COLLATERALLY ATTACKING THE PRISON LITIGATION REFORM ACT'S APPLICATION TO MERITORIOUS PRISONER CIVIL LITIGATION

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Earlier this year, the Prison Litigation Reform Act (PLRA) reached its twenty-fifth birthday, reinvigorating discussion on its effects on people in prison and the U.S. criminal justice system more broadly. This Note examines how the PLRA deters and obstructs prisoners' ability to file meritorious civil rights lawsuits regarding the conditions of their confinement. The PLRA does so primarily through four of its provisions, which this Note refers to as the "access provisions." The access provisions include: (1) the exhaustion of administrative remedies; (2) the filing fee provision; (3) the three-strikes rule; and (4) limitations on attorney's fees.

This Note argues that there is a need for states to counteract the PLRA's application to meritorious prisoner litigation not only for the dignity and well-being of people in prison but also to improve prison conditions overall. This Note therefore proposes a broad framework to better ensure that prisoners have a fair opportunity to have their meritorious civil rights claims reach the court system and, further, succeed. The framework requires states to: (1) implement electronic grievance systems and (2) grant appropriate legal aid organizations that typically litigate prisoners' civil rights cases with access to those electronic grievance systems. This Note aims to encourage government actors and scholars to think more critically about how best to navigate a post-PLRA reality.

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INTRODUCTION

Nowhere else has the destruction of the unprecedented COVID-19 pandemic been more deeply felt than throughout America's prisons.[1] Prisons are notoriously overcrowded and unsanitary, and they house populations that are disproportionately susceptible to illnesses.[2] All of this coupled with

1. *See* Lee Kovarsky, *Pandemics, Risks, and Remedies*, 106 VA. L. REV. ONLINE 71, 73 (2020) ("American criminal detention was ground zero for COVID outbreaks.").
2. *See id.* at 73–74.

initially inadequate responses at the federal[3] and state levels[4] have resulted in over 2600 prisoner deaths since the pandemic's beginning.[5] In an effort to prevent imprisonment from becoming a de facto death sentence, inmates across the country have flocked to the courts seeking relief,[6] whether it be for compassionate release, transfer to home confinement, or on the basis that their constitutional rights have been violated by inadequate protections against COVID-19.[7]

However, even in the present crisis, prisoner lawsuits alleging constitutional violations have been thwarted[8] by the Prison Litigation Reform Act of 1995[9] (PLRA or "the Act"), an under-the-radar piece of Clinton-era legislation that has made it considerably harder for prisoners[10] to challenge their conditions of confinement[11] in federal court.[12]

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3. *See* Kim Bellware, *Prisoners and Guards Agree About Federal Coronavirus Response: "We Do Not Feel Safe"*, WASH. POST (Aug. 24, 2020, 2:16 PM), https://www.washingtonpost.com/nation/2020/08/24/prisoners-guards-agree-about-federal-coronavirus-response-we-do-not-feel-safe/ [https://perma.cc/5CFR-RYUH].

4. *See* Emily Widra & Dylan Hayre, *Failing Grades: States' Responses to COVID-19 in Jails & Prisons*, PRISON POL'Y INITIATIVE (June 25, 2020), https://www.prisonpolicy.org/reports/failing_grades.html [https://perma.cc/S3A7-7QWM] (concluding that "despite all of the information, voices calling for action, and the obvious need, state responses ranged from disorganized or ineffective, at best, to callously nonexistent at worst").

5. *See A State-by-State Look at 15 Months of Coronavirus in Prisons*, MARSHALL PROJECT, https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons [https://perma.cc/282K-YCEG] (last visited Aug. 9, 2021).

6. *See* Michael Gelb, *'Dozens of Prisons' Targeted in COVID-19 Civil Rights Lawsuits*, CRIME REPORT (July 30, 2020), https://thecrimereport.org/2020/07/30/civil-rights-lawsuits-target-prison-response-to-pandemic/ [https://perma.cc/Z45U-DJ2V].

7. *See* Ariane de Vogue, *Covid-19 Cases Concerning Prisoners' Rights Hit the Supreme Court*, CNN (May 21, 2020, 7:01 AM), https://www.cnn.com/2020/05/21/politics/covid-19-supreme-court-prisoners-rights/index.html [https://perma.cc/MRL8-J9CF].

8. *See, e.g.*, Valentine v. Collier, 140 S. Ct. 1598, 1598 (2020) (mem.) (affirming the Fifth Circuit's denial of an injunction which would require a Texas geriatric prison to make enhanced efforts to contain the coronavirus due to failure to exhaust administrative remedies pursuant to the PLRA).

9. Pub. L. No. 104-134, §§ 801–10, 110 Stat. 1321, 1321-66 to -77 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

10. The PLRA defines "prisoner" as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 42 U.S.C. § 1997e(h). However, this Note focuses on individuals in prison or those who have already been convicted of a crime. This Note uses the terms "prisoner," "inmate," and "person in prison" interchangeably.

11. The phrase "conditions of confinement" includes "all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002).

12. *See* John Pfaff, *The 1994 Crime Law Hogs the Legal Reform Spotlight. But a Lesser-Known Law Deserves More Attention*, APPEAL (Oct. 2, 2019), https://theappeal.org/1994-crime-law-biden/ [https://perma.cc/RCV4-CCKF]. The PLRA does not apply to habeas corpus petitions and criminal appeals, as it is restricted to civil actions. *See* Walker v. O'Brien, 216 F.3d 626, 634 (7th Cir. 2000).

In 1996, Congress enacted the PLRA in response to a perceived overabundance of frivolous[13] inmate civil rights litigation, which Congress deemed highly costly for the federal court system and state governments.[14] While Congress's stated intention in passing the PLRA was to curtail frivolous lawsuits,[15] the Act has in fact deterred and obstructed the filing of meritorious civil rights lawsuits,[16] resulting in a significant reduction of prisoner lawsuits in the federal courts.[17] It has done so primarily through four of its provisions:[18] (1) the administrative exhaustion requirement; (2) the filing fee provision, (3) the three-strikes rule, and (4) limitations on attorney's fees. This Note refers to these provisions as the PLRA's "access provisions." This Note examines how these particular provisions deter and obstruct the filing of meritorious civil rights lawsuits, consequently diminishing the already lacking transparency of prison conditions nationwide.

Part I discusses how prisons typically operate with minimal transparency, enabling troubling prison conditions to persist. It then provides a brief history of how federal litigation improved state prison conditions, particularly from the 1960s to the 1980s. Part I concludes by highlighting the rise in so-called "frivolous" prisoner litigation that culminated in the early to mid-1990s and served as the basis for the PLRA's enactment.

Part II describes the PLRA's access provisions in detail and explores how these provisions deter and obstruct the filing of meritorious prisoner civil rights lawsuits. In doing so, Part II concludes that the PLRA has tampered with the only real transparency mechanism for exposing prison conditions.

Finally, Part III argues that there is a need to combat the access provisions' application to meritorious prisoner civil litigation. To address this need, Part III proposes that states implement a two-step framework. This proposed framework takes a broad approach, so as to give the best chance for practical implementation. More specifically, this Note argues that: (1) states should require that prison grievance processes are conducted primarily via electronic means to ensure that all grievances are stored in an electronic database and (2) states should require that appropriate outside legal aid organizations be given access to those electronic grievance databases in order to facilitate attorney representation.

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13. This Note uses the term "frivolous" to mean that which lacks an arguable basis in law or fact.

14. *See infra* notes 104–05 and accompanying text.

15. *See* 141 CONG. REC. 27,041–42 (1995).

16. *See infra* Part II.B.

17. *See infra* notes 250–52 and accompanying text.

18. The PLRA has several other provisions which are not the focus of this Note. A few of those provisions include: a requirement that a prisoner cannot bring a lawsuit without a prior showing of physical injury or the commission of a sexual act, 42 U.S.C. § 1997e(e); a screening provision whereby a court must dismiss a prisoner's case if it determines that the complaint is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief," 42 U.S.C. § 1997e(c)(1); and provisions restricting the ability for federal judges to grant prospective relief, *see* 18 U.S.C. § 3626.

I. BREAKING DOWN THE BARRIER BETWEEN PRISONS AND THE PUBLIC: THE IMPORTANCE OF PRISONER LITIGATION

This part discusses how prisoner litigation has traditionally served as one of the only effective transparency mechanisms for prisoners to expose the realities of prison life to the outside world. Part I.A briefly describes several barriers that prevent the public from knowing what occurs behind prison walls. Given these barriers, Part I.B highlights how prisoner civil rights litigation is one of the only means to expose and improve prison conditions. Part I.C then provides context for the PLRA's enactment by recounting the rise in so-called frivolous prisoner litigation.

A. Barriers to Public Access of Prisons

State prisons in the United States house approximately 1.3 million people[19] and receive significant funding through taxpayer dollars.[20] Despite the number of people and costs involved, state prisons remain "shrouded in secrecy."[21] In large part, this comes as a result of several barriers to public access, including geographic separation, limits on media access and external communication, inefficacy of public disclosure laws, and a general lack of independent prison oversight.[22]

First, prisons are physically separated from the public at large.[23] Typically located in geographically remote, rural locations,[24] the heavily guarded and closed environment of prisons naturally hides them from public view.[25] As one historian put it: "Prisons are built to be out of sight and are, thus, out of mind."[26]

19. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/QZ4D-EZCQ] (displaying slideshow showing 1,291,000 people in state prisons).

20. *See* Nicole Lewis & Beatrix Lockwood, *The Hidden Cost of Incarceration*, MARSHALL PROJECT (Dec. 17, 2019, 5:00 AM), https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration [https://perma.cc/5ARC-PWE3] (noting how the United States spends more than $80 billion each year to keep roughly 2.3 million people behind bars).

21. Andrea C. Armstrong, *No Prisoner Left Behind?: Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 462 (2014).

22. *See infra* notes 23–39 and accompanying text.

23. *See* Michele Deitch, *The Need for Independent Prison Oversight in a Post-PLRA World*, 24 FED. SENT'G REP. 236, 236 (2012) ("Prisons and jails are closed institutions, both literally and symbolically, and they operate far away from public view.").

24. *See* Laura Rovner, *On Litigating Constitutional Challenges to the Federal Supermax: Improving Conditions and Shining a Light*, 95 DENV. L. REV. 457, 461 (2018).

25. David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1453 (2010).

26. Heather Ann Thompson, *What's Hidden Behind the Walls of America's Prisons*, CONVERSATION (June 4, 2017, 9:45 PM), https://theconversation.com/whats-hidden-behind-the-walls-of-americas-prisons-77282 [https://perma.cc/CU2H-SYVR].

Second, media access to prisons is limited and subject to the discretion of corrections officials.[27] Additionally, although incarcerated people can communicate with members of the public, external prisoner communication remains subject to prison surveillance, making it difficult to obtain an unfiltered prisoner viewpoint.[28]

Third, public disclosure laws do not provide full transparency of prison conditions. In addition to the Freedom of Information Act[29] (FOIA), which governs the disclosure of government records at the federal level, all fifty states have open records statutes, many of which are modeled off FOIA.[30] These statutes are meant to embody a commitment to openness and transparency.[31] However, state departments of correction (DOCs) often take long to respond to disclosure requests or fail to respond altogether.[32] In addition, DOCs frequently rely on statutory exemptions in public disclosure laws, which often preclude public access to information regarding law enforcement.[33] The common response to an open records request about prison conditions is that public access to the requested documents would "threaten the security of the institution" by possibly resulting in "prison riots, public disturbances, and increases in violent crime within prison walls."[34] Thus, in the prison context, public disclosure laws do not freely grant the public access to information about prison conditions.[35]

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27. *See, e.g.*, Thornburgh v. Abbot, 490 U.S. 401, 413 (1989); Turner v. Safley, 482 U.S. 78, 89 (1987); Pell v. Procunier, 417 U.S. 817, 827–28 (1974); *see also* Rovner, *supra* note 24, at 462–63.

28. Demetria D. Frank, *Prisoner-to-Public Communication*, 84 BROOK. L. REV. 115, 117 (2018).

29. 5 U.S.C. § 552.

30. *See* Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1161 (2002); *see also* Christina Koningisor, *Transparency Deserts*, 114 NW. U. L. REV. 1461, 1506 (2020) (stating that while many state public records statutes have adopted certain parts or features of FOIA, each state law remains unique).

31. *See* Solove, *supra* note 30, at 1161.

32. *See, e.g.*, Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 461–62 (2011) (explaining how the Alabama DOC continuously ignored Open Records Act requests for months and only provided the requested documents after repeated threats of litigation); *Florida Department of Corrections Sued over Failure to Provide Public Records Related to COVID-19 Policies*, S. POVERTY L. CTR. (May 15, 2020), https://www.splcenter.org/presscenter/florida-department-corrections-sued-over-failure-provide-public-records-related-covid-19 [https://perma.cc/GRH9-LB9U] (discussing how for almost two months the Florida DOC failed to respond to public records requests by the Southern Poverty Law Center asking for information about policies to deal with the COVID-19 pandemic).

33. FOIA contains nine broad categories of government records exempt from public disclosure. 5 U.S.C. § 552(b). In contrast, state public disclosure laws can contain hundreds of enumerated exemptions which tend to sweep broadly. *See, e.g.*, Koningisor, *supra* note 30, at 1506 (explaining how Florida's open records law contains 1000 exemptions to public disclosure).

34. Armstrong, *supra* note 21, at 464.

35. *See* Michele Deitch, *But Who Oversees the Overseers?: The Status of Prison and Jail Oversight in the United States*, 47 AM. J. CRIM. L. 207, 222–23 (2020).

Lastly, a lack of independent prison oversight enables prisons to generally operate without public scrutiny.[36] Despite having one of the highest rates of incarceration worldwide, the United States lacks a national comprehensive mechanism for the routine inspection and monitoring of all confinement facilities.[37] At the state level, nonjudicial independent oversight of correctional facilities has been described as "spotty and in many jurisdictions nonexistent."[38] While some states have implemented different types of independent monitoring and investigative agencies,[39] they remain the minority.

Thus, prison conditions lack transparency, leaving many Americans in the dark about the realities of prison life.[40] This has enabled unspeakable abuse of men and women to occur behind prison walls.[41] More specifically, extreme overcrowding, routine violence, sexual misconduct, and inadequate physical and mental health care consistently plague federal and state correctional facilities throughout the United States.[42]

The COVID-19 pandemic has further exposed and exacerbated these existing deficiencies. Prisons remain "cramped, unhygienic, and designed to inhibit a person's ability to protect themselves."[43] Without the opportunity to practice social distancing or frequent handwashing in typically unsanitary and crowded environments,[44] "inmates everywhere have been rendered vulnerable and often powerless to protect themselves from harm."[45] To minimize the spread of the virus, prison systems have placed prisoners in

36. *See* Armstrong, *supra* note 21, at 467.

37. *See* Fathi, *supra* note 25, at 1454 (noting that the "United States has no independent national agency that monitors prison conditions").

38. *Id.* at 1460; *see also* Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754, 1762 (2010) (finding that formal and comprehensive external oversight among the states is "truly rare").

39. *See, e.g.*, Deitch, *supra* note 38, at 1788. Professor Michele Deitch's most recent overview in 2020 of correctional oversight mechanisms throughout the United States noted that in the past few years, several states have established or strengthened existing independent prison oversight. *See* Deitch, *supra* note 35, at 246; *see, e.g.*, H.B. 1552, 30th Leg., Reg. Sess. (Haw. 2019) (establishing the independent Hawaii Correctional System Oversight Commission); A.B. 3979, 218th Leg., Reg. Sess. (N.J. 2019) (strengthening the Office of the Corrections Ombudsperson, an independent office that reports directly to the governor, in New Jersey).

40. *See* Rovner, *supra* note 24, at 461; *see also supra* note 21 and accompanying text.

41. *See* Deitch, *supra* note 23, at 236 ("In such closed environments, abuse is more likely to occur and less likely to be discovered."); Thompson, *supra* note 26.

42. *See* Sharon Dolovich, *Cruelty, Prisons, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 887–89 (2009).

43. Dylan Hayre, *How State Governments Across the Country Failed to Protect Our Communities From COVID-19*, ACLU (July 2, 2020), https://www.aclu.org/news/criminal-law-reform/how-state-governments-across-the-country-failed-to-protect-our-communities-from-covid-19/ [https://perma.cc/RS6N-G37F].

44. *See* Aleks Kajstura & Jenny Landon, *Since You Asked: Is Social Distancing Possible Behind Bars?*, PRISON POL'Y INITIATIVE (Apr. 3, 2020), https://www.prisonpolicy.org/blog/2020/04/03/density/ [https://perma.cc/5M5X-XQ9V] (demonstrating that social distancing is impossible behind bars and access to necessary hygiene products is lacking).

45. Valentine v. Collier, 140 S. Ct. 1598, 1601 (2020) (mem.).

lockdown or solitary confinement.[46] As a result, prisons across the country have further closed their doors by suspending family visits, halting inspections by outside agencies, and limiting prisoners' communications with the outside world.[47]

Despite these efforts to contain the virus, there have been devastating consequences. As of May 30, 2021, more than 390,000 people in prison have tested positive for COVID-19, and over 2600 inmates have died as a result.[48]

B. Federal Litigation: Exposing and Reforming Prison Conditions

While the aforementioned barriers have largely kept the public shielded from the realities of life behind bars, prisoners have taken matters into their own hands. Thus, it is important to note how federal litigation has historically improved prison conditions, making the current conditions "less brutal" and inhumane than in years past.[49]

Without political representation,[50] prisoners have turned their attention to the federal courts to have their voices heard.[51] However, they have not always been met with open arms. Prior to the 1960s, courts took a "hands-off" approach to prison oversight, leaving prisoners vulnerable to the unchecked authority of correctional officers and staff.[52] This approach was grounded in the notion that a prisoner, as a convicted criminal, was a "slave of the state" and was not entitled to any legal rights enjoyed by free citizens.[53] Federal courts further justified nonintervention with concerns over separation of powers and a lack of judicial expertise in handling corrections operations.[54]

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46. *See* Joseph Shapiro, *As COVID-19 Spreads in Prisons, Lockdowns Spark Fear of More Solitary Confinement*, NPR (June 15, 2020, 4:53 PM), https://www.npr.org/2020/06/15/877457603/as-covid-spreads-in-u-s-prisons-lockdowns-spark-fear-of-more-solitary-confinemen [https://perma.cc/MQ2Y-THWS].

47. *See* Keri Blakinger, *As COVID-19 Measures Grow, Prison Oversight Falls*, MARSHALL PROJECT (Mar. 17, 2020, 6:00 AM), https://www.themarshallproject.org/2020/03/17/as-covid-19-measures-grow-prison-oversight-falls [https://perma.cc/WUW9-LLJ7].

48. *See A State-by-State Look at 15 Months of Coronavirus in Prisons*, *supra* note 5.

49. *See* Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 359 (2018) ("And while American jails and prisons are less brutal and unhealthy now than they were in the 1970s . . . current conditions behind bars are sometimes horrendous."); Van Swearingen, *Imprisoning Rights: The Failure of Negotiated Governance in the Prison Inmate Grievance Process*, 96 CALIF. L. REV. 1353, 1358 (2008).

50. *See* Frank, *supra* note 28, at 116 (describing how prisoners have no political power to challenge conditions of the prison system).

51. *See* Swearingen, *supra* note 49, at 1358 n.32.

52. Hedieh Nasheri, *A Spirit of Meanness: Courts, Prisons and Prisoners*, 27 CUMB. L. REV. 1173, 1175 (1997).

53. *See id.*; *see also, e.g.*, Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 798 (1871) (finding that a prisoner is "for the time being a slave, in a condition of penal servitude to the State, and is subject to such laws and regulations as the State may choose to prescribe").

54. Ira P. Robbins, *The Cry of* Wolfish *in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIMINOLOGY 211, 212 (1980).

Federal courts began to depart from this traditional "hands-off" policy in the 1960s.[55] In 1961, the U.S. Supreme Court decided *Monroe v. Pape*,[56] which opened the door for prisoners to file civil rights lawsuits pursuant to 42 U.S.C. § 1983[57] over prison conditions that allegedly violated their constitutional rights. In 1964, the Court, in *Cooper v. Pate*,[58] solidified a state prisoner's right to bring a claim under § 1983.[59]

As a result of these landmark decisions, federal litigation became an effective transparency mechanism to expose the realities of prison conditions nationwide. A civil rights lawsuit provided the public with an unfiltered glimpse into the conditions of prison confinement.[60] People in prison then had the ability to effectively force judges to face the realities of the "appalling" conditions of penal institutions in some states.[61]

From the 1960s onward, people in state prisons increasingly utilized § 1983 claims as a valuable tool to improve their prison conditions.[62] Courts recognized a prisoner's ability to seek relief for violations of various constitutional rights, including the right to be free from excessive force by corrections officers and the rights to adequate medical care, religious freedom, and due process in disciplinary proceedings.[63] One of the most important rights recognized by the courts was a prisoner's fundamental right to access the courts in the first place.[64] Federal courts acknowledged that "an inmate's right of unfettered access to the courts is as fundamental a right as any other . . . . All other rights of an inmate are illusory without it," as they

55. *See* Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 558–59 (2006).

56. 365 U.S. 167 (1961).

57. The section 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 . . . .

42 U.S.C. § 1983.

58. 378 U.S. 546 (1964) (per curiam).

59. *See id.* at 546. Federal prisoners have a parallel right to bring constitutional claims against the federal government. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390–97 (1971).

60. *See* Ken Strutin, *Litigating from the Prison of the Mind: A Cognitive Right to Post-Conviction Counsel*, 14 CARDOZO PUB. L. POL'Y & ETHICS J. 343, 367–68 (2016).

61. Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 424 (1993).

62. *See* Allen E. Honick, *It's "Exhausting": Reconciling a Prisoner's Right to Meaningful Remedies for Constitutional Violations with the Need for Agency Autonomy*, 45 U. BALT. L. REV. 155, 160–61 (2015).

63. *See* Hudson v. McMillian, 503 U.S. 1, 4 (1992) (recognizing the right to be free from excessive force); Estelle v. Gamble, 429 U.S. 97, 103 (1976) (recognizing the right to adequate medical care); Wolff v. McDonnell, 418 U.S. 539, 556–57 (1974) (recognizing the right to minimum due process protections in proceedings to strip prisoners' good-time credits); Cruz v. Beto, 405 U.S. 319, 322 (1972) (recognizing the right to religious freedom).

64. *See, e.g.*, Bounds v. Smith, 430 U.S. 817, 821 (1977), *abrogated by* Lewis v. Casey, 518 U.S. 343 (1996).

are "entirely dependent for their existence on the whim or caprice of the prison warden."[65]

In addition to recognizing a prisoner's ability to recover for violations of their constitutional rights, federal courts demonstrated a willingness to take a step further. In the 1970s, courts began to order long-term structural reform of state prison systems.[66] These federal court orders ended some of the most cruel and inhumane practices and conditions in prisons throughout the country. For example, federal court orders halted routine practices in the "dark and evil world" of Arkansas's prisons,[67] such as lashing prisoners for minor infractions with a wooden-handled, five-foot long leather strap until their skin was bloody;[68] giving prisoners electrical shocks to sensitive parts of their body from a hand-cranked device known as the "Tucker telephone";[69] and crowding prisoners into barracks where "rape was so common and uncontrolled that some potential victims dared not sleep."[70] Without the initial filing of a civil rights lawsuit, these injustices would have never been exposed and subsequently terminated.[71]

By the early 1980s, prisons in twenty-five states were subject to comprehensive court orders to reform prison conditions.[72] By 1995, forty-one states had prison orders to either reduce overcrowding or eliminate other unconstitutional conditions of confinement, with 37 percent of those states under system-wide regulation.[73]

C. The Prelude to the PLRA: The So-Called Rise of Frivolous Prisoner Litigation

In addition to the growing number of federal court orders, the number of prisoner civil rights filings also increased. As the Supreme Court once recognized: "What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State."[74] Whereas the number of federal prisoner civil rights filings was 3620 in 1972, that number rose to approximately 39,000 in 1995,[75] comprising 19 percent of the federal civil

65. Adams v. Carlson, 488 F.2d 619, 630 (7th Cir. 1973).

66. *See generally* Schlanger, *supra* note 55 (providing a detailed account of the history of prison court-order litigation).

67. Hutto v. Finney, 437 U.S. 678, 681 (1978) (quoting Holt v. Sarver, 309 F. Supp. 362, 381 (E.D. Ark. 1970)).

68. *See id.* at 682 n.4.

69. *See id.* at 682 n.5.

70. *Id.* at 681 n.3.

71. *See* Darryl M. James, Note, *Reforming Prison Litigation Reform: Reclaiming Equal Access to Justice for Incarcerated Persons in America*, 12 LOY. J. PUB. INT. L. 465, 471 (2011) ("Without exposing injustice and abuse through landmark litigation like *Hutto*, these horrible conditions will not be rectified.").

72. *See* Swearingen, *supra* note 49, at 1357.

73. *See* Schlanger, *supra* note 55, at 577.

74. Preiser v. Rodriguez, 411 U.S. 475, 492 (1973).

75. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1583 (2003).

docket.[76] This increase was primarily associated with a simultaneously growing incarcerated population in nearly every state.[77]

Despite notable legal victories, such as the ones previously described, many prisoner civil rights lawsuits were unsuccessful.[78] One explanation of the lack of success was that an overwhelming percentage of cases were filed and litigated pro se.[79] Many prisoners suffer from literacy and language deficits, as well as mental health issues that impair their ability to draft well-pled complaints and advocate on their own behalf.[80] Even if an inmate is fully capable, restricted access to libraries, legal materials, the internet, and telephones makes preparing a case difficult.[81] Furthermore, pro se prisoners face an uphill battle in conducting effective discovery not only due to a lack of legal skills and financing to fund discovery costs but also because of resistance by prisons and judges to share necessary information.[82] Because of these deficits, pro se prisoners understandably struggle to successfully litigate an otherwise meritorious civil rights case.[83] It is thus no surprise that prisoner civil rights cases with attorney representation fared much better than cases brought pro se.[84]

An alternative explanation for the high rates of dismissal, as the PLRA's proponents in Congress argued,[85] was that the bulk of inmate civil rights cases lacked sufficient merit.[86] While it is true that there were many frivolous cases, this argument slightly mischaracterizes what was really taking place.[87] For instance, many of the so-called frivolous cases were

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76. *Id.* at 1558. Although the rise of the total number of prisoners' lawsuits was readily apparent, the rate at which prisoners filed civil rights lawsuits nevertheless declined between 1980 and 1996. *See* Allen W. Burton, Note, *Prisoners' Suits for Money Damages: An Exception to the Administrative Exhaustion Requirement of the Prison Litigation Reform Act*, 69 FORDHAM L. REV. 1359, 1368 (2001); *see also* Schlanger, *supra* note 75, at 1583.

77. *See* Schlanger, *supra* note 75, at 1586–87.

78. *See id.* at 1594; Burton, *supra* note 76, at 1367 ("According to the National Association of Attorneys General, more than 95% of inmate civil rights suits are dismissed in favor of the defendant.").

79. *See* Schlanger, *supra* note 75, at 1609–10. Inmate civil rights cases were also litigated pro se far more than cases involving nonprisoners. *See id.* at 1609; *see also infra* Part II.B.4.a. (explaining the difficulties prisoners have in obtaining counsel).

80. *See* Michael W. Martin, *Foreword: Root Causes of the Pro Se Prisoner Litigation Crisis*, 80 FORDHAM L. REV. 1219, 1225–26 (2011); *see also* Johnson v. Avery, 393 U.S. 483, 496 (1969) (Douglas, J., concurring) ("In a community where illiteracy and mental deficiency is [sic] notoriously high, it is not enough to ask the prisoner to be his own lawyer.").

81. Martin, *supra* note 80, at 1226.

82. *See* Schlanger, *supra* note 75, at 1611.

83. To the contrary, lawyers possess "[t]he ability to build a case, strategize in accordance with a case theory, avoid pleading and discovery pitfalls, [and] survive motion practice." Martin, *supra* note 80, at 1226.

84. *See* Schlanger, *supra* note 75, at 1610 (noting that among cases terminated in 2000, "counseled cases were three times as likely as pro se cases to have recorded settlements, two-thirds more likely to go to trial, and two-and-a-half times as likely to end in a plaintiff's victory at trial").

85. *See infra* notes 103–09 and accompanying text.

86. *See* Schlanger, *supra* note 75, at 1599 (finding that the pre-PLRA data establishes that the inmate docket tends to have a low probability of litigated success).

87. *See, e.g.*, Jon O. Newman, Opinion, *No More Myths About Prisoner Lawsuits*, N.Y. TIMES (Jan. 3, 1996), https://www.nytimes.com/1996/01/03/opinion/l-no-more-myths-about-

legally frivolous, not substantively so. While an inmate may have experienced some legitimate form of harm, the claim was barred due to doctrines such as immunity.[88] Nevertheless, some prisoner civil rights lawsuits were, in fact, substantively frivolous and garnered a significant amount of media attention.[89] The media, with the help of the National Association of Attorneys General, put these so-called frivolous cases on public display in "Top Ten Frivolous Filings Lists,"[90] which highlighted several notorious examples: an inmate suing because the piece of cake on his dinner tray was "hacked up," an inmate suing because corrections officials took away his Gameboy electronic game, or, most famously, an inmate suing because he was served chunky instead of smooth peanut butter.[91]

These lists publicly portrayed inmate civil rights cases as wholly devoid of merit.[92] But the reality appeared more complex, with some describing how these lists included accounts that were "at best highly misleading and, sometimes, simply false."[93] For example, in the chunky peanut butter case, the inmate was not suing merely because he received chunky instead of creamy peanut butter; he was actually complaining that his prison account had been incorrectly charged $2.50 for a jar of peanut butter he never received.[94] As Second Circuit Judge Jon O. Newman explained, although $2.50 is not a large sum of money, "such a sum is not trivial to the prisoner whose limited prison funds are improperly debited."[95] This is just one example of how the dominant public narrative not only failed to acknowledge this more nuanced reality but also did not adequately emphasize the other side of the story—that there remained inmates bringing meritorious cases alleging serious constitutional violations.[96]

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prisoner-lawsuits-041220.html [https://perma.cc/VK9U-CAZF] (arguing that "those in responsible positions ought not to ridicule all prisoner lawsuits by perpetuating myths about them").

88. *See* Burton, *supra* note 76, at 1367 n.74. A legally frivolous complaint lacks an arguable basis in law. Neitzke v. Williams, 490 U.S. 319, 328 (1989).

89. Burton, *supra* note 76, at 1367 n.74 ("While the mass media focuses on cases that are substantively frivolous, dismissals for legal frivolousness are far more common."). Substantively frivolous claims include allegations that are "fantastic" and "delusional." *Neitzke*, 490 U.S. at 325, 328.

90. *See* Schlanger, *supra* note 75, at 1568.

91. *See* 141 CONG. REC. 27,045 (1995); Jennifer A. Puplava, Note, *Peanut Butter and Politics: An Evaluation of the Separation-of-Powers Issues in Section 802 of the Prison Litigation Reform Act*, 73 IND. L.J. 329, 330–31 (1997).

92. *See* Burton, *supra* note 76, at 1368.

93. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520 (1996).

94. *See* Pfaff, *supra* note 12 (noting how the reality of the chunky peanut butter case was "far more complex" than how it was portrayed); Alysia Santo, *Suing From Prison*, MARSHALL PROJECT (Feb. 18, 2015, 4:45 PM), https://www.themarshallproject.org/2015/02/18/suing-from-prison [https://perma.cc/ZHK5-JJDR].

95. Newman, *supra* note 93, at 522.

96. *See* Burton, *supra* note 76, at 1368–69 (discussing how media coverage failed to mention legitimate inmate claims and, in doing so, distorted the public's view).

II. BROKEN PROMISES: THE PLRA'S DETERRENCE AND OBSTRUCTION OF MERITORIOUS LAWSUITS

To address the perceived problem of a burgeoning number of frivolous prisoner civil rights lawsuits, Congress passed the PLRA.[97] The PLRA imposes three types of limitations on inmates challenging prison conditions in federal court: "restrictions on the powers of the federal courts; restrictions on the relief available in prisoner cases; and restrictions on the ability of prisoner litigants to get into court."[98]

The PLRA seeks to reduce frivolous prisoner civil rights lawsuits through the following access provisions: (1) a requirement that a prisoner exhaust available administrative remedies prior to bringing suit in federal court;[99] (2) the imposition of filing fee payments for prisoners who qualify for in forma pauperis status;[100] (3) the "three-strikes" rule that bars plaintiffs who have filed three civil actions or appeals dismissed as frivolous, malicious, or failing to state a cause of action;[101] and (4) limitations on attorney's fees awards.[102]

This Note analyzes each of the PLRA's access provisions in order to develop a synthesized understanding of how states can confront the PLRA's negative effects. Part II.A describes Congress's stated purpose for the PLRA's access provisions, specifically noting its intent to target only frivolous lawsuits. Part II.B shows that the PLRA has not lived up to Congress's stated purpose, explaining how the Act's access provisions deter and obstruct meritorious prisoner civil rights lawsuits. Part II.C then examines the PLRA's overall impact.

A. The Stated Purpose of the PLRA's Access Provisions

The stated purpose of the PLRA was "to discourage frivolous and abusive prison lawsuits."[103] The PLRA's limited legislative history shows that the Act's proponents emphasized how the overwhelming number of frivolous prisoner lawsuits "tie up the courts, waste valuable legal resources, and affect the quality of justice enjoyed by law-abiding citizens."[104] The PLRA, Congress believed, would help put an end to a "ridiculous waste of taxpayers'

97. The PLRA was part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104–134, 110 Stat. 1321. As such, its provisions are scattered throughout the U.S. Code.

98. *See* Elizabeth Alexander, *Prison Litigation Reform Act Raises the Bar*, 16 CRIM. JUST. 10, 11 (2002). This Note focuses on the last category of restrictions. In addition to reducing frivolous lawsuits, the PLRA's other main goal was to limit federal judicial involvement in the administration of state prisons. *See* 141 CONG. REC. 27,042 (1995) (statement of Sen. Hatch) (stating that "courts have gone too far in micromanaging our Nation's prisons").

99. *See infra* notes 112–13 and accompanying text.

100. *See infra* note 179 and accompanying text.

101. *See infra* note 193 and accompanying text.

102. *See infra* notes 208–13 and accompanying text.

103. 141 CONG. REC. 27,041 (1995). Although not discussed in this Note, the PLRA's other stated purpose was "[t]o provide for appropriate remedies for prison condition lawsuits." *Id.*

104. *Id.* at 27,042 (statement of Sen. Dole).

money"[105] and what it called the "inmate litigation fun-and-games."[106] To demonstrate these "fun-and-games," members of Congress used anecdotes of fantastical cases, most notably the cases highlighted in the "Top Ten Frivolous Filings Lists."[107]

Congress assured that the PLRA's target was not set on meritorious prisoner litigation. For example, Senator Orrin Hatch, chair of the Senate Judiciary Committee, emphasized that he "d[id] not want to prevent inmates from raising legitimate claims" and that the PLRA would not do so.[108] He further stated that the "crushing burden of these frivolous suits makes it difficult for the courts to consider meritorious claims," thus implying that if frivolous cases were reduced, meritorious claims could receive proper court attention.[109]

However, then-Senator Joe Biden noticed early on that the PLRA's ability to target only frivolous cases might be unrealistic. While acknowledging the need to deal with an overburdened court system, largely because of the influx of prisoner civil rights cases, Biden worried that "in an effort to curb frivolous prisoner lawsuits, [the PLRA] places too many roadblocks to meritorious prison lawsuits."[110] Yet, despite these concerns, Congress passed the PLRA, and President Bill Clinton signed it into law on April 26, 1996.[111]

B. How the PLRA Deters and Obstructs Meritorious Civil Rights Lawsuits

Biden's worries quickly became, and continue to be, the practical reality. Despite Congress's stated intent to put an end only to frivolous inmate filings, the PLRA has in fact deterred and obstructed inmates' ability to file meritorious civil rights lawsuits. This part analyzes how exactly the Act does so, by exploring each of the PLRA's access provisions in detail.

1. Exhaustion of Administrative Remedies

Perhaps the most impactful access provision of the PLRA is the mandatory exhaustion requirement.[112] Section 1997e(a) provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other

105. *Id.* (statement of Sen. Hatch). Senator Hatch emphasized that the "huge costs imposed on State governments to defend against these meritless suits is another kind of crime committed against law-abiding citizens." *Id.*

106. *Id.* (statement of Sen. Dole).

107. *See supra* notes 90–91 and accompanying text.

108. 141 CONG. REC. 27,042 (1995) (statement of Sen. Hatch).

109. *Id.*

110. *Id.* at 27,044 (statement of Sen. Biden); Puplava, *supra* note 91, at 331–32.

111. 42 U.S.C. § 1997e.

112. *See* Derek Borchardt, Note, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 470–71 (2012) (recognizing the exhaustion requirement as the PLRA's largest hurdle).

correctional facility until such administrative remedies as are available are exhausted."[113]

The administrative remedies to be exhausted are not defined within the PLRA but are rather determined by the particular processes spelled out in a prison's internal grievance procedure.[114] For state prisons, state DOCs promulgate grievance procedures pursuant to broad legislative authority.[115] Though the process differs between states, many states' grievance policies follow a similar structure.[116] A typical policy requires a prisoner to complete multiple levels of review, beginning first with seeking a remedy through informal resolution and then pursuing more formal protocols if a favorable outcome is not attained.[117] These formal protocols often have numerous procedural technicalities, such as using the correct form, attaching appropriate documentation, naming all individuals involved in an alleged incident, and even using the proper ink color.[118] If a formal grievance results in denial, a prisoner must usually follow a detailed appeal process, which sometimes requires two levels of appeal.[119] Prisoners must adhere to strict time requirements—typically consisting of mere days—when proceeding through each stage of the process.[120] Only once all stages have been completed will an inmate be deemed to have exhausted administrative remedies.[121] As described below, under the PLRA, prisoners must exhaust administrative remedies before having their cases heard on the merits, thus making prisons' grievance procedures a barrier of access to the formal justice system.

113. 42 U.S.C. § 1997e(a).

114. *See* Jones v. Bock, 549 U.S. 199, 218 (2007) ("The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion."). Nearly all states have some form of a general grievance policy, which outlines the appropriate steps an inmate must take to air a grievance. Borchardt, *supra* note 112, at 492. For a detailed account of grievance policies from state DOCs, see generally PRIYAH KAUL ET AL., PRISON AND JAIL GRIEVANCE POLICIES: LESSONS FROM A FIFTY-STATE SURVEY (2015), https://www.law.umich.edu/special/policyclearinghouse/Site%20Documents/FOIAReport10.18.15.2.pdf [https://perma.cc/MXU5-93SP].

115. *See* Borchardt, *supra* note 112, at 490–91.

116. *Id.* at 492.

117. *Id.* at 492–93.

118. *Id.* at 493.

119. *Id.* at 493–94.

120. *Id.* at 494.

121. *Id.*

The PLRA's exhaustion requirement "invigorated the exhaustion prescription"[122] by making exhaustion mandatory.[123] The purpose of the exhaustion requirement was to "reduce the quantity and improve the quality of prisoner suits" by affording corrections officials with an opportunity to address prisoners' complaints internally before resorting to the courts.[124]

An exhaustion requirement can offer several benefits.[125] For administrative bodies, it can preserve their autonomy and allow them to handle internal grievances according to their own special expertise.[126] For courts, it can lighten caseloads by limiting the need for judicial review.[127] And even for potential plaintiffs, it may be beneficial if complaints can be more quickly resolved, thus making judicial involvement unnecessary.[128]

However, this section demonstrates how an exhaustion requirement is particularly problematic when applied to prisoners' meritorious complaints. This section begins by exploring courts' strict application of the exhaustion requirement and then turns to a discussion of the increasing complexity of prison grievance procedures.

a. Strict Application of Exhaustion

Courts have consistently applied a strict textual interpretation of the PLRA's exhaustion requirement. Such a strict application is a product of a series of Supreme Court cases in which the Court intensified the PLRA's exhaustion requirement as a significant procedural hurdle for inmates to overcome.[129] As the decisions demonstrate, mandatory exhaustion applies regardless of a lawsuit's merit, with only one narrow textual exception.[130] The practical effect is that courts must dismiss a prisoner's case without considering the claim's merits if the prisoner-plaintiff has not previously completed all requisite stages of a prison's internal grievance process.

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122. Porter v. Nussle, 534 U.S. 516, 524 (2002). The PLRA's exhaustion requirement amended the Civil Rights of Institutionalized Persons Act (CRIPA). Pub. L. No. 96–247, 94 Stat. 349, 352 (1980) (codified as amended at 42 U.S.C. § 1997e). CRIPA required a prisoner to exhaust administrative remedies before filing a lawsuit regarding prison conditions only if the particular prison's internal grievance process had been certified by the attorney general as "plain, speedy, and effective." *Porter*, 534 U.S. at 524; Schlanger, *supra* note 75, at 1627. *See generally* Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It*, 86 CORNELL L. REV. 483, 493–96 (2001) (detailing CRIPA's framework). Moreover, courts could use discretion and decide if requiring exhaustion was ultimately "appropriate and in the interests of justice." *Porter*, 534 U.S. at 523 (quoting 42 U.S.C. § 1997e(a)–(b)).

123. *See Porter*, 534 U.S. at 524.

124. *Id.* at 524–25.

125. *See* Burton, *supra* note 76, at 1372–74 (describing the benefits of the exhaustion requirement in general).

126. *See id.* at 1372–73.

127. *See id.* at 1373.

128. *See id.*

129. *See infra* notes 131–48 and accompanying text.

130. *See infra* notes 131–48 and accompanying text.

In *Booth v. Churner*[131] and *Porter v. Nussle*,[132] the Supreme Court clarified the applicability of PLRA exhaustion to specific types of claims. In *Booth*, the Court held that a prisoner who alleged that corrections officers assaulted him and denied him medical attention to treat his resulting injuries was still required to exhaust administrative remedies despite the impossibility of receiving requested monetary compensation through the prison's grievance process.[133] When addressing the inability of the grievance system to provide the requested relief, the Court emphasized that it would "not read futility or other exceptions into [the PLRA's] exhaustion requirement[]."[134] As a result, the Court affirmed the dismissal of Booth's otherwise meritorious claim based on his failure to exhaust the prison's grievance process.[135]

In *Porter*, the Court held that the PLRA's exhaustion requirement applies to individual instances of excessive force.[136] In doing so, the Court clarified that the exhaustion requirement "applies to all prisoners seeking redress for prison circumstances or occurrences."[137] Thus, the Court rejected an interpretation of the exhaustion provision that would create an exception for excessive force claims, rationalizing that Congress did not intend to divide inmates' claims into two discrete subcategories.[138]

While *Booth* and *Porter* clarified the applicability of PLRA exhaustion to different types of claims, the Court's 2006 decision in *Woodford v. Ngo*[139] dictated the precise manner in which exhaustion itself must be achieved. In *Woodford*, the Court held that "proper exhaustion of administrative remedies is necessary," meaning that an inmate must strictly meet all institutional deadlines and procedures of a prison's internal grievance procedure prior to filing a civil action regarding prison conditions in federal court.[140] In setting "proper exhaustion" as the standard for satisfying PLRA exhaustion, the *Woodford* majority was relatively unsympathetic to the fact that such a standard could be "harsh for prisoners, who generally are untrained in the law and are often poorly educated."[141] The Court also rejected the argument that the "proper exhaustion" doctrine would "lead prison administrators to devise procedural requirements that are designed to trap unwary prisoners" and purposely defeat their claims.[142] Ultimately, as a result of *Woodford*,

131. 532 U.S. 731 (2001).
132. 534 U.S. 516 (2002).
133. *See Booth*, 532 U.S. at 741 (holding that Congress mandates exhaustion regardless of relief sought).
134. *Id.* at 741 n.6.
135. *Id.* at 741.
136. *See Porter*, 534 U.S. at 520.
137. *Id.*
138. *Id.* at 526–27.
139. 548 U.S. 81 (2006).
140. *Id.* at 84; *see also* Meredith Sterritt, Note, *The Prison Litigation Reform Act &* Ross v. Blake*: Why the Constitution Requires Amending the Exhaustion Requirement to Protect Inmates' Access to Federal Court*, 53 SUFFOLK U. L. REV. 115, 122 (2020).
141. *Woodford*, 548 U.S. at 103.
142. *Id.* at 102.

even the most minor departure from a procedural requirement in a prison grievance system can serve as the basis for dismissing a prisoner-plaintiff's claim before examining the merits.[143]

In 2016, the Court considered whether special circumstances can excuse an inmate's failure to exhaust administrative remedies. In *Ross v. Blake*,[144] the Court rejected a special circumstances exception to the PLRA's exhaustion provision,[145] while simultaneously identifying a textual exception requiring an inmate to exhaust only administrative remedies that are "available."[146] It emphasized that a grievance process would be practically unavailable: (1) where it "operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) where it is "so opaque that it becomes, practically speaking, incapable of use"; or (3) where prison administrators prevent access to it "through machination, misrepresentation, or intimidation."[147] The Court, however, left lower courts to engage in fact-specific inquiries over whether administrative remedies were "available" in certain instances.[148]

Most recently, however, the Court revisited the issue of PLRA exhaustion in the context of the COVID-19 pandemic. Despite affirming the denial of an application to vacate a stay on an injunction requiring a state geriatric prison to follow an extensive protocol to prevent the spread of the coronavirus, Justice Sotomayor explained that "if a plaintiff has established that the prison grievance procedures at issue are utterly incapable of responding to a rapidly spreading pandemic like Covid-19, the procedures may be 'unavailable' to meet the plaintiff's purposes."[149] She reasoned that, in "unprecedented circumstances," the PLRA's textual exception of "availability" formally introduced in *Ross v. Blake* could "open the courthouse doors where they would otherwise stay closed."[150]

Despite Justice Sotomayor's implicit signal to lower courts to utilize the exhaustion requirement's lone textual exception for claims arising during and related to the pandemic, some courts have still refused to find that a prison's

143. As a procedural matter, an inmate's failure to exhaust administrative remedies under the PLRA is an affirmative defense and inmates are not required to specially plead or demonstrate exhaustion in their complaints. Jones v. Bock, 549 U.S. 199, 216 (2007). However, some federal district courts have inmates file pro forma complaints that include questions asking if they have exhausted their administrative remedies, thus requiring them to allege exhaustion in many instances. *See* Broc Gullett, Comment, *Eliminating Standard Pleading Forms That Require Prisoners to Allege Their Exhaustion of Administrative Remedies*, 2015 MICH. ST. L. REV. 1179, 1199.

144. 136 S. Ct. 1850 (2016).

145. *Id.* at 1858.

146. *See id.* (explaining the textual exception to the PLRA's mandatory exhaustion provision). As used in the PLRA, "available" means capable of use to obtain some relief for the action complained of. *See id.* at 1859 (quoting Booth v. Churner, 532 U.S. 731, 738 (2001)).

147. *Id.* at 1859–60.

148. *See id.* at 1859.

149. Valentine v. Collier, 140 S. Ct. 1598, 1600–01 (2020) (mem.).

150. *Id.* at 1601.

grievance process is unavailable.[151] For example, the Fifth Circuit bluntly concluded that "under *Ross*, special circumstances—even threats posed by global pandemics—do not matter" for the purpose of PLRA exhaustion.[152] In holding that two geriatric inmates had failed to exhaust their prison's grievance system prior to bringing suit, the Fifth Circuit reasoned that "inadequate is not a synonym for unavailable."[153] Despite acknowledging that the prison's grievance process was "suboptimal," in that it was "lengthy and unlikely to provide necessary COVID-19 relief," the Fifth Circuit nevertheless found the process to be "available."[154]

In the midst of a pandemic posing unique dangers to people in prison,[155] courts have continued to strictly interpret the PLRA's exhaustion requirement which, by its unambiguous terms, "prevent[s] a court from deciding that exhaustion would be unjust or inappropriate in a given case."[156] Thus, all inmates—regardless of the merits of their claims or the unprecedented circumstances in which they find themselves—are required to exhaust all available remedies before accessing the court system.

b. Navigating Increasingly Complex Grievance Procedures

Strict application of the PLRA's exhaustion requirement and the court-made doctrine of "proper exhaustion" makes grievance procedures a critical element in the protection of prisoners' constitutional rights.[157] However, successfully completing all stages of a prison's grievance process may prove difficult for many inmates. Without an attorney, many inmates[158] often struggle to master the intricate details of a grievance procedure.[159] The practical administration of a typical grievance system also poses serious challenges.[160] In states where a grievance procedure is not subject to notice-and-comment rulemaking, a prisoner is required to "complain[] *about* the actions of prison staff *to* prison staff using rules administered and often written *by* prison staff and corrections officials."[161] Accordingly, corrections staff have an interest in making it hard for prisoners to successfully exhaust

151. *See generally, e.g.*, Valentine v. Collier, 978 F.3d 154 (5th Cir. 2020); Nellson v. Barnhart, No. 20-cv-00756, 2020 WL 6204275 (D. Colo. Oct. 22, 2020).
152. *Valentine*, 978 F.3d at 161.
153. *Id.*
154. *Id.* at 162.
155. *See supra* notes 43–48 and accompanying text.
156. Ross v. Blake, 136 S. Ct. 1850, 1858 (2016).
157. Borchardt, *supra* note 112, at 490.
158. *See supra* note 80 and accompanying text.
159. *See* Schlanger, *supra* note 55, at 592–93 ("The exhaustion rule establishes an extremely difficult hurdle for many of the inmates who bring damage actions, usually without counsel, because they are frequently unable to navigate cumbersome and confusing grievance procedures.").
160. A typical grievance procedure does not have an external entity to the prison agency overseeing the grievance system. *See* Deitch, *supra* note 38, at 1767–72 (listing only a few states that have an independent ombudsperson who investigates prisoners' grievances).
161. Alison M. Mikkor, *Correcting for Bias and Blind Spots in PLRA Exhaustion Law*, 21 GEO. MASON L. REV. 573, 579 (2014).

administrative remedies, as the ability to properly exhaust directly impacts the viability of a future lawsuit that could hold those same individuals liable.[162]

Moreover, inmates' fear of retaliation can deter them from participating in the grievance process altogether, despite having a potentially meritorious complaint.[163] As the typical first step of a prison grievance procedure is to seek an informal resolution by confronting the officer or staff member involved, the system can naturally facilitate these fears.[164] According to Professor James E. Robertson, retaliation against inmates is an unfortunate norm.[165] Studies have shown that large percentages of people in prison have experienced retaliation as a result of submitting a grievance.[166] Thus, despite having legitimate complaints regarding their conditions of confinement, many inmates may choose to not file grievances at all.[167] Because of PLRA exhaustion, these inmates who abstain from filing grievances may ultimately sacrifice the ability to bring their underlying complaint to federal court, meaning that their experiences will remain behind bars.[168]

In addition to these difficulties, there is also evidence that some states have reconfigured their grievance processes to have "increasingly onerous, rigid requirements, or otherwise maintain[ed] grievance systems designed to foil prisoners' lawsuits."[169] For example, one study found the evolution of Arkansas's grievance procedure to exhibit a troubling pattern. From 1997 to 2011, the difficulty of the Arkansas DOC's grievance procedure was "incrementally raised, and revisions were added to specifically target and

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162. *See id.* at 581.

163. *See* James E. Robertson, *"One of the Dirty Secrets of American Corrections": Retaliation, Surplus Power, and Whistleblowing Inmates*, 42 U. MICH. J.L. REFORM 611, 614 (2009).

164. *See* Borchardt, *supra* note 112, at 493 n.130 (citing to several state grievance policies that require informal resolution involving a discussion or dialogue with prison staff as the first step).

165. Robertson, *supra* note 163, at 613.

166. *See e.g.*, PRISON JUST. LEAGUE, A "RIGGED SYSTEM": HOW THE TEXAS GRIEVANCE SYSTEM FAILS PRISONERS AND THE PUBLIC 5 (2017), https://www.prisonpolicy.org/scans/prison_justice_league/a_rigged_system.pdf [https://perma.cc/2GQK-WPHK] (finding that 85.45 percent of prisoners surveyed in the Texas Department of Criminal Justice reported some form of staff retaliation for using the grievance system); Robertson, *supra* note 163, at 613–14 (describing a survey of Ohio inmates that found that 70.1 percent of inmates who brought grievances suffered retaliation as a result and a New York State study with comparable results).

167. *See* Robertson, *supra* note 163, at 614 (summarizing a study finding that 60 percent of the prison supervisors surveyed responded that a substantial number of inmates do not file grievances despite having legitimate complaints, in part, because of the fear of retaliation).

168. *See id.*

169. Borchardt, *supra* note 112, at 472. Providing a detailed account of the myriad of ways in which some states have changed their grievance procedures is outside the scope of this Note. This Note makes the general point that the PLRA's exhaustion requirement has provided state DOCs with incentives to erect higher barriers to court and that some states have, in fact, acted accordingly. For an in-depth study of the precise changes made by several states to their grievance procedures, see *id.* at 490–519; *see also* Mikkor, *supra* note 161, at 583 (describing how several state corrections agencies made changes to their internal grievance procedures after the PLRA's enactment).

defeat arguments that prisoners had previously used to convince courts that they adequately exhausted the available procedures."[170] In addition to imposing shorter time limits to appeal a grievance decision,[171] revisions included a requirement that an inmate exhaust remedies through the grievance process in instances where officers have retaliated against the same inmate for filing a grievance in the first place,[172] as well as a strict requirement to identify all relevant personnel on a grievance form.[173]

Under the proper exhaustion standard set out in *Woodford*, elaborate grievance procedures, such as the one described, become traps for the unwary.[174] Since *Woodford*, thousands of prisoner civil rights cases have been dismissed for failure to properly exhaust administrative remedies, without regard for the merits of the claims.[175] In a report criticizing the PLRA and calling for amendment to the Act, Human Rights Watch illustrated how district courts have frequently dismissed cases because inmates have made technical errors, used the wrong form, or wrote to the wrong entity within the prison system, thus not properly following a prison's internal grievance process.[176] Even when there is good cause for an inmate's failure to comply with a prison's grievance system—such as dyslexia, illiteracy, mental illness, brain injury and memory loss, blindness, or being in a coma—courts have continued to enforce the PLRA's exhaustion requirement.[177] This has even continued during the COVID-19 pandemic,[178] making clear that courts are not departing from a strictly textual interpretation of the exhaustion requirement, even when faced with otherwise meritorious civil rights claims. In this way, the exhaustion requirement obstructs meritorious civil rights lawsuits.

2. The Filing Fee Provision

The PLRA's filing fee provision requires all inmate litigants challenging the conditions of their confinement to pay court filing fees in full.[179] When describing its rationale for the filing fee requirement, Congress stated that all

170. Borchardt, *supra* note 112, at 502.
171. *See id.* at 506.
172. *See id.* at 507–08 (stating how the procedures were updated to eliminate the possibility of a prisoner immediately filing a lawsuit in federal court after being retaliated against by providing that "[i]f an inmate believes he/she has been retaliated against for the use of the grievance procedure, he/she must . . . exhaust their [sic] remedies through the grievance process" (alterations in original) (quoting Dep't of Corr., State of Ark., Administrative Directive 04-01 § IV.K.1 (2004))).
173. *See id.* at 505 (quoting the Dep't of Corr., State of Ark., Administrative Directive 07-03 § IV.C.4 (2007)).
174. *See* HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 14 (2009), https://www.hrw.org/sites/default/files/reports/us0609web.pdf [https://perma.cc/T3S8-VX7W].
175. Honick, *supra* note 62, at 180.
176. HUMAN RIGHTS WATCH, *supra* note 174, at 15.
177. *See id.* at 16.
178. *See supra* note 8 and accompanying text.
179. 28 U.S.C. § 1915(b)(1).

it was doing was "asking [inmates to] pay the same kind of filing fees and costs" as all other citizens bringing lawsuits.[180]

Although perhaps an appropriate measure[181]—both to ensure proper funding of the court system and to create a financial disincentive for would-be inmate litigants filing frivolous complaints—the filing fee provision imposes a considerable financial burden on inmate litigants, who overwhelmingly proceed as indigent plaintiffs.[182]

Generally, indigent plaintiffs who cannot afford to pay court filing fees and costs may request in forma pauperis status and ask a court to waive the requisite fees.[183] Prior to the PLRA, the same was true for indigent inmate litigants.[184] But pursuant to the PLRA, inmates can no longer have fees waived.[185] If an inmate qualifies as in forma pauperis,[186] the full filing fee still must be paid, but the payment can be completed in installments.[187]

Denying indigent inmate litigants the ability to waive court filing fees can deter them from filing meritorious claims. For example, the current amount for an initial filing fee in federal court is $350.[188] This can amount to "months, if not years, of prison wages."[189] While there may be less of a need for an income in prison, the money an inmate earns or receives from the state

180. 141 CONG. REC. 27,044 (1995).

181. *See* Schlanger, *supra* note 75, at 1695 ("Inmates, like most other litigants, can appropriately be asked to bear some of the costs of their litigation.").

182. *See* Free v. United States, 879 F.2d 1535, 1539 (7th Cir. 1989) (Coffey, J., concurring) ("[T]he vast majority of prisoners are indigent, necessitating the filing of their complaints *in forma pauperis* . . . .").

183. *See, e.g.*, FED. R. APP. P. 24(a)(2).

184. *See* Green v. Young, 454 F.3d 405, 407 (4th Cir. 2006) ("Prior to the enactment of the PLRA, prisoners were able to use the *in forma pauperis* statute to avoid paying filing fees."); *see also* Tasha Hill, Comment, *Inmates' Need for Federally Funded Lawyers: How the Prison Litigation Reform Act,* Casey*, and* Iqbal *Combine with Implicit Bias to Eviscerate Inmate Civil Rights*, 62 UCLA L. REV. 176, 202 (2015); Schlanger, *supra* note 75, at 1607; Mallory Yontz, Comment, *Amending the Prison Litigation Reform Act: Imposing Financial Burdens on Prisoners over Tax Payers*, 44 J. MARSHALL L. REV. 1061, 1069 (2011).

185. Hill, *supra* note 184, at 202.

186. To request in forma pauperis status, a prisoner must submit "an affidavit that includes a statement of all assets such prisoner possesses" and "a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a).

187. *See id.* § 1915(b)(1)–(2). The inmate litigant must pay, at the time of filing and each month thereafter until the filing fee is paid off, 20 percent of the greater of (1) the amount of money in the inmate's prison account or (2) the average of funds in the inmate's prison account for the preceding six months. *Id.* If an inmate is ultimately incapable of paying even the initial partial payment, he will not be prohibited from bringing the civil action but will still be required to pay off the requisite amount in monthly installments. *See* 28 U.S.C. § 1915(b)(4).

188. 28 U.S.C. § 1914(a) ("The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court . . . to pay a filing fee of $350 . . . .").

189. Brief Amici Curiae of Thirty-Three Professors in Support of Petitioner, Coleman v. Tollefson at 19, 135 S. Ct. 1759 (2015) (No. 13-1333), 2014 WL 7205509, at *19. The average hourly wage for people working in state prisons ranges anywhere from approximately fourteen cents to less than two dollars per hour. *See* Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages/ [https://perma.cc/Y584-JH2E].

is often used to satisfy fees and inflated commissary costs of items, such as extra food, hygiene supplies, postage and writing supplies, phone calls, and other essential goods and services.[190] Per the PLRA, "[n]o matter how poor an inmate is, or how essential the items she must buy from the commissary with her meager funds, monthly payments of 20 percent of her inmate account must be handed over until the court fees are paid in full."[191] The PLRA's filing fee thus pushes indigent inmates to weigh their options: pursuing a civil rights claim—likely lessening the ability to purchase goods and services from the commissary—or abstaining from filing a civil rights complaint to have fewer struggles in prison.[192] Therefore, even when cases may be high in merit, the filing fee requirement discourages prisoners from filing a civil rights lawsuit in the first place.

3. The "Three-Strikes" Rule

The PLRA removes the ability to pay filing fees through monthly installments for those deemed to be frequent filers through the "three-strikes" rule. The three-strikes rule prohibits people in prison from filing in forma pauperis if:

> the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.[193]

Accordingly, a prisoner who has received three strikes must almost always pay the entire court filing fee up front before proceeding.[194] If a court determines that a prisoner-plaintiff has three strikes, it can allow thirty days for the full filing fee to be paid. If this is not done, the action will be dismissed.[195] Barring a prisoner from proceeding in forma pauperis is the practical equivalent of barring a prisoner from court altogether.[196] Most

190. Schlanger, *supra* note 75, at 1646; *see also, e.g.*, Hill, *supra* note 184, at 195 n.114 (noting that in Illinois state prisons, inmates without jobs receive $9.60 from the state each month, which can be fully spent on health care co-pays, extra shampoo or toothpaste, and extra clothing).

191. Hill, *supra* note 184, at 202–03.

192. *See id.* at 203 n.185 ("If an inmate should be lucky enough to have a job, at the average wage of a few dollars a day, if she spends no money on food, toiletries, or any other essentials, she could pay [sic] filing fee in roughly six and a half months.").

193. 28 U.S.C. § 1915(g).

194. *See* Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1723 (2020).

195. *See, e.g.*, McFadden v. U.S. Dep't of Just., 270 F. Supp. 3d 82, 87–90 (D.D.C. 2017) (explaining that where a prisoner with three strikes does not fall within the imminent danger exception, the "better procedure" is to revoke in forma pauperis status, order payment of the full filing fee within thirty days, and dismiss the action without prejudice if the prisoner failed to pay within that time frame (quoting Matthews v. FBI, 251 F. Supp. 3d 257, 264 (D.D.C. 2017))).

196. Molly Guptill Manning, *Trouble Counting to Three: Circuit Splits and Confusion in Interpreting the Prison Litigation Reform Act's 'Three Strikes Rule,' 28 U.S.C. § 1915(g)*, 28 CORNELL J.L. & PUB. POL'Y 207, 213–14 (2018).

importantly, the three-strikes rule—just like the exhaustion and filing fee provisions—applies equally to frivolous and meritorious claims.

Nevertheless, courts have consistently upheld the constitutionality of the PLRA's "three-strikes" rule.[197] Courts have rejected equal protection challenges, asserting that the rule is rationally related to a legitimate government interest in "relieving the pressure of excessive prisoner filings" on federal courts by introducing economic disincentives to filing frivolous lawsuits.[198] Moreover, in holding that the rule does not violate an inmate's right to access to the courts, the Second Circuit explained that the provision affects merely an inmate's "ability to proceed *in forma pauperis* after repeated filings reaching a level that Congress has deemed abusive" and does not prevent inmates from filing civil actions altogether.[199]

However, in reality, the three-strikes rule has not been limited to instances of abusive, repeated frivolous filings.[200] The statute does not define the terms "frivolous," "malicious," or "fails to state a claim," thus leaving courts to evaluate whether to count a prior dismissal of an inmate's lawsuit as a strike.[201] However, in a concise opinion, the Supreme Court recently held that a dismissal for failure to state a claim counts as a strike, whether or not it was with prejudice.[202] Treating a dismissal for failure to state a claim as a strike can serve to effectively punish a pro se inmate litigant for an understandable inability to artfully draft a complaint sufficient to survive heightened federal pleading standards.[203] Regardless of whether prior dismissals were based on insufficiencies in pleading, procedural mistakes, or even frivolous claims, once an inmate has accumulated three strikes, the

197. *See, e.g.*, Carolina v. Rubino, 644 F. App'x 68, 71 (2d Cir. 2016) (holding that the PLRA three-strikes rule does not violate an inmate's First Amendment right to access to the courts); Higgins v. Carpenter, 258 F.3d 797, 801 (8th Cir. 2001) (holding that the three-strikes rule was rationally related to a legitimate government interest in curtailing meritless inmate suits); Carson v. Johnson, 112 F.3d 818, 821 (5th Cir. 1997) (stating that the PLRA's three-strikes rule does not violate due process or the Fifth Amendment equal protection rights of prisoners).

198. Nicholas v. Tucker, 114 F.3d 17, 20 (2d Cir. 1997). Prior to the PLRA, Congress recognized that "a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits." Neitzke v. Williams, 490 U.S. 319, 324 (1989).

199. *Rubino*, 644 F. App'x at 71.

200. *See* Schlanger, *supra* note 75, at 1695 (noting how "[t]he PLRA's frequent filer provision is far, far broader than th[e] quite limited problem" of abusive inmate filings).

201. *See* Manning, *supra* note 196, at 215. An order granting summary judgment in favor of a defendant does not typically count as a PLRA strike. Richard H. Frankel & Alistair E. Newbern, *Prisoners and Pleading*, 94 WASH. U. L. REV. 899, 923 (2017).

202. Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1727 (2020).

203. *See* Hill, *supra* note 184, at 183, 210 (explaining how the Supreme Court decisions in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal* have created a heightened federal pleading standard that is extremely difficult for pro se inmate plaintiffs to overcome). Although judges are supposed to read pro se complaints liberally and apply less stringent standards than papers drafted by counsel, it does not appear that judges often do so. *See id.* at 212; *see also* Eisenberg, *supra* note 61, at 443 (referencing a commentator who, upon review of reported district court and court of appeals decisions, "found that a significant number of courts have applied stringent pleading standards to *pro se* plaintiffs").

statute is strictly applied, thus preventing the filing of even meritorious claims unless a prisoner can pay a relatively significant sum of money.[204]

Because the three-strikes rule has no time limit, if a prisoner obtains three strikes early in a sentence or over a short span of time, a prisoner will be forever barred from seeking federal court relief for any nonphysical harm, unless the prisoner has sufficient funds to pay a $350 filing fee and related costs.[205] In a dissenting opinion, a Third Circuit judge acknowledged that some prisoners "whose 'strikes' were racked up without any bad faith or abuse" subsequently face § 1915(g)'s bar of even "potentially meritorious litigation at the filing stage, with no opportunity for substantive review or appeal."[206] Despite PLRA proponents' promise that the Act would not prevent the filing of meritorious suits, the three-strikes rule continues to break this promise.

4. Limitations on Attorney's Fees

The PLRA's provisions limiting attorney's fee awards specifically target only successful, meritorious cases.[207] The PLRA limits the scope and amount of attorneys' compensation for prisoners' civil rights claims that would otherwise be awarded under 42 U.S.C. § 1988.[208] The limitations function in the following ways.[209] Attorney's fees cannot be an hourly rate greater than 150 percent of the hourly rate established under the Criminal Justice Act of 1964[210] for payment of court-appointed costs.[211] In addition, in damages cases, attorney's fees cannot be greater than 150 percent of the

204. Although the statute provides that an indigent inmate will not have to pay the filing fee up front when facing "imminent danger of serious physical injury," this exception has been reasonably understood to serve its role "as an escape hatch for genuine emergencies only." Lewis v. Sullivan, 279 F.3d 526, 531 (7th Cir. 2002).

205. *See* Manning, *supra* note 196, at 238.

206. Abdul-Akbar v. McKelvie, 239 F.3d 307, 320 (3d Cir. 2001) (Mansmann, J., dissenting).

207. Hill, *supra* note 184, at 204 (explaining how the PLRA's rules "limit attorney compensation for successful constitutional claims").

208. 42 U.S.C. § 1997e(d); *see* Eleanor Umphres, Note, *150% Wrong: The Prison Litigation Reform Act and Attorney's Fees*, 56 AM. CRIM. L. REV. 261, 264 (2019) (discussing how the PLRA "strikes a damning blow" by restricting attorney compensation otherwise authorized by the Civil Rights Attorney's Fees Awards Act of 1976, which is commonly referred to as § 1988). For a comprehensive description of attorney's fee awards under the Civil Rights Attorney's Fees Awards Act, see Karen M. Klotz, *The Price of Civil Rights: The Prison Litigation Reform Act's Attorney's Fee-Cap Provision as a Violation of Equal Protection of the Laws*, 73 TEMP. L. REV. 759, 764–66 (2000).

209. In order for attorney's fees to be awarded, they must have been "directly and reasonably incurred" in proving a civil rights violation, and the amount of the fee must be "proportionately related to the court ordered relief for the violation" or "directly and reasonably incurred in enforcing the relief ordered for the violation." 42 U.S.C. §§ 1997e(d)(1)(A), (B)(i)–(ii).

210. Pub. L. No. 88-455, 78 Stat. 552 (codified as amended at 18 U.S.C § 3006A).

211. 42 U.S.C. § 1997e(d)(3); *see also* Hill, *supra* note 184, at 204.

plaintiff's monetary recovery.[212] Courts are also instructed to require a portion of an inmate plaintiff's money judgment, not exceeding 25 percent, to be deducted to satisfy an attorney's fee award.[213]

This section explains how these limitations exacerbate the preexisting difficulties for inmates in obtaining legal counsel and emphasizes how the PLRA's limitations on attorney's fees further diminish an inmate's chances of succeeding on a meritorious claim.

a. The Difficulties in Obtaining Counsel

Even before the PLRA, inmates have always had considerable difficulty obtaining counsel in civil rights cases.[214] While there is a constitutional right to counsel for defendants in criminal cases,[215] there is no such parallel right in civil cases.[216] Nor is there typically a statutory right to counsel.[217] If an inmate attempts to seek counsel prior to filing a lawsuit, finding private attorneys willing to provide legal services in a prisoner's civil rights case is rather difficult.[218] First, prisoners have no suitable way of identifying and connecting with the small percentage of lawyers who are actually willing to take on their cases before a complaint is filed.[219] Second, because prisons are often located in remote, rural areas, attorneys may be unwilling to make a "300 mile trip" to participate in client interviews and provide in-person counseling.[220] Lastly, both the "deep-seated societal antipathy towards prisoners as a class as well as the absence of lost wages or future earnings damages ensures that damages in prisoner cases will nearly always be minimal."[221] The high costs of conducting effective discovery and retaining

212. 42 U.S.C. § 1997e(d)(2); *see also* Hill, *supra* note 184, at 204; *see also* Umphres, *supra* note 208, at 264 (arguing that for decades courts have erroneously construed the language of § 1997e(d)(2) to cap attorney's fees at 150 percent of the monetary award).

213. 42 U.S.C. § 1997e(d)(2); Klotz, *supra* note 208, at 769.

214. *See* Schlanger, *supra* note 75, at 1613 (explaining that before the PLRA, inmates' cases were less attractive to lawyers).

215. *See* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (establishing a criminal defendant's right to counsel).

216. *See* Eisenberg, *supra* note 61, at 446.

217. *See id.* at 448.

218. *See id.* at 463 ("There are virtually no lawyers in the United States who solicit prisoner civil rights litigation in the hope of earning fees through such representation."); *see also* Sarah B. Schnorrenberg, Note, *Mandating Justice:* Naranjo v. Thompson *as a Solution for Unequal Access to Representation*, 50 COLUM. HUM. RTS. L. REV. 260, 283 (2019) (noting how limits on sending mail and accessing telephones and on the number of lawyers with whom they can keep confidential contact make the odds that inmates will contact and convince an attorney to willingly take on their cases extremely low).

219. *See* Eisenberg, *supra* note 61, at 463 n.216.

220. *Id. See generally* Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466 (2014) (emphasizing the serious lack of adequate legal services in rural America, particularly to low-income individuals).

221. Johnson v. Daley, 339 F.3d 582, 606 (7th Cr. 2003) (Rovner, J., dissenting); *see also* Schlanger, *supra* note 75, at 1622–23 (explaining that, under ordinary rules of tort damages, because injured inmates who remain incarcerated after injury suffer little or no lost wages and no medical expenses, damages remain low even in cases involving serious injury).

expert assistance can exceed expected damages,[222] making litigating a prisoner's civil rights case not economically feasible. Thus, even if more attorneys were willing to provide representation for prisoners in civil rights case, they may be unable to do so.

Nonetheless, there remains a handful of legal services organizations that aid prisoners in civil rights cases pro bono.[223] Nonprofit organizations that litigate prisoners' civil rights lawsuits include the American Civil Liberties Union (ACLU)[224]—at both national and state levels—as well as different state organizations, such as Prisoners' Legal Services of New York (PLS).[225] While national organizations tend to take on large class actions or impact litigation,[226] regional, state, and local organizations tend to focus on representing individual inmates.[227] However, the decision to assist with any particular case "depends on the issue or problem presented, the chance of success, the amount of time and resources necessary to properly assist, the office's resources, staff availability and caseload."[228] As such, legal aid organizations can only offer a limited amount of representation.[229] While all of these organizations can aid in some cases, there remains a large gap in representation, as demand typically overwhelms the supply of available pro bono assistance.[230]

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222. *See* Eisenberg, *supra* note 61, at 488–89.

223. *See Legal Resource Database*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/resources/legal/ [https://perma.cc/M4HQ-U5NK] (last visited Aug. 9, 2021) (listing a database of law firms and organizations that provide free legal assistance to incarcerated people on civil matters).

224. *See About the ACLU National Prison Project*, ACLU, https://www.aclu.org/other/about-aclu-national-prison-project [https://perma.cc/F5NZ-WZMS] (last visited Aug. 9, 2021) (explaining how the ACLU National Prison Project is the only program that litigates prison conditions cases on a national level).

225. PRISONERS' LEGAL SERVS. OF N.Y., https://www.plsny.org [https://perma.cc/7JCG-C8F9] (last visited Aug. 9, 2021) (indicating that PLS provides legal representation to incarcerated New Yorkers).

226. *See* Susan P. Sturm, *Lawyers at the Prison Gates: Organizational Structure and Corrections Advocacy*, 27 U. MICH. J.L. REFORM 1, 23 (1993) (describing how two national organizations concentrate on class-action litigation challenging widespread systemic problems).

227. *See id.* at 37 (describing how numerous states and the District of Columbia have programs providing legal representation to prison inmates in individual cases).

228. *Legal Resources for People in Prison in New York*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/resources/legal/NY/ [https://perma.cc/2S4Q-MW9U] (last visited Aug. 9, 2021).

229. In 2018, Prisoner Legal Services of New York received over 10,000 requests for assistance from incarcerated New Yorkers but, due to limited resources, was only able to accept and investigate approximately 2000, or 20 percent, of those requests. KAREN L. MURTAGH & THOMAS J. CURRAN, TESTIMONY BEFORE THE JOINT LEGISLATIVE HEARINGS ON THE NEW YORK STATE PUBLIC PROTECTION BUDGET FOR FY2019–2020 CONDUCTED BY THE ASSEMBLY WAYS AND MEANS AND SENATE FINANCE COMMITTEES 3 (2019), https://www.nysenate.gov/sites/default/files/testimony_given_by_the_prisoners_legal_services_pls.pdf [https://perma.cc/FP6L-JFUD].

230. *See* Hill, *supra* note 184, at 226.

Therefore, in the vast majority of situations, a prisoner has no choice but to proceed pro se.[231] Only after a complaint is drafted and the case is filed may an indigent inmate litigant move to appoint counsel under 28 U.S.C. § 1915(e)(1).[232] Typically, district courts appoint counsel only in exceptional cases where the claims have sufficient merit or involve complex or novel legal questions and where the indigent litigant cannot adequately present his case and has made unsuccessful efforts to obtain a lawyer.[233] Court appointment is typically the primary means of involving private law firms who volunteer to take on pro bono matters in prisoners' civil rights cases.[234]

However, because the motion to appoint counsel occurs after an inmate plaintiff is supposed to have exhausted administrative remedies and drafted a complaint, the motion is considered moot if a court finds that an inmate has failed to satisfy any one of the PLRA's procedural requirements or that the complaint fails to state a claim.[235] Thus, the decision to appoint counsel occurs after an inmate would have already made errors resulting in dismissal—errors that could have possibly been avoided if that inmate had attorney representation from the initial filing of an internal grievance in prison.[236]

Even once a court decides counsel is appropriate in a given case, it can often do no more than merely request such representation.[237] Thus, an attorney must voluntarily accept a court appointment for a prisoner's case free of charge.[238]

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231. *See* Tiffany Buxton, Note, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 105 (2002) (explaining, with respect to the general population, that "[t]he prohibitive cost of obtaining counsel remains the primary reason for the increased number of litigants appearing *pro se*"); *see also* Free v. United States, 879 F.2d 1535, 1539 (7th Cir. 1989) (Coffey, J., concurring) ("[T]he vast majority of prisoners are indigent, necessitating the filing of their complaints *in forma pauperis* . . . .").

232. *See* 28 U.S.C. § 1915(e)(1) (providing that a court "may request an attorney to represent any person unable to afford counsel").

233. *See generally* John R. FitzGerald, Note, *Non-Merit-Based Tests Have No Merit: Restoring District Court Discretion Under § 1915(E)(1)*, 93 NOTRE DAME L. REV. 2169 (2018) (highlighting a circuit split in which the majority of circuits allow district judges to consider the case's merits before appointing counsel under § 1915(e)(1)).

234. *See* Sturm, *supra* note 226, at 105.

235. *See, e.g.*, Gaither v. Deal, CV 120-094, 2020 WL 5736612, at *3 (S.D. Ga. Aug. 4, 2020) (denying indigent inmate's motions for appointment of counsel as moot because the inmate had at least three strikes and did not qualify for the imminent danger exception under the PLRA).

236. *See, e.g.*, Hill, *supra* note 184, at 194 n.108 (explaining how the Central District of California appoints counsel only if the case has survived dismissal and summary judgment, unless an inmate has severe mental or language-related challenges).

237. *See* Schlanger, *supra* note 75, at 1612 (noting that counsel appointments have been quite rare since courts can neither compel attorneys to serve as counsel nor compensate them for their service). *But see* Schnorrenberg, *supra* note 218, at 265 (highlighting how the Fifth Circuit became the first circuit to find that courts can compel representation via inherent authority).

238. *See* Hill, *supra* note 184, at 195.

b. A Chilling Effect: Attorney's Fee Limitations Discourage Representation

The PLRA's attorney's fee limitations exacerbate these existing difficulties in obtaining counsel and discourage attorney representation in prisoner civil rights cases, particularly cases with merit. Despite expressing concerns about how the PLRA's limitations on attorney's fees may disincentivize attorneys from representing prisoners in civil rights cases, courts have rejected constitutional challenges.[239] For example, in *Walker v. Bain*,[240] the Sixth Circuit upheld the constitutionality of the PLRA's attorney fee caps[241] despite noting that § 1997e(d)(2) "will have a strong chilling effect upon counsels' willingness to represent prisoners who have meritorious claims" and admitting "to being troubled by a federal statute that seeks to reduce the number of meritorious civil rights claims and protect the public fisc at the expense of denying a politically unpopular group their ability to vindicate actual . . . civil rights violations."[242]

This "chilling effect" is best illustrated in how courts have applied the fee limitations in cases where a prisoner-plaintiff is awarded minimal or nominal damages.[243] Courts have repeatedly rejected an exception to § 1997e(d)(2) for minimal or nominal monetary judgments.[244] Thus, lawyers who represent prisoners in civil rights cases resulting in low damage awards are sometimes left with a fee award of just $1.50 for years of work.[245] The Second Circuit acknowledged that capping attorney's fees for a $1.00 monetary judgment at $1.50 is the "practical equivalent of no fee award at all."[246] Consequently, private attorneys have even less of an incentive to take on prisoner's rights cases than they had before.[247]

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239. *See, e.g.*, Walker v. Bain, 257 F.3d 660, 669 (6th Cir. 2001) ("§ 1997e(d)(2) is rationally related to serving the purposes of decreasing marginal prisoner lawsuits and protecting the public fisc."); Boivin v. Black, 225 F.3d 36, 46 (1st Cir. 2000) (holding that § 1997e(d)(2) does not offend the Fifth Amendment); Madrid v. Gomez, 190 F.3d 990, 996 (9th Cir. 1999).

240. 257 F.3d 660 (6th Cir. 2001).

241. *Id.* at 670 (holding that § 1997e(d)(2) survived rational basis review).

242. *Id.*

243. It is common for money damages in successful inmate civil rights cases finding constitutional violations to be of low or nominal value, unless violations are accompanied by serious bodily harm or dehumanizing treatment. *See* Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U. L. REV. 835, 895 (2002).

244. *See, e.g.*, Shepherd v. Goord, 662 F.3d 603, 609 (2d Cir. 2011); Keup v. Hopkins, 596 F.3d 899, 905–06 (8th Cir. 2010); Pearson v. Welborn, 471 F.3d 732, 742 (7th Cir. 2006); Robbins v. Chronister, 435 F.3d 1238, 1244 (10th Cir. 2006); *Boivin*, 225 F.3d at 40.

245. *See supra* note 244; *see also* Umphres, *supra* note 208, at 271.

246. *Shepherd*, 662 F.3d at 609.

247. *See* Martin v. Hadix, 527 U.S. 343, 369 n.2 (1999) (Ginsburg, J., concurring in part and dissenting in part) ("An attorney's decision to invest time and energy in a civil rights suit necessarily involves a complex balance of factors, including the likelihood of success, the amount of labor necessary to prosecute the case to completion, and the potential recovery."); Tsai, *supra* note 243, at 895 (explaining how the PLRA's attorney's fee caps further disincentivize lawyers from representing inmates).

This added disincentive negatively affects not the frivolous cases that Congress intended to target but the meritorious lawsuits that it claimed would not be disturbed.[248] As a result, the PLRA's attorney's fee limitations further complicate the ability of an inmate to adequately present a meritorious claim to the court, as cases with attorney representation are much more successful than those without.[249]

C. The Post-PLRA Aftermath

Overall, the PLRA's impact on individual inmate cases was immediate and profound, particularly with respect to the number of new civil rights complaints filed in federal court. In the first five years following the PLRA's enactment, there was a 43 percent decline in new federal filings despite a simultaneous 23 percent increase in the incarcerated population.[250] By 2006, the number of inmate filings per 1000 inmates had decreased by 60 percent since 1995.[251] Filing rates then stabilized between 2007 and 2018.[252]

It is difficult to know for certain whether the sharp decline in new federal filings reflected a decline in frivolous or meritorious lawsuits.[253] According to Professors Margo Schlanger and Giovanna Shay, these trends suggest that the PLRA has fulfilled its stated purpose of lightening the burdens imposed on state governments and courts by frivolous prisoner litigation.[254] But meritorious lawsuits have become collateral damage, suggesting that the decline in filings reflects, at least in part, a decline in filings that may have otherwise had some merit.

If the PLRA only targeted frivolous lawsuits, thus allowing for meritorious claims to shine through, one would expect to see prisoner-plaintiffs succeeding in more lawsuits than before.[255] Yet, as fewer inmates are

248. *See* Johnson v. Daley, 339 F.3d 582, 601 (7th Cir. 2003) (Rovner, J., dissenting) (predicting that the only impact the PLRA's attorney's fee provisions will have is on the meritorious prisoner actions).

249. *See supra* note 84 and accompanying text.

250. Schlanger, *supra* note 75, at 1559–60.

251. Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 141–42 (2008).

252. Margo Schlanger, *Trends in Prisoner Litigation as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 156 (2015). Recently updated data shows how filing rates have slightly increased between 2012 and 2018, with a slight uptick of approximately 2 percent. *Data Update: Table A: Incarcerated Population and Prison/Jail Civil Rights/Conditions Filings, FY 1970–FY 2020*, INCARCERATION & THE L., https://incarcerationlaw.com/resources/data-update/#TableA [https://perma.cc/4NUQ-BFYQ] (last visited Aug. 9, 2021); *see also* Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (Apr. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html [https://perma.cc/RQ7B-XRFE].

253. *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, 1544 (2003) ("The precise nature of the cases *not* filed because of the PLRA's provisions (meritorious vs. nonmeritorious) is unknowable.").

254. *See* Schlanger & Shay, *supra* note 251, at 141.

255. *Id.* at 142; *see also* 141 CONG. REC. 27,042 (1995) (statement of Sen. Hatch) ("The crushing burden of these frivolous suits makes it difficult for the courts to consider meritorious

accessing the courts, even more cases are dismissed pretrial.[256] Not only are more cases dismissed, but they are dismissed at a faster rate than nonprisoner civil rights cases.[257]

In addition to the decline in filings and increase in dismissal rates, there was also a noticeable increase in the percentage of inmate civil rights cases no longer represented by counsel. This suggests that the PLRA's attorney's fee limitations had the chilling effect previously described. In 1996, prisoner civil rights cases proceeded without counsel 83.3 percent of the time.[258] By 2000, that number jumped to 95.6 percent and remained relatively high, staying at 92.4 percent in 2020.[259]

While the PLRA governs prisoners' lawsuits challenging prison conditions in federal court, state prisoners theoretically have the option of bringing state claims in state court.[260] However, after the PLRA's passage, many state legislatures enacted analogous statutes restricting inmate access to state court[261] if they had not done so already.[262] Thus, at both the federal and state levels, courthouse doors remain largely closed to people in prison.

These post-PLRA trends indicate that the PLRA has disrupted the ability of litigation to serve its traditional role as a viable transparency mechanism for the prison population.[263] In deterring and obstructing the filing of meritorious prisoner civil rights claims, the PLRA has constructed yet another barrier between prisons and the public[264]—one that does not appear ready to break down anytime soon.

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claims."); 141 CONG. REC. 38,276 (1995) (statement of Sen. Kyl) ("If we achieve a 50-percent reduction in bogus Federal prisoner claims, we will free up judicial resources for claims with merit by . . . prisoners . . . .").

256. *See* Hill, *supra* note 184, at 208.

257. *See* Schlanger, *supra* note 252, at 166, 166 tbl. 5.

258. *Id.* at 167 tbl. 6.

259. *Data Update: Table B: Pro Se Litigation in U.S. District Courts, by Case Type*, INCARCERATION & THE L., https://incarcerationlaw.com/resources/data-update/#TableB [https://perma.cc/RM8Y-E343] (last visited Aug. 9, 2021).

260. *See* Alison Brill, Note, *Rights Without Remedy: The Myth of State Court Accessibility After the Prison Litigation Reform Act*, 30 CARDOZO L. REV. 645, 676 (2008).

261. *See, e.g.*, GA. CODE ANN. §§ 42-12-1 to 42-12-9 (West 2021); LA. REV. STAT. ANN. §§ 15:1181–90 (West 2020); MICH. COMP. LAWS ANN. §§ 600.5501–600.5531 (West 2020); 42 PA. CONS. STAT. ANN. §§ 6601–08 (West 2021); *see also* Lynn S. Branham, *Of Mice and Prisoners: The Constitutionality of Extending Prisoners' Confinement for Filing Frivolous Lawsuits*, 75 S. CAL. L. REV. 1021, 1029 (2002) ("The PLRA catalyzed the enactment of state statutes designed to further curb prisoners filing frivolous lawsuits.").

262. *See* Brill, *supra* note 260, at 676–77; Schlanger, *supra* note 75, at 1635 n.272 (listing state statutes specifically regulating inmate access to state court). Similar to the federal counterpart, these state versions typically "require inmates to exhaust administrative remedies, pay mandatory filing fees, impose penalties for frivolous suits, and limit the terms of prospective relief." Brill, *supra* note 260, at 676–77.

263. *See supra* notes 60–61 and accompanying text; *see also* Stan Stojkovic, *Prison Oversight and Prison Leadership*, 30 PACE L. REV. 1476, 1482 (2010) (contending that the PLRA's ultimate impact is that "prisons have become less transparent").

264. *See supra* note 22 and accompanying text.

III. COLLATERALLY ATTACKING THE PLRA'S APPLICATION TO MERITORIOUS CIVIL LAWSUITS

The PLRA continues to deter and obstruct the filing of meritorious prisoner civil lawsuits, thus sharply limiting litigation as one of the only effective transparency mechanisms for people in America's prisons. While many have urged for the Act's amendment or repeal, those efforts have yet to come to fruition, at least with respect to the access provisions.[265] Moreover, there is no indication that courts will depart from a strictly textual reading of the statute,[266] absent Congressional action, which also appears unlikely. Little scholarship has addressed how to counteract the harmful effects that the PLRA's access provisions have caused, while still preserving litigation as a crucial transparency mechanism—short of the Act's amendment, repeal, or judicial reinterpretation.[267] This Note therefore aims to fill that gap.

Given the reality that the PLRA is likely to remain intact, Part III.A argues that there is a need to combat the PLRA's application to meritorious prisoner civil rights lawsuits. Part III.B proposes that states adopt a two-step framework that can pave the way for more meritorious claims to make it to court with greater chances of success.

A. The Need to Combat the PLRA's Application to Meritorious Lawsuits

There is a critical need for states to take proactive steps to counteract the PLRA's negative effects on meritorious prisoner civil rights cases. As a general matter, transparency remains one of the key features of a properly functioning democratic society. Without transparency, people in prison, the public, and even correctional staff suffer the consequences. First, without unfettered access to the courts, people in prison typically have no other effective means to voice legitimate complaints about prison conditions to the external world, leaving them vulnerable to mistreatment and abuse.[268] The PLRA thus tampers with one of the most fundamental rights belonging to people in prison.[269]

Second, while macro-level judicial oversight and large-scale prison reform are undoubtedly crucial,[270] the role of individual inmate lawsuits must not be overlooked. Individual inmate lawsuits can often be reflective of larger existing issues that affect all inmates, such as overcrowding, inadequate

265. *See, e.g.*, Prison Abuse Remedies Act of 2009, H.R. 4335, 111th Cong. (2009).

266. *See, e.g.*, *supra* notes 151–54 and accompanying text.

267. *See* Deitch, *supra* note 23, at 236 (arguing that there is a "critical need for alternative and effective forms of correctional oversight" in a post-PLRA world); Hill, *supra* note 184, at 227 (proposing that "an organization called Prison Lawyers be established in the Ninth Circuit as a pilot program to provide attorney assistance for inmates in all civil rights claims"); KAUL ET AL., *supra* note 114, at 3–4 (recommending how to make grievance policies more fair because grievance policies serve a court gatekeeper function assigned by the PLRA).

268. *See supra* notes 22–42 and accompanying text.

269. *See supra* notes 64–65 and accompanying text.

270. *See supra* notes 66–73 and accompanying text.

health care, and unsafe living conditions.[271] Moreover, they can serve as an early-warning system of problematic practices or conditions that may become widespread absent deliberate correction.[272] Even if claims may ultimately be unsubstantiated, the claim itself can help officials identify potentially bad actors.[273] Without a steady flow of viable inmate civil rights lawsuits, this early-warning system fails, leading to bigger problems down the road.

Third, combatting the PLRA's application to meritorious civil rights lawsuits is in the public interest. With billions of taxpayer dollars pouring into the operation of correctional facilities nationwide, the public has a right to know what occurs behind prison walls.[274] Recent events, most notably the COVID-19 crisis, have sparked public attention to issues in prisons, as it has become clear that what happens inside prisons can directly impact the public health and safety of not only those physically incarcerated but also the public at large.[275] For all of these reasons, there is a need to ensure that prisoners with meritorious claims can have their complaints heard in court.

B. A Framework for Combatting the PLRA's Application to Meritorious Lawsuits

States are best equipped to counteract the PLRA's negative effects, as the majority of incarcerated persons in the United States are housed in state prisons[276] and the administration of grievance procedures is determined by state processes.[277] This Note proposes that states follow a two-step framework. First, as Part III.B.1 explains, states should conduct prison grievance processes primarily via electronic means to ensure that all grievances are stored in electronic databases. Second, as Part III.B.2 describes, states should require that outside legal aid organizations litigating prisoner civil rights cases be given access to prisons' electronic grievance databases.

As a practical matter, this Note neither encourages a particular means of adoption nor provides which specific organizations must have access, as it recognizes that each state's political makeup is different and that each state has different local organizations that litigate prisoner civil rights cases. With that said, states can implement this Note's proposed framework through

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271. *See* Sturm, *supra* note 226, at 12–13.

272. *See* Tom Robbins, *New York State Prisons Take Steps to Track Complaints About Guards*, N.Y. TIMES (Dec. 20, 2015), https://www.nytimes.com/2015/12/21/nyregion/new-york-state-prisons-take-steps-to-track-complaints-about-guards.html [https://perma.cc/ZN76-M4ER] (discussing how the hundreds of lawsuits filed by New York state inmates could function as an early-warning system of repetitive abusive conduct by state corrections officers).

273. *See id.* (quoting Karen L. Murtagh, the executive director of Prisoners' Legal Services of New York, claiming that "[i]f you are serious about identifying bad actors, . . . you should be tracking the cases that have been filed against them, substantiated or not").

274. *See supra* note 20 and accompanying text.

275. *See* Deitch, *supra* note 35, at 213.

276. *See supra* note 19 and accompanying text.

277. *See supra* note 115 and accompanying text.

legislation, administrative regulation by the state DOC, or gubernatorial authority. This Note's proposal is thus broadly envisioned to promote practical adoption among numerous states. Moreover, this Note's proposed framework not only offers a practical means to collaterally attack the PLRA's application to meritorious prisoner lawsuits but also can spark a lively debate over how to best navigate a post-PLRA reality.

1. Step One: Implementing Electronic Grievance Systems

States should ensure that prison grievance processes are conducted primarily via electronic means to ensure that all grievances are then stored in electronic databases. While some state prison systems have electronic data systems to store information pertaining to grievances, those data systems typically require manual entry by prison staff, who sometimes only log grievances into the system if they are filled out correctly.[278] In recent years, however, several state prison systems have begun to make,[279] or have made, the transition from all paper forms by implementing kiosks or providing electronic tablets made by private companies, such as JPAY.[280] Having an electronic means through which to submit, process, and track grievances also allows states to further standardize the grievance process and simplify it as much as possible.

In providing an electronic means to submit and track grievances which can enable further standardization of forms, inmates may have a better chance of satisfying the PLRA's exhaustion requirement. For inmates, the ability to electronically submit a grievance can place greater confidence in the grievance system, as inmates can fully control their submissions.[281] Such a system also benefits the staff overseeing the grievance process, as they no

278. *See, e.g.*, Goodrick v. Field, No. 17-CV-265, 2020 WL 6371160, at *2 (D. Idaho Oct. 29, 2020). According to the Idaho DOC's grievance system, upon receipt of a grievance form from an inmate, the grievance coordinator enters the grievance information into the "Corrections Integrated System," which is an electronic database used to log offender grievances and grievance appeals. *Id.* The grievance coordinator, however, only logs the information into the database if an inmate completes the grievance form correctly. *Id.* Otherwise, the form is returned to the inmate. *Id.*

279. *See, e.g.*, PRISON L. OFF., HOW TO FILE A CDCR ADMINISTRATIVE GRIEVANCE AND APPEAL 4 (2020), https://prisonlaw.com/wp-content/uploads/2020/08/AdminAppeals-June-2020.pdf [https://perma.cc/MBE7-JSBH] (mentioning that inmates in some California state prison facilities may be able to submit grievances through electronic kiosks or tablets).

280. *See, e.g.*, Nance v. SCO Francis Danley, No. 17-6409, 2021 WL 2592931, at *2 (D.N.J. June 23, 2021) (referencing the New Jersey DOC's electronic JPAY System for submitting grievances electronically via the unit kiosk); State *ex rel.* Wolfenbarger v. Mohr, No. 18AP-508, 2019 WL 4447406, at *4 app. (Ohio Ct. App. Sept. 17, 2019) (describing how, in 2017, the Ohio Department of Rehabilitation and Correction implemented JPAY grievance kiosks and replaced its paper-based grievance procedure with an electronic system); Ga. Dep't of Corr., Standard Operating Procedures (2019), https://www.powerdms.com/public/GADOC/documents/105711 [https://perma.cc/LX6X-Z6WK].

281. *Cf. Goodrick*, 2020 WL 6371160, at *2 (describing the limited discretion that the Idaho grievance process leaves to the grievance coordinator over whether to upload the grievance information into the database); PRISON JUST. LEAGUE, *supra* note 166, at 20 (noting that in the Texas Department of Criminal Justice grievance staff misplace or lose Texas state prisoners' grievances in some cases).

longer need to spend time logging grievances themselves. Instead, they can focus on addressing the underlying issues presented by the grievances.[282]

Several states have already understood the added benefits of an electronic grievance system.[283] Using paper forms, on the other hand, can create a whole host of problems. For example, in December 2015, the *New York Times* reported how Eastern District of New York Judge John Gleeson rebuked the New York State grievance process when presiding over a former inmate's case, which alleged prison guard abuse.[284] Judge Gleeson stated that the particular guard had been the target of other abuse claims brought by inmates, but that those grievances were handwritten and deeply buried away in the prison's arcane filing system.[285] At the time, prison officials had no way of adequately tracking potential problems with particular guards.[286] However, in response to criticism, the New York State Department of Corrections and Community Supervision indicated that it had begun electronically logging complaints to allow the department to better monitor accusations of misconduct and change bad practices.[287]

Despite these potential benefits, the primary anticipated objection to making this transition is financial. For states that do not have a system in place already, implementing a database and kiosks or electronic tablets, can be a costly undertaking. Moreover, given that some states have complicated their grievance procedures and enacted their own analogous PLRA schemes, there is some doubt as to whether states would be open to making a process more seamless.[288] However, in the long term, having a system that allows state officials to spend more time addressing grievances and monitoring for potential problems generates significant cost savings and improves prison conditions overall, leading to state officials facing less costly lawsuits in the future. This reasoning is consistent with the Supreme Court's assumption in *Woodford* that "[c]orrections officials concerned about maintaining order in their institutions have a reason for creating and retaining grievance systems that provide—and that are perceived by prisoners as providing—a meaningful opportunity for prisoners to raise meritorious grievances."[289] The fact that some states have already undergone the transition to electronic systems signals recognition that the benefits outweigh any anticipated costs.

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282. *See* N.Y.C. BD. OF CORR., A STUDY OF THE DEPARTMENT OF CORRECTION INMATE GRIEVANCE AND REQUEST PROGRAM 13 (2016), https://www1.nyc.gov/assets/boc/downloads/pdf/final_board_of_correctionreport_oct2016.pdf [https://perma.cc/5YSP-EXKH].

283. *See supra* note 280; *see also* Robbins, *supra* note 272.

284. *See* Robbins, *supra* note 272.

285. *Id.*

286. *See id.*

287. *See id.*; *see also* Shannon Heffernan, *The Way Prisoners Flag Guard Abuse, Inadequate Health Care and Unsanitary Conditions Is Broken*, PROPUBLICA (Dec. 2, 2020, 6:00 AM), https://www.propublica.org/article/the-way-prisoners-flag-guard-abuse-inadequate-health-care-and-unsanitary-conditions-is-broken [https://perma.cc/Q6QF-S8QY] (reporting that the Illinois DOC stated that it would be transitioning to electronic grievances in light of major problems with the grievance system, "a move that would make the system more efficient and data easier to track").

288. *See supra* note 169 and accompanying text.

289. Woodford v. Ngo, 548 U.S. 81, 102 (2006).

2. Step Two: Granting Outside Legal Aid Organizations Access to Electronic Grievance Databases

The first step serves as a prerequisite for implementing the second step. Once states have electronic grievance processes with corresponding databases in place, states should ensure the appropriate legal aid organizations that typically litigate prisoner civil rights cases are provided with database access. With instant access to prisons' grievance databases, these organizations can monitor grievances and identify prisoners' apparently meritorious complaints, which are thus worthy of attorney representation. Once identified, these organizations can decide whether to assist selected inmates through the prison grievance process to ensure that, if prisoners wish to file lawsuits, they will have properly exhausted their administrative remedies per *Woodford*.[290] If an organization does not have the capacity to take on a particular case,[291] it can reach out to private law firms to determine whether the firms can provide pro bono assistance. This part of the framework therefore envisions not only an initial sharing of grievances with appropriate legal aid organizations but also a collaboration between public and private attorneys to better connect lawyers willing to take on prisoners' civil rights lawsuits with prisoners themselves.

This Note argues that such a process can directly counteract the PLRA's access provisions' cumulative application to meritorious prisoner civil rights lawsuits. First, having a more seamless process to connect inmates with pro bono lawyers from the initial filing of a grievance enhances the probability of attorney representation prior to filing a civil rights complaint in court, thus increasing the odds the complaint will survive dismissal.[292] As mentioned previously, inmates have not historically had such a process, and this lack of a process has contributed to the existing difficulties in finding lawyers ready to take on prisoner civil rights cases.[293] This proposal therefore combats the disincentives exacerbated by the PLRA's attorney's fee limitations by connecting inmates with meritorious claims to attorneys who are willing to assist.[294]

Second, having attorney representation from the start of the grievance process ensures that inmates are counseled to properly exhaust administrative remedies. With many people in prison suffering from a combination of

290. *See supra* note 140 and accompanying text.

291. *See supra* notes 228–30 and accompanying text.

292. *See supra* notes 79–84 and accompanying text. As described previously, when an inmate moves to appoint counsel in a given case, it typically occurs after they already may have made errors warranting dismissal.

293. *See supra* note 219 and accompanying text.

294. This Note's proposal seeks to build on preexisting infrastructure to connect attorneys with prisoners who have meritorious civil rights claims. However, others have argued for the creation of a new organization to provide inmates with legal assistance for their civil rights claims. *See, e.g.*, Hill, *supra* note 184, at 226–34 (arguing for the creation of a new organization called Prison Lawyers, which would be funded by the Ninth Circuit).

different disadvantages, including illiteracy, legal assistance throughout the grievance process can make a significant difference in outcome.[295]

Third, although this Note's proposal directly targets the PLRA's administrative exhaustion and attorney's fee provisions, it can indirectly and positively impact the filing fee and three-strikes rule provisions.[296] For example, pro bono attorneys can assist with covering the initial filing fee to avoid the case's outright dismissal, even if an inmate has previously acquired three strikes, thus lessening the financial burden on inmates filing a civil rights lawsuit. Additionally, attorney representation from the very start can help inmates avoid any pitfalls that may lead to acquiring a "strike."

This Note's proposal ultimately aims to facilitate and restore federal litigation as a critical transparency mechanism for people in America's prisons. Allowing prisoner grievances to be instantly accessible to outside lawyers provides prisoners with meritorious claims an opportunity to share their otherwise hidden experiences with the outside world. Doing so also creates an ongoing external oversight mechanism to continuously monitor the issues affecting people in prison on a daily basis.

Aside from electronic grievance database sharing, this proposal builds on already existing infrastructure in some states. For example, PLS—an established nonprofit organization that litigates New York prisoners' civil rights cases—has a Pro Bono Partnership Program (PBPP) that aims to expand legal services to prisoners by recruiting attorneys to represent prisoners on a pro bono basis.[297] The PBPP receives cases from PLS, conducts an initial review of the merits of those cases, and upon determining that a case is worthy of representation, PBPP staff contact volunteers individually to arrange for a case referral.[298] This Note's proposal capitalizes on this sort of existing infrastructure while streamlining the process by which a legal aid organization is made aware of prisoners' complaints in the first place.

Despite the potential benefits of this second step, state DOCs are likely to be wary of exposing daily prison life to outsiders. State DOCs may not want increased external scrutiny of prisons coming from independent legal organizations. In line with responses to public disclosure requests, they are likely to insulate information about prison conditions as much as possible.[299] However, unlike public disclosure requests, prisoners' grievances would not be shared with the public at large, avoiding any concerns regarding the security or safety of the facility itself and those inside. Moreover, having independent oversight by external legal aid organizations is beneficial in the long term, as it increases transparency of prison conditions to those whose

295. *See supra* note 80 and accompanying text.

296. *See supra* Parts II.B.2–3.

297. *See Pro Bono Partnership Program*, PRISONERS' LEGAL SERVS. OF N.Y., https://plsny.org/pro-bono-partnership-program/ [https://perma.cc/6VS3-UA63] (last visited Aug. 9, 2021).

298. *See id.*

299. *See supra* notes 32–34 and accompanying text.

mission it is to ultimately improve them.[300] While such external involvement may seem, at first glance, to benefit only incarcerated individuals, it can also create safer institutions for correctional staff,[301] providing an additional critical incentive for implementing such a framework. While this Note's proposed framework is just a first step, it aims to make significant strides to ensure that the intended purpose of the PLRA is fulfilled, although no longer at the expense of meritorious prisoner civil litigation.

CONCLUSION

Congress enacted the PLRA to reduce the perceived rise in frivolous prisoner litigation. Despite statements to the contrary, the PLRA's access provisions deter and obstruct prisoners' ability to file and succeed on meritorious civil rights claims. With recent events such as the COVID-19 pandemic leaving people in prison more vulnerable than ever before and without indication that the PLRA will be significantly amended or repealed, states must begin to take proactive steps to counteract the PLRA's effect on meritorious prisoner lawsuits. This Note's proposed framework is suggested as a practical means not only to collaterally attack the PLRA's provisions restricting prisoners' access to court but also to facilitate a meaningful debate over how to best navigate a reality in which the PLRA remains intact.

300. *See* Deitch, *supra* note 23, at 236 (arguing for creativity and increased transparency in prison operations).

301. *See* Deitch, *supra* note 35, at 219–21 (explaining how, although correctional administrators often give the greatest pushback to external oversight, they nevertheless are the second beneficiaries of such oversight).