
Abolitionist Prison Litigation

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ABSTRACT. There has long been a perceived tension between abolition and prison-conditions litigation. This piece offers a path forward for such litigation that is consistent with abolitionist goals. Drawing from experience with Texas state prisons, the piece proposes a framework for litigating prison understaffing that advances the project of abolition.

INTRODUCTION

Over the past decade, abolition has gradually begun to gain recognition, if not acceptance, in mainstream discourse on the criminal legal system.¹ “[Prison-industrial complex] abolition is a political vision with the goal of eliminating imprisonment, policing, and surveillance and creating lasting alternatives to punishment and imprisonment.”² As abolition gains footing among legal practitioners, academics, and the broader public, prison-conditions litigation faces an ambiguous future. Since before the mid-twentieth century, people in prison have

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1. See, e.g., *A Better Path Forward for Criminal Justice: A Report by the Brookings-AEI Working Group on Criminal Justice Reform*, BROOKINGS INST. & AM. ENTER. INST. (Apr. 2021), https://www.brookings.edu/wp-content/uploads/2021/04/Better-Path-Forward_Brookings-AEI-report.pdf [<https://perma.cc/E63S-37ZZ>]; Michael M. O’Hear & Darren Wheelock, *Public Attitudes Toward Punishment, Rehabilitation, and Reform: Lessons from the Marquette Law School Poll*, 29 FED. SENT’G REP. 1, 47 (Oct. 2016), <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1678&context=facpub> [<https://perma.cc/W4FQ-ES8F>]; Ruha Benjamin, *To Dismantle the Prison System, We Need Viral Justice*, TIME (Oct. 18, 2022), <https://time.com/6221717/dismantle-prison-system-viral-justice> [<https://perma.cc/FND6-FJQD>]; Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [<https://perma.cc/9TZA-DQNH>].
 2. *What Is the PIC? What Is Abolition?*, CRITICAL RESISTANCE, <https://criticalresistance.org/about/not-so-common-language> [<https://perma.cc/4LCH-TQ2Y>].

turned to the courts to vindicate their rights in numerous areas, from racial discrimination to overcrowding to medical care. Yet even seasoned practitioners have begun to question the efficacy of this model, as litigation and monitoring stretch on for years while people continue to languish in conditions that, while better than they have been, are still inhumane. Many abolitionists have foreworn this litigation as only strengthening the hold of the carceral state.

The detractors of conditions litigation are not entirely wrong. Abolitionists decry conditions litigation that channels streams of funding towards small improvements while further entrenching prisons in society. However, the ongoing humanitarian crisis in the nation's prisons causes real harm to thousands upon thousands of people every day, and litigation is one way to alleviate that suffering. Even with strong philosophical arguments against pursuing incremental relief through litigation, it can be difficult—if not morally questionable—to dismiss the present suffering of individuals. But if we continue to prioritize immediate conditions over more fundamental changes, it is nearly impossible to envision a time when present suffering will be alleviated and the path cleared for more high-minded concerns.

Against this backdrop, I will explore one litigation issue—understaffing—in one state. Texas incarcerates more people than any other state, by tens of thousands.³ From the past year of engaging with people in prison, community advocates, scholars, litigators, and others as a legal fellow in the Criminal Injustice Program of the Texas Civil Rights Project, I have come to understand that understaffing causes or exacerbates an overwhelming number of the problems in the state's prisons. Like many other states, Texas has seen a precipitous decline in its prison workforce, attributable to a combination of factors, including the COVID-19 pandemic and national economic conditions.⁴ In prisons that are short-staffed, conditions deteriorate and drive out more of the staff that remains, creating a compounding crisis in an already fraught system. Prisons are left in an inescapable staffing rut, and incarcerated people find themselves in even worse conditions than they would otherwise.

By weaving together theoretical and practical considerations, this Essay proposes a strategy for prison-conditions litigation that is both consistent with and an asset to the abolitionist project. Part I discusses the current crisis of prison understaffing, focusing on Texas as an example of egregious conditions linked

3. E. Ann Carson, *Prisoners in 2021—Statistical Tables*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. 8 (Dec. 2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf> [<https://perma.cc/TGB4-8U68>].

4. Keri Blakinger, Jamiles Lartey Beth Schwartzapfel & Christie Thompson, *US Prisons Face Staff Shortages as Officers Quit Amid COVID*, ASSOCIATED PRESS (Nov. 1, 2021), <https://apnews.com/article/coronavirus-pandemic-business-health-texas-prisons-d367722492d903e9299fd66ea3518998> [<https://perma.cc/NZY7-LWZH>].

to staff vacancies. Part II provides a brief look at abolitionist theory, highlighting the purported tension between abolition and prison-conditions litigation. I suggest that it is possible to frame conditions litigation in a way that supports abolitionist principles. In the context of understaffing, litigation could be designed to seek large-scale releases, advancing the abolitionist goal of decarceration. Part III then sets out a framework for such a litigation challenge. It outlines the procedural requirements for seeking release, discusses the practical realities in Texas prisons that could form the basis of an understaffing challenge, and explains why release is and must be presented as the only viable remedy. Finally, Part IV takes on potential challenges to this approach, including litigation delays, potential co-option through prison transfers, and the specific realities in Texas. Despite these challenges, I argue that abolitionists should not dismiss conditions litigation as a strategy. Instead, they should work to shape conditions litigation as a tool that can serve the abolitionist project.

I. TEXAS'S UNDERSTAFFING PROBLEM

Prison understaffing can be a nebulous concept. Of course, a certain minimum number of staff members are necessary in any institution to carry out basic operations. In the prison setting, the government is tasked with the care and safety of those in its custody, and it must maintain sufficient staff to fulfill those responsibilities. As prison populations rise, their staffing needs rise as well; when a prison is crowded, its staff numbers should be correspondingly high. However, the relationship between population and staffing needs may not be linear, as crowded prisons have compounding needs, from the elevated health risks posed by congregate settings to the elevated likelihood of conflicts in close quarters.

Beyond these broad considerations, however, there is little concrete guidance on what understaffing means in practice, or when mounting staff vacancies become impermissible. Officials must take into account myriad factors including incarcerated individuals' security levels, the physical layout and design of each building and the pods inside, the technology available to assist in monitoring, and medical and programming needs.⁵ But there is no fixed rule designating a

5. See, e.g., *Zara v. Strain*, No. CIV.A. 09-3919, 2011 WL 723409, at *7 (E.D. La. Feb. 22, 2011), *aff'd*, 458 F. App'x 393 (5th Cir. 2012) ("A prison filled only with minimum-security inmates might well get by with quite relaxed inmate monitoring. Or, a prison filled with more dangerous inmates might get by with the type of security system installed in C-Building if it has sufficient staff to break up any fights before a prisoner is seriously injured. Or, a prison with inmates of mixed security classifications might get by with the security system and staffing

number or ratio of officers required for a prison to be safe or, at minimum, constitutional. Federal law is unhelpful in clarifying basic requirements on this front. For example, the Prison Rape Elimination Act (PREA), a major source of prison safety standards geared specifically at preventing sexual abuse, does not provide a target staffing ratio for adult facilities.⁶ Rather, PREA only “provides guidance on how agencies can determine adequate staffing levels to protect inmates, residents, and detainees”⁷ Without a national benchmark, states have ended up with incarcerated person-to-staff ratios that are highly divergent, ranging from 3.0 to 20.8.⁸

Although understaffing is by no means isolated to Texas, the state is a useful case study to explore the issue. Like federal law, Texas law is silent on the appropriate staffing levels of its prisons. The Texas Jail Standards, a set of rules promulgated by a legislatively created commission, contain regulations requiring no less than one officer per forty-eight detainees on each floor of housing, and at least one officer on each floor with ten or more detainees.⁹ However, the standards are unenforceable and apply only to county jails—not to the state prison system. Beyond these staffing ratios, no other guidance is available on vacancy rates to clarify when the number of unfilled positions becomes untenable.

Although statutes and judicial opinions are largely silent on the specific constitutional, or minimally safe, ratio of officers to incarcerated individuals, there are circumstances in which a prison is clearly understaffed. In Texas, the data on

levels present in C-Building so long as the inmates are not aware of the security system’s vulnerabilities.”) (citing *Coker v. Strain*, No. CIV.A. 08-678, 2010 WL 3922134, at *5-6 (E.D. La. Sept. 30, 2010)).

6. 28 C.F.R. § 115.13(a) (2022); *Developing and Implementing a PREA-Compliant Staffing Plan*, NAT’L PREA RES. CTR. 6, https://www.prearesourcecenter.org/sites/default/files/content/staffing_plan_final_w_bja_logo_submt.pdf [<https://perma.cc/BNB7-CL6U>].
7. *Frequently Asked Questions: What Is Adequate Staffing?*, NAT’L PREA RES. CTR. (Feb. 7, 2013), <https://www.prearesourcecenter.org/frequently-asked-questions/what-adequate-staffing> [<https://perma.cc/F47G-WL4A>] (“For prisons, jails, and juvenile facilities, the standards require that agencies consider 1) generally accepted practices; 2) judicial findings of inadequacy; 3) findings of inadequacy from federal investigative agencies; 4) findings of inadequacy from internal or external oversight bodies; 5) all components of the facility’s physical plant (including ‘blind spots,’ or areas where staff or residents may be isolated); 6) composition of the inmate/resident population; 7) number and placement of supervisory staff; 8) number and types of programs occurring on a particular shift; 9) applicable state or local laws, regulations, or standards; 10) prevalence of substantiated and unsubstantiated incidents of sexual abuse; and 11) any other relevant factors.”); see 28 C.F.R. § 115.13(a) (2022).
8. ASS’N OF STATE CORR. ADM’R, *ASCA Responses: Staff to Inmate Ratio Survey (June 2010)*, <https://www.prisonlegalnews.org/media/publications/ASCA%20Responses%20Staff%20to%20Inmate%20Ratio%20Survey%2C%20Association%20of%20State%20Correctional%20Administrators%2C%202010.pdf> [<https://perma.cc/53LF-EN9R>].
9. 37 TEX. ADMIN. CODE § 275.4 (2014).

staff vacancies reveals the crisis in the system. From 2020 through 2022, staff vacancies rose from 4,300 to more than 7,600.¹⁰ As of December 2022, the system-wide vacancy rate was approximately thirty-two percent.¹¹ Of the eighty-eight state-run prisons, twenty-one—nearly one quarter—had staff vacancy rates of at least fifty percent. The James Lynaugh Unit topped the list, with a seventy-one percent vacancy rate that month. Forty prisons were understaffed by at least one-third, and only nineteen were fully staffed. In terms of raw numbers, twenty-eight prisons had at least 100 vacant positions, and sixteen had at least 200 empty slots. The William P. Clements Unit and H. H. Coffield Unit were the leaders in absolute terms, with 437 and 427 vacancies, respectively, and vacancy rates of at least sixty percent.

The effects of understaffing are not felt uniformly across the system: facilities with the greatest restrictive housing populations, where security protocols result in heavy staffing requirements, have had notably high levels of understaffing. These prisons averaged vacancy rates of at least forty-eight percent in 2022, which is sixty-nine percent greater than all other facilities and thirty-three percent greater than other maximum-security facilities.¹² In fact, these numbers underemphasize the extent of understaffing, as the Texas Department of Criminal Justice (TDCJ) has eliminated approximately 1,500 staff positions since 2020, deflating the number of positions left unfilled.¹³ Moreover, there is no standardized system for reporting staff positions, and some wardens are known to underreport the number of positions they would like filled to lower their vacancy rates.¹⁴

As will be explored in greater detail in Section III.A, staffing shortages contribute to virtually every problem in prisons. Without sufficient staffing numbers to see to people's basic needs, a prison system cannot hope to provide constitutional conditions. In Texas, where understaffing is at crisis levels, the effects permeate the lives of incarcerated people. The solution would seem to be simple:

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10. Jolie McCullough, *Chronically Understaffed Texas Prisons Set Stage for Prison Bus Escape and Massacre of Family*, TEX. TRIB. (Dec. 9, 2022), <https://www.texastribune.org/2022/12/09/texas-prison-escape-review> [<https://perma.cc/NSM9-7PEL>].
 11. According to data obtained by the author from the Texas Department of Criminal Justice (TDCJ) under the Texas Public Information Act. This data has not been vetted by empirical methods and does not include private prisons.
 12. Texas Civil Rights Project & The University of Texas Law School Civil Rights Clinic, *Solitary Confinement in Texas: A Crisis with No End* (forthcoming 2023). The Texas Justice Initiative and UCLA Law Behind Bars Data Project assisted in summarizing this data.
 13. *Id.*
 14. According to information provided confidentially to the author by a former TDCJ employee. This data has not been vetted by empirical methods.

do whatever it takes to hire more staff. This objective would likely require a significant and sustained infusion of resources into the prison system. But, as explained below, such a demand would run counter to the abolitionist principles that call for reducing the footprint—including the fiscal footprint—of prisons in society. Litigation could accelerate the demands for adequate staffing, but, unless carried out in a deliberately abolitionist posture, it would confront the same dilemma.

II. RECONCILING ABOLITION AND PRISON-CONDITIONS LITIGATION

Prison-industrial complex abolition is an ideology that envisions an end to prisons and all aspects of the current system of policing and incarceration. Dismantling these institutions is part of a broader project of reimagining a society in which they are unnecessary, or, as Angela Y. Davis suggests, where prisons are obsolete.¹⁵ For some, abolition is a difficult framework to accept because it does not purport to have all the answers. It is easier to conceptualize tearing down prisons than it is to think about what comes next. But abolitionists understand that fundamentally rethinking society takes time. Abolition is an inherently uncertain framework for change, leaving room for debate as to which concrete steps will best advance its ends.¹⁶

Given its expansive goals, abolition calls for fundamental changes to the prison system as we know it. That level of change requires us to rethink the very foundations of our current system of punishment. From this perspective, efforts to improve present prison conditions can appear to be distracting at best and counterproductive at worst. An extreme version of abolition may even call for foregoing the immediate needs of incarcerated people to further the long-term goals of overhauling the system. This central tension places abolitionist theory at odds with prison-conditions litigation. However, the two poles need not be so far apart. Indeed, when carried out deliberately and self-reflectively, prison-

15. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 10 (2003).

16. See, e.g., *id.* at 107 (“[I]magine a constellation of alternative strategies and institutions, with the ultimate aim of removing the prison from the social and ideological landscapes of our society.”); MARIAME KABA, WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE (Tamara K. Nopper ed., 2021); DERECKA PURNELL, BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM 10 (2021); *id.* at 11 (“[T]here is no singular alternative to police that does not risk replicating the forms of oppression that we currently face.”); LIAT BEN-MOSHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION 126 (2020) (“[A]lternatives cannot come from living in the existing order but will come from a process of change as a result of a transition from it.”).

conditions litigation can support abolitionist goals, and abolition can respond to the present abuses faced by incarcerated people.

A. Distinguishing Between Reformist and Nonreformist Approaches

Not all projects that mitigate the harms of the prison system are abolitionist. Whether a specific course of action is consistent with abolition hinges on the distinction between what experts have termed reformist and nonreformist reforms.¹⁷ Whereas nonreformist reforms advance the abolitionist project,¹⁸ reformist reforms result in further entrenchment of prisons in society, making them more difficult to do away with in the future.¹⁹ Reformist reforms “are limited to recommending only minor revisions to the fundamental structures of incarceration and punitive policing practices – which are not susceptible to meaningful change without far more fundamental reconstitution.”²⁰ Indeed, “[a]bolition critiques the carceral system and carceral logics, but also critiques any efforts to *reform* carceral sites, because some of the factors leading to the growth of the carceral state were the direct result of attempts to reform the system.”²¹

Many large-scale reforms of prisons may be reformist measures. For example, litigation over unconstitutional conditions may lead to building new prisons, whether to alleviate overcrowding, modernize facilities, enable people to be incarcerated closer to home, or create programs, such as drug treatment, for specialized populations. Whatever the reason, increasing the number of prisons entrenches and expands the reach of the carceral state, making it more difficult to

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17. See Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1207-18 (2015); *So Is this Actually an Abolitionist Proposal or Strategy? Resource Binder*, INTERRUPTING CRIMINALIZATION, PROJECT NIA & CRITICAL RESISTANCE (June 30, 2022), <https://criticalresistance.org/resources/actually-an-abolitionist-strategy-binder> [https://perma.cc/NR62-6EV5].
 18. See Rachel Herzing, *Big Dreams and Bold Steps Toward a Police-Free Future*, in WHO DO YOU SERVE, WHO DO YOU PROTECT? POLICE VIOLENCE AND RESISTANCE IN THE UNITED STATES 111, 115 (Maya Schenwar, Joe Macaré & Alana Yu-lan Price eds., 2016) (Nonreformist reforms should “build on each other and continue to clear the path for larger future steps while being mindful not to build something today that will need to be torn down later on the path toward the long-term goal”).
 19. *Id.* at 113 (“Without a strategic long-term vision for change . . . today’s reforms may be tomorrow’s tools of repression.”).
 20. McLeod, *supra* note 17, at 1173.
 21. LIAT BEN-MOSHE, *supra* note 16, at 127; see also *id.* at 53 (“[T]he focus on deplorable conditions may have assisted in shaping the public’s view as to the abuses taking place but it did not lead to abolishing the spaces of confinement; instead, it led to calls to reform them, which often aided in prolonging and justifying their existence.”).

excise in the future.²² Sentencing reforms that single out certain categories of offenses for favorable treatment, often nonviolent drug felonies, may be considered reformist in creating a dichotomy between those who “deserve” or “need” prison and those who “deserve” leniency.²³ Similarly, even death penalty abolition efforts may be considered reformist by some. For ordinarily, when a person’s death sentence is vacated, the sentence becomes one of life without parole, adding to the number of those permanently warehoused in the country’s prisons.

But efforts to reform prisons can still advance abolitionist goals. First among these goals is harm reduction, which alleviates immediate suffering and “ensure[s] that abolitionists do not end up so concerned with the *theory* of abolition that they fail to consider the *practice* of abolition.”²⁴ People in prison face severe abuses every day, and ignoring those conditions entirely would be difficult to stomach, if not hypocritical. Reducing harm to incarcerated individuals has always been a part of abolition in practice. For example, “[a]bolitionists have worked to end solitary confinement and the death penalty, stop the construction of new prisons, eradicate cash bail, organized to free people from prison . . . and developed alternative modes of conflict resolution that do not rely on the criminal punishment system.”²⁵ Aside from harm reduction, reforms can also more directly pave the way for an end to prisons. Incremental reforms can change power relations, empower marginalized groups, and spark mobilizations that lead to more systematic change.²⁶

Theorists characterize these changes that still serve the abolitionist agenda as nonreformist reforms. In contrast to reformist reforms—those that ultimately expand or legitimize the carceral system—nonreformist reforms advance the goal of dismantling prisons in the long run. Put otherwise, nonreformist reforms, such as measures to increase release from prisons, close facilities, or halt funding that sustains them, are “those measures that reduce the power of an oppressive system while illuminating the system’s inability to solve the crises it creates.”²⁷ Nonreformist reforms can be a part of abolition’s long-term project of eradicating prisons, so long as they “build on each other and continue to clear

22. See *So Is this Actually an Abolitionist Proposal or Strategy?* Resource Binder, *supra* note 17, at 50.

23. *Id.*

24. Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1215 (2022).

25. Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://jacobin.com/2017/08/prison-abolition-reform-mass-incarceration> [<https://perma.cc/2HV6-RJZ5>].

26. See Herzing, *supra* note 18, at 113.

27. Berger, Kaba & Stein, *supra* note 25.

the path for larger future steps while being mindful not to build something today that will need to be torn down later on the path toward the long-term goal.”²⁸

The question remains, then, how to ensure that strategies aimed at harm reduction and incremental systemic change are executed in a manner consistent with abolitionist principles. This question is especially urgent in the context of prison-conditions litigation, which some abolitionists have suggested cannot be nonreformist.

B. Prison-Conditions Litigation’s Nonreformist Potential

Litigating prison conditions in a nonreformist manner is possible, but it requires a thoughtful approach to avoid further legitimizing the carceral system. Sheila Bedi has proposed an abolitionist framework for prison litigation that might consist of two types of cases: those with explicitly decarcerative aims, whether through release, reduction in security level, or other measures that increase liberty for those behind bars; and those that increase the power of people in prison and their communities, whether by providing them with information and access, amplifying their voices, or otherwise.²⁹ Further, Jamelia Morgan highlights that “abolitionist proposals are practical, but only to the extent that they are accompanied by organizing and political education that can shift discourse and change minds as to certain long-standing and widely held beliefs.”³⁰

This framework provides a straightforward means of evaluating a proposed litigation challenge’s consistency with abolitionist goals. It is useful both in determining whether a challenge as a whole will serve these principles, and in crafting a request for relief that avoids the trap of reformist reforms. Based on Bedi and Morgan’s framing, there appears to be a path for abolitionist litigation to alleviate present conditions when the legal challenge does not contribute to the entrenchment of prison systems *and* it: (1) seeks decarcerative ends, meaning some increase in liberty; (2) increases the knowledge or power of impacted communities, or both; or (3) contributes to political education and organizing for broader abolitionist goals. Of course, any litigation must be undertaken carefully and in consultation with impacted communities to avoid unintended reformist outcomes. But with these principles in mind, there is no need for abolitionists to forego conditions litigation entirely.

28. Herzing, *supra* note 18, at 115 (discussing “incremental steps toward the abolition of policing”).

29. Sheila Bedi, Comments at the University of Texas School of Law Prison and Jail Innovation Lab Symposium: Cruel and Not Unusual: Can America’s Prisons and Jails Change, and, If So, How? (Feb. 3, 2023).

30. Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1119, 1217 (2022).

It is easy to envision conditions litigation that fails to achieve these principles. Litigation that leads to building new prisons or improves the efficiency of bureaucratic processes is counter to abolitionist ends. However, it is equally possible to construct litigation that meets the conditions necessary to be nonreformist. Such litigation might include challenges leading to closure of facilities, release from solitary confinement, or publication of information regarding concealed prison operations. Even simply improving the transparency of these systems by obtaining information through litigation can be an important first step in raising awareness of hidden abuses in impacted communities, revealing the extent of their injustice, and determining the most impactful targets for future advocacy.

Along these lines, a nonreformist challenge to understaffing could be framed to seek decarceration as a remedy. While a case challenging understaffing could easily tip into a reformist mode if used to funnel additional funding into a prison system, it is possible to construct a litigation challenge such that it is a tool for decarceration.

III. AN ABOLITIONIST CHALLENGE TO UNDERSTAFFING IN TEXAS

As explained in Part II, for prison-conditions litigation to serve abolitionist ends, it is critical that the remedy be release from prison. Although Eighth Amendment jurisprudence and procedural requirements make securing release difficult, these challenges are not insurmountable. This Part explains how a litigation challenge to understaffing can be crafted in conformity with legal requirements and in a manner consistent with abolition.

This type of litigation challenge builds upon the limited number of cases brought based on understaffing claims. However, it also departs from these cases in its remedial and strategic orientation. None of these prior cases seek widespread release as a remedy, and next to none appear to seek the broad, systemic change contemplated here. One exception is *Laube v. Haley*, a years-long, sweeping case targeting understaffing and overcrowding in Alabama's Julia Tutwiler Prison for Women.³¹ Although the case was filed more than two decades ago, the beginnings of a decarcerative orientation are present. At the outset of the litigation, the state prison commissioner had already instituted measures to return people to the community, including work release, community corrections programs, and increasing the volume of parole reviews, both in an attempt to

31. *Laube v. Haley*, 234 F. Supp. 2d 1227, 1252-53 (M.D. Ala. 2002) (finding unconstitutional conditions at Tutwiler Prison and granting preliminary injunction).

counteract crowded facilities and arising out of a court order in a separate case.³² Those measures were insufficient to remedy the prison's abuses.

In entering a preliminary injunction, the court gave the defendants a great deal of leeway but advised that they “may want to adopt the simple and direct measure of immediately and significantly increasing the number of security officers for Tutwiler’s dorms or to find some way to reduce immediately the dorm populations or to pursue some other immediately effective measure unknown to the court at this time”³³ Despite the prison commissioner’s and court’s apparent openness to decarcerative strategies, it is worth noting that the court still presented hiring more staff as the most obvious solution in its preliminary injunction order. Ultimately, the settlement agreement declined to outline any decarcerative remedies and merely mandated minimum staffing levels. The court ordered staffing “in sufficient numbers so that each officer is supervising no more than 50 women each in the dormitories” and an overall “vacancy rate [which] shall not exceed 10 percent for any 18-month period” which would doubtless lead the prison to hire additional officers.³⁴

A litigation challenge to understaffing could instead be constructed to remain consistent with abolitionist principles. First, the challenge would identify constitutional violations in prison that trace back to understaffing and demonstrate that these problems will persist until there is enough staff to ensure the health and safety of prison residents. Second, the challenge would demonstrate why hiring sufficient additional staff to maintain the current number of prisoners is infeasible. Finally, the challenge would seek a prisoner release order as the only way to bring the staff-to-prisoner ratio back in check, and thus the only viable remedy for the ongoing constitutional violations.

A. Legal Standard

A legal challenge arising out of understaffing would center on Eighth Amendment claims of cruel and unusual punishment, which in actions against a state are applied through the Fourteenth Amendment.³⁵ To state an Eighth Amendment claim connected to prison conditions, an incarcerated person must

32. *Id.* at 1241 (describing Commissioner Haley’s “non-custodial correctional measures to prevent more inmates from entering the Department of Corrections custodial facilities”).

33. *Id.* at 1253.

34. *Laube v. Campbell*, 333 F. Supp. 2d 1234, 1250 (M.D. Ala. 2004). The court did put in place certain restrictions of security officers, including a cap of sixteen hours’ work at a time with a minimum of eight hours’ break.

35. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 101 (1976). Legal claims need not be restricted to the Eighth Amendment; many conditions cases bring claims under the Americans with Disabilities Act, for example. *See, e.g., Armstrong v. Brown*, 732 F.3d 955, 960-62 (9th Cir. 2013).

demonstrate that a defendant acted with deliberate indifference to their health or safety.³⁶ Courts have established that “[k]nowledge of prison understaffing and a decision not to increase the number of guards on duty may amount to deliberate indifference to the safety and well-being of the inmates, in violation of the Eighth Amendment.”³⁷ Understaffing alone is insufficient to sustain such a claim, however; the prison must have implemented a policy of understaffing and have deliberately disregarded the risks of that policy. This knowledge requirement means that in the related context of jails, where municipal liability claims depend on establishing an official policy leading to constitutional deprivations, “[e]vidence of understaffing would become proof of an official policy only if more complete funding and staffing were possible and it was the deliberate intent of the policy-making official not to adequately fund and staff the jail.”³⁸

Because of these demanding requirements for pure understaffing claims under the already-unforgiving Eighth Amendment, past cases instead rely on other underlying constitutional violations. These violations, in turn, are traced to the lack of staff necessary to secure the safety or basic needs of incarcerated people. Such claims have tended to center on either violence³⁹ or inadequate medical or

36. *Farmer v. Brennan*, 511 U.S. 825, 837–38 (1994).

37. *Miles v. Wilkinson*, No. CV06-1079-A, 2013 WL 5592412, at *5 (W.D. La. Oct. 9, 2013) (citing *Edwards v. Gilbert*, 867 F.2d 1271 (11th Cir. 1989); *Anderson v. Atlanta*, 778 F.2d 678, 685 (11th Cir. 1985); see also *Anderson*, 778 F.2d at 686 (“The jury could reasonably find that a policy of understaffing resulted in the unavailability of medical personnel and prevented individual officers from being able to do their tasks properly.”)).

38. *Miles*, 2013 WL 5592412, at *5; see also *Anderson*, 778 F.2d at 686–87 (“[I]t was possible for the jury to decide that there was a conscious decision . . . not to increase the staff at the Detention Center in the face of complaints of inadequate staffing. The result of this decision was that officers were unable to perform their jobs properly. Furthermore, the jury could have found that [Defendants] knew or should have known that the natural consequence of this failure to adequately staff the jail would impair proper medical care and attention necessary to protect the health of pre-trial detainees.[] In sum, there was sufficient proof to support the jury’s conclusion that if the City of Atlanta had not utilized a custom, policy, pattern and/or practice of inadequately staffing the Pre-trial Detention Center, thus making it difficult for the officers to tend to the medical complaints of detainees, Larry Anderson would not have died . . .” (citations omitted)).

39. See, e.g., *Marbury v. Warden*, 936 F.3d 1227, 1235 (11th Cir. 2019) (“[W]hen we have held that a generalized risk of violence from a prison population could support a claim of deliberate indifference . . . , the plaintiff has pointed to specific features of a facility or its population rendering it particularly violent . . . [including] pervasive staffing and logistical issues rendering prison officials unable to address near-constant violence”); *Thomas v. Stewart*, No. 20-0302, 2021 WL 1655835, at *7 (S.D. Ala. Mar. 31, 2021), *report and recommendation adopted*, No. 20-0302, 2021 WL 1651235 (S.D. Ala. Apr. 27, 2021) (“With knowledge of the prison’s violence, Plaintiff has alleged that Defendant Stewart severely understaffs the prison (especially at night and on weekends, with approximately 6-10 officers securing approximately 900 inmates.)”); *Coker v. Strain*, No. CIV.A. 08-678, 2010 WL 3922134, at *5-6 (E.D. La. Sept. 30, 2010) (understaffing a unit with known security risks, leading to the beating of a prisoner,

mental health care—sometimes leading to suicide.⁴⁰ But the level of mistreatment must be devastating for it to take on constitutional dimensions. Courts have required incarcerated people, for example, to “demonstrate a pattern of suffering . . . in which it is unacceptably likely a serious mental illness will go untreated.”⁴¹

If prison conditions deteriorate to the level of a constitutional violation, the biggest practical hurdle to court-ordered release is the Prison Litigation Reform Act (PLRA).⁴² The PLRA, which was enacted in 1996, governs civil litigation regarding prison conditions. It imposes strict requirements on suits filed by prisoners, including exhaustion requirements, filing fees, and limitations on the number of suits a person can file. Most relevant here is the provision governing a “prisoner release order.”⁴³ The law defines a “prisoner release order” as “any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison[.]”⁴⁴ The term “prison” includes all federal, state, and local facilities of confinement for juveniles or adults, pre- or post-trial.⁴⁵ Any decarcerative order would almost certainly meet the PLRA’s definition.

could meet the standard for deliberate indifference); *Capps v. Atiyeh*, 559 F. Supp. 894, 904 (D. Or. 1982) (“Given the increase in population without a concomitant increase in staff, it is inevitable that some violence will occur because there are too few officers The question remains whether the level of violence . . . is deliberately indifferent to the inmates’ safety.”).

40. See, e.g., *McDowell v. Brown*, 392 F.3d 1283, 1292–94 (11th Cir. 2004) (holding that Plaintiff’s constitutionally inadequate medical care did not establish a causal link to understaffing because “the Board’s budget practices,” which resulted in understaffing, “do[] not amount to a purposeful disregard,” and “[t]here is no indication that Dekalb County deliberately invoked a policy to interfere with the Jail’s provision of medical care”); *Cabrales v. Cnty. of Los Angeles*, 864 F.2d 1454, 1466 (9th Cir. 1988), *cert. granted, judgment vacated*, 490 U.S. 1087, 109 S. Ct. 2425, 104 L. Ed. 2d 982 (1989), *and opinion reinstated*, 886 F.2d 235 (9th Cir. 1989) (holding the prison liable under the Eighth Amendment for the understaffing of psychiatrists that contributed to a suicide); *Floyd v. Ada Cnty.*, No. 17-CV-00150, 2018 WL 3212006, at *3–4 (D. Idaho June 29, 2018) (holding that Plaintiff adequately pled a deliberate policy of understaffing mental health professionals that led to constitutionally inadequate treatment); *Colbert v. City of Baton Rouge*, No. 17-00028, 2018 WL 344966, at *9–10 (M.D. La. Jan. 9, 2018) (holding that medical, dental, and psychiatric understaffing supported a *Monell* municipal liability claim). *But see* *Christie ex rel. estate of Christie v. Scott*, 923 F. Supp. 2d 1308, 1319 (M.D. Fla. 2013) (holding that the facility’s lack of psychiatric nurses on weekends did not constitute deliberate indifference).

41. *Capps*, 559 F. Supp. at 916.

42. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 803-04, 110 Stat. 1321-66, 1321-70 to -75 (codified in relevant part at 18 U.S.C. § 3626 (2018)).

43. 18 U.S.C. § 3626(a)(3).

44. *Id.* § 3626(g)(4).

45. See *id.* § 3626(g)(5).

The PLRA limits the circumstances under which a court can order release from prison as a remedy in a § 1983 action. A court can only enter a release order when there has been a “previously entered . . . order for less intrusive relief” which “failed to remedy” the rights violation and “the defendant has had a reasonable amount of time to comply with the previous court orders.”⁴⁶ This provision ensures that “when a party moves for a prisoner release order, a constitutional violation requiring relief has already been established.”⁴⁷ Because of this requirement, a release order cannot be the first relief sought concerning any violation. Accordingly, a litigation plan must include a first attempt at remedying understaffing or underlying constitutional violations short of a release order.

In addition to requiring prior remedial attempts, the law includes other restrictions on prospective relief, imposing rigorous standards for preliminary injunctions and procedures and timelines for termination of relief.⁴⁸ All prospective relief under the PLRA, including release orders, must meet the “need-narrowness-intrusiveness” factors.⁴⁹ Specifically, a court may not order prospective relief absent a finding that such relief “is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.”⁵⁰ Meanwhile, courts must “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.”⁵¹

If, after a prison has failed to comply with previous remedial orders within a reasonable period of time, and the need-narrowness-intrusiveness requirements are met, a judge can request a three-judge panel to consider a case seeking a release order.⁵² Only a three-judge panel is empowered to enter a prisoner release

46. *Id.* § 3626(a)(3)(A).

47. *Gillette v. Prosper*, 66 V.I. 807, 817 n.7 (D.V.I. 2016).

48. 18 U.S.C. §§ 3626(a)-(b). It also regulates consent decrees and private settlement agreements, automatic stays, the appointment and operation of special masters, and intervention rights. *Id.* §§ 3626(c)-(f).

49. *See, e.g., Blake P. Sercye, Need-Narrowness-Intrusiveness Under the Prison Litigation Reform Act of 1995*, 2010 U. CHI. LEGAL F. 471, 472-73. The minimal statutory language makes it “unclear what facts in a given case courts should consider in determining whether the prospective relief offered is sufficiently narrow in scope and form.” *Id.* at 473. A panel comprised of three federal district judges has interpreted the requirements as “simply codifications of the common-law approach to injunctive relief[,]” though the courts in practice have inquired more broadly into prison conditions than under the common law. *Id.* at 473.

50. 18 U.S.C. § 3626(a)(1)(A).

51. *Id.*

52. *Id.* § 3626(a)(3)(D); *see also Huerta v. Ewing*, No. 16-cv-00397, 2018 WL 780509, at *2 (S.D. Ind. Feb. 8, 2018) (“When considering whether a three-judge panel should be convened, the Court need not consider whether a prisoner release order is ultimately appropriate.”).

order,⁵³ and only if it finds by clear and convincing evidence that “crowding is the primary cause of the violation” and that “no other relief will remedy the violation of the Federal right.”⁵⁴

Thus, to be eligible for a release remedy, a legal challenge must meet not only the substantive requirements of the Eighth Amendment or other laws, but also the procedural requirements of the PLRA. Substantively, this means Eighth Amendment claims must establish conditions related to understaffing that constitute deliberate indifference to health or safety. On the procedural side, litigants must establish that (1) a previous attempt to remedy the rights violations at issue has been unsuccessful; (2) the “need-narrowness-intrusiveness” factors have been met; and (3) a three-judge panel is warranted. Under these conditions, an understaffing challenge can plausibly lead to release.

B. Unconstitutional Conditions Related to Understaffing

The crisis-level understaffing in TDCJ at present leads to conditions sufficient to demonstrate constitutional violations. In my time working on litigation and policy at the Texas Civil Rights Project, I have witnessed a host of issues that all trace back, at least to some degree, to understaffing. Through letters from incarcerated people across Texas, calls with family members, interviews with incarcerated people at several prisons, conversations with people released from incarceration, and many discussions with other advocates, I have encountered a wide array of injustices in the system. While my limited perspective only scratches the surface of what people experience in Texas prisons, it provides some representative examples of the types of claims an understaffing challenge could include.

For example, in one prison I visited, the staff forced people to spend days in holding cages meant for use only during brief transitional periods. The staff used these cells to manage a variety of difficult situations, often related to mental health crises or disciplinary infractions. They would leave people in the cages

53. 18 U.S.C. § 3626(a)(3)(B) (2018). The three-judge court must follow the procedures outlined in 28 U.S.C. § 2284. *See Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1857 (2002). The Supreme Court has mandatory appellate jurisdiction over final judgments by the three-judge court. *See* Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 712 & n.52 (2018).

54. 18 U.S.C. § 3626(a)(3)(E). The Prison Litigation Reform Act (PLRA) also provides standing to oppose, and right of intervention in, litigation regarding imposition, continuation, or termination of a release order to “[a]ny state or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison” based on such an order. *Id.* § 3626(a)(3)(F).

without adequate staff to move them elsewhere or monitor their needs. The cages are smaller even than ordinary cells and have no furniture whatsoever. Most shockingly, they have no toilets inside. Staff were required to unlock the cages and bring people to a separate bathroom, which is a cumbersome process. Because of low staffing levels, people would be left for days in these cells without access to a bathroom and were forced to urinate and defecate in the small space where they slept. With adequate staffing, people could be appropriately supervised to prevent situations from escalating to the point that staff put them in cages. Moreover, no one would be placed in a situation without staff available to ensure basic access to toilet facilities.

A more widespread consequence of understaffing is that people spend extended periods of time locked in their cells. Prisons are more frequently on lockdown status than they would be if adequately staffed, but even when there is no official lockdown, out-of-cell time is infrequent. Instead of being allowed out of their cells for several hours a day, people have infrequent and sporadic access to recreation. In solitary confinement, recreation is even less frequent, as people are only let out of their cells one person at a time. When a prison is understaffed, few officers are available for this task. Some people decline recreation even when given the opportunity, as there is no guarantee that an officer will be available to let them back into their cells once let out. This can mean hours alone in a slightly larger “recreation” cage, sometimes without access to water or toilet facilities. Extended time locked in a cell restricts people’s liberty and can contribute to unconstitutional conditions.

A related issue is access to showers. In multiple prisons where I spoke with people, staff run recreation and showers together, and when they are understaffed, people must choose between the two. People can go days on end without access to showers. People in solitary confinement at the highest security levels must be escorted by staff every time they leave their cells, including to shower. For people with higher security levels, even when they do get to shower, there is no guarantee that they will get out of the shower when they are finished. In some prisons, showers are like metal holding cages, coffin-like and claustrophobic. Without sufficient staff to escort people back to their cells, a shower can be a traumatizing experience.⁵⁵ Some people I talked to washed themselves in the small sinks in their cells rather than risk this ordeal.

In addition, responses to medical concerns can be dangerously slow in understaffed prisons.⁵⁶ Of course, understaffed medical departments mean long

55. See Jason Wright, *Why Showering in Prison Is Hell*, MARSHALL PROJECT (Jan. 10, 2019, 10:00 PM), <https://www.themarshallproject.org/2019/01/10/i-ve-been-in-prison-for-15-years-showering-is-hell> [<https://perma.cc/LXY8-YQJS>].

56. See *Brown v. Plata*, 563 U.S. 493, 493, 496 (2011) (linking deficient medical care to overcrowding, an issue related to understaffing).

wait times for any kind of care. But even security officer vacancies have a negative impact on medical care. Officers are often unavailable to escort people to medical appointments. In some cases, staff stretched thin are known to record that someone has refused a medical appointment when no appointment was offered, or the appointment was unworkable in some way such as being in the middle of the night or coinciding with a set court date. People at some facilities have to bang on their cells and yell for a “man down,” a call in prisons to indicate an emergency, to get any kind of medical care. When a medical emergency does occur, it can take hours for an emergency response team to arrive, even after a person has died in their cell.

Perhaps the most troubling consequence of understaffing is an increase in rates of suicide. Although suicide cannot be traced exclusively to understaffing, staff play a key role in keeping people safe in prison.⁵⁷ Texas prisons, like virtually all systems, have suicide prevention plans, but these plans rely on the constant presence of staff. There is no replacement for a staff member regularly observing an incarcerated person inside their cell to make sure they have not engaged in self-harm behaviors and to intervene if they have.

TDCJ has a higher suicide rate than the national average: the average annual mortality rate for suicide in TDCJ between 2020 and 2022 was eighty-six percent greater than the national average for 2019, the most recent available data. Texas had almost twice as many suicides per year as the Federal Bureau of Prisons.⁵⁸ In my work, I represent a woman whose sixteen-year-old son died by suicide, tying his sheet around his neck while in his cell at a mental health treatment program in TDCJ. A child with documented mental health diagnoses and a history of self-harm had to be left alone for a significant amount of time for this to happen. But when prisons are understaffed, policies like observations and mental health checks that are routine, but nonetheless essential, fall through the cracks.

While each of these deficiencies may not rise to the level of a constitutional violation in isolation, they surely present a situation that violates incarcerated people’s Eighth and Fourteenth Amendment rights in combination. As one court held, “[s]ome conditions of confinement may establish an Eighth Amendment violation ‘in combination’ when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need.”⁵⁹ Claims for deficient medical and mental health care are

57. See *id.* at 504 (linking suicide rates to overcrowding, an issue related to understaffing).

58. Texas Civil Rights Project, *supra* note 12.

59. *Laube v. Haley*, 234 F. Supp. 2d 1227, 1245 (M.D. Ala. 2002) (quoting *Wilson v. Seiter*, 501 U.S. 294, 304 (1991)) (“The court does not hold that any one of the above circumstances, standing alone, necessarily violates the Eighth Amendment Rather, the court holds today that it is the combination of substantial overcrowding and significantly inadequate supervision in open

regularly validated in the prison setting. In Texas, where mental health care is cursory at best, and people are left to die in their cells without a response from staff, an Eighth Amendment claim is more than plausible. Similarly, the use of holding cages may present a due process claim. Some courts may be amenable to claims arising out of solitary confinement in certain circumstances.⁶⁰ Taken together, the injustices in Texas prisons are likely sufficient to form the basis of a claim for understaffing – the common thread running through all the other violations. The PLRA’s procedural requirements still remain, but the crisis in Texas can meet that standard as well.

C. The Inadequacy of Other Approaches to Understaffing

To be a nonreformist intervention, a litigation challenge to understaffing must center the decarcerative remedy in its formulation. To do so, litigators must convince the court that no viable alternatives to release exist. This is the case for two reasons. First, the PLRA requires that previous attempts to resolve the violations have failed before a court may enter a release order. Second, it is a significant step to request a court to issue a release order. If any less intrusive options exist, a court will likely forego release for a more moderate intervention. And state defendants will likely argue vigorously for any viable alternatives to release, given its political unpopularity. Accordingly, a litigation challenge should marshal evidence showing that a release order is the only remaining option that can plausibly remedy the constitutional violations at issue.

In the case of Texas, past attempts make clear that no other viable approaches to understaffing remain, short of a decarcerative intervention. TDCJ has attempted for several years to increase its staffing levels without much success. It has tried increasing pay and implementing a program of traveling officers, which allowed enrollees to choose their prison after a period of time as roving support. Still, staffing levels remain unsustainably low. A report by the Texas State Auditor’s Office in December 2022 found that the statewide employee turnover rate for TDCJ was 22.7%, the highest in the past ten years.⁶¹ Voluntary separations made up eighty-two percent of turnover, a 6.2% increase from 2021.⁶² In their

dorms that deprives inmates In addition, other circumstances, such as improper classification, access to weapons, and the lack of adequate segregation units exacerbate the problem, as do the problems with the prison’s ventilation and heat.”).

60. See, e.g., *Hope v. Harris*, 861 F. App’x 571, 575 (5th Cir. 2021), *cert. denied*, 143 S. Ct. 1746 (mem.) (2023).

61. Lisa R. Collier, *An Annual Report on Classified Employee Turnover for Fiscal Year 2022*, TEX. STATE AUDITOR’S OFF. 5 (Dec. 2022), <https://sao.texas.gov/reports/main/23-703.pdf> [<https://perma.cc/KM28-TPYL>].

62. *Id.* at 6.

reasons for departure listed in exit surveys, 28.8% of employees cited pay or benefits and 14.2% cited poor working conditions or environment.⁶³ In terms of poor working conditions, common reasons included “heavy workload leading to burnout[,], not [being] able to take time off due to staffing shortage[, and] inadequate training and lack of resources to perform [the] job.”⁶⁴

TDCJ has attempted to remedy the problem by increasing pay for officers. In April 2022, it authorized a fifteen percent pay increase for all correctional officers, supervisors, and certain other staff positions.⁶⁵ This raise has seemingly had a modest effect, with approximately one thousand fewer vacancies in December than in April 2022 by some measures.⁶⁶ In the 2023 legislative session, TDCJ requested and received a legislative appropriation for fiscal year 2024-2025, which included \$374.8 million to continue to fund the approved raise, the single greatest expense of its nonstandard budget items.⁶⁷ Explaining this budget request, TDCJ noted that “over the past 10 years, the agency has seen a steady increase in staff vacancies. In February 2022, the agency reached an all-time high vacancy of 8,043 correctional officers To continue to address this significant operational challenge, continued funding for this pay raise is necessary.”⁶⁸ But as of December, there remained approximately 7,200 vacant positions even with the pay increase.⁶⁹

There are other potential strategies for hiring and retaining staff. Texas recently tried offering officers a \$100 bonus for referring another recruit.⁷⁰ Commentators have also suggested strategies such as improving the public perception and prestige of the correctional officer occupation; providing more detail in job postings to highlight the rehabilitative elements of the role; and developing

63. *Id.* at 11. 18.7% of the departed employees cited retirement, rounding out the top three reasons combined with pay/benefits and poor working conditions/environment since 2009. *Id.*

64. *Id.* at 11.

65. *Correctional Officer Pay Increase, Effective April 1, 2022*, TEX. DEP’T OF CRIM. JUST., https://www.tdcj.texas.gov/news/co_pay_increase.html [https://perma.cc/WZW2-SN8D].

66. *See supra* note 11.

67. *FY2024-25 Exceptional Items*, TEX. DEP’T OF CRIM. JUST., https://www.tdcj.texas.gov/documents/bfd/LAR_2024-25_Exceptional_Item_Listing.pdf [https://perma.cc/MV3N-8Z6Y].

68. Bryan Collier, *TBCJ Approves Agency’s 2023 Operating Budget, Legislative Appropriations Request for 2024-25 Biennium*, TEX. DEP’T OF CRIM. JUST., https://www.tdcj.texas.gov/news/ED_LAR_Update_FY24-25.html [https://perma.cc/P4GC-MKT5].

69. *See supra* note 11.

70. Alexander L. Burton & Cheryl Lero Jonson, *Jailers Need More than Money*, DALL. MORNING NEWS (Oct. 12, 2022, 1:30 AM), <https://www.dallasnews.com/opinion/commentary/2022/10/12/jailers-need-more-than-money> [https://perma.cc/L8YR-M9GP].

an internship program to assist in training and identifying potential recruits.⁷¹ But none of these measures are likely to provide a significant enough increase in staff to remedy the current shortage. TDCJ has even taken the step of closing several prisons, but has not gone far enough, nor released enough people in conjunction with closures, to bring staffing levels into check.⁷² Moreover, given the recent pay raise appropriation, it is unlikely that the legislature will be willing to fund another significant salary increase for a number of years. Nor can Texas rely on the lack of funding as an excuse to maintain unconstitutional conditions in its prisons. As the Eleventh Circuit has noted, “[l]ack of funds for facilities cannot justify an unconstitutional lack of competent medical care or treatment of inmates.”⁷³

One common strategy to compensate for understaffing is overreliance on overtime. This is nothing new. In *Laube*, the court noted that, on average, thirty-seven percent of the second shift staff were working overtime, and sometimes the entire staff was.⁷⁴ In Texas, “TDCJ authorizes units to work overtime, to include using officers from neighboring units, and deploying mobile correctional officer teams to cover positions necessary to provide appropriate security.”⁷⁵ But the system does not always work as smoothly as this assurance suggests. Officers are capped in the number of consecutive hours they are permitted to work, which means they may reach their limit after starting but before completing an overtime shift. Some prisons allow officers to start such a shift, mark the position as filled, and allow the officers to leave once they hit the cap part-way through a shift. This practice leads to inflated staffing numbers, disguising even more vacancies than appear at first glance. As the court in *Laube* recognized, “[f]illing staffing voids through the use of overtime can only do so much; officers working overtime tire and, ultimately, cannot compensate for the severe dearth of officers.”⁷⁶

71. *Id.*

72. Jolie McCullough, *As the Texas Prison Population Shrinks, the State Is Closing Two More Lockups*, HOUS. PUB. MEDIA (Feb. 21, 2020, 8:43 AM), <https://www.houstonpublicmedia.org/articles/news/2020/02/21/361405/as-the-texas-prison-population-shrinks-the-state-is-closing-two-more-lockups> [https://perma.cc/77C3-TA8L].

73. *Anderson v. City of Atlanta*, 778 F.2d 678, 688 n.14 (11th Cir. 1985) (citing *Newman v. Alabama*, 559 F.2d 283, 286 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978)).

74. *Laube v. Haley*, 234 F. Supp. 2d 1227, 1233-34 (M.D. Ala. 2002).

75. Email from the Office of the General Counsel, Texas Dep’t of Crim. Just. (Feb. 17, 2023) (on file with author) (“Units are currently allowed to fill more than their authorized part and full time positions. Due to the overall staffing shortage this will assist in staff helping at other units and reducing total agency overtime.”).

76. *Laube*, 234 F. Supp. 2d at 1251.

TDCJ does not appear to have seriously considered release or prison closure as strategies to address understaffing. The Department has periodically closed facilities it is unable to staff. But closures may be temporary – some facilities have reopened after, for example, pandemic-related understaffing led TDCJ to temporarily shutter them.⁷⁷ When a prison closes, the people incarcerated there are simply transferred to other facilities.⁷⁸ And despite the occasional closure, staff vacancy rates have remained high. Given this state of affairs, TDCJ appears unable to increase its staffing levels to an operable level – at least without a prohibitively large investment of resources. As such, a court-ordered response may be the only way to meaningfully address the inhumane conditions in Texas prisons.

D. Designing a Noncarceral Remedy

The PLRA’s main function is to limit prison litigation, whether by keeping prisoners out of court or courts out of prisons.⁷⁹ It is no surprise, then, that release orders are difficult to obtain and regularly denied. The framework for release is available, and by carefully navigating its provisions, a court order for a decarcerative remedy may be attainable.

Because the PLRA is worded with a focus on crowding, rather than staffing, it is essential that a challenge to understaffing is framed to encompass crowding. The phenomena are closely related: understaffing is one of many consequences of overcrowding, and remedying crowding will likely bring down prison populations to levels workable for the number of staff present. One potential stumbling block is that some systems, including Texas, are not actually over capacity. However, nothing in the PLRA defines “crowding.” Therefore, even if a prison is not over capacity based on physical space, it could be construed as over capacity with respect to certain units, services, or even staff. Moreover, crowding need not be the only cause of violations, just the primary cause. A court may also consider understaffing in evaluating an issue as a whole. As the Eastern District of California has noted, “[b]y requiring only that crowding be the primary cause

77. See Jolie McCullough, *Texas to Shutter Three More Prisons as Units Face Critical Staffing Shortages*, TEX. TRIB. (Dec. 1, 2020, 4 PM), <https://www.texastribune.org/2020/12/01/texas-prisons-close-understaffing> [https://perma.cc/NZ6X-BVXQ]. The Scott Unit, discussed here, has since reopened.

78. *Id.*

79. BEN-MOSHE, *supra* note 16, at 258 (“The PLRA was passed in 1996 with a stated purpose, backed up by a conservative agenda, to combat seemingly frivolous and costly litigation by prisoners. The act was passed with no actual evidence demonstrating any substantial problems with so-called frivolous litigation, but the rhetoric of pampered prisoners who were abusing the system with their minor complaints ultimately won the day.”).

of the constitutional violations at issue, the PLRA's language explicitly contemplates that secondary causes may exist. Had Congress intended to require that crowding be the only cause, it would have used language to that effect—for example, 'exclusive' or 'only' instead of 'primary.'"⁸⁰ Thus, it is possible to envision a challenge where understaffing also significantly contributes to violations.

Although the PLRA requires prior remedial attempts, the Act does not specify how long a "reasonable amount of time" is for defendants to attempt to remedy the situation. Further, the statute does not call for a previous order by *the same* court. "Under the plain language of the statute, the fact that a court has entered the relevant order in a different case does not disqualify that order for purposes of satisfying" the PLRA.⁸¹ It is possible, therefore, that separate litigation could fulfill this requirement, as long as the claims are similar.

In addition, there are two minor provisions of the PLRA that could be leveraged to support a decarcerative remedy. First, the Act clarifies that courts may not "order the construction of prisons or the raising of taxes" in fashioning relief.⁸² This first limitation is helpful because it prevents courts from resorting to the most obviously anti-abolitionist outcome of any conditions litigation—building new prisons. It also eliminates tax hikes as a potential, albeit drastic, source of funding for prisons, and by extension for prison staff. The legislature is still free to increase prison budgets, and it is difficult to imagine the political calculus, especially in a state like Texas, that would lead to raising taxes specifically to fund prisons. Even so, it is significant that the PLRA draws a line in the sand, refusing to grant entirely free rein in amassing funds to support prisons.

A second provision exempts from the PLRA's restrictions any "relief entered by a State court based solely upon claims arising under State law."⁸³ While the Federal Constitution is the obvious source of rights for abuses in prison, bringing an action in state court based only on analogous provisions in a state constitution could allow litigants to avoid the PLRA's onerous requirements entirely. However, the Texas state court system, with elected judges and justices, may be even less friendly to a large-scale prisoner release order than are federal courts.

Given these realities, a federal litigation challenge of the sort discussed here would surely be an uphill battle—especially in a state like Texas. But, if undertaken with sufficient planning, vigilance, and a consistent commitment to abolitionist principles, it may nevertheless be the best hope for alleviating the humanitarian crisis underway in the state's prisons. In sum, a challenge (after less

80. *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 920 (E.D. Cal. 2009).

81. *Gillette v. Prosper*, 66 V.I. 807, 818 n.8 (D.V.I. 2016).

82. *Jones v. Gusman*, No. CV 12-859, 2015 WL 7458605, at *2 n.21 (E.D. La. Nov. 24, 2015) (quoting 18 U.S.C. § 3626(a)(1)(C)).

83. 18 U.S.C. § 3626(d).

intrusive relief has failed) must establish that (1) constitutional violations are ongoing in the prison system; (2) the violations are traceable to understaffing and crowding, if only as defined by reference to staffing levels, and cannot be remedied if understaffing persists; (3) the state is unable to increase staffing to adequate levels; and (4) the only way to achieve an acceptable ratio of incarcerated people to staff is by decreasing the number of incarcerated people.

* * *

The centerpiece of an abolitionist challenge is the decarcerative remedy.⁸⁴ In the best of circumstances, a case can advance the “short-term goal of litigation (getting specific individuals out of specific carceral settings or getting specific facilities or units to close down) and the long-term goals of abolition of carceral enclosures.”⁸⁵ Ideally, a court would mandate enough releases to make it inefficient to continue to operate as many prisons as the system does, compelling closure of facilities. There will surely be pushback from local officials, worried about the economic impact of loss of jobs and prison industry. Indeed, “financial reasoning is one of the most pervasive discourses to maintain carceral spaces.”⁸⁶ Similarly, unions will likely protest such a move, as “it is most often the case that unions represent the fiercest opposition to the abolition and closure of prisons and institutions.”⁸⁷ But states can benefit financially from having fewer prisons to maintain; fewer people to house, feed, clothe, and provide medical care to; and less pressure to continue pouring funding into staff. Further, unions may accept some parts of a decarcerative remedy to an understaffing challenge, given the deplorable conditions in which their members may currently work.⁸⁸ Prisons

84. See FAY HONEY KNOPP ET AL., PRISON RESEARCH EDUCATION ACTION PROJECT, *INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS* 83 (Mark Morris ed., 1976) [hereinafter *INSTEAD OF PRISONS*] (“Get as many prisoners out of their cages as possible. Examine all methods of depopulating the prisons and jails.”).

85. BEN-MOSHE, *supra* note 16, at 231.

86. *Id.* at 201.

87. *Id.* at 203; see also *id.* at 226 (“In many hearings regarding the potential closures of institutions or prisons, one of the most pervasive arguments to keep them open (second only to ‘safety’) is about the facilities being major economic engines for their surrounding areas and the loss of jobs their closures will entail . . . What labor unions could be doing, for example – and some have already begun this transition – is advocating for better wages and opportunities for their employees to work in community noncarceral settings.”).

88. See *id.* at 207 (“[A]lthough most contemporary unions are against closure of prisons and institutions, there are potentials for coalition and solidarity to form among workers, including those who work inside, that is, between labor movements, unions, and those who are incarcerated, for both pragmatic economic and ethical reasons.”).

with fewer residents generally make for better working conditions, with less violence and with the potential for staff to form real relationships with incarcerated people, rather than simply putting out fires.

Releasing large numbers of people will demonstrate that imprisonment is not as essential as many assume it to be. Society can remain safe and orderly with a much smaller carceral footprint. Large-scale release can pave the way for even more releases and prison closures, undermining the role of prison in society, all the while priming the public to question carceral institutions and be more open to accepting an abolitionist future.⁸⁹

In addition, an abolitionist challenge such as this can advance other features of nonreformist litigation. Litigators can obtain otherwise inaccessible information about prison systems throughout the litigation process and share that information with impacted communities. Those communities can then act on the information to advance nonreformist ends, taking on carceral systems with better preparation than they previously could. Litigators should also work together with community advocates to ensure the message of the litigation is used to support abolitionist aims and is not co-opted for reformist goals. As Derecka Purnell notes, abolition “is a bigger idea than firing cops and closing prisons; it includes eliminating the reasons people think they need cops and prisons in the first place.”⁹⁰

IV. POTENTIAL CHALLENGES

Of course, these are lofty goals. But even a modest number of releases can begin to move the needle. To increase the potential for success, it is important to act deliberately—any legal challenge to understaffing, especially one in Texas, must be undertaken with caution.⁹¹ The Fifth Circuit in its current composition

89. This strategy, of reducing the power of prisons over time by, among other things, decarcerating “as many prisoners . . . as possible,” is known as the “attrition model.” *INSTEAD OF PRISONS*, *supra* note 84, at 82–83. It should be noted that “[t]here are quite a few critics of this strategy The problem of chipping at the margins of the system is that the center, the logic of incarceration itself as neutral and essentially benign (as long as those incarcerated are healthy and not mistreated), remains intact.” BEN-MOSHE, *supra* note 16, at 263–64. Therefore, it is important that abolitionist messaging be present throughout the litigation, to continue to challenge the logic of incarceration.

90. DERECKA PURNELL, *BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM* 6 (2021); *see also* *INSTEAD OF PRISONS*, *supra* note 84, at 128 (“Abolitionists can provide and stimulate needed community support for favorable judges and other decision makers.”).

91. Further, “all interim as well as long range strategies [should] be considered only after conferring with knowledgeable prisoner and ex-prisoner groups. Interim policies crucially affect the lives of prisoners . . . and many ex-prisoners What seems a paltry and therefore unacceptable change to those outside the wall, might be a highly significant and desirable change

is notoriously hostile to prisoners, and any adverse ruling in the Fifth Circuit may lead to setbacks nationally, especially given the current orientation of the Supreme Court with regard to the civil rights of politically unpopular groups. More specifically, the most obvious answer to a staffing shortage is to increase funding for state corrections departments so that they can hire more staff, but this response would only further entrench the current prison establishment—in direct contravention of abolitionist principles. Any case with the potential to funnel more resources into prisons may do more harm than good in the long run. Accordingly, it is essential to take account of these potential pitfalls before embarking on a staffing challenge.

A. Delays

Conditions litigation has been characterized by litigation stretching on for years and decades. Any case brought in this model should therefore aim to define and achieve an endpoint, to whatever extent possible, to prevent abolitionist goals from being subsumed by the needs and realities of litigation. The PLRA itself is written to require a drawn-out process, with an initial court order and time for implementation before a court can even consider a release order. Both before the PLRA and since its enactment, it takes years for a case to proceed through the courts to even obtain an order, which can then take even longer to implement and monitor. By the end of the process, the state of the prison system may be a far cry from the initial relief ordered. It is no secret that “[t]hese litigations [have] indeed lasted for decades, and the court orders that called for closure or complete overhaul of the facilities were never quite adhered to, resulting in more litigation.”⁹²

Even in the paradigmatic example of successful release order litigation, decades of court involvement have not completely resolved the underlying issues. In *Brown v. Plata*, the culmination of a legal challenge to overcrowding linked to unconstitutionally deficient medical care in California’s prisons, the Supreme Court upheld a three-judge panel’s release order.⁹³ It took decades of litigation, a gubernatorial proclamation, and countless deaths to convince two district courts, a three-judge panel, and ultimately the Supreme Court that the conditions in California’s prisons were constitutionally impermissible and that only a

for those who are caged or under control in the streets. If there are differences in strategies between prisoners who have experienced the day to day reality of prisons and prison changers who have not, take the time to hammer out differences and reach agreement. Strategies and tactics that are not in unity weaken the total movement toward systems change.” *INSTEAD OF PRISONS*, *supra* note 84, at 114.

92. BEN-MOSHE, *supra* note 16, at 241.

93. 563 U.S. 493, 502 (2011).

release order could remedy them. As Sharon Dolovich put it, “[t]hat the *Plata* Court upheld the panel’s order indicates just how dire the situation in the California prisons had become.”⁹⁴ Indeed, “*Plata* stands less for any legal principle than for the proposition that, when circumstances become sufficiently dire, the need for relief will become desperate enough to vindicate unprecedented forms of remedy.”⁹⁵

Although *Plata* served some abolitionist goals by providing an impetus for decreasing prison populations and improving the lives of those left inside, its decarcerative impact was limited. It did not attempt to undermine the value of incarceration in society: “Even if it is true that *Plata*[] put *mass* incarceration on trial, it did not critique confinement itself and the legitimacy of these carceral edifices [T]he need for segregation was not questioned by the courts, only the conditions by which people are segregated.”⁹⁶ *Plata*’s delays and framing may lead some abolitionists to question the value of this type of litigation. If litigation is truly aimed at changing systems, it must progress at a reasonable pace. Otherwise, it risks settling into reformist trends, not to mention preventing the alleviation of harm in the present. Still, when conditions are critical, litigation can be worth pursuing with an eye towards proceeding as efficiently as possible. Whether this means pushing for settlement, structuring relief on a limited time frame, or other measures, litigators have a variety of strategies available to them to minimize lengthy delays.

B. Transfers to Other Facilities or Systems

Another unintended consequence of the *Plata* litigation was an influx of people into county jails. Faced with a mandate to reduce the state prison population, California officials chose to lessen the population pressure by relocating many

94. Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 332 (2011).

95. Kiel Brennan-Marquez, *Judging Pain*, 31 QUINNIPIAC L. REV. 233, 269 (2013); see also Neil Stockbridge, *Eighth Amendment State of Emergency—Prisoner Reduction Order as a Last Resort in Brown v. Plata*, 65 SMU L. REV. 229, 235 (2012) (“One does not simply fast-track a prisoner reduction order This case has set the bar high for developing a factual record, attempting several relief plans, and affording a long time period before addressing a prisoner reduction order. Moreover, California was in a unique position due to its fiscal crisis and the low priority that its legislature gave prison reform. For these reasons, it seems unlikely that a prisoner reduction order of this magnitude will ever again be ordered.”); Lauren Salins & Shepard Simpson, *Efforts to Fix a Broken System: Brown v. Plata and the Prison Overcrowding Epidemic*, 44 LOY. U. CHI. L.J. 1153, 1177 (2013) (“While the Court-imposed prisoner release order was a necessary step after more than a decade of litigation, it was also one of last resort.”).

96. BEN-MOSHE, *supra* note 16, at 261.

individuals to a convenient parallel system: county jails.⁹⁷ The policy went by the name of “realignment,” indicating adjustment rather than release. This phenomenon was by no means new – moving people from one cage to another has long been a response to calls for reform.⁹⁸ Thus, a case seeking a decarcerative remedy must ensure that any release order is crafted in a way that requires true release – not just displacement to another corner of the criminal legal system.

A litigator must therefore frame any challenge in a way that reduces the possibility of transfer in response to understaffing claims, a procedurally simpler path than release. This means focusing the case on how understaffing affects the system as a whole, such that moving people around cannot sufficiently alleviate the harms at issue. The appeal of transferring prisoners rather than releasing them will likely be strong for all sides, both because it is a less drastic intervention and because it could allow the parties to sidestep the complexities of the PLRA. In the decades since the PLRA’s enactment, courts have struggled to precisely define “release.” If an action can be construed as anything other than a request for a release order, then the court need not comply with the onerous requirements of § 3626(a)(3), and prisoners have a greater chance of success.

In particular, courts have come to conflicting decisions regarding whether transfer constitutes release under the PLRA. Still, the weight of the authority seems to support excluding transfer orders from the requirements for prisoner release orders. For example, the district court in *Plata* contemplated the possibility that transfers could fall outside the scope of these requirements: “Defendants conceded that an order to transfer any single inmate out of a prison to correct the violation of a constitutional right caused by something other than crowding – for example, because [the] transfer was necessary for the inmate to obtain appropriate medical care – would not be a ‘prisoner release order.’”⁹⁹ Another district court concurred: “A transfer of prisoners to another correctional facility is not a ‘release,’ but is germane to release by reducing the number of prisoners who have to be released in order to reduce overcrowding: the more transfers, the fewer releases.”¹⁰⁰

97. Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 165, 166 (2013).

98. Cf. BEN-MOSHE, *supra* note 16, at 225 (“As with many other cases of prison closures, the vast majority of those incarcerated in Tamms [a former maximum-security facility in Illinois that was shuttered] were transferred out not to freedom but to other facilities.”).

99. *Plata v. Brown*, 427 F.Supp.3d 1211, 1222 (N.D. Cal. 2013).

100. *United States v. Cook Cnty.*, 761 F. Supp. 2d 794, 800 (N.D. Ill. 2011); *see also Plata v. Newsom*, 445 F. Supp. 3d 557, 570 (N.D. Cal. 2020) (“Judge Henderson concluded that a single-judge court had the authority to enter an order requiring transfer of inmates between [California Department of Corrections and Rehabilitation] facilities when such transfer was not required to correct the violation of a constitutional right caused by crowding.”); *Money v. Pritzker*, 453 F. Supp. 3d 1103, 1124 n.11 (N.D. Ill. 2020) (noting with approval a single-judge’s

The question of transfer versus release has the potential to divide abolitionists from reformists. In some scenarios, individuals could be transferred to facilities with higher staffing levels rather than released as a result of litigation. If a transfer is not considered release, then the prisoner release order provision would not apply, allowing litigators to avoid the arduous requirements and slow pace of a suit for a release order (although the PLRA provisions governing prospective relief likely would still apply). Even if TDCJ, for example, is currently reluctant to invest the resources necessary to transfer large numbers of incarcerated individuals to balance out staffing ratios, when faced with the possibility of a release order, such transfers may become a more appealing option. And in terms of the present wellbeing of people in prison, transfer may be appealing as well.

But from an abolitionist perspective, a lawsuit (or even a settlement) culminating in transfers would be a loss. Shuffling people from one carceral setting to the next does not serve the goals of the movement, beyond alleviating immediate suffering. Even then, transfer is unlikely to improve physical conditions in any lasting way. Mass transfers could also further entrench the current rate of incarceration and staffing levels, a significant setback for abolitionist goals.

It appears unlikely that, at least in the case of Texas, mass transfer is a viable option. If it were, one would hope TDCJ would have tried it by this point in their staffing crisis. Rather, the vacancy rates appear too high to be amenable to this type of remedy. Indeed, the extreme vacancy rate is the reason a release order is legally viable. However, it is nevertheless important to consider the possible co-option of a staffing challenge by more conservative actors when framing such a strategy. As one court stated, the line between transfer and release “is a distinction not without a difference.”¹⁰¹ Therefore, an abolitionist legal challenge must anticipate this potential counterproductive alternative and clearly articulate that transfer is not an appropriate or sufficient remedy.

C. *The Texas Context*

Texas state law presents its own barriers to release. For a release order to take effect, there must be some legal mechanism for people to leave prison. Potential paths include early parole review, compassionate release, commutations, or other means. Assuming a state executive hostile to mass commutations, an administrative mechanism is likely preferable. But Texas law provides limited options. Under a policy known as discretionary mandatory sentencing, even some people

“exclusionary order for medically vulnerable prisoners’ during a ‘Valley Fever’ epidemic”). But see *Money*, 453 F. Supp. 3d at 1124-26 (denying temporary restraining order to transfer prisoners to their homes on temporary medical furlough as a “release order” under the PLRA).

101. *Reaves v. Dep’t of Corr.*, 404 F. Supp. 3d 520, 522 (D. Mass. 2019).

who have served their full terms must be reviewed before TDCJ will release them, holding up the release of untold numbers of people.¹⁰² Legislation eliminating this review requirement would open up possibilities for large-scale release.

Similarly, while Texas has a compassionate-release mechanism – a generous one by some measures – it is used rarely and primarily when people are terminally ill or require constant medical care.¹⁰³ But the compassionate-release statute allows for release in a number of situations, including for people over the age of sixty-five and for those with intellectual or certain physical disabilities.¹⁰⁴ A policy shift at the parole board could pave the way for the release of the vast numbers of people in TDCJ custody who fall into these categories, thus operationalizing a prisoner-release order.

Although these limited release mechanisms exist, and could be expanded, the state political process as a whole is unlikely to provide a solution to understaffing. In the most recent Texas legislative session, bills to reform solitary confinement, prison programs, and compassionate release all failed.¹⁰⁵ Even measures requiring prisons to keep the temperature at livable levels failed, in the lead-up to the hottest summer on record.¹⁰⁶ The legislature did approve additional funding for staff, which, as discussed above, has proven time and again to be insufficient to end deficient prison conditions.

To the extent that TDCJ officials understand the crisis and desire some relief, if only for the sake of their officers, they could consent to a release remedy. Indeed, a significant number of the release orders entered have been with the consent of both parties. Particularly in the case of jails, sheriffs have been able to point to court orders as political cover “for administrators stuck with overcrowded facilities (which are dangerous for staff as well as for inmates)”¹⁰⁷

102. *BPP-POL 145.202: Discretionary Mandatory Sentencing*, TEX. BD. OF PARDONS & PAROLES (Apr. 27, 2023), https://www.tdcj.texas.gov/bpp/policies_directives/POL_145.202.pdf [<https://perma.cc/H6G5-ZZ6Q>].

103. TEX. CODE ANN. § 508.146 (West 2023); see *Annual Statistical Report, FY 2022*, TEX. BD. OF PARDONS & PAROLES 11, https://www.tdcj.texas.gov/bpp/publications/FY_2022_Annual_Statistical_Report.pdf [<https://perma.cc/C4H8-QJTY>].

104. TEX. CODE ANN. § 508.146(a)(1)(A) (West 2023).

105. See H.B. 480, 88th Leg., Reg. Sess. (Tex. 2023) (solitary confinement); H.B. 967, 88th Leg., Reg. Sess. (Tex. 2023) (prison programs); H.B. 305 88th Leg., Reg. Sess. (Tex. 2023) (compassionate release).

106. H.B. 1708, 88th Leg., Reg. Sess. (Tex. 2023).

107. Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 623 (2006) (“As one jail administrator said to me about a case that served his jail very well, budgetarily, ‘We got a lot of mileage out of that lawsuit; [we could] whip out [that decree] like a stiletto.’”); see also Schlanger, *supra* note 97, at 199 (“Jail and prison officials may be happy to live under a population cap nominally imposed upon them

But in Texas, a consent order is also a longshot. In this environment so hostile to the rights of incarcerated persons, a political solution to understaffing appears incredibly unlikely. Therefore, the courts may be the most viable path forward for abolitionists interested in making change in the Texas prison system.

CONCLUSION

Even with the many obstacles discussed in this Essay, and countless others, abolitionists should not discount the potential of conditions litigation to advance their aims. A legal challenge organized around unconstitutionally low staffing levels may be a viable option to bring violations to the courts in a package aimed at securing release. In the face of significant hurdles, it is important to bear in mind that the “strategy of sounding off alarms and characterizing institutional reform litigation as inherently unsuccessful has been used as a deliberate tactic by opponents of decarceration and deinstitutionalization that wanted to portray them as unrealistic and wasteful.”¹⁰⁸

Litigation strategies like the one discussed here are early interventions in the path towards prison abolition that can minimize the harms of incarceration, gain momentum for decarceration, and pave the way for bolder action. This strategy in isolation is insufficient. But in conjunction with work by organizers in and out of prisons, it can bolster a broader vision for the future. Moreover, it can help prime public perception to accept the possibility that large-scale release is not a threat to public safety. By grounding this litigation strategy in abolitionist principles, it may be possible to walk the line between harmful reformist efforts and counterproductive overtheorizing and to chart a course for decarcerative prison litigation.

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by a federal court . . . [T]he court-appointed receiver in charge of the California prison medical system under *Plata*, observes that ‘operating with a cap is, for corrections people, a joy; you actually can operate.’ In addition, as the California sheriffs’ own lobbyist . . . explains . . . ‘These caps are hedges against liability; it’s unlikely you’ll see any sheriffs ask for them to be lifted.’” (footnote omitted)). For examples of parties other than prisoners requesting release orders, see *United States v. Cook Cnty.*, 761 F. Supp. 2d 794, 796 (N.D. Ill. 2011), in which the Sheriff of Cook County, who is the administrator of the Cook County Jail, moved for entry of a release order; and *Roberts v. Mahoning Cnty.*, 495 F. Supp. 2d 713, 715 (N.D. Ohio 2006), in which a judge initiated proceedings for a release order sua sponte after a bench trial, although neither party requested a release order.

¹⁰⁸ BEN-MOSHE, *supra* note 16, at 241.

ABOLITIONIST PRISON LITIGATION

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