNN S. BRANHAM, CASES AND MATERIALS ON THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS’ RIGHTS 339 (6th ed. 2002).

37. See generally DARRELL L. ROSS, CIVIL LIABILITY ISSUES IN CORRECTIONS 42–45 (2005); CHADWICK L. SHOOK & ROBERT T. SIGLER, CONSTITUTIONAL ISSUES IN CORRECTIONAL ADMINISTRATION 8–9 (2000). Early cases are also illustrative. *E.g.*, *Pervear v. Massachusetts*, 72 U.S. 475 (1866); *United States ex rel. Morris v. Radio Station WENR*, 209 F.2d 105, 107 (7th Cir. 1954); *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790 (1871).

38. *E.g.*, *City of Topeka v. Boutwell*, 35 P. 819 (Kan. 1894) (holding correctional officer liable for damages for needless suffering inflicted).

39. The view on using federal versus state courts for prisoner suits has flipped. After the federal courts discarded the hands-off doctrine and took jurisdiction over prisoner suits, many commentators argued to keep § 1983 cases in the federal courts because state courts would not be sufficiently independent. See Brian J. Ostrom et al., *Congress, Courts and Corrections: An Empirical Perspective on the Prison Litigation Reform Act*, 78 NOTRE DAME L. REV. 1525, 1530–31 n.18 (2003) (citing commentators).

40. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS 150–51 (1998) [hereinafter FEELEY & RUBIN, JUDICIAL POLICY MAKING].

41. *Id.* at 162–77.

42. SHOOK & SIGLER, *supra* note 37, at 9–14.

43. The Court has granted religious freedom to members of minority religions, *Cruz v. Beto*, 405 U.S. 319 (1972), and has held that officials cannot censor outgoing mail com-

Eighth,⁴⁴ and Fourteenth⁴⁵ Amendments. Although judicial attempts to balance prisoners' rights with competing concerns has tempered the explosion of rights in the 1960s and 1970s,⁴⁶ the federal courts revolutionized the judicially-enforceable rights of prisoners during those two decades.

In 1980, Congress responded by enacting the Civil Rights of Institutionalized Persons Act (CRIPA).⁴⁷ Further federalizing prison reform, CRIPA authorized the Department of Justice to investigate and sue state institutions subjecting prisoners to poor conditions.⁴⁸ In addition, federal courts could require exhaustion of state administrative procedures that the Department of Justice had approved.⁴⁹ Nonetheless, despite CRIPA, federal suits con-

plaining about the prison, *Procunier v. Martinez*, 416 U.S. 396 (1974). But prisoners do not have a right to unionize to negotiate conditions. *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977).

44. This includes challenges to the conditions of confinement. Prisoners have a right to adequate medical care, *Estelle v. Gamble*, 429 U.S. 97 (1976), to be protected from other prisoners, *Farmer v. Brennan*, 511 U.S. 825 (1994) (finding a claim exists if prison officials know prisoner faces substantial risk of serious harm and do not try to stop it), to be free from excessive physical force, *Hudson v. McMillian*, 503 U.S. 1 (1992) (holding that use of excessive physical force against prisoner may constitute cruel and unusual punishment even though prisoner does not suffer serious injury), and even not to live with a cellmate who smokes five packs of cigarettes a day, *Helling v. McKinney*, 509 U.S. 25 (1993). But violations must be serious and address a basic human need. *Wilson v. Seiter*, 501 U.S. 294, 302-04 (1991).

45. Prisoners also have significant due process rights. There must be due process in disciplinary proceedings. *Wolff v. McDonnell*, 418 U.S. 539 (1974). And the Court has granted numerous protections concerning court access, *Johnson v. Avery*, 393 U.S. 483 (1969) (holding that corrections officers cannot deny access to courts), such as requiring adequate law libraries, *Bounds v. Smith*, 430 U.S. 817 (1977), and holding that prisons cannot limit access to law books and legal assistance. *Younger v. Gilmore*, 404 U.S. 15 (1971).

46. Today, reasonableness generally governs prison administration. See SHOOK & SIGLER, *supra* note 37, at 40-41. One commentator states that many of the motivations for the hands-off doctrine — federalism, separation of powers, expertise, and chilling fears — are why courts still defer to state prison decisions. She quotes one officer who describes the current era as one hand on, one hand off. BRANHAM, *supra* note 36, at 339-40.

47. Pub. L. No. 96-247, 94 Stat. 349 (codified as amended at 42 U.S.C. §§ 1997-1997j (2006)).

48. The DOJ has investigated over one hundred jails and prisons around the country under CRIPA. See United States Department of Justice Civil Rights Division, Jails and Prisons, <http://www.usdoj.gov/crt/split/jails.htm> (last visited Jan. 12, 2008).

49. *Id.*; see also Malcolm M. Feeley & Roger A. Hanson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the Literature in Courts, Corrections, and the Constitution: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS* 12, 31-32 (John J. Dilulio, Jr. ed., 1990).

tinued to rise as prisoners sued to enforce rights recognized by the Supreme Court.⁵⁰

In response to calls for reform,⁵¹ Congress passed the Prison Litigation Reform Act in 1996.⁵² The statute significantly hindered prisoners' ability to sue by including a mandatory exhaustion of state remedies, limiting recovery of attorneys' fees, and requiring physical injury for damages.⁵³ Commentary on the Act's success has varied,⁵⁴ but commentators agree that it has made suing more difficult for prisoners and has greatly reduced federal court lawsuits.⁵⁵

B. THE END GAME: REMEDIES, BUDGETS, AND RECOVERING DAMAGES

This Note is ultimately concerned with litigation-based enforcement of the rights established during the reform movement. When prisoners sue under § 1983, available remedies include compensatory and nominal damages,⁵⁶ punitive damages,⁵⁷ attor-

50. JOHN SCALIA, U.S. DEP'T OF JUSTICE, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980–2000 3 (2002) [hereinafter SCALIA, PRISONER PETITIONS 2002], <http://bjs.ojp.usdoj.gov/content/pub/pdf/ppfusd00.pdf>.

51. The states were among the parties urging this reform. Schlanger, *supra* note 5, at 1566.

52. Pub. L. No. 104-134, 110 Stat. 1321-66 to 1321-77 (codified as amended at 11 U.S.C. § 523 (2006); 18 U.S.C. § 3626 (2006); 28 U.S.C. §§ 1346, 1915, 1915A (2006); 42 U.S.C. § 1997-1997h (2006)).

53. 42 U.S.C. § 1997e(a), (d)–(e) (2006). For a more detailed description of the statute, see Schlanger, *supra* note 5, at 1627–33.

54. See, e.g., Ostrom et al., *supra* note 39, at 1529 (finding the impact of the PLRA is “largely in line with the goals stated by the authors of the legislation in that filings are down in all circuits”); Schlanger, *supra* note 5, at 1634 (arguing that the PLRA has stemmed the tide of bad inmate cases but has probably continued to allow for recovery in the good ones).

55. See, e.g., Ostrom et al., *supra* note 39; Schlanger, *supra* note 5; FRED L. CHEESMAN II, ET AL., A TALE OF TWO LAWS REVISITED: INVESTIGATING THE IMPACT OF THE PRISONER LITIGATION REFORM ACT AND THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY E-8 (2004), <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/criminal&CISOPTR=19>; SCALIA, PRISONER PETITIONS 2002, *supra* note 50, at 7 (estimating that state prisoners filed 73,000 fewer petitions in U.S. district courts between April 1996 and September 2000 due to the PLRA).

56. *Carey v. Piphus*, 435 U.S. 247 (1978) (holding that damages awards under § 1983 should be governed by the principle of compensation and tailored to the particular interests protected and that, without actual injury, nominal damages should be awarded).

57. *Smith v. Wade*, 461 U.S. 30 (1983).

neys' fees,⁵⁸ and injunctive relief.⁵⁹ The reform movement took place mainly through injunctive suits,⁶⁰ which remain an important method for seeking institutional reform in state prisons.⁶¹ This Note, however, examines the enforcement of federal prisoners' rights through damages.⁶² Successful vindication of such rights encompasses two related aspects of scholarly theory. Ex ante, better agency policy regarding prisoners' constitutional rights should more adequately protect those rights. Ex post, after an alleged violation has occurred, increased settlement or plaintiff trial success is one measure of greater rights vindication.⁶³

This section addresses these two ideas. It first details how prisoners collect damages from state agents and agencies and then describes scholarly theories regarding the impact of such liability. It concludes with hypotheses about agency behavior based upon whether the agency pays damages from its own budget.

1. *Getting Paid: Sovereign Immunity and Indemnity*

Along with functional and procedural idiosyncrasies of prisoner litigation,⁶⁴ the rules governing how to seek and collect damages against government agencies and officials also partially drive

58. 42 U.S.C. § 1997e(d) (2006); *see also* BRANHAM, *supra* note 36, at 750 (stating that in § 1983 suits seeking injunction against state official in official capacity, state may be liable for attorney's fees).

59. *E.g.*, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989) (holding a state official in his official capacity is a "person" under § 1983 when sued for prospective injunctive relief). There is an extensive body of scholarship related specifically to injunctive relief against state governments. A particularly relevant example is Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006).

60. *See supra* note 42 and accompanying text.

61. Telephone conversations with state attorneys (Jan. 29, Feb. 1 & Feb. 12, 2008).

62. One reason injunctive suits are not addressed is data issues discussed in the Data Appendix. *See infra* notes 231–233 and accompanying text.

63. Using damages as a proxy for rights vindication is generally supported in the literature, and, more specifically, using settlements as a proxy for vindication of civil rights is not novel. *See, e.g.*, Peter H. Woodin, Note, *Fee Waivers and Civil Rights Settlement Offers: State Ethics Prohibitions After Evans v. Jeff D.*, 87 COLUM. L. REV. 1214, 1228 (1987) ("[S]ettlement of these [civil rights] suits serves an important role in the vindication of civil and constitutional rights . . ."). This idea is imperfect because, for instance, nuisance value may drive settlement even in non-meritorious suits.

64. *See supra* notes 29–33 and accompanying text.

inmate case outcomes.⁶⁵ Broadly, the Eleventh Amendment prevents suits against the states without waiver or consent,⁶⁶ and, therefore, state prisoners needed an alternative mechanism for suing states to enforce their civil rights in federal court. In a roundabout way, § 1983 provided it.⁶⁷ Although Congress can generally abrogate the states' immunity and authorize suit under the Fourteenth Amendment,⁶⁸ § 1983 does not do so.⁶⁹ Nor are states and state agencies "persons" under the statute,⁷⁰ meaning that they cannot be sued for retrospective relief.⁷¹

65. This Note only concerns state prisoners' civil-rights suits for damages and thus does not address many other aspects of prisoner suits. For example, prisons challenging their detention must use habeas corpus, not § 1983. *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973). Prisoners also can file claims in state court or use administrative procedures. See Schlanger, *supra* note 5, at 1573–74 n.52.

66. *E.g.*, *Alabama v. Pugh*, 438 U.S. 781 (1978) (dismissing case seeking an injunction against Alabama and its Department of Corrections because the Eleventh Amendment prohibits suit without consent). Generally, the test for waiving immunity in federal court is stringent. For example, a state statute waiving sovereign immunity must explicitly specify an intent to allow suit in federal court. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 452–59 (5th ed. 2007).

67. Originally known as the Ku Klux Klan Act, § 1983 was enacted in 1871 to respond to southern terrorism, but then was virtually dormant for almost a century. See ROSS, *supra* note 37, at 69–70; PETER H. SCHUCK, *SUING GOVERNMENT* 47–50 (1983); KAREN M. BLUM & KATHRYN R. URBONYA, *FED. JUDICIAL CTR., SECTION 1983 LITIGATION* 2 (1998), [http://www.fjc.gov/public/pdf.nsf/lookup/sect1983.pdf/\\$file/sect1983.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sect1983.pdf/$file/sect1983.pdf). Immediately preceding the judicial reform movement, in 1961, the Supreme Court greatly expanded the remedial power of § 1983 in *Monroe v. Pape*, 365 U.S. 167 (1961), holding that a "person" under the Act included an individual officer. The Court then held that actions taken by state government officials, whether valid under state law or not, were actions "under color of law." The federal remedy, therefore, allowed officers who deprived people of constitutional rights to be held liable. *Id.* at 183–92. In a brief per curiam opinion three years later, the Court expanded § 1983 to cover state prisoners. *Cooper v. Pate*, 378 U.S. 546 (1964) (finding an Illinois prisoner claiming a First Amendment violation had a cause of action under § 1983). Section 1983 is inapplicable to federal officials but federal prisoners can sue analogously under the doctrine of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

68. *E.g.*, *Tennessee v. Lane*, 541 U.S. 509, 517–20 (2004); see also Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 817 (2007).

69. *Quern v. Jordan*, 440 U.S. 332, 342–45 (1979).

70. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (holding that neither states nor officials sued in their official capacity are persons under § 1983); *Toledo, Peoria & W. R.R. Co. v. Ill., Dep't of Transp.*, 744 F.2d 1296 (7th Cir. 1984) (finding a state agency is not a § 1983 person subject to suit). Local and municipal governments, however, can be sued directly under § 1983 if the injury results from a government custom or policy. *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 690 (1978).

71. *Edelman v. Jordan*, 415 U.S. 651, 663–71 (1974) (holding that in a § 1983 suit the Eleventh Amendment bars retroactive liability which would require payment from a state treasury in a private individual's federal court suit, even when the nominal defendant was

As a result, suits must proceed against the individual officer accused of the violation.⁷² The Supreme Court has explained that damages awards against individual defendants in federal courts are permissible in some circumstances, notwithstanding the fact that they hold public office, and the Eleventh Amendment does not bar suits for individual and personal liability against state officials under § 1983.⁷³ State officials can be sued either in their official or personal capacity,⁷⁴ but because official capacity suits are treated as suits against the state,⁷⁵ prisoners seeking damages must sue the state officer personally.

Even if a prisoner properly sues the state official in his personal capacity, the officer may assert immunity as a defense. Under the doctrine of qualified immunity, an officer is immune from liability if his conduct was objectively reasonable and not contrary to a clearly established right.⁷⁶ The doctrine responds to the fear that overbearing liability will chill officers in carrying out their governmental duties.⁷⁷

Theoretically, under this doctrine, an officer found to be personally liable and without a qualified immunity defense must pay any damages award from personal assets.⁷⁸ In reality, however, unless the officer acts in extreme bad faith or outside the scope of employment, the State Attorney General litigates the case and

a public official); *see also* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1091 (6th ed. 2009).

72. *See, e.g.*, CLAIR A. CRIPE, LEGAL ASPECTS OF CORRECTIONS MANAGEMENT 53 (1997). Section 1983 also applies to contractors not on the state payroll. *West v Atkins*, 487 U.S. 42 (1988).

73. *Hafer v. Melo*, 502 U.S. 21, 30–31 (1991).

74. For a clarifying discussion of the differences between official and personal capacity suits, *see Kentucky v. Graham*, 473 U.S. 159, 165–67 (1985).

75. *Brandon v. Holt*, 469 U.S. 464 (1985). In an official capacity suit, the government can be liable, even for damages, with notice and a reasonable opportunity to respond. But because payment would be from the state treasury, an award is only proper in accordance with the rules about liability, immunity, and damages. FALLON, JR. ET AL., *supra* note 71, at 957–58.

76. *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982); *see Procunier v. Navarette*, 434 U.S. 555 (1978) (holding that state prison officials are entitled to qualified immunity when the right was not clearly established at the time of alleged harm).

77. *See, e.g.*, Rosenthal, *supra* note 68, at 816 n.69 (citing cases). But because the same concerns, such as chilling conduct, do not apply to private corrections officers, the Supreme Court has found that they are not entitled to qualified immunity, even though they can be sued under § 1983. *Richardson v. McKnight*, 521 U.S. 399 (1997).

78. *See, e.g., Kentucky*, 473 U.S. at 166; FALLON, JR. ET AL., *supra* note 71, at 957–58; JOHN W. PALMER & STEPHEN E. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 270 (7th ed. 2004).

the state or state agency indemnifies the officer for at least some portion of the judgment.⁷⁹ Indemnity rules, therefore, ultimately allow prisoners to reach the state treasury.⁸⁰

2. *Making Departments of Corrections Pay: Ex Ante Theories of Liability*

Much of the scholarship about how government agencies and their officers respond to litigation addresses the goals of compensation and deterrence. Although compensation is a significant goal,⁸¹ administrative, psychological, symbolic, and political effects are also important, especially in prisoner litigation where damages awards are so low.⁸² Indeed, scholars often focus on deterrence and bureaucratization to assess whether litigation against state agencies causes agencies to internalize costs of unconstitutional behavior.⁸³

79. For common law tort violations, indemnity is virtually always provided by statute. *See generally* Rosenthal, *supra* note 68, at 804–13 (listing different state statutes and policies). The same policy applies to constitutional violations. Professor Schlanger found that “in nearly all inmate litigation, it is the correctional agency [not officers] that pays both litigation costs and any judgments or settlements.” Schlanger, *supra* note 5, at 1676. Professor Jeffries found that “the state defends the action and pays any adverse judgment. So far as can be assessed, this is true not occasionally and haphazardly but pervasively and dependably.” John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50 (1998). Responding to Professor Schuck’s observation that indemnity was neither certain nor universal, Jeffries noted that in his personal experience, “the state or local government officer who is acting within the scope of his or her employment in something other than extreme bad faith can count on government defense and indemnification.” *Id.* & n.16. Professor Rosenthal agrees. Speaking specifically about constitutional torts, he stated that “indemnification is nearly always offered to public employees” and pointed to the “ubiquity of public employee indemnification.” Rosenthal, *supra* note 68, at 819. Professor Schlanger also noted that “the best evidence available suggests that the law in action is quite different from the law on the books. Agency-provided defense and near-universal indemnification are the rule in practice.” Schlanger, *supra* note 5, at 1676 n.391. If the judgment is higher than the indemnity limit, the officer will pay. An officer is also responsible for paying any punitive damages. ROSS, *supra* note 37, at 82.

80. But some states require insurance to cover suits against agencies and officers. *See* CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENT: ITS DIVISIONS, AGENCIES, AND OFFICERS § 3:20 (rev. 2d. ed. 2009).

81. *Carey v. Phipus*, 435 U.S. 247, 254 (1978) (“[T]he basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights . . .”).

82. *See, e.g.*, Schlanger, *supra* note 5, at 1664.

83. *But see* John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 90–96 (1989) (discussing compensatory rationales); James J. Park, *The Constitutional Tort as Individual Remedy*, 38 HARV. C.R.-

Several theories have been advanced about such ex ante impact on agencies. The classic concern with creating government liability is that it will over-deter conduct and chill officers.⁸⁴ Others argue that requiring state governments to pay damages for constitutional torts does not reliably deter constitutional violations because governments respond to political rather than monetary incentives, and constitutional violations may even produce political benefits.⁸⁵ Although imposing government liability does not yield optimal deterrence, litigation risk matters to officials and to agencies,⁸⁶ financially and otherwise.⁸⁷ As Professor Schlanger writes:

But I think the evidence clearly shows that, in general, government agencies seek to avoid fines, which are extremely disruptive to the normal operation of any bureaucracy —

C.L. L. REV. 393 (2003) (arguing to expand the debate beyond deterrence to conceptualize constitutional tort actions as an individual remedy). The Supreme Court has also recognized deterrence as a goal of § 1983. *Owen v. City of Independence, Mo.*, 445 U.S. 622, 651 (1980) (“[Section] 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well.”).

84. See, e.g., *Forrester v. White*, 484 U.S. 219, 223 (1988) (“By its nature . . . , the threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties.”). Professor Schlanger, however, argues that correctional agencies and prison officials are probably not over-deterred because officers are indemnified and can assert immunity. Further, because prisons can be constitutionally liable for omissions, such as failing to protect an inmate, as much as overt acts, agencies cannot simply avoid conflict to reduce liability, as an over-deterred agent would. Schlanger, *supra* note 5, at 1673–77.

85. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345 (2000). But see Rosenthal, *supra* note 68 (arguing that by exacting a political price, government liability creates a political incentive to invest in loss prevention). Based on anecdotal evidence about prisons and the less politically-driven nature of the officers, Professor Schlanger concludes that any perverse consequences in this context will be exceptional. Schlanger, *supra* note 5, at 1677–80; see also Rosenthal, *supra* note 68, at 831 (“If Levinson were right, the officials within Chicago’s government with whom I worked should have been indifferent to municipal damages liability. Yet, in fact, city government devoted enormous resources to trying to minimize liability.”).

86. See, e.g., SCHUCK, *supra* note 67, at 60, 70 (arguing personal risks affect officials, despite indemnity, insurance, and immunity); Schlanger, *supra* note 5, at 1675–76 n.389 (detailing the financial risks for individual officers, even if indemnified).

87. Moreover, during the federal judiciary’s reform movement of state prisons, court-ordered injunctions had a significant impact. E.g., Feeley & Hanson, *supra* note 49, at 30; M. KAY HARRIS & DUDLEY P. SPILLER, JR., AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS 21, 24, 26–27 (1977); THOMAS, *supra* note 35, at 249–54.

especially if the money must be diverted from other, already budgeted, priorities. . . .

. . . [E]ven for an agency that doesn't care about payouts (perhaps because those payouts come from some general fund rather than the agency's own budget), media coverage of abuses or administrative failures can trigger embarrassing political inquiry and even firings, resignations, or election losses.⁸⁸

After the passage of the PLRA, moreover, correctional agencies still care about liability and are forced to internalize some costs.⁸⁹ Even if the probability of inmate success is now lower,⁹⁰ litigation and the financial burden of damages still affects Departments of Corrections.

Thus, although financial risk is only one aspect of what drives this effect,⁹¹ damages liability is the starting point for most theories about ex ante effects of damages litigation.⁹² As other scholars have posited,⁹³ therefore, the hypothesis to be examined in

88. Schlanger, *supra* note 5, at 1681 (footnotes omitted).

89. The burden of litigation decreased, especially procedurally, but prisoners still sue. Moreover, because the chances of a large payout were so slim before, strict cost-benefit calculations were not driving the entire response to litigation. *Id.* at 1690–91; see also Margo Schlanger, *Operationalizing Deterrence: Claims Management (In Hospitals, a Large Retailer, and Jails and Prisons)*, 2 J. TORT L. 1, 42 (2008), <http://www.bepress.com/cgi/viewcontent.cgi?article=1072&context=jtl>.

90. See *supra* notes 23–25 and accompanying text.

91. See, e.g., Margo Schlanger, *Second Best Damage Action Deterrence*, 55 DEPAUL L. REV. 517 (2006) (describing yet another aspect of ex ante response to liability: behavioral changes that do not shift the probability or severity of accidents but reduce the probability of claims or lower damages amounts); Schlanger, *supra* note 89, at 48 (hypothesizing that, despite low payouts in prisons and prevalent indemnity, litigation remains an “almost obsessive interest” of officers due to claims management issues). Even in these accounts, however, damages liability lies at the root of such ex ante actions in agencies because it is the genesis of suits in the first instance.

92. See, e.g., Schlanger, *supra* note 91, at 529–30. There, Professor Schlanger suggests that one way to reduce payouts ex ante is to undercapitalize more risky entities. The approach implies that the potential financial burden is significant ex ante and thus something an entity would seek to avoid.

93. E.g., SCHUCK, *supra* note 67, at 104 (proposing to link government tort settlements to the agency's own budget to establish conventional incentives for impacting behavior through training and guidelines); cf. HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES (1998), available at <http://www.hrw.org/legacy/reports98/police/download.htm>; Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URBAN L. J. 587, 596–600

Part III is that forcing state agencies to make financial outlays from their budgets for damages as opposed to paying those damages from a statewide general fund should force greater cost internalization.⁹⁴

3. *Making Departments of Corrections Pay: Ex Post Financial Liability*

Because agencies generally respond to financial liability, the source of damages payments should also affect litigation outcomes and the ex post response to constitutionally-challenged behavior and liability.⁹⁵ Specifically, the question is whether damage payments coming from the agency's budget instead of a general state-wide fund affects the way in which agencies react to litigation. Although many factors impact litigation outcomes,⁹⁶ the basic and intuitive theory that scholars often advance,⁹⁷ which

(2000) (arguing for the allocation of settlement and judgment costs between police departments and officers).

94. *But see* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1432106 (questioning the basic assumption that liability has any ex ante effect on many police departments because they do not gather or analyze information from past suits).

95. It is only relevant how agencies, not individual officers, act because the state indemnifies and defends individuals. Whether the threat of liability has any deterrent effect on how officers do their jobs is a separate issue from what happens when agencies are sued. For a comparison of how organizations and individuals litigate, see Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275 (2005), finding, among other conclusions, that organizational plaintiffs are more likely to settle than to have cases decided by trial or non-trial adjudication.

96. *See, e.g.*, Theodore Eisenberg & Henry Farber, *The Government as Litigant: Further Tests of the Case Selection Model*, 5 AM. L. & ECON. REV. 94 (2003) (predicting higher trial wins for plaintiffs when government is defendant); A. Mitchell Polinsky & Daniel L. Rubinfeld, *The Deterrent Effects of Settlements and Trials*, 8 INT'L REV. L. & ECON. 109 (1988) (arguing that in comparing settlement and trial as optimal, one must account for the decreased deterrent effect of lower payouts in settlement); Kathryn E. Spier, *Settlement Bargaining and the Design of Damage Awards*, 10 J.L. ECON. & ORG. 84 (1994) (discussing the tension between ex ante deterrence and ex post administrative efficiency and showing optimal damages award structures vary with litigation costs). Other factors can impact litigation behavior. *See* discussion *infra* Parts III.C, IV.A.

97. Professor Schlanger stated that "[l]arger liability risk obviously puts pressure on jails to settle." Schlanger, *supra* note 5, at 1689. Similarly, a study of litigation's effect on municipality budgets noted that the litigation strain on budgets is "best reflected in the willingness of many cities to settle cases they believe they could have won just to save money." Susan A. MacManus, *Litigation Costs, Budget Impacts, and Cost Containment Strategies: Evidence from California Cities*, 17 PUB. BUDGETING & FIN. 28, 30 (1997). *But*

is assessed in Part III, is that proximity to the risk of damages payments should affect litigation behavior. Those agencies closer to the risk — that is, those paying damages from their budgets — should settle more frequently than agencies that do not pay directly.⁹⁸ All damages payments require dipping into an already-limited agency budget. If the financial loss is felt more directly, agencies should be more risk averse.

4. *Summary*

In the preceding sections, the inquiry into the ex ante and ex post impact of liability was broken up to facilitate the empirics of Part III. The two ideas, however, carry the same theme: the closer the agency and its officers are to the risk of damages liability, the more risk averse they should be while, conversely, the financial burden of litigation should affect agencies less when they are not forced to bear it. The next Part examines whether those ideas are an empirical reality.

III. EMPIRICAL EVIDENCE FROM STATE DEPARTMENTS OF CORRECTIONS

This Part proceeds in three sections. First, Section A discusses the data on state budgeting practices and federal court case outcomes. Section B then analyzes the hypotheses by looking at case filings and by comparing litigation trends for state prisoners' federal civil-rights suits against different state agencies. Section C adds qualitative data from interviews and discusses the results.

see infra Part III.C (reporting that government attorneys find budgetary payment is not generally a key factor in settlement).

98. Because of the data's limitations, this Note does not address the more specific hypothesis that budgetary constraints would also force settlements for smaller amounts. The data on judgment amounts is highly unreliable, especially for low amounts like in most prison suits. *See* Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455 (2003); Schlanger, *supra* note 5, at 1702–03.

A. THE DATA

1. *Budgeting Practices and the Source of Claims Payments*

Little scholarship directly addresses the source of damages payments from agencies, but existing works often summarily assert that agencies do not pay judgments from their appropriations.⁹⁹ The reality, however, is not as straightforward. Table 1 presents the budgeting practices in fifteen states as well as the federal government and shows a variety of positions.¹⁰⁰ The table lists the source of a damages payments by type of suit and state agency.¹⁰¹

99. See, e.g., Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Fault Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447, 483 n.133 (1997) (“[D]amage awards against the government are usually not taken out of the guilty agency’s budget, [and] particular agencies do not pay for the costs of the torts they commit, even where sovereign immunity has been abrogated.”); Jeremy Rabkin, *Where the Lines Have Held: Tort Claims Against the Federal Government*, 37 PROC. ACAD. POL. SCI. 112, 120 (1988), available at <http://www.jstor.org/stable/pdfplus/1174058.pdf> (asserting that “federal tort payouts do not come out of particular agency appropriations but from a general ‘judgment fund’ that covers the entire government”). Professor Hills states, without citation, that an “essential premise” of his argument is that “state agencies typically do not pay damage judgments out of their own appropriation for operations.” Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1246 (2001) (arguing that because agency budgets must deal with injunctions, while damages are from a state-wide fund, the doctrine protects against “picket fence federalism”). Similarly, Professor Schuck states that “the litigation, liability, and settlement costs resulting from misconduct by agency employees are in practice borne by the Treasury, not by the agency’s own budget.” SCHUCK, *supra* note 67, at 107.

100. States were chosen randomly. I tried to choose states that are diverse in both geography and population. Only fifteen states were used due to time and resource constraints.

101. The sources for Table 1 are as follows (names of those spoken to are on file with the author):

Alabama: Telephone Interview with Accounting, Ala. Div. of Risk Mgmt., Alabama Dep’t Fin. (Jan. 31, 2008). The money from Risk Management is appropriated from the legislature but then subtracted as a cost from the agency’s budget, like an insurance fund.

Alaska: ALASKA STAT. § 09.50.270 (2010) (directing the Department of Administration to approve payment if sufficient appropriation exists or to recommend to the legislature that an appropriation be made). An official in the Risk Management section stated that agencies pay claims indirectly by funding the Department of Administration. Premiums paid to the department are based on exposure and past experience with claims. Telephone Interview with Claims Adm’r, Alaska Dep’t of Admin., Risk Mgmt. (Jan. 23, 2008). The Risk Management website says that its budget “is funded entirely through inter-agency receipts annually billed each agency. . . . For most cost of risk allocations, 80% of the premium billing is based on the average of the past 5 years-actual claims experience. Thus [sic] provides a direct fiscal incentive to each agency to reduce or control their claim costs.” Alaska Department of Administration, Cost of Risk Allocation,

<http://doa.alaska.gov/drm/cora.html> (last visited Mar. 22, 2010); *see also* E-mail from Attorney, Alaska Attorney General's Office, to Author (Dec. 11, 2007) (on file with author) ("Judgments and settlements are administered through and paid by the Department of Administration (which does risk management) and not by the Department of Corrections itself.")

Arizona: Telephone Interview with Ariz. Dep't of Admin., Risk Mgmt., Prop. & Liab. Section (Nov. 30, 2007); *see also* ARIZ. REV. STAT. ANN. § 41-621(P) (2010); ARIZ. ADMIN. CODE §§ R2-10-101 – R2-10-401 (2010).

California: Telephone Interview with Legal Claims Coordinator, Cal. Dep't of Corr. & Rehab. (Nov. 20, 2007); Telephone Interview with Attorney, Office of Legal Affairs, Cal. Dep't of Corr. & Rehab. (Nov. 30, 2007).

Connecticut: Telephone Interview with Gen. Counsel, Conn. Office of the State Comptroller (Nov. 6, 2007); *see also* CONN. GEN. STAT. ANN. §§ 4-142, 4-160(j) (2010); *Torres v. Dep't of Corr.*, 912 A.2d 1132 (Conn. Super. Ct. 2006) (explaining the process for suing the agency).

Florida: Telephone Interview with Bureau Chief, Dep't of Fin. Servs., Fla. Div. of Risk Mgmt., Bureau of State Liab. Claims (Nov. 30, 2007); *see also* FLA. STAT. ANN. §§ 11.066, 284.36 (West 2010).

Indiana: Email from Assistant Dir. Pub. Safety, State Budget Agency, to Author (Dec. 10, 2007) (on file with author) ("In the case of federal civil rights claim involving the Department of Correction, it is common (dependent upon the amount of the settlement) that the Department of Correction appropriation (also General Fund) would be used to pay to the extent possible. Amounts over and above what could be absorb[ed] by a Correction appropriation would then be paid via the Attorney's General's Torts Claim account [which is funded via the State General Fund]."); *see also* IND. CODE ANN. § 34-13-3-1to -25 (West 2010).

Kansas: KAN. STAT. ANN. § 75-6117(b) (2010). The Attorney General's Officer administers the tort claims fund, which is funded through general appropriations that are not agency-specific. Claims against the Department of Corrections are always paid from that fund. Telephone Interview with Deputy Attorney, Civil Div., Office of the Kan. Attorney Gen. (Jan. 23, 2008).

Maine: Email from Res. Adm'r, Me. Dep't of Corr., to Author (Feb. 1, 2008) (on file with author); Telephone Interview with Office of the Me. Attorney Gen. (Feb. 1, 2008).

Massachusetts: Email from Mass. Office of the Comptroller, to Author (Nov. 5, 2007) (on file with author); *see also* MASS. GEN. LAWS ANN. ch. 258, § 9 (West 2010); 815 MASS. CODE REGS. 5.00 (2010).

Michigan: Telephone Interview with Fin. Office, Mich. Dep't of Corr. (Jan. 30, 2008); *see also* MICH. COMP. LAWS ANN. § 600.6458 (West 2010); *Estate of Ritter v. Univ. of Mich.*, 851 F.2d 846, 849 (6th Cir. 1988) (using 600.6458 to determine from where judgment rendered in federal court would come).

Missouri: MO. ANN. STAT. § 105.711 (West 2010); *see also* State *ex rel.* Cravens *v.* Nixon, 234 S.W.3d 442 (Mo. Ct. App. 2007) (holding that damages in a § 1983 suit, even where the Attorney General did not defend the defendant, come from the State Legal Expense Fund); *Dixon v. Holden*, 963 S.W.2d 306, 307 (Mo. Ct. App. 1997) (holding that a § 1983 suit is covered by the State Legal Expense Fund).

New York: N.Y. PUB. OFF. LAW § 17(3) (McKinney 2010); Telephone Interview with Assistant Attorney Gen., Office of the N.Y. State Attorney Gen. (Jan. 29, 2008). Officer must be acting within the scope of employment and unintentionally.

Oklahoma: Telephone Interview with Comptroller, Assistant Chief Fin. Officer for Budget, Inventory and Accounts Control, Okla. Dep't of Corr. (Jan. 8, 2008); *see also* OKLA. STAT. ANN. tit. 51, §§ 159(D), 162(A)(2) (West 2010).

Table 1: Agency Budgeting Practices

State	Agency	Type of Suit	Source of Payment
Alabama	Corrections	All, including federal civil rights	Department of Risk Management, funded by the agency
Alaska	All	All, including federal civil rights	Department of Administration, funded by the agency
Arizona	All	All, including federal civil rights	Risk management fund, which is replenished by the agency
California	Corrections	All, including federal civil rights	Agency budget ¹⁰²
Connecticut	All	Federal civil rights	State general fund
Florida	All	All, including federal civil rights	State general fund, after premium is paid by agency
Indiana	Corrections	Federal civil rights	Agency budget and state general fund
Kansas	All	All	State general fund
Maine	Corrections	Amounts up to \$1,500	Agency budget
		Amounts over \$1,500	Risk management fund, funded by the agency
Massachusetts	All	Non-tort employment suit by current employee, Non-tort civil rights or other non-employment	Agency budget, with conditions ¹⁰³
		Torts under Mass. Gen. Laws ch. 258	Liability management and reduction fund, charged to department over 5 years
Michigan	All	All	Agency budget
Missouri	All ¹⁰⁴	All	State general fund
New York	All	All	State general fund
Oklahoma	Corrections	Federal civil rights	Agency budget
Vermont	All	Torts and federal civil rights	Agency budget
U.S.	All	<i>Bivens</i> actions against officers	Agency budget

Vermont: VT. STAT. ANN. tit. 12, § 5606 (2010); Telephone Interview with Budget Analyst, Vt. Agency of Admin., Fin. & Mgmt. (Nov. 7, 2007) (stating that “we hold people accountable” and with respect to Corrections that the agency ends up paying judgments). Federal: 3 U.S. GEN. ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 14-21-14-24 (2d ed. 1994), available at <http://www.gao.gov/special.pubs/og94033.pdf>; see also U.S. DEP’T OF JUSTICE, CIVIL RESOURCES MANUAL § 4-10.010 (2010). There is a general judgments fund for the government with the Treasury. 31 U.S.C. § 1304 (2006). In prison suits, however, actions against the Bureau of Prisons should be *Bivens* actions. See Schlanger, *supra* note 5, at 1573 n.52.

102. Funds for a suit against an agency will come from the agency’s litigation budget. If a judge ordered a costly item like a new medical facility, the agency would need to ask the legislature for appropriations, but the funds would still come from the agency budget.

103. For non-tort civil-rights suits, damages can be paid from department appropriations only when: (a) the appropriation or fund language is broad enough that it can be interpreted to legally cover this type of expenditure, (b) the department determines that payment of the claim from available funds is a necessary and appropriate business expenditure, (c) the payment does not create any risk of the department facing a funding deficiency during the fiscal year, and (d) the payment will not significantly impair funding necessary to conduct department business.

104. The departments of conservation and transportation, however, must immediately reimburse the state legal-expense fund. MO. ANN. STAT. § 105.716(1) (West 2010).

As the table shows, in federal civil-rights cases, four states (California, Michigan, Oklahoma, and Vermont) and the federal government require that the agency pay from its budget; one state (Massachusetts) does so with conditions; four states (Connecticut, Kansas, Missouri, and New York) have a general state-wide fund; and six states (Alabama, Alaska, Arizona, Florida, Indiana, and Maine) have a middle-of-the-road policy that involves a state-wide funding source that agency budgets finance. Thus, it is clear that judgment funds with no ties to agency budgets are not universal.

2. Federal Court Cases Data

The Administrative Office of the U.S. Courts (AO) and the Federal Judicial Center (FJC) collect detailed data on all cases filed and terminated in the federal courts. The database dates back to 1970 and includes civil, criminal, and appellate cases.¹⁰⁵ Prisoner suits are civil cases and thus Part III.B.1 uses civil filings data for 2000 through 2006.¹⁰⁶ The following sections about case outcomes use the civil terminations data for 2000 through 2006.¹⁰⁷ The start year was selected to be 2000 because it was

105. Inter-University Consortium for Political and Social Research (ICPSR) maintains the data and makes it available to the public. ICPSR Homepage, <http://www.icpsr.umich.edu/> (last visited Mar. 22, 2010).

106. The data from Table C-3 of annual reports is available online at: ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2006 REPORT OF THE DIRECTOR 168-73, <http://www.uscourts.gov/judbus2006/appendices/c3.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2005 REPORT OF THE DIRECTOR 164-69, <http://www.uscourts.gov/judbus2005/appendices/c3.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2004 REPORT OF THE DIRECTOR 138-43, <http://www.uscourts.gov/judbus2004/appendices/c3.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2003 REPORT OF THE DIRECTOR 132-37, <http://www.uscourts.gov/judbus2003/appendices/c3.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2002 REPORT OF THE DIRECTOR 135-40, <http://www.uscourts.gov/judbus2002/appendices/c03sep02.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2001 REPORT OF THE DIRECTOR 136-41, <http://www.uscourts.gov/judbus2001/appendices/c03sep01.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2000 REPORT OF THE DIRECTOR 141-46, <http://www.uscourts.gov/judbus2000/appendices/c03sep00.pdf>.

107. The specific databases used in this Note are: Federal Judicial Center, Federal Court Cases: Integrated Database, 1970-2000 (pt. 117 (civil terminations 2000)) (ICPSR Study No. 8429) (last updated Apr. 29, 2005), at <http://www.icpsr.umich.edu/cocoon/NACJD/STUDY/08429.xml>; Federal Judicial Center, *Federal Court Cases: Integrated Database, 2001* (pt. 2 (civil terminations)) (ICPSR Study No. 3415) (last updated Jan. 27,

several years after the passage of the PLRA. By then, the vast majority of cases terminating should have been filed after the statute's enactment. For more details on the data and how outcomes are defined, a Data Appendix follows this Note.

B. TESTS AND RESULTS

To consider how agency budgeting practices affect litigation trends, this section assesses case trends — filings, settlements and overall plaintiff victories — in suits against the Departments of Corrections listed in Table 1. Section 1 examines ex ante liability and Sections 2 and 3 analyze ex post prisoner suit outcomes based on two methodologies for counting state prisoners' suits. Section 4 uses the same analysis of litigation behavior for more meritorious cases.

The payment policies described in Part III.A.1 are simplified into three groups. "Budget" represents states where agency budgets are charged directly — California, Michigan, Oklahoma, Vermont, and Massachusetts.¹⁰⁸ The Bureau of Prisons is also included in several tables but kept out of the group totals because it is federal. "Both" covers states with an indirect payment policy — Alabama, Alaska, Arizona, Florida, Indiana, and Maine. "General" includes states with a generally appropriated judgment fund — Connecticut, Kansas, Missouri, and New York.

2005), at <http://www.icpsr.umich.edu/cocoon/NACJD/STUDY/03415.xml>; Federal Judicial Center, *Federal Court Cases: Integrated Database, 2002* (pt. 1 (civil terminations)) (ICPSR Study No. 4059) (last updated Apr. 29, 2005), at <http://www.icpsr.umich.edu/cocoon/NACJD/STUDY/04059.xml>; Federal Judicial Center, *Federal Court Cases: Integrated Database, 2003* (pt. 3 (civil terminations)) (ICPSR Study No. 4026) (last updated Apr. 22, 2005), at <http://www.icpsr.umich.edu/cocoon/NACJD/STUDY/04026.xml>; Federal Judicial Center, *Federal Court Cases: Integrated Database, 2004* (pt. 2 (civil terminations)) (ICPSR Study No. 4348) (last updated Mar. 17, 2006), at <http://www.icpsr.umich.edu/cocoon/NACJD/STUDY/04348.xml>; Federal Judicial Center, *Federal Court Cases: Integrated Database, 2005* (pt. 3 (civil terminations)) (ICPSR Study No. 4382) (last updated Mar. 17, 2006), at <http://www.icpsr.umich.edu/cocoon/NACJD/STUDY/04382.xml>; Federal Judicial Center, *Federal Court Cases: Integrated Database, 2006* (pt. 1 (civil terminations)) (ICPSR Study No. 4685) (last updated Mar. 15, 2007), at <http://www.icpsr.umich.edu/cocoon/NACJD/STUDY/04685.xml>.

108. Massachusetts is included in this group with some hesitation. In particular, the conditions described in note 103, *supra*, suggest that any financial risk to the agency from paying damages — the main rationale for considering these states separately — is essentially removed.

1. *Federal Civil Rights Case Filings*

As described in Part II.B.2, scholarship posits that a greater threat of liability should affect agency behavior and cost internalization. While finding a precise measure for that concept is difficult, case filing rates provide one measure.¹⁰⁹ In particular, if a more direct source of money damages impacts cost internalization and promotes better policy at the agency, then federal civil-rights cases filed against them should be fewer in number because prisoners should have less cause to sue. Table 2¹¹⁰ presents data on case filings by state.¹¹¹

109. Many factors can influence case filing rates, including culture, a prison's legal resources, or internal grievance procedures. *See infra* Part IV.A. There are countless factors that could be considered under the broad umbrella of the ex ante impact of damages actions, e.g., Schlanger, *supra* note 89 (discussing how damages actions against organizations sued frequently induce methods and capabilities to manage claims), but accounting for such factors is beyond the scope of this Note. Moreover, no measure is perfect, *see, e.g.*, Schlanger, *supra* note 91, at 519 (noting that, in the context of possible proposals for a multiplier regime, "the complexity of the adjustments that would be necessary to preserve perfect ex ante correspondence between harm and damages is daunting enough to seem impracticable"), and filings offer a simple methodology. This measure does not, for example, confront many of the issues of agencies' not gathering and analyzing the litigation information that Schwartz identified because filings simply consider whether an agency is being taken to court. *See* Schwartz, *supra* note 94. Nonetheless, the use of filings as a general proxy for ex ante cost internalization is rough and likely imperfect.

110. This estimate for federal civil-rights cases against these state agencies has certain issues. *See infra* Part III.B.2 (detailing three general concerns). An additional concern here is that because AO reports, not the case-by-case database, are used, some preliminary "fixes" on the database, such as excluding case re-openings and duplicates, have not been run.

111. Cases filed are from AO reports. *See supra* note 106. Prison and jail populations are from the following reports: ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP'T OF JUSTICE, PRISONERS IN 2000 (2001), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p00.pdf>; PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISONERS IN 2001 (2002), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p01.pdf>; PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISONERS IN 2002 (2003), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p02.pdf>; PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISONERS IN 2004 (2005), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p04.pdf>; WILLIAM J. SABOL, HEATHER COUTURE & PAIGE M. HARRISON, U.S. DEP'T OF JUSTICE, PRISONERS IN 2006 (2007), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p06.pdf>.

Table 2: Inmate Case Filings and Filing Rates 2000–2006

Payment Source	State	Case Filings ¹¹²	Rate Per 1,000 Prisoners	Rate Per 1,000 Prisoners Held in Prison Only ¹¹³
Budget	CA	18,247	15.7	15.9
	MA	515	7.0	7.2
	MI	4,092	11.8	11.8
	OK	1,929	11.5	12.2
	VT	175	13.0	13.0
	Total	24,958	14.1	14.4
	No CA ¹¹⁴	6,711	11.1	11.4
BOP ¹¹⁵	8,099	6.7	6.8	
Both	AL	5,750	30.1	32.3
	AK	123	3.8	3.8
	AZ	6,498	30.0	30.2
	FL	8,900	15.6	15.6
	IN	3,902	24.3	26.0
	ME	221	16.4	16.4
	Total	25,394	21.5	21.9
General	CT	1,320	9.6	9.6
	KS	1,370	22.2	22.2
	MO	3,484	16.7	16.7
	NY	8,504	18.5	18.5
	Total	14,678	16.9	16.9

Broadly, these results follow the hypothesis. Although differences exist within groups,¹¹⁶ to the extent that the results can be generalized, there are significantly fewer filings in the “Budget” states than in the other two groups of states.¹¹⁷ Somewhat sur-

112. Because the AO reports case filings are based upon a fiscal year ending September 30, these figures are off by three months on both ends. That is, they include case filings from October 1, 1999 through September 30, 2006 instead of from January 1, 2000 through December 31, 2006. This slight discrepancy should not materially affect the filing rates given that they span seven years.

113. A small percentage of state and federal prisoners are held in local jails. To the extent that such a prisoner’s lawsuit targets only the jail officials, that case might not implicate the state correctional agency’s budget even though the prisoner is a state, not local, prisoner. This column, therefore, gives filing rates for state or federal prisoners held only in state or federal prisoners and not in local jails. Finally, it is noteworthy that although Professor Schlanger reports that jails inmates account for a significant amount of inmate litigation nationwide, Schlanger, *supra* note 5, at 1579–80, that fact is not critical for the purposes of this Note, which is about state prisoners’ litigation against Departments of Corrections, not local jail inmates’ cases against their local jails or municipalities.

114. These tables provide a subtotal including and excluding California because California’s large size heavily skews weighted averages. *See also infra* note 117.

115. This is the Federal Bureau of Prisons, whose budgeting policy is listed under “U.S.” in Table 1.

116. *See infra* Parts III.C, IV.

117. This is especially true when excluding California, which has had well-known troubles with its prison system. *E.g.*, John Pomfret, *California’s Crisis In Prison Systems A Threat to Public*, WASH. POST, June 11, 2006, at A3; Sonja Steptoe, *California’s Growing*

prisingly, however, the rates are highest in the states with middle-of-the-road policies. Thus, the table suggests that charging the agency's budget directly for money damages has an impact on agencies but that indirect payment or payment from a general fund does not. The differences between groups are all statistically significant.¹¹⁸

2. *Outcomes: A Rough Test*

This Section analyzes the ex post impact of agency budget policies for damages payments. Part II.B.3 hypothesizes that an agency should settle more often if it pays from its own budget. Using settlement and plaintiff success rates as a proxy for some vindication of constitutional rights,¹¹⁹ the hypothesis predicts that rights vindication will vary based on how a state agency pays money damages. Prisoners in states paying damages from agency budgets should receive monetary settlements more often than agencies paying from a general fund.

The first test, although imprecise, draws on past researchers' assumptions, including the Bureau of Justice Statistics at the Department of Justice.¹²⁰ First, it assumes that all suits in a state's federal district courts are suits by prisoners in that state.¹²¹ Second, and perhaps most problematic, it assumes that all prisoner cases coded as federal defendant are suits by federal prisoners while cases coded as federal question jurisdiction are

Prison Crisis, TIME, June 21, 2007, <http://www.time.com/time/nation/article/0,8599,1635592,00.html>.

118. A standard test for evaluating the difference between two binomial proportions was used. See, e.g., WILLIAM MENDENHALL ET AL., INTRODUCTION TO PROBABILITY AND STATISTICS 348-50 (11th ed. 2003). The differences in filing rates for prison inmates only were all significant at the 99.5% confidence level with or without California in the total.

119. See *supra* note 63 and accompanying text.

120. See, e.g., SCALIA, PRISONER PETITIONS 1997, *supra* note 30; SCALIA, PRISONER PETITIONS 2002, *supra* note 50. Because the reports make certain implicit assumptions, I emailed the author. He confirmed that the reports assume that a suit against a state department of corrections is brought in that same state, that the jurisdiction field is used to separate state from federal prisoners, and that cases with a "Nature of Suit" listed as "prisoner - civil rights" or "prisoner - prison conditions" are § 1983 suits. Email from John Scalia, Jr., Chief Statistician, Office of the Fed. Det. Tr., U.S. Dep't of Justice, to Author (Jan. 8, 2008) (on file with author).

121. This assumption is only partially correct. For example, several of the cases that I gathered for Part III.B.2 confirmed that the Kansas Department of Corrections may be sued in a district court in Arizona. Nonetheless, the vast majority of cases against a state's correctional agency will occur in a district court within that state.

suits by state prisoners. But many cases by federal prisoners are erroneously coded as federal question cases rather than federal defendant cases.¹²² Thus, the assumption overstates the number of suits by state prisoners. Finally, it assumes that all inmate litigation in a state necessarily implicates the Department of Corrections even though between six and twenty percent of the inmate docket involves local jails, not state prisons.¹²³

Despite these issues, this section's advantage is the large number of cases. It accounts for all prisoner civil-rights cases that state prisoners file in district court. Thus, whether the plaintiff sues just one line officer in a prison, a warden, or the head of the state correctional agency, the case should be included. As one study noted, correctional officers are the most commonly named defendants in prisoner suits,¹²⁴ and there is no realistic way to account for all such suits under any methodology like that used in Part III.B.3. Table 3 presents the basic results — litigation outcomes by state.

122. Schlanger, *supra* note 5, at 1701; *see also* TECH. TRAINING AND SUPPORT DIV., ADMIN. OFFICE OF THE U.S. COURTS, CIVIL STATISTICAL REPORTING GUIDE § 3:6, http://www.law.umich.edu/facultyhome/margoschlanger/Documents/Publications/Using_Court_Records_Appendix/Civil_Statistical_Reporting_Guide.pdf.

123. Schlanger, *supra* note 5, at 1579-82 & n.76. Because this Note only looks at the percentage of outcomes favorable to plaintiffs, this assumption is only problematic if suits involving jails settle or are disposed of at systematically different rates than against prisons. As Professor Schlanger has shown, however, jails should have different settlement incentives than prisons. Thus, depending on how large the jail docket is in a given state, and how different jails react to litigation, the results may be skewed slightly. *Id.* at 1686-90.

124. HANSON & DALEY, *supra* note 20, at 16.

Table 3: Dispositions in Prisoner Suits by State 2000–2006

Payment Source	State	Total Dispositions	Settlements ¹²⁵	Percent	Plaintiff Victories ¹²⁶	Percent	Defendant Victories
Budget	CA	14,851	918	6.2%	995	6.7%	13,846
	MA	422	65	15.4%	66	15.6%	351
	MI	3,451	173	5.0%	196	5.7%	3,248
	OK	1,473	253	17.2%	257	17.4%	1,216
	VT	158	27	17.1%	28	17.7%	130
	Total	20,355	1,436	7.1%	1,542	7.6%	18,791
	No CA	5,504	518	9.4%	547	9.9%	4,945
BOP		6,810	515	7.6%	565	8.3%	6,241
Both	AL	5,234	214	4.1%	232	4.4%	4,990
	AK	120	23	19.2%	23	19.2%	97
	AZ	5,913	262	4.4%	314	5.3%	5,599
	FL	8,060	499	6.2%	550	6.8%	7,505
	IN	3,291	314	9.5%	341	10.4%	2,945
	ME	202	45	22.3%	46	22.8%	156
	Total	22,820	1,357	5.9%	1,506	6.6%	21,292
General	CT	1,346	283	21.0%	294	21.8%	1,047
	KS	1,265	99	7.8%	104	8.2%	1,159
	MO	2,920	239	8.2%	253	8.7%	2,659
	NY	7,530	1,157	15.4%	1,213	16.1%	6,302
	Total	13,061	1,778	13.6%	1,864	14.3%	11,167

Overall, the data support the theory that agencies react differently in litigation but not in the predicted direction.¹²⁷ For some states, however, the results are in line with the traditional hypothesis. The settlement and plaintiff win rates are considerably higher in Massachusetts, Oklahoma, and Vermont, where damages are paid from agency budgets. Conversely, the rates are quite low in Alabama, Arizona, Florida, Indiana, Kansas, and Missouri, where payment is not made directly from the corrections budget. There are, nonetheless, just as many states that do not follow the prediction, such as California, Michigan, and New York. Connecticut, where the agency does not directly pay, has the second highest rate among the fifteen states. The difference in settlement and plaintiff win rates between the three groups is statistically significant,¹²⁸ but they do not follow the prescription of previous scholarship — states paying from a general fund have the highest plaintiff success rate, not the lowest. Finally, as in

125. This includes voluntary dismissals. For details on this assumption, see *infra* Data Appendix Part B.

126. This is the sum of settlements and plaintiff trial wins. See Schlanger, *supra* note 5, at 1592-93.

127. See *supra* Part II.B.3.

128. The test is described in note 118, *supra*. The differences in settlement rates were all significant at the 99.5% confidence level with or without California in the total.

Part III.B.1, plaintiff success rates do not increase sequentially from Budget to Both to General.

3. *Outcomes: A More Specific Test for Suits Against Correction Agencies*

Due to concerns about the broader case list, this Section analyzes a more refined list of cases against State Departments of Corrections. For privacy reasons, the Federal Judicial Center's public database hides the names of plaintiffs and defendants.¹²⁹ Therefore, the list of cases was assembled using Westlaw's docket list, which allows users to search all named defendants in all federal district court lawsuits. Cases filed from 2000 through 2006 were searched for prisoner civil-rights cases, including those naming the Departments of Corrections or their heads.¹³⁰ Ultimately, the list encompassed over 10,000 cases filed against the correctional agencies in the fifteen states. This is well short of the approximately 63,000 cases analyzed in Part III.B.2¹³¹ but is nonetheless substantial. Moreover, the list most likely includes cases where the state correctional agencies (or their officers) were being actually sued.¹³²

Using a unique identifier for each case, this list was then merged into the Federal Judicial Center database. Predictably, not all cases matched up,¹³³ but the list still contained a substan-

129. The data can be attained with plaintiff and defendant names from ICPSR under certain agreements. However, even that data would not work as well as the source used here because it only lists the first plaintiff and the first defendant named in a given case. In most of these cases, there are many defendants, and the defendants searched for are often not listed first. The Westlaw search allows users to search all named defendants and is therefore much more comprehensive.

130. For more details on the search, see *infra* Data Appendix.

131. Across the fifteen states, the highest level of overlap between the two case lists was only 43%. In most states, the overlap was roughly only between 10% and 25%. However, for at least two reasons — that federal defendants were included and jail inmate suits were included — the larger case list was over-inclusive, so the real difference is not as stark.

132. There are risks of bias if, for instance, there is a systematic difference between cases naming only a low-level individual officer and cases that would be included here.

133. This is likely because the search on the Westlaw dockets encompassed all cases *filed*, while the FJC database contained only cases that have been *terminated*. Therefore, the vast majority of cases not included in the FJC database were filed in later years. The largest number of such cases was overwhelmingly in 2006 and 81% of cases not found in the FJC database were filed from 2004-2006.

tial 7,265 cases that reached some judgment disposition.¹³⁴ The same query on the outcomes of these cases was run, and the results follow in Table 4.

Table 4: Dispositions in Prisoner Suits by State Department of Corrections 2000–2006

Payment Source	State	Total Dispositions	Settlements	Percent	Plaintiff Victories	Percent	Defendant Victories
Budget	CA	1,613	114	7.1%	124	7.7%	1,487
	MA	84	23	27.4%	24	28.6%	58
	MI	623	19	3.0%	21	3.4%	601
	OK	262	43	16.4%	43	16.4%	219
	VT	69	12	17.4%	12	17.4%	57
	Total	2,651	211	8.0%	224	8.4%	2,422
No CA	1,038	97	9.3%	100	9.6%	935	
Both	AL	669	38	5.7%	40	6.0%	629
	AK	6	1	16.7%	1	16.7%	5
	AZ	756	65	8.6%	77	10.2%	679
	FL	1,072	84	7.8%	92	8.6%	977
	IN	241	16	6.6%	18	7.5%	223
	ME	25	7	28.0%	7	28.0%	18
Total	2,769	211	7.6%	235	8.5%	2,531	
General	CT	276	67	24.3%	67	24.3%	208
	KS	320	30	9.4%	31	9.7%	287
	MO	420	38	9.0%	40	9.5%	379
	NY	544	62	11.4%	64	11.8%	479
	Total	1,560	197	12.6%	202	12.9%	1,353

The results in Table 4 are largely similar to the results in Part III.B.2.¹³⁵ The same states adhere to and diverge from the predictions of Part II. Massachusetts, Oklahoma, and Vermont settle inmate suits at a considerably higher rate than Alabama, Arizona, Florida, Indiana, Kansas, and Missouri, while “outliers” like California, Maine, and Connecticut remain. As in Part III.B.2, the plaintiff win rates between these two groups of states is generally statistically significant.¹³⁶

134. For example, this includes cases that were not transferred or remanded. Table 3 contains only cases that reach a *known* judgment disposition — a slightly different figure. As explained in the Data Appendix, however, using either figure does not significantly affect the results.

135. Although the rates are parallel, some states here have too few observations to draw any conclusions about the data.

136. The test is described in note 118, *supra*. The rates between the General and Budget states and between the General and Both states are statistically different at the 99.5% confidence level. The difference between the settlement rates in the Budget and Both states, however, is not statistically significant when California is included. When California is excluded, the difference is significant at the 95% confidence level.

4. *A Further Refinement: Outcomes in More Meritorious Suits*

Most commentators believe that inmate litigation is usually unmeritorious.¹³⁷ Because this Note only makes comparisons among inmate suits, the fact that plaintiff victory percentages in the tables are low does not affect the comparisons made between correctional agencies and states. Nonetheless, agencies might react differently to more meritorious suits. Specifically, if an agency is more concerned about the threat of financial liability, that concern may be magnified in suits having a greater chance of plaintiff success. This section evaluates that idea using non-pro se suits as a proxy for more meritorious cases.¹³⁸ Table 5 presents the litigation outcomes in these cases for the case list from Part III.B.2.¹³⁹

137. See, e.g., Schlanger, *supra* note 5, at 1600. Many scholars, however, have acknowledged a difference between frivolous and low merit — the latter meaning plaintiffs rarely prevail. See *supra* Part II.A.

138. Many pro se inmate plaintiffs are successful, see, e.g., BRANHAM, *supra* note 15, at 44 (stating that in 1997 a quarter of state prisons were operating under court order, some of which stemmed from litigations that were initially pro se), but litigating pro se presents many obstacles to settlement, especially for inmates. See, e.g., Schlanger, *supra* note 5, at 1609-21. Thus, non-pro se suits seem like a reasonable proxy for meritorious claims. One study found that, in Illinois in 1995, forty percent of the time spent on inmate litigation by the Attorney General's office was on suits with an attorney. BRANHAM, *supra* note 15, at 36. The overwhelming percentage of suits filed pro se (95.6% in 2000) supports the idea that non-pro se cases are more meritorious.

139. The same test was run using the case list in Part III.B.3 and the results were similar. However, there were too few non-pro se cases in that case list to draw any conclusions with great confidence. Thus, this Section only reports the results from the Part III.B.2 case list.

Table 5: Dispositions in Prisoner Suits Brought by Non-Pro Se Plaintiffs by State 2000–2006

Payment Source	State	Total Dispositions	Settlements	Percent	Plaintiff Victories	Percent	Defendant Victories
Budget	CA	356	91	25.6%	101	28.4%	255
	MA	26	9	34.6%	9	34.6%	16
	MI	143	43	30.1%	48	33.6%	94
	OK	42	20	47.6%	22	52.4%	20
	VT	10	7	70.0%	8	80.0%	2
	Total	577	170	29.5%	188	32.6%	387
	No CA	221	79	35.7%	87	39.4%	132
BOP	324	67	20.7%	78	24.1%	246	
Both	AL	88	29	33.0%	33	37.5%	49
	AK	87	18	20.7%	18	20.7%	69
	AZ	58	22	37.9%	25	43.1%	33
	FL	165	36	21.8%	40	24.2%	124
	IN	159	82	51.6%	89	56.0%	67
	ME	13	4	30.8%	5	38.5%	8
	Total	570	191	33.5%	210	36.8%	350
General	CT	110	50	45.5%	52	47.3%	55
	KS	35	18	51.4%	20	57.1%	15
	MO	129	51	39.5%	56	43.4%	69
	NY	294	158	53.7%	162	55.1%	131
	Total	568	277	48.8%	290	51.1%	270

Predictably, plaintiffs have a significantly higher success rate in these cases than in Tables 3 and 4. The results largely parallel the previous analyses.¹⁴⁰ Plaintiffs win in states paying from a general fund more than in states with a policy of indirect agency charges. Here, moreover, they win more in the “Both” states than in the “Budget” states (including California).

C. QUALITATIVE EMPIRICS AND ANALYSIS

Overall, the empirical data yield mixed results. To learn more, I contacted attorneys with State Attorneys General and State Departments of Corrections who litigate correctional agency actions about federal civil-rights suits.¹⁴¹ Generally, they said that settlement decisions are made based on the merits of the case, not the source of damages. In New York, for example, where back-pay damages come from an agency’s appropriations

140. The results are generally statistically significant. Again using the test described in note 118, *supra*, the rates are statistically significantly different at the 99.5% confidence level between the General states and the Both and Budget states. The difference between Budget and Both states, however, is only significant at the 90% confidence level with California included and is not statistically significant with California excluded.

141. Specific conversations are not cited because the attorneys asked to remain anonymous, but interview notes, including names and dates, are on file with the author.

but § 1983 damages come from a general fund, the two categories of cases are nonetheless handled based on merit and standard litigation-risk analysis. The state ultimately pays in either case, and that is the concern. An attorney from a state where damages are paid directly from the agency budget said that budgetary outlays for damages and the cost of litigating are sometimes a consideration. Like other states, however, decisions are made primarily on the merits of the suits, and budget concerns rarely matter. If the source of damages does not greatly affect settlement decisions, these accounts help to explain why the data in Tables 3-5 are so scattered and do not generally follow the hypothesis of Part II.B.3.

The interviews also noted other important factors in federal civil-rights litigation. First, state officials said that an office overburdened with case filings may be forced into settlement due to insufficient resources. Second, with respect to pro se litigation, they noted that § 1988 allows a successful plaintiff to recover attorney's fees,¹⁴² which can impact settlement (though the PLRA has limited fees available for recovery).¹⁴³ Additionally, pro se litigants in some districts are afforded extensive protections that can even the playing field. Because a judge or jury ultimately rules on the merits, however, these litigations are generally assessed in the same manner as those with an attorney — based on merit. Finally, the interviewed state officials cautioned that there are many other factors that can affect outcomes.¹⁴⁴

These accounts only partially explain the data. Because non-pro se suits are generally assessed in the same way as pro se suits, for example, the parallel patterns in Table 5 are consistent. In other ways, however, the interviews only confound the issue. These interviews indicate that, in states that do not pay damages from agency budgets, higher filing rates may cause higher settlement rates. The tables, however, do not comport with this theory, and more often, filing rates and settlement rates maintain an inverse relationship state by state.¹⁴⁵ Further, if an agen-

142. 42 U.S.C. § 1988(b) (2006).

143. § 1997e(d).

144. See *infra* Part IV.

145. Compare filing rates in Table 2 with settlement rates in Table 4. For example, Alabama, Arizona, Indiana, Kansas, and Connecticut have high filing rates but low settlement rates. Conversely, Massachusetts has a low filing rate but a high settlement rate.

cy pays money damages from its budget, it generally also pays attorneys' fees from the same source.¹⁴⁶ This implies that, in non-pro se litigation, state agencies in the "Budget" group might be induced to settle more often to avoid fees, but this trend does not appear in Table 5.

Moreover, the data for states that do not follow expected litigation patterns, or those of their overall group, cannot be generalized. Consider two "outliers," California and Alaska. In California, monetary payments to inmates is a miniscule percentage of the agency's budget.¹⁴⁷ Moreover, the agency can be insulated from paying enormous claims by going to the legislature.¹⁴⁸ Both may influence lower settlement rates, despite paying damages from the agency's budget. In Alaska, the agency is made heavily responsible for past claims through payments to the Department of Administration fund, which may imply that it is more like an agency paying from its own appropriations. Other states that follow the hypothesis's predictions, however, have similar policies. Florida, for example, has a system similar to Alaska's and outcomes differ significantly in the two states. Within each group of states, therefore, just as many states follow the hypothesis as do not.

The results, therefore, are scattered. The filing rates in Table 2 broadly supported the ex ante theory that charging agency budgets for money damages may force greater cost internalization, but case outcomes did not follow the predicted theory. Within groups, moreover, the basic results in Tables 3 and 4 supported the hypothesis about litigation outcomes for only about half of the states. In more meritorious suits, the findings were entirely contradictory. Plaintiff success rates increased sequentially among each of the three groups of states, but they did so in an unpredicted order — with plaintiffs winning most often in "General" states, followed by "Both" states, followed by "Budget" states. Qualitative interviews provided important information about litigation drivers but did not further explain the data.

146. See, e.g., Email from Donna Corbin, Legal Claims Coordinator, Cal. Dep't of Corr. & Rehab., to Author (Nov. 21, 2007) (on file with author) (listing fees payments).

147. Specifically, the total paid out for adult and juvenile settlements, judgments, and fees in fiscal year 2006 was \$ 19,555,910 — only about 0.21% of the 2006-2007 budget. *Id.*

148. See *supra* note 102.

IV. IMPLICATIONS OF THE EMPIRICAL RESULTS

This Part analyzes the implications of the empirical evidence presented in Part III. Section A discusses the data's impact on existing theoretical models of suing government agencies. Section B then considers whether the evidence that inmate success rates in suits against correctional agencies varies greatly from state to state suggests that the government should intervene. Section C concludes by giving suggestions for future work.

A. THOUGHTS ABOUT THEORIES OF SUING GOVERNMENT

The data's main theoretical implication is that the impact of agency financial liability on litigation outcomes is questionable. One idea behind imposing direct financial liability on agencies is that victims of agency misconduct will be better vindicated.¹⁴⁹ In suits against agencies that are directly liable, however, this preliminary research indicates that inmates do not succeed more often,¹⁵⁰ and proximity to the monetary risk does not appear to influence behavior predictably.¹⁵¹ Put differently, claims of scarce budgetary resources do not seem to drive agencies to avoid risks of trial.

These results are valuable for the literature on suing government agencies, even though this study does not contemplate all factors possibly influencing cost internalization or plaintiff success and settlement rates, and the proxy measures themselves are imprecise.¹⁵² With respect to ex ante cost internalization, agency incentives are complex.¹⁵³ Scholars have pointed out the importance of accounting for benefits of liability and good policy.¹⁵⁴ Due to already-strained budgets, others have been cautious to propose imposing financial liability on agencies.¹⁵⁵ With re-

149. See *supra* note 63 and accompanying text.

150. See *supra* Parts III.B–C.

151. See *supra* Parts III.B.2–4.

152. See, e.g., *supra* note 109.

153. E.g., Levinson, *supra* note 85, at 384–86.

154. See, e.g., William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1165–67 (1996); Levinson, *supra* note 85, at 384–86.

155. See, e.g., Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61 (1997); Book Note, *Suing Government*, 82 MICH. L. REV. 1036, 1040 (1984) (reviewing PETER H. SCHUCK, *SUING*

spect to litigation strategies, many factors influence litigation outcomes not accounted for here.¹⁵⁶ Interviews with practicing attorneys, for instance, revealed factors such as plaintiffs' settlement incentives,¹⁵⁷ the risk of high punitive damages, and even officers' reputations.¹⁵⁸

This Note's objective, however, is not to account for all relevant complexities or to generate a new theory about the impact of financial liability on an agency. Rather, it adds empirical data to the debate in the hope of prompting further discussion. In fact, the plethora of factors unaccounted for here partially supports one of the Note's main conclusions: that focusing solely on charging agency budgets, creatively or otherwise, is unlikely to provide the solution to changing the litigation behavior of state correctional agencies. While many avenues exist for future empirical work,¹⁵⁹ scholars should be cautious when asserting that moving the risk of financial liability closer to the agency budget will affect plaintiff success rates. The opposite may be true, and each state may be idiosyncratic.

Finally, the evidence suggests that, in assessing theories of suing government, the *ex ante* threat of liability and the *ex post*

GOVERNMENT (1983)) (criticizing Professor Schuck on this point). *But see* Barbara Kritchevsky, *Is There a Cost Defense? Budgetary Constraints as a Defense in Civil Rights Litigation*, 35 RUTGERS L.J. 483 (2004) (arguing agency cost constraints should not be an excuse).

156. Gubernatorial or correctional agency administrations' policies for handling certain cases do not seem to affect outcomes much based on plaintiff success rates broken down by state administrations. In a few states, however, there is some correlation. For example, plaintiffs won much more frequently under Governors Keating and Dean in Oklahoma and Vermont. But these results do not explain the outcomes in those states entirely. Moreover, based on conversations with government attorneys, administration is rarely a factor, and if it is, it only influences handling cases for significant injunctive relief, not money damages.

157. In New York, for example, a payment to an inmate of over \$10,000 must be reported to a state board, which will then notify the victim of the possible restitution. *See* N.Y. EXEC. LAW § 632-a (McKinney 2001). Thus, plaintiffs are incentivized to settle for under \$10,000. Other circuits have allowed the state to withhold some damages in certain circumstances. *Compare* *Hankins v. Finnel*, 964 F.2d 853 (8th Cir. 1992) (holding a Missouri law allowing seizure of § 1983 award to pay costs of incarceration conflicts with § 1983), *with* *Beeks v. Hundley*, 34 F.3d 658 (8th Cir. 1994) (holding § 1983 does not preempt the seizure of § 1983 damages to pay victim restitution). The PLRA also allows diversion of damages. Schlanger, *supra* note 5, at 1631.

158. A younger officer seeking employment in a police or correctional agency should avoid any public acknowledgement of misconduct. *See* Schwartz, *supra* note 94, at 13-14.

159. *See infra* Part IV.C.

reaction are intrinsically linked.¹⁶⁰ In particular, when agencies are not held liable, there are significantly more inmate suits than when agencies are directly accountable. As interviews indicated, however, case volume can drive settlement.¹⁶¹ The result is somewhat paradoxical to the extent that filings capture cost internalization. In states where agencies are held more accountable and internalize costs better with sound policy, there may be additional resources available to vigorously oppose cases by inmates seeking to vindicate their constitutional rights. Conversely, in states where the agency is financially untethered, inmates may achieve higher settlements and win more often because litigation resources are stretched across a higher caseload.

Alternatively, looking at the data state by state rather than in groups often reveals an inverse relationship between filings and plaintiff win rates.¹⁶² A straightforward explanation — and one unconnected to agency budgeting practices — is that for an agency successful at discouraging filings,¹⁶³ only the most contentious cases are brought. In such states, settlement rates would be expectedly higher because the few cases filed would be more meritorious. By contrast, a state with a high number of case filings might have a lower settlement rate because most of the filings lack merit and do not warrant settlement. Attorneys' indications that most cases are settled based only on merit would comport with such an explanation.¹⁶⁴ These potential links between ex ante and ex post data should be considered and explored further in research on suing state agencies.

B. PRACTICAL IMPLICATIONS OF THE DATA

Beyond testing traditional theories of suing government, this Note probes how seriously state correctional agencies take federal civil-rights suits. A desire for underlying federal and constitutional rights to be uniformly vindicated across states motivated

160. Cf. Schlanger, *supra* note 91, at 524 (stating that ex ante risk-management interests are typically joined by ex post claim-management interests in minimizing litigation's cost).

161. See *supra* Part III.C.

162. Compare Tables 2 and 4. All states except, perhaps, Vermont and Oklahoma could be characterized in this manner.

163. This could be, for example, due to well-structured internal-grievance procedures.

164. See *supra* Part III.C.

the federal judiciary to pronounce extensive inmate rights.¹⁶⁵ A need for national standards drove the movement. One implication from the empirical evidence, however, is that plaintiffs' success rates differ significantly by state.¹⁶⁶ If this, in turn, implies that a prisoner's ability to vindicate constitutional rights fluctuates by state, such variation would conflict with the reform movement's objective.¹⁶⁷

This observation raises the question of whether there is sufficient cause for the federal government to intervene, but this Section concludes that there is not. To begin, the uncertainty of what produces the observed disparity in case outcomes is too great to make a case for national action without more convincing evidence.¹⁶⁸ For example, there is scant, if any, proof that requirements with respect to agency budgeting rules are likely to yield universal rights enforcement.

Moreover, despite the diverse plaintiff success rates found, inmates' constitutional rights may not fluctuate significantly based on the budgeting practices of state agencies. As explained in Part IV.A, Table 2 shows that holding an agency directly liable for money damages results in fewer suits overall. Tables 3 through 5 show that it also results in fewer settlements and plaintiff victories. To the extent that these tables are generalizable,¹⁶⁹ a straightforward (if hard-nosed) explanation might be that plaintiffs in those states do not deserve to win more. If Table 2 indicates, on average, better cost internalization and better policies in states where agencies pay, then those states are prob-

165. See *supra* Part II.A.2.

166. See *supra* Tables 3–4.

167. This fluctuation does not appear to be simply based only on the merits of cases brought from state to state. Some states simply may run their prisons better than others, causing lower plaintiff success rates, but Massachusetts is an example of why this cannot explain everything. Massachusetts has one of the highest plaintiff success rates, but the lowest filing rate among the fifty states. If a terrible prison system caused more meritorious suits (and thus higher success rates), then one would also expect a high prisoner filing rate reacting to that system. But in fact, Massachusetts has the lowest filing rate among the fifty states. Schlanger, *supra* note 5, at 1575.

168. Based on the data, the current situation is arguably a prime example of decentralization or federalism. The federal courts and the Constitution have laid down constitutional standards regulating prisoners' rights. The precise implementation of the national standards is then left to the states, including the method for paying damages judgments.

169. Again, there are issues with the proxies and the differences within groups. For many individual states, settlement and plaintiff win rates have an inverse relationship with filing rates. See *supra* Parts III.C, IV.A.

ably violating inmates' constitutional rights less often. Conversely, inmates in states where agencies do a worse job of internalizing costs deserve to win more frequently because they face more dire conditions, implying that their constitutional rights are likely infringed more often.

There are clear objections to this idea.¹⁷⁰ It is offered, however, as an additional reason why this Note advocates that the federal government should not act despite the apparent differences in inmate successes from state to state.¹⁷¹ More empirical work is needed before calling for any national action, and the following section outlines some possibilities.

170. First, budgeting policies may not affect inmate success rates. As interviews indicated, plaintiffs in "General" states may not win more often because their underlying claims are more meritorious but because they flood the state's attorneys with claims. Note, however, that the interviews of state officials indicated that merit largely drives settlement rates. Second, generalizations for states in the Budget, Both, and General groups mask the significant variation that occurs within these groups. Within the Both group, for example, Maine and Alabama have remarkably different figures in Tables 2, 3, and 4. Within the General group, the same is true for Kansas and Connecticut. This theory would be much more convincing if every state paying from its budget had a low filing and settlement rate, and every state paying from a general fund had a high filing and settlement rate. But the data do not show such uniformity within the three groups. This implies that one should be cautious when adopting an overarching theory like this.

171. The case for federal action might proceed as follows. States have important interests in protecting fiscal resources. *See, e.g.,* *Edelman v. Jordan*, 415 U.S. 651, 663-71 (1974) (discussing the Eleventh Amendment bar to retroactive liability which would require payment from a state treasury); *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (acknowledging a state's legitimate interest in preserving scarce resources). However, an advocate for federal action could argue that constitutional values and constitutional torts are uniquely important. Furthermore, some courts have explicitly held that budgetary or financial constraints cannot excuse federal constitutional violations. *E.g.,* *Bounds v. Smith*, 430 U.S. 817, 825 (1977) ("[T]he cost of protecting a constitutional right cannot justify its total denial."). If a state's fiscal choices lead to constitutional violations, that state assumed the risk of paying damages through litigation rather than up front. *See* *Farmer v. Brennan*, 511 U.S. 825, 858 (1994) (Blackmun, J., concurring). Moreover, federalism policies already heavily favor protecting the state fiscally. Many doctrines that impede a prisoner's ability to bring suit are partially rooted in the states' interests in protecting resources. *See, e.g., supra* note 3 and accompanying text. And the PLRA purports to protect state fiscal burdens against inmate litigation. Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You're Out of Court — It May Be Effective, But Is It Constitutional?*, 70 TEMP. L. REV. 471, 502 (1997). Thus, the federalism balance is tipped toward allowing federal action. The means for implementing such action could be Section 5 of the Fourteenth Amendment. *See* *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997).

C. FUTURE WORK

Part III showed that no clear relationship exists between state agencies' source of damages payments and litigation outcomes. Making agencies pay damages from their budgets does not seem conclusively to affect government behavior in the way past commentators suggested.¹⁷² The empirical reality, in other words, is not always aligned with the theories about how government responds to liability. Accordingly, more empirical research into what drives agency decisions in litigation and what impact an agency's budgetary liability for damages has, if any, would be beneficial. This Section offers some suggestions.

As an initial matter, many factors affect the success of inmate litigants, and future work should address these factors and their impact on agency behavior. Interviews with state attorneys suggested that varying district court policies can be important.¹⁷³ State policies about settlement or indemnity may impact outcomes significantly. In New York, for example, the state's duty to defend or fund the defense of an officer is greater than the duty to indemnify, and this can impact settlement decisions.¹⁷⁴ Such factors may be difficult to account for statistically but could add to the discussion of empirical results for a given state.

Another aspect of prisoner litigation that this Note does not address, but with potentially important effects on agency and inmate behavior, is a prison system's culture and history.¹⁷⁵ This may affect how the agency responds to prisoner rights *ex ante* or how it litigates cases. For example, Professor Schlanger reports how Utah attorneys commented that they sought employees who would "be warriors" and litigate prison cases vigorously.¹⁷⁶ Moreover, culture and history is probably state-specific and will impact behavior regardless of whether the agency pays money damages from its budget. Thus, a comprehensive analysis of the impact of state-by-state cultural changes would be valuable before

172. See, e.g., SCHUCK, *supra* note 67, at 102-03 (advocating charging agency budgets to make agencies more accountable).

173. See *supra* note 141 and Part III.C.

174. Telephone Interview with New York state attorneys (Jan. 29 & Feb. 1, 2008).

175. See generally Justin Brooks, *How Can We Sleep While the Beds Are Burning? The Tumultuous Prison Culture of Attica Flourishes in American Prisons Twenty-Five Years Later*, 47 SYRACUSE L. REV. 159, 163-65 (1996) (discussing the idea of a prison culture).

176. Schlanger, *supra* note 5, at 1620-21.

advocating a broad theory about suing state correctional agencies.¹⁷⁷

Further, the amounts that prisoners requested and were awarded may have an important impact on correctional agency behavior. Generally, prisoners demand extremely high damages, but awards are small.¹⁷⁸ Despite the small awards, damages paid to prisoners still somewhat affect state agencies.¹⁷⁹ Future research, therefore, might explore how damages amounts affect agency litigation strategy. For example, regression analysis could be used to check whether, after accounting for other factors, these amounts have a statistically significant impact on settlement likelihood.¹⁸⁰ Continuing the works of Professors Schlanger and Eisenberg,¹⁸¹ future researchers would need to use the PACER database to gather the amounts demanded and awarded in each case.¹⁸² While time consuming, this work would add to the results presented here.

Another possibility is that the degree of federal funding has some link to the agency's treatment of federal civil rights. In his functional defense of the Eleventh Amendment, Professor Hills discusses state agency loyalty to federal agencies and policies that provide funding to the agency.¹⁸³ Following this reasoning, a state correctional agency may be more responsive to national standards for prisons as federal funding to the prison, relative to its budget, increases. A statistical analysis could measure the relationship, if any, between a state agency's proportion of federal funding and its implementation of federal constitutional rights.¹⁸⁴

Apart from accounting for additional factors impacting litigation behavior, future work could address the weaknesses of this

177. Such findings would likely complement the state differences pointed out above.

178. Telephone Interview with New York state attorneys (Jan. 29, Feb. 1 & Feb. 12, 2008).

179. See Schlanger, *supra* note 5, at 1681.

180. Due to constraints of the data, however, such an inquiry is outside the scope of this Note. The data contain fields for amount awarded and amount demanded. The amount awarded field is unreliable in this context. See *supra* note 98. And because the amount demanded is so irrational, and also infrequently filled in, it is highly unlikely that it impacts an agency's behavior.

181. Eisenberg & Schlanger, *supra* note 98.

182. PACER is available at <http://pacer.psc.uscourts.gov/>.

183. Hills, Jr., *supra* note 99, at 1236.

184. For example, such analysis could be a straightforward regression of settlement likelihood against the percent of a state agency's budget that is federal funding.

Note's proxy measures, although none is likely perfect.¹⁸⁵ Measuring ex ante responses to damages liability, for example, is complex. This Note uses the imprecise measure of case filing rates, and future work may account for some of the issues with this statistic.¹⁸⁶ Rare but important injunctive suits may also affect cost internalization, as opposed to suits for damages addressed here.

Perhaps the best way to measure state agencies' cost internalization in response to heightened or weakened damages liability is through additional interviews. The interviews conducted for this Note were with state attorneys litigating federal civil-rights claims, but senior administrators in Departments of Corrections who implement budget and policy decisions more directly may also have important insight. Similar empirical studies focused on qualitative methods are increasingly being undertaken.¹⁸⁷ In line with those studies, additional qualitative work tailored to the issue presented in this Note could add significantly to its analysis.

V. CONCLUSION

This Note is not a decisive study. It analyzes only thirty percent of states. The issue is complex, and the inherent limitations of correlational research leave concerns about how state policies affect litigation outcomes. But these concerns should not detract from its findings. The Note has attempted to spark discussion in an area of scholarship replete with claims and assumptions but often lacking empirical verification.¹⁸⁸

This Note confronts several assumptions about government liability and practice with some hard data and adds to the scholarly debate in at least two dimensions. First, it undercuts the view that no one in state agencies pays damages and thus litiga-

185. See *supra* note 109.

186. This may be done by isolating statistically the impact of a budgeting policy on payment of damages while accounting for factors like prison legal resources. The concern, however, is that the factors impacting case filings may be too amorphous to measure reliably.

187. See, e.g., Schlanger, *supra* note 89; Schwartz, *supra* note 94.

188. See generally Schwartz, *supra* note 94 (analyzing an assumption, critical to deterrence theory, that police departments actually gather and collect information from past suits).

tion does not affect agencies or their officers. Second, it suggests that the threat of financial liability may cause better cost internalization but may also result in fewer settlements when agencies pay damages directly. However, the data also reveal significant differences state to state, even within groups with similar policies for sourcing damages payments. These scattered findings undermine contentions that charging agency budgets for damages and settlements would significantly impact the behavior of that agency or its officers.

Without more information, this Note cautions against action from the federal government. The resounding policy behind the prison reform movement of the twentieth century was a relatively uniform vindication of prisoners' constitutional rights. To assess more fully whether such uniformity currently prevails, future work should follow this Note and examine theories about suing state prisons empirically.

DATA APPENDIX

This Appendix details the empirics. Section A discusses assembling the two case lists. Section B then addresses how case outcomes were coded and the assumptions underlying the numbers given throughout the Note.

A. ASSEMBLING THE CASE LISTS

Several common assumptions and restrictions apply to both case lists. I began with the Federal Judicial Center's files on civil suits terminating in federal courts from 2000 to 2006.¹⁸⁹ I then kept only cases with a "nature of suit" code of 550 (prisoner - civil rights) and 555 (prisoner - prison conditions). The underlying assumption, therefore, is that all inmate civil-rights cases will be coded as such. Some observers suspect that in some districts, non-indigent and represented inmates may classify their cases under catch-all code 440 (other civil rights), but this is unconfirmed by audits of the FJC database.¹⁹⁰ If true, it could affect the outcome analysis, assuming non-indigent and non-pro se inmates

189. For a list of the data files, *see supra* note 107.

190. *See Schlanger, supra* note 5, at 1699-1700.

file more meritorious cases. Codes 550 and 555, however, cover the vast majority of inmate civil-rights cases and should not be *over-inclusive*.¹⁹¹ Because other researchers appear to have used 550 and 555 to encompass all prisoner civil-rights suits¹⁹² without accounting for the possible use of the 440 code, I made the same assumption.¹⁹³

The second significant change made to the database was to drop certain observations. Using district, office, and docket number as a unique identifier for a case,¹⁹⁴ I found 5,566 duplicates in the seven years of data. Many of these cases were transfers, remands or re-openings. Consistent with Professor Schlanger, I dropped all but the most recent observation for a given case.¹⁹⁵ Additionally, because this Note assesses federal civil-rights suits, I dropped cases coded as diversity jurisdiction (only 15 observations out of approximately 170,000). The larger case list described in Part III.B.2 included these adjustments. The remaining drawbacks and implicit assumptions for that list are described in III.B.2.

Generating the smaller case list in Part III.B.3 was more complicated. Because the FJC data do not show plaintiffs and defendants, I used the Westlaw docket list for “All Federal Courts Combined” to search for suits against correctional agencies in the fifteen states. For each state, I began by searching in party name¹⁹⁶ for the state name within five words of “Department”

191. Eisenberg & Schlanger, *supra* note 98, at 1463 (finding the subject matter is highly accurate and that while attorneys or pro se inmates fill out the forms themselves, inmate cases are not over-inclusive).

192. Schlanger, *supra* note 5, at 1699-1700; SCALIA, PRISONER PETITIONS 1997, *supra* note 30; SCALIA, PRISONER PETITIONS 2002, *supra* note 50.

193. Additionally, cases coded as 440 could only be accounted for in the smaller dataset because 440 includes many non-prisoner suits.

194. Schlanger, *supra* note 5, at 1698; Telephone Interview with Margo Schlanger, Professor of Law, Wash. Univ. Sch. of Law (Oct. 26, 2007).

195. Schlanger, *supra* note 5, at 1698. I used the termination date to find the most recent case among duplicates.

196. I searched all parties instead of just defendants because searching just defendants does not pick up what Westlaw classifies as “interested parties.” For Kansas, I checked all cases that were picked when searching all parties but not when searching just defendants. The extra cases were all against a correctional officer, like a warden, where the agency was listed as an interested party. These are cases I wanted to capture. Because these cases are also coded as prisoner civil-rights actions, there should not be many cases where the agency or department head was a plaintiff.

within five words of “Corrections”¹⁹⁷ from 2000 to 2006.¹⁹⁸ Then, I searched for every possible iteration of the names of the heads of the Departments of Corrections in the same years.¹⁹⁹ After each of these searches, I tried to eliminate any erroneous inclusions. The first step was to delete all cases not coded with a “nature of suit” as 550 or 555. I then deleted all cases not in the district courts.²⁰⁰ Next, for the searches on department heads, I went through all cases that were not filed in district courts in that state to confirm whether the case should be included.²⁰¹ For example, if “Justin Jones” was a party to a case outside of Oklahoma, I checked whether the case was actually against Justin Jones, the director of Oklahoma’s correctional agency. Any dubious cases were deleted.²⁰² Although sometimes Westlaw indicates that a party was later terminated, I generally did not elimi-

197. For Indiana, Alabama, and New York, I had to make exceptions. The Westlaw search automatically includes state abbreviations when searching for a state. So, for Indiana, the abbreviation “in” was vastly over-inclusive, picking up, for example, every case that said “sued *in* individual capacity.” For Alabama, it included every case with “et al” in the party names. Therefore, I limited the search to Indiana/Alabama within two words of Department within two words of Corrections. As a check, I searched for “Indiana Corrections, Department of” and “Alabama Corrections, Department of,” a commonly used naming pattern that would have been left out of the smaller search, but it yielded zero cases. Finally, in New York, there is also a City of New York Department of Corrections. I excluded all cases with “city” in the party name. This may have excluded some that should not have been, but it was the only realistic approach. For this database, I was more concerned with being confident all of the cases were properly included, which meant over-excluding some at times.

198. I searched after December 31, 1999 and before January 1, 2007.

199. This meant two main iterations for each name. First, I searched with and without a middle initial. Second, I searched for the possible variations and nicknames based on first names, also with and without middle initials. That is, for James, I also searched Jim, for Michael, Mike, for Ronald, Ron, for Charles, Chuck, for Edward, Ed, and so on.

200. This Note is concerned only with outcomes at the district court level. Moreover, as Professor Schlanger has explained, the analysis probably does not change if appeals are included. Schlanger, *supra* note 5, at 1596-97 & n.121.

201. The underlying assumption here is that cases against heads of the correctional departments in their home states — for example, a case against Robert Hickman in a California district court — coded as prisoner civil rights, were, in fact, against the correctional agency of that state. I suspect this is overwhelmingly accurate, and the alternative — checking thousands of cases — was impractical.

202. The two exceptions to this methodology were for Dora Schriro and Donal Campbell. Ms. Schriro served as the Director of the Missouri Department of Corrections and the Arizona Department of Corrections. When looking for cases against the Arizona agency, I assumed cases in Missouri courts were not against the Arizona agency and vice versa. This assumption seemed reasonable given my experience with the data. Mr. Campbell served as the head of the Tennessee Department of Corrections and the Alabama agency. Likewise, I assumed cases in Tennessee involved him in his role as the head of that state’s agency.

nate such cases because the agency seemed to remain an interested party even if terminated in name.²⁰³

Using the Westlaw docket search provided some additional benefits. First, the search canvasses all defendants, whereas earlier versions of the FJC data only listed the first defendant.²⁰⁴ In addition, case titles often contain an abbreviation or misspelling (for example, “Cal Dept Corrections”) that would not be picked up in a search just on case titles. Westlaw, however, often “corrects” the abbreviation when listing out all defendants and lists “California Department of Corrections” in full. This allows the search to pick up the case.²⁰⁵ Additionally, when searching for a state name, Westlaw automatically includes the abbreviation for the state. For example, searching for “Arizona Department of Corrections” will also include “AZ Department of Corrections.”

However, my search was not completely comprehensive. First, it did not account for any cases where all search terms were misspelled in the database. Additionally, sometimes cases will just name “Department of Corrections” and not, say, “Vermont Department of Corrections.” I could have searched in the district courts of a given state for just “Department” within five words of “Corrections.”²⁰⁶ Nonetheless, I purposefully chose a more restrictive approach because sometimes state correctional agencies are not sued in the district courts of their home state. Arizona’s Department of Corrections, for example, was sued in the district court in Utah.²⁰⁷ Because the main goal in assembling this smaller case list was to be as confident as possible that every case was

203. As a check, I looked at all cases in which the Department of Corrections was terminated as a party in Arizona. In each one, the State Attorney General’s office continued as the attorneys for the individual defendants. Thus, it seems the state and its agency were still implicated in the case. In one set of cases, however, I did use the terminated party criteria to delete cases. In some cases against a state in the district courts of another state, all of the first state’s parties would be terminated. For example, the Arizona Department of Corrections and all observable officers may have been terminated in a suit in a Kansas court. In that case, I did not include the case as a suit against Arizona’s corrections agency.

204. *See supra* note 129.

205. For example, case number 2:04-CV-01564 in the Eastern District of California.

206. As a check, I did this search in Vermont’s district courts and I discovered that I missed eight cases that were not picked up when searching across all federal courts with “Vermont” in the search terms.

207. This means that the broader approach used in Part III.B.2 erroneously includes such cases. In fact, three of the additional eight cases picked up in searching Vermont’s district courts were not against the Vermont Department of Corrections.

properly coded, the results are under-inclusive in exchange for greater accuracy.

The final set of excluded cases are those only against the warden or officer charged with the violation. In many instances, my search would have picked up these cases. For example, the warden's title, which is searchable, may include the agency name, or a warden may be listed as a defendant along with the state agency. But the search is incomplete on this issue. Indeed, because correctional officers and wardens are the most commonly named defendants,²⁰⁸ this is probably the main reason for disparity between the two case lists.

Nonetheless, there is some room for optimism about my list. For instance, I looked at Arizona in 2006 to see how many cases I missed that named the wardens in each of the state's fifteen prisons.²⁰⁹ Most wardens were not even named in a single suit. There were only fifteen cases naming a state prison warden. Of these, only four were not picked up in original search methodology. Compared to the seventy-three 2006 cases my original search collected, missing only four cases (about five percent of the sample) is quite efficient. This result may be unique to Arizona, but still leaves optimism about the search methodology used. In any event, accounting for all wardens or all correctional officers would be too time-consuming, but the methodology described here is still fairly comprehensive and yields a case list of over 10,000 unique cases.

Once I had a final case list, I eliminated duplicates using the docket number, office, and district as a unique identifier, and merged the list into the AO database on civil-case terminations using the unique identifier.

B. CASE OUTCOMES AND OTHER ROBUSTNESS CHECKS AND ASSUMPTIONS

This section traces the assumptions underlying the data on outcomes displayed in the tables, detailing what refinements or

208. HANSON & DALEY, *supra* note 20, at 16.

209. Arizona Department of Corrections, ADC Prisons, http://www.azcorrections.gov/prisons/prisons_1.aspx (last visited Mar. 22, 2010). I called each facility's warden's office to attain the name of the warden or wardens in 2006, and I used the same search methodology as for agency heads. *See supra* note 199.

groupings were made with the data. I largely followed the well-researched methodology of Professor Schlanger.²¹⁰

Overall outcomes. To categorize cases by litigation outcomes, I relied on two variables — “disposition” and “judgment.” If a final judgment is entered, the judgment field is designed to list the winner, and the disposition variable assigns the case to one of twenty categories for the manner of disposition.²¹¹ I collapsed the data into seventeen categories: non-judgment disposition,²¹² pre-trial dismissal for defendant²¹³ and for plaintiff,²¹⁴ voluntary dismissal,²¹⁵ settlement,²¹⁶ jury trial for plaintiff, defendant, or unknown,²¹⁷ directed verdict for plaintiff, defendant, or unknown,²¹⁸ bench trial for plaintiff, defendant, or unknown,²¹⁹ arbitration for plaintiff, defendant, or unknown,²²⁰ and other.²²¹ Total dispositions listed in the Note do not include non-judgment dispositions or “other” outcomes.²²²

Settlements. Following Professor Schlanger, the Note’s settlement figures include both settlements and voluntary dismissals. I deferred to her conclusion that voluntary dismissals include many out-of-court settlements,²²³ and, moreover, my inde-

210. Most of her assumptions are described in a data appendix. Schlanger, *supra* note 5, at 1698-1706. Her statistical code is available at <http://www.law.umich.edu/facultyhome/margoschlanger/Pages/InmateLitigationAppendix.aspx> (last visited Mar. 22, 2010).

211. See, e.g., Federal Court Cases Database 2006, *supra* note 107, pt. 1(civil terminations, codebook), at 18-19.

212. Disposition codes 0 (transfer), 1 (remand), 10 (multi-district litigation transfer), 11 (remand to agency), 16 (stayed), and 18 (statistical closing). See Schlanger, *supra* note 5, at 1594 n.108.

213. Disposition codes 2 (dismissal for want of prosecution), 3 (dismissal for lack of jurisdiction), 4 (judgment on default for defendant), 6 (judgment on pre-trial motion for defendant), 14 (other dismissal, not for plaintiff), 17 (other judgment, not for plaintiff), 19 (appeal affirmed for defendant), and 20 (appeal denied for defendant).

214. Disposition codes 4 (judgment on default for plaintiff), 6 (judgment on pre-trial motion for plaintiff), 14 (other dismissal for plaintiff), 17 (other judgment for plaintiff), 19 (appeal affirmed for plaintiff), and 20 (appeal denied for plaintiff).

215. Disposition code 12 (voluntary dismissal).

216. Disposition codes 5 (judgment on consent) and 13 (settled).

217. Disposition code 7 and appropriate judgment code.

218. Disposition code 8 and appropriate judgment code.

219. Disposition code 9 and appropriate judgment code.

220. Disposition code 15 and appropriate judgment code.

221. Meaning all other unaccounted for outcomes.

222. I looked at the tables including the “other” category, and the results were not materially affected; all percentages were just slightly lower.

223. Schlanger, *supra* note 5, at 1593 & n.104; Telephone Interview with Margo Schlanger, Professor of Law, Wash. Univ. Sch. of Law (Nov. 11, 2007).

pendent research indicates that this assumption does not materially affect the results. For example, running the same comparisons following Table 3,²²⁴ looking at settlements without voluntary dismissals, the same results follow.²²⁵ The comparisons following Table 4 are also basically the same.²²⁶

One final note about the settlement field responds to an article auditing the disposition variable in the AO data. Professor Hadfield conducted a preliminary check on a random sample of cases and found some issues with the disposition field.²²⁷ The article, however, excludes prisoner cases and thus does not bear on the data used here.²²⁸ Further, she found that the settlement field is largely accurate. Erroneously including settlements in other pre-trial dismissal categories is what causes errors.²²⁹ On the whole, the under-inclusiveness and over-inclusiveness of settlements in different places may balance out. In any case, her audit should not significantly discount these results for prisoner cases.²³⁰

Other assumptions and checks. The database also keeps a field titled “nature of judgment,” which should be filled out for cases with a final judgment. The categories are: no monetary award, monetary award, injunction, forfeiture, and costs with or without attorneys’ fees.²³¹ I have not eliminated any observations based on this variable for several reasons. First, the most ob-

224. See *supra* note 128.

225. The rates are lower, but the relative magnitudes of the rates are the same, with the “General” group being the highest. Moreover, I still find a statistically significant difference between settlement rates in all three state groupings at the 99.5% confidence level. The only exception is comparing the “Budget” states to the “Both” with California included. There, the difference is insignificant.

226. The relative magnitudes are the same. The settlement rates between General and Budget states and between the General and Both states are statistically different at the 99.5% confidence level. The difference between the rates in the Budget and Both states, however, is not statistically significant when California is excluded. When California is included, the difference is significant at the 90% confidence level.

227. Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004).

228. *Id.* at 723.

229. *Id.* at 723-28. For example, she finds that 54% of voluntary dismissals were settlements.

230. Professor Schlanger agreed that this issue should be insignificant. Telephone Interview with Margo Schlanger, Professor of Law, Wash. Univ. Sch. of Law (Nov. 11, 2007).

231. Federal Court Cases Database 2006, *supra* note 107, pt. 1(civil terminations, codebook), at 18-19.

vious categories to eliminate — injunctions and forfeitures — are small. There are only 20 such observations out of about 70,000 cases in the fifteen states used here. What is more, it is unclear whether those cases involved some financial outlay for damages (apart from whatever money would be paid towards implementing an injunction).²³² As interviews confirmed, most prisoner suits seek damages of some sort, even if an injunction is also sought, and most § 1983 suits do not seek injunctive relief.²³³ Finally, settlements, which are particularly important, are coded in every category except forfeiture, and I did not want to risk erroneously dropping settlements from the dataset. Thus, due to the small number of coded injunctions and the likelihood that most or all prisoner cases seek some form of monetary relief, I have not used the nature-of-judgment field to delete cases.

Finally, two additional assumptions were made based on issues that Professor Schlanger raised.²³⁴ First, based on two audits of the data, I assumed that a judgment field coded as “both” was actually a judgment for the plaintiff. I replicated all of my tables without this assumption to ensure that this did not materially affect the results, and it did not.²³⁵ Second, the same audits also revealed a curious set of observations showing a judgment for the plaintiff but zero dollars awarded. In inmate cases, several of these cases are actually defendant victories.²³⁶ I created a flag for these cases²³⁷ and replicated the results without these ob-

232. For example, case number 4:00-CV-01860 in the Northern District of California, which appears to include an order to pay fees.

233. See *supra* note 141. As an additional check, I looked at complaints filed against the Massachusetts Department of Corrections in 2006 (the state and year were random). Specifically, I gathered the complaints from the list of cases against the Massachusetts Department of Corrections, generated as described in this data appendix for 2006. The complaints are from Public Access to Court Electronic Records (PACER), <http://pacer.psc.uscourts.gov/> (last visited Mar. 22, 2010). Many cases requested an injunction, money damages, and fees; however, only one requested an injunction without also requesting money damages and fees.

234. Eisenberg & Schlanger, *supra* note 98, at 1489; Schlanger, *supra* note 5, at 1702.

235. This check was suggested in Eisenberg & Schlanger, *supra* note 98, at 1489.

236. Eisenberg & Schlanger, *supra* note 98, at 1472-73; Schlanger, *supra* note 5, at 1702.

237. Specifically, the flag was: nature of judgment is not 3 (injunction) or 4 (forfeiture); judgment was for plaintiff; amount received was equal to zero; and disposition was either 4 (judgment on default), 6 (motion before trial), 7 (jury verdict), 8 (directed verdict), 9 (bench trial), 14 (other dismissal), 15 (arbitration award), 17 (judgment on other), 19 (appeal affirmed), or 20 (appeal denied). This did not cover dispositions like settlement or voluntary dismissals where amounts could be unknown.

servations. Again, the results were not impacted in any meaningful way,²³⁸ and, thus, without having audited each of the cases individually, I left them in the sample.

238. Professor Schlanger came to the same conclusion because it is not a large category. Schlanger, *supra* note 5, at 1702.