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## **Access Denied: How 28 U.S.C. § 1915(g) Violates the First Amendment Rights of Indigent Prisoners**

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Molly Guptill Manning\*

### INTRODUCTION

The First Amendment guarantees that Congress “shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances.”<sup>1</sup> Congress and the courts have long recognized that poverty, and an inability to pay court filing fees, should not bar litigants from filing a complaint. In 1892, Congress memorialized this principle by enacting an *in forma pauperis* statute that waived filing fees for those who could not afford to pay them.<sup>2</sup> As the Supreme Court explained, this statute was built on the understanding that “no citizen [sh]ould be denied an opportunity to commence, prosecute, or defend an action, civil or criminal,

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<sup>1</sup> U.S. CONST. amend. I; *see also* *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (reaffirming that “the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances”).

<sup>2</sup> Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252. The original *in forma pauperis* statute provided that “any citizen of the United States . . . may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs.” *Id.* To do so, a litigant need only “fil[e] in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence,” and the litigant must provide a brief explanation for why he “believes he is entitled to the redress he seeks.” *Id.*

in any court of the United States, solely because his poverty makes it impossible for him to pay or secure the court costs.”<sup>3</sup> Nearly one hundred years after its original passage, the Supreme Court continued to describe *in forma pauperis* status as a safeguard “designed to ensure that indigent litigants have meaningful access to the federal courts.”<sup>4</sup>

However, as the federal courts experienced ballooning caseloads in the 1990s, Congress placed significant restrictions on *in forma pauperis* status for prisoners.<sup>5</sup> Rather than acknowledge the causal link between mass incarceration and worsening prison conditions, Congress waged a campaign to reduce the number of prisoner civil rights lawsuits by tinkering with the requirements for *in forma pauperis* status.<sup>6</sup>

In 1995, the Prison Litigation Reform Act (PLRA) was proposed. Ignoring the many legitimate grievances prisoners raised in federal courts, the sponsors of the bill dwelled on the most bogus claims ever filed. “These suits can involve such grievances as insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety,” Senator Dole

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<sup>3</sup> *Adkins v. E. I. DuPont de Nemours & Co.*, 335 U.S. 331, 342 (1948) (internal quotation marks omitted).

<sup>4</sup> *Neitzke v. Williams*, 490 U.S. 319, 324 (1989).

<sup>5</sup> TRACEY KYCKELHAHN & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUST., CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 1990-2006 1 (2008).

<sup>6</sup> 141 CONG. REC. 14,413 (1995). When Senator Bob Dole introduced the Prison Litigation Reform Act, he praised its “several important reforms that would dramatically reduce the number of meritless prisoner lawsuits.” *Id.* Bureau of Justice statistics show that there were mixed results. “Prison petitions involving state inmates declined by 7% from 24,732 filings in 1999 to 23,122 filings in 2006,” while “federal inmate prison petitions increased from 962 filings in 1999 to 1,334 filings in 2004 and declined to 1,116 filings by 2006.” KYCKELHAHN & COHEN, *supra* note 5, at 8. Thus, state filings decreased since 1999, while federal filings increased.

said.<sup>7</sup> The bill's sponsors aimed to create an "economic disincentive [for prisoners] to going to court."<sup>8</sup>

One of the major changes the PLRA imposed on in forma pauperis status is that prisoners—and prisoners only—now had to pay the entire filing fee in installments, while non-prisoners with in forma pauperis status paid nothing towards the filing fee.<sup>9</sup> The PLRA also ushered in a "three strikes

<sup>7</sup> 141 CONG. REC. 14,413 (1995) (statement of Sen. Dole). In reality, the "peanut butter" case involved a prisoner who had ordered two jars of peanut butter from the prison canteen, one was the wrong variety, and when he returned the jar of the wrong variety he was never issued a refund. Jon O. Newman, *Not All Prisoner Lawsuits Are Frivolous*, PRISON LEGAL NEWS (April 1996), available at <https://www.prisonlegalnews.org/news/1996/apr/15/not-all-prisoner-lawsuits-are-frivolous/> [<https://perma.cc/U8MMU-LG8G>]. As Second Circuit Judge Jon Newman remarked, "Maybe \$2.50 doesn't seem like much money, but out of a prisoner's commissary account, it is not a trivial loss, and it was for loss of those funds that the prisoner sued." *Id.*

<sup>8</sup> 141 CONG. REC. 14,413 (1995) (statement of Sen. Dole). "Many prisoners filing lawsuits today in Federal court claim indigent status. As indigents, prisoners are generally not required to pay the fees that normally accompany the filing of a lawsuit," Senator Dole stated. *Id.*

<sup>9</sup> 28 U.S.C. §§ 1915(b)(1), (2) (stating that prisoners are "required to pay the full amount of a filing fee" through a garnishment procedure whereby partial payments of court fees are made as funds become available in the prisoner's institutional trust account"). An initial partial payment of twenty percent of either the average monthly deposits or average monthly balance (whichever was greater) is made, and thereafter monthly payments are withdrawn from the prisoner's account equivalent to "20 percent of the preceding month's income credited to the prisoner's account." *Id.*

As explained by Senator Dole when he introduced the PLRA to the Senate, the "garnishment procedure" would work so that, upon seeking in forma pauperis status, "20 percent of the funds in [the prisoner's] trust account would be garnished for this purpose. Every month thereafter, an additional 20 percent of the income credited to the prisoner's account would be garnished, until the full amount of the court fees and costs are paid-off." 141 CONG. REC. 14,413 (1995) (statement of Sen. Doyle). Interestingly, Senator Dole went on to state that when "law-abiding citizens file a lawsuit, they recognize that there could be an economic downside to going to court." *Id.* Yet, under 28 U.S.C. § 1915(a), when non-prisoners are granted in forma pauperis status, they do not pay court filing fees and thus they do not encounter any "economic downside" to filing a frivolous lawsuit. *Id.* "If a law-abiding citizen has to pay the costs associated with a lawsuit, so too should a convicted criminal," Senator Dole reasoned. *Id.* Again, this ignores that non-prisoners proceeding in forma pauperis do not pay any filing fees. 28 U.S.C. § 1915(a). Under the new requirements established by the PLRA, non-prisoners have continued to enjoy immunity from paying filing fees when proceeding in forma pauperis; prisoners, on

rule,” codified at 28 U.S.C. § 1915(g), which required a prisoner to prepay an entire filing fee “if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal . . . that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted.”<sup>10</sup> Considering that most prisoners proceed pro se, lack legal education or expertise, and are at the mercy of whatever limited law library their facility may have, three strikes can mount quickly.<sup>11</sup> The three-strikes bar never expires, and a prisoner with three strikes can only file a future action upon prepayment of hundreds of dollars in filing fees.<sup>12</sup> Accordingly, prisoners with three strikes, no money, and lengthy prison terms are barred from seeking redress in federal court for a prison’s abuses or constitutional violations—no matter how meritorious the prisoner’s allegations may be.

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the other hand, have become responsible for repaying the full amount of filing fees through a garnishment procedure.

<sup>10</sup> 28 U.S.C. § 1915(g). A single, narrow exception to the prepayment requirement exists if a “prisoner is under imminent danger of serious physical injury.” *Id.*

<sup>11</sup> Dismissal of two complaints and one appeal can amount to three strikes. *Chavis v. Chappius*, 618 F.3d 162, 167 (2d Cir. 2010) (holding that two strikes accumulate when a complaint is dismissed on § 1915(g) grounds and an appeal from this dismissal is denied on listed grounds); *see also Jennings v. Natrona Cnty. Det. Ctr. Med. Facility*, 175 F.3d 775, 780 (10th Cir. 1999); *Hains v. Washington*, 131 F.3d 1248, 1250 (7th Cir. 1997) (per curiam); *Henderson v. Norris*, 129 F.3d 481, 485 (8th Cir. 1997) (per curiam); *Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996); Meredith Booker, *20 Years Is Enough: Time to Repeal the Prisoner Litigation Reform Act*, PRISON POL’Y INITIATIVE (May 5, 2016), [https://www.prisonpolicy.org/blog/2016/05/05/20years\\_plra/](https://www.prisonpolicy.org/blog/2016/05/05/20years_plra/) [<https://perma.cc/5PYK-Q76E>] (stating that, in 2012, “just over 5% of incarcerated people’s civil rights cases were represented by attorneys,” while 65% of non-prisoner civil rights plaintiffs secured representation).

At the time this article is being written, COVID-19 is exacerbating the many obstacles that prisoners already face in preparing court papers; there have been prison law library closures and weeks-long delays in getting responses to administrative complaints and grievances. Peter Debelak, *We Would Die of the Virus or Not. The System Would Roll On.*, N.Y. TIMES (June 27, 2020), <https://www.nytimes.com/2020/06/27/opinion/prison-coronavirus.html> [<https://perma.cc/YQB9-NJAD>].

<sup>12</sup> 28 U.S.C. § 1915(g).

Courts that have considered the constitutionality of 28 U.S.C. § 1915(g) have upheld the provision time and again.<sup>13</sup> Operating under the assumption that prisoners can save their money and earmark it for a filing fee, federal courts have failed to consider the significant limitations prisoners face in obtaining paid employment and in having autonomy over their prison trust accounts.<sup>14</sup> More than half of U.S. prisoners are not able to secure a paying job within a correctional facility (and those with jobs typically earn cents per hour), and prisoners with financial obligations (ranging from restitution to child support and student loans) may be contractually obligated to make installment payments towards these debts.<sup>15</sup> Thus, over one million prisoners cannot earn money to save, and those who can earn money may be required to spend it on other financial obligations.<sup>16</sup> Consequently,

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<sup>13</sup> See, e.g., *Lewis v. Sullivan*, 279 F.3d 526, 527 (7th Cir. 2002) (stating that seven Courts of Appeals had considered the constitutionality of § 1915(g) on a variety of bases, “including [a] due process right of access to the courts, the equal protection clause, the ex post facto clause, the first amendment right to petition for redress of grievances, and several others”; none of the challenges to this subsection have “succeeded”; and all of the seven “decisions [were] sound”). *Id.* It bears noting that, although the Seventh Circuit specifically referred to an “access to the courts” challenge, it did not cite to the most relevant Supreme Court cases on prisoner access-to-the-courts claims discussed in Part V of this article—notably *Wolff v. McDonnell* and *Bounds v. Smith*. *Wolff v. McDonnell*, 418 U.S. 539, 542 (1974); *Bounds v. Smith*, 430 U.S. 817, 827 (1977). These Supreme Court cases predated *Lewis v. Sullivan* and squarely addressed the requirements of prisoner access-to-the-courts claims. *Id.* These Supreme Court cases support the principle that a litigant whose nonfrivolous claims are barred because of an inability to pay a filing fee may sufficiently allege an access-to-the-courts violation. See *infra* Part V.

<sup>14</sup> See, e.g., *Sanders v. Melvin*, 873 F.3d 957, 959–60 (7th Cir. 2017) (stating that a three-strikes prisoner should “save up” and pay the filing fee if he wished to pursue his complaint).

<sup>15</sup> See, e.g., 28 C.F.R. § 545.11 (2021) (detailing the Bureau of Prison’s “Inmate Financial Responsibility Program” and listing the various categories of financial obligations a prisoner may have and the “priority” of payments to be made—ranging from criminal court fees, restitution, student loans, outstanding taxes, and many others); Daniel Moritz-Rabson, ‘Prison Slavery’: Inmates Are Paid Cents While Manufacturing Products Sold to Government, *NEWSWEEK* (Aug. 28, 2018), <https://www.newsweek.com/prison-slavery-who-benefits-cheap-inmate-labor-1093729> [<https://perma.cc/VRD3-7B9T>] (stating that only half of all prisoners are able to secure a paying job while incarcerated).

<sup>16</sup> *Id.*

indigent three-strikes prisoners may have no ability to save an entire federal filing fee before commencement of a federal action or appeal.<sup>17</sup> An “access to the courts” claim is the proper vehicle for challenging an obstacle (such as prepayment of a filing fee) preventing a litigant from obtaining judicial review of a nonfrivolous claim.<sup>18</sup> Ironically, however, if an indigent three-strikes litigant wanted to raise a First Amendment challenge—that prepayment of a filing fee bars access to the courts because the prisoner cannot amass \$400 for a district court filing fee—the prisoner cannot obtain review of his claim without paying the very filing fee he is alleging he cannot pay. It is an unconstitutional Catch-22.

This article argues that 28 U.S.C. § 1915(g) should be amended or repealed because it denies indigent prisoners access to the federal courts to litigate nonfrivolous claims, in violation of the First Amendment. Part I of this article traces the history of filing fee waivers for indigent litigants and the duality that exists between prisoner and non-prisoner litigants. Part II explores the legislative history for the PLRA and what the sponsors of this legislation hoped to achieve. Part III examines 28 U.S.C. § 1915(g) and

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<sup>17</sup> 28 U.S.C. § 1914(a) (providing that a district court filing fee is \$350); 28 U.S.C. § 1914 (District Court Miscellaneous Fee Schedule, listing other court costs and fees, including a \$50 “administrative fee for filing a civil action, suit, or proceeding in a district court.”). The \$50 administrative fee “does not apply to . . . persons granted in forma pauperis status under 28 U.S.C. § 1915.” *Id.* Thus, this is yet another expense that prisoners face if they file three unsuccessful actions and are no longer eligible for in forma pauperis status because of 28 U.S.C. § 1915(g). *Court of Appeals Miscellaneous Fee Schedule*, ADMIN. OFF. OF THE U.S. CTS. ¶ 1 (effective Oct. 1, 2019), <https://www.uscourts.gov/services-forms/fees/court-appeals-miscellaneous-fee-schedule> [<https://perma.cc/8ZMB-WXTG>] (stating that the docketing fee for a federal appeal is \$500). Not only is a federal appeal more costly than the filing of a complaint in district court, but the period of time to file an appeal (and pay the docketing fee) is short: either thirty or sixty days, depending on whether the U.S. Government or its officials are named parties to the lawsuit. Fed. R. App. P. 4(a)(1)(A)—(B) (setting forth a thirty-day period to file a notice of appeal from entry of judgment and a sixty-day period when one of the parties is the United States, a United States agency, or a United States employee).

<sup>18</sup> *Lewis v. Casey*, 518 U.S. 343, 351–52 (1996) (explaining that an access-to-the-courts claim requires allegations of “actual injury”—that “a nonfrivolous legal claim had been frustrated or was being impeded.”).

how the federal courts have reasoned that it does not impose an unconstitutional burden on prisoners. Part IV details the constraints on prisoners' ability to earn and save income to pay a lump-sum filing fee. Part V analyzes "access to the courts" claims and what the Supreme Court has required to successfully assert such a claim in the realm of prisoner civil rights litigation. Finally, Part VI argues why amendment or repeal of 28 U.S.C. § 1915(g) would best achieve Congress' goals for the PLRA, ease the burden on federal courts by enabling them to efficiently manage their caseloads, and ensure that indigent prisoners with three strikes do not lose their First Amendment right to file nonfrivolous claims.

## I. HISTORY OF COURT FEE WAIVERS

### *A. Legislative History*

In June 1892, a bill was introduced in the House of Representatives that would "open the courts of the United States to a class of persons who are now denied the right of bringing suits in the courts of the United States, that have no money or property by which to comply with the rules of the courts in respect to costs."<sup>19</sup> After a few clerical amendments and brief discussion about the requirement that an indigent plaintiff submit an affidavit detailing his inability to pay court fees, the bill was passed.<sup>20</sup> The Senate, equally satisfied with the principle that the aggrieved should be able to seek recourse in the federal courts irrespective of their financial ability to pay court fees, favored the bill.<sup>21</sup> In July 1892, it became law that

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<sup>19</sup> 23 CONG. REC. 5,199 (1892) (statement of Rep. Culberson).

<sup>20</sup> *Id.*

<sup>21</sup> 23 CONG. REC. 6,291 (1892) ("A further message from the Senate, . . . announced that the Senate had passed without amendment bills of the following titles. . . . A bill (H.R. 8153) providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court."). Days later, the Senate received word that the President of the United States had approved and signed the bill. 23 CONG. REC. 6,543 (1892).

any citizen . . . may commence and prosecute . . . any [federal] suit or action without being required to prepay fees or costs . . . upon filing . . . a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action.<sup>22</sup>

Over the next one hundred years, small tweaks were made to the 1892 *in forma pauperis* statute as well as other legislation governing the waiver of court fees for indigent litigants to expand the scope of the original Act. For example, while the original legislation seemed to contemplate the waiver of court fees only in trial court proceedings, a 1910 amendment broadened the original statute after federal courts held it was inapplicable to appellate proceedings and writs of error.<sup>23</sup> The new language provided that

any citizen . . . may . . . commence and prosecute or defend to conclusion any suit or action, or a writ of error, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings . . . without being required to prepay fees or costs or for the printing of the record in the appellate court.<sup>24</sup>

This amendment also provided that a trial court could essentially revoke *in forma pauperis* status for an appeal by determining that an “appeal or writ of error is not taken in good faith.”<sup>25</sup> If the district court does not revoke in

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<sup>22</sup> Act of July 20, 1892, ch. 209, 27 Stat. 252 (“An act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court.”).

<sup>23</sup> 45 CONG. REC. 8,626–27 (1910) (proposing that the *in forma pauperis* statute “section 1, chapter 209, of the United States Statutes at Large, volume 27” be amended to include the language that an indigent litigant could seek *in forma pauperis* status to “commence and prosecute or defend to conclusion any suit or action, or a writ of error, or an appeal to the circuit court of appeals, or to the Supreme Court . . . .”) (emphasis added); *Bradford v. S. R.R. Co.*, 195 U.S. 243, 250–52 (1904). In *Bradford*, the Supreme Court held that “[w]e adhere to the view that the [in *in forma pauperis*] act, on its face, does not apply to appellate proceedings,” and when addressing whether a writ of error could be prosecuted *in forma pauperis*, “we find no statute authorizing any order to that effect.” *Id.* at 250, 252.

<sup>24</sup> Act of June 25, 1910, ch. 435, 36 Stat. 866.

<sup>25</sup> 45 CONG. REC. 1,767 (1910) (discussing a proposed amendment to include “good faith” language). In *Wells v. United States*, the Supreme Court explained a “Circuit Court of Appeals could allow an appeal *in forma pauperis* to review, in the light of all the

forma pauperis status, a litigant would continue to have this status on appeal.<sup>26</sup>

In 1944, Congress amended 28 U.S.C. § 9, governing court reporters, and this statute provided that “fees for transcripts furnished in . . . proceedings to persons permitted to appeal in forma pauperis shall . . . be paid by the United States if the trial judge or a circuit judge shall certify that the appeal is not frivolous but presents a substantial question.”<sup>27</sup> When the federal Judicial Code of 1911 was restructured, the in forma pauperis statute was codified as 28 U.S.C. § 1915; this version of the statute included the requirement that indigent litigants file an affidavit detailing their inability to pay court costs and provided that indigent litigants could request free production of necessary transcripts.<sup>28</sup> Until 1996, Congress made only ministerial changes to the text of the statute.<sup>29</sup>

### *B. Court Decisions*

During the latter half of the twentieth century, courts consistently recognized the importance of ensuring that all litigants—whether they were

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circumstances, the adequacy of the district court’s certificate,” but when an appeal does not challenge the trial court’s good faith determination, the denial of “in forma pauperis must . . . be affirmed.” *Wells v. United States*, 318 U.S. 257, 260 (1943).

<sup>26</sup> This principle is memorialized in Fed. R. App. P. 24(a)(3)(A):

A party who was permitted to proceed in forma pauperis in the district-court action, . . . may proceed on appeal in forma pauperis without further authorization unless . . . the district court—before or after the notice of appeal is filed—certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding.

<sup>27</sup> Act of Jan. 20, 1944, ch. 3, 58 Stat. 5, 6(c) (codified as amended at 28 U.S.C. § 9).

<sup>28</sup> See generally Edgar E. Bethell & Herschel Friday, *The Federal Judicial Code of 1948*, 3 ARK. L. REV. 146, 146 (1949) (noting the retailoring of the Judicial Code and the consolidation of related statutes under Title 28 of the United States Code); see also 28 U.S.C. §§ 1915(a) (providing for waiver of court fees), (b) (providing that a transcript or record on appeal may be paid for by the United States when authorized by the Director of the Administrative Office of the United States Courts).

<sup>29</sup> 28 U.S.C. § 1915(g) (legislative history).

behind prison bars or not—were able to access the courts irrespective of their financial ability to pay fees. In fact, some courts were especially solicitous about prisoners’ access to federal tribunals. For example, the Seventh Circuit stated in 1973, “[a]n inmate’s right of unfettered access to the courts is as fundamental a right as any other he may hold. . . . All other rights of an inmate are illusory without it.”<sup>30</sup> The Fifth Circuit along with federal district courts across the country adopted this principle verbatim—or nearly so.<sup>31</sup>

Throughout the 1970s and 1980s, the United States Supreme Court reaffirmed the importance of ensuring that prisoners’ right to access the courts remain unimpeded. In *Hudson v. Palmer*, the Supreme Court noted that it had “repeatedly held that prisons are not beyond the reach of the Constitution,” and that “[l]ike others, prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts.”<sup>32</sup> The Supreme Court also assailed the importance of prisoner civil rights actions: “As this Court has ‘constantly emphasized,’ . . . civil rights actions are of ‘fundamental importance . . . in our constitutional scheme’ because they directly protect our most valued rights.”<sup>33</sup>

Nevertheless, during the mid-1990s, Congress made clear that it viewed civil rights cases in a different light. At a time when federal courts faced burgeoning caseloads, Congress aimed its remedial legislation at only one group of people: prisoners. At the time, the prison population in the United

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<sup>30</sup> *Adams v. Carlson*, 488 F.2d 619, 630 (7th Cir. 1973).

<sup>31</sup> *McCray v. Sullivan*, 509 F.2d 1332, 1337 (5th Cir. 1975) (quoting *Adams*, 488 F.2d at 630); *Arruda v. Fair*, 547 F. Supp. 1324, 1335 (D. Mass. 1982) (same); *Sims v. Brierton*, 500 F. Supp. 813, 815 (N.D. Ill. 1980) (same); *Keker v. Procunier*, 398 F. Supp. 756, 762 (E.D. Ca. 1975) (same); *Rizzo v. Zubrik* 391 F. Supp. 1058, 1060 (S.D.N.Y. 1975) (“It is thus apparent that an inmate’s right of unfettered access to the courts is as fundamental a right as any other he may hold.”).

<sup>32</sup> *Hudson v. Palmer*, 468 U.S. 517, 523 (1984).

<sup>33</sup> *Bounds v. Smith*, 430 U.S. 817, 827 (1977) (quoting *Johnson v. Avery*, 393 U.S. 483, 485 (1969); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974)).

States was dramatically rising. In 1980, the combined state and federal prison population totaled 315,974.<sup>34</sup> By 1994, this total had more than doubled, rising to 1,016,691.<sup>35</sup> While some sources attribute this increase in prisoner filings to the expansion of civil rights legislation—such as the Americans with Disabilities Act of 1990, the Civil Rights Act of 1991 (the latter of which amended Title VII of the Civil Rights Act of 1964), the Civil Rights Act of 1871, and the Rehabilitation Act of 1973—this attribution ignores the reality that the “War on Drugs” led to an increase in incarceration rates that, in turn, led to an increase in prisoner court filings.<sup>36</sup> Between 1970 and 2009, the prison population went from 196,429 state and federal inmates to 1,613,740.<sup>37</sup> It is easy to deduct that this eightfold increase in under thirty years could result in an array of deficiencies amounting to constitutional violations, such as poor “sanitation, fire safety, medical care, mental health care, diet, exercise, and protection of inmates from assaults,” that would only be exacerbated by overcrowding.<sup>38</sup> To compare statistics, as the total case filings by state and federal inmates “increase[d] from 25,992 in 1990 to 41,215 in 1996,”<sup>39</sup> the prison population grew from 739,980 in 1990 to 1,137,722 in 1996.<sup>40</sup> These figures are in lockstep with one another: as filings increased by 63%, the prison population grew by 65%.<sup>41</sup>

Rather than acknowledge that the trend towards mass incarceration would inevitably lead to poor conditions prompting more prisoner civil

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<sup>34</sup> *U.S. State and Federal Prison Population, 1925-2018*, Chart in *U.S. State and Federal Prison Population, 1925-2017*, THE SENT’G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> [https://perma.cc/K8JA-CMCC].

<sup>35</sup> *Id.*

<sup>36</sup> KYCKELHAHN & COHEN, *supra* note 5, at 1–2.

<sup>37</sup> *U.S. State and Federal Prison Population, 1925-2017*, *supra* note 34.

<sup>38</sup> Alan J. Kessel, *Prisoners’ Rights: Unconstitutional Prison Overcrowding*, 1986 ANN. SURV. AM. L. 737, 737 (1986).

<sup>39</sup> KYCKELHAHN & COHEN, *supra* note 5, at 8.

<sup>40</sup> *U.S. State and Federal Prison Population, 1925-2017*, *supra* note 34.

<sup>41</sup> *Id.*

rights complaints, Congress focused on reducing caseloads by creating roadblocks for prisoners seeking redress for violations of their constitutional rights.

## II. THE PRISON LITIGATION REFORM ACT

In 1995, Senator Bob Dole introduced the PLRA, stating that the legislation was critical to respond to the staggering increase of prisoner court filings.<sup>42</sup> “Frivolous lawsuits filed by prisoners tie up the courts, waste valuable resources, and affect the quality of justice enjoyed by law-abiding citizens,” he said.<sup>43</sup> “I happen to believe that prisons should be just that—prisons, not law firms.”<sup>44</sup> Senators, stoking a jocular tone, even created a “Top 10 Frivolous Inmate Lawsuits” list, which included a complaint filed over being served melted (not frozen) ice cream, another complaint alleging “that being forced to listen to his unit manager’s country and western music constituted cruel and unusual punishment,” an action “demanding L.A. Gear or Reeb[ok] ‘Pumps’ instead of Converse,” and a complaint asserting that “unidentified physicians implanted mind control devices in [the plaintiff’s] head.”<sup>45</sup> The sponsors acted on the presumption that prisons

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<sup>42</sup> 141 CONG. REC. 14,413 (1995) (statement of Sen. Dole).

<sup>43</sup> *Id.* Senator Dole went on to state that the “time and money spent defending these cases are clearly time and money better spent prosecuting violent criminals, fighting illegal drugs, or cracking down on consumer fraud.” *Id.* However, the claims he identified—such as a prisoner who filed a complaint because he was served chunky instead of creamy peanut butter—could be dismissed as facially insufficient and would require no “time and money spent” on defense. *Id.*

<sup>44</sup> 141 CONG. REC. 14,413 (1995) (statement of Sen. Dole).

<sup>45</sup> 141 CONG. REC. 14,629 (1995). It bears noting that some of the cases that legislators labelled as “frivolous” during congressional debates are quite possibly meritorious. For example, senators described as “frivolous” the claim that “the prison chaplain refused to perform [a] same-sex religious ceremony.” 141 CONG. REC. 14,627 (1995); *see also* Sandoval v. Obenland, No. 3:17-cv-05667, 2019 U.S. Dist. LEXIS 27003, at \*8–9 (W.D. Wash., Jan. 29, 2019) (reviewing claim that a prison’s “marriage policy discriminates against prisoners who intend to marry members of the same gender,” and denying the claim because the prison’s policy statement required only that “the offender and the intended spouse . . . be eligible to legally marry . . . in Washington State,” and it was

rarely violated the constitutional rights of their prisoners and that correctional facilities were owed the benefit of the doubt in how they treated prisoners.<sup>46</sup>

Yet prisoner litigation can involve egregious behavior by correctional officers and the blatant violation of prisoners' constitutional rights. The congressional debates regarding the PLRA largely ignored common civil actions that prisoners have filed to protect their constitutional rights—including violation of their freedom of religion,<sup>47</sup> deliberate indifference to their medical needs,<sup>48</sup> inadequate medical assistance,<sup>49</sup> and a failure to protect inmates from harm.<sup>50</sup> Additionally, some cases evidence prison-

“undisputed that same-sex couples are legally allowed to marry in the State of Washington.”).

<sup>46</sup> For example, Senator Dole noted that there would be “some tough new guidelines for Federal courts when evaluating legal challenges to prison conditions.” 141 CONG. REC. 14,626 (1995) (statement of Sen. Dole). Later, prisoner lawsuits were referred to as a “waste [of] valuable legal resources” and “garbage.” 141 CONG. REC. 14,626, 14,627 (1995) (statements of Sen. Dole & Sen. Reid).

<sup>47</sup> *See, e.g.,* Gartrell v. Ashcroft, 191 F. Supp. 2d 23 (D.D.C. 2002) (reviewing claims by a Rastafarian inmate who alleged that it violated his religion to be required to shave his beard and cut his hair as required by his facility's grooming policy, and by two Sunni Muslims who alleged that shaving their beards violated a “fundamental tenet of Islam,” and ruling that the plaintiffs' rights under the Religious Freedom Restoration Act had been violated and that they were entitled to a permanent injunction to prevent the future violation of their religious rights).

<sup>48</sup> *See, e.g.,* Feliciano v. Gonzalez, 13 F. Supp. 2d 151, 208 (D.P.R. 1998) (determining that “defendants have continuously acted with deliberate indifference toward the standards of care ‘within the modern and prudent professional standards’ by delaying or denying access to medical attention to serious and urgent medical needs of inmates, all without any penological purpose”).

<sup>49</sup> *See, e.g.,* Tillery v. Owens, 719 F. Supp. 1256, 1305–06 (W.D. Pa. 1989) (noting that “only 2 doctors and a maximum of 8 registered nurses attend to the medical needs of over 1800 inmates,” and there were “[in]sufficient clerical staff,” which led to “medical services [that were] constitutionally inadequate”).

<sup>50</sup> *See, e.g.,* Miles v. Baker, 1992 U.S. Dist. LEXIS 4873, at \*7–9 (N.D. Ill. Jan. 15, 1992) (determining a prison guard was not entitled to summary judgment on a “failure to protect” claim when the evidence showed that he knew the plaintiff had been threatened by a group of prisoners called the “Gangster Disciples,” the guard left his assigned post at a time when the plaintiff was recreating with known members of the Gangster Disciples, the guard heard the plaintiff cry for help as he was assaulted by the Gangster

wide abuse. For example, in *Littler v. Martinez*, the district court remarked that the facts “paint[ed] a bleak picture of inmate treatment” throughout an entire correctional facility, as the record demonstrated that the defendants brutalized the plaintiff, Phillip Littler, by “intentionally sh[ooting] [Littler] in the face with a pepperball gun at point-blank range”; “repeatedly spray[ing] [Littler] with a chemical agent”; “slamm[ing] [Littler] into the wall and punch[ing] [him] in the head several times”; and “attempt[ing] before, during, and after the incident to cover it up, including by creating an apparently false incident report and by submitting an arguably false sworn declaration to the Court.”<sup>51</sup>

A single senator, Joe Biden, expressed concern that “we must not lose sight of the fact that some of these lawsuits have merit—some prisoner’s rights are violated.”<sup>52</sup> He cited, in support, abuse at a juvenile detention center where children were beaten with chains and a women’s correctional facility where inmates were frequently raped by correctional officials.<sup>53</sup>

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Disciples, and the guard did not assist the plaintiff even though the guard testified that “no single inmate could have prevented him from coming to the aid of another inmate”).

<sup>51</sup> *Littler v. Martinez*, No. 2-16-CV-00472, 2018 U.S. Dist. LEXIS 155868, \*\*1–3, 24–25 (S. D. Ind., Sept. 13, 2018). In conclusion, the decision stated:

The Court is deeply troubled by what the evidence produced thus far in this action reveals about the constitutional guarantees to which inmates at Wabash Valley, including ostensibly difficult ones as Mr. Littler, are entitled. If Mr. Littler’s version of events is even partially true—which several of the emails and other documents almost indisputably show it is—his constitutional right to be free from cruel and unusual punishment has been flagrantly ignored by several staff members at Wabash Valley, including by those at the highest levels of administration.

*Id.* at \*30. Among the emails submitted at summary judgment was one from a corrections captain asking the assistant superintendent whether there was a “min distance for the pepperball” because the captain was “in the giving mood,” and the assistant superintendent responded “I love that. lol.” *Id.* at \*10. In the end, the parties reached a settlement that was favorable to Littler, and the action ended with a stipulation of dismissal. Stipulation of Dismissal, *Littler v. Martinez*, No. 2:16-cv-00472 (S.D. Ind. Mar. 15, 2020).

<sup>52</sup> 141 CONG. REC. 14,628 (1995) (statement of Sen. Biden).

<sup>53</sup> *Id.*; see also *Santiago v. City of Philadelphia*, 435 F. Supp. 136 (E.D. Pa. 1977) (alleging conditions at a juvenile detention center were unconstitutional); *Women*

Although the sponsors of the bill provided assurances that meritorious complaints and appeals would not be affected—stating “I do not want to prevent inmates from raising legitimate claims” and that “[t]his legislation will not prevent those claims from being raised”—there was no discussion of how 28 U.S.C. § 1915(g) could bar legitimate claims.<sup>54</sup> Specifically, legislators did not consider how this provision barred prisoners from filing federal complaints (no matter how meritorious) unless an inmate produced a \$400 lump-sum filing fee.<sup>55</sup> Rather, the sponsors of the bill continued to insist that prisoner filings needed to be curbed and that amending the *in forma pauperis* statute was the best method of achieving this goal. As Senator Dole stated, *in forma pauperis* status was to be modified, for prisoners only, to create an “economic disincentive to going to court.”<sup>56</sup>

To create this disincentive, the PLRA requires a prisoner to jump through several hoops to proceed *in forma pauperis*. Before passage of the PLRA, a prisoner—like any other litigant seeking *in forma pauperis* status—needed only to file an affidavit detailing all assets and stating an inability to pay the filing fee.<sup>57</sup> When the PLRA became law in 1996, it added subsection (b) to 28 U.S.C. § 1915, which provided that, notwithstanding the filing of an affidavit alleging indigency, “if a *prisoner* brings a civil action or files an appeal *in forma pauperis*, the prisoner shall be required to pay the full amount of a filing fee.”<sup>58</sup> To achieve this, the “court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of” either the

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Prisoners of D.C. Dep’t of Corr. v. District of Columbia, 877 F. Supp. 634 (D.D.C. 1994) (involving female prisoners alleging various civil rights violations).

<sup>54</sup> 141 CONG. REC. 14,627 (1995) (statement of Sen. Hatch).

<sup>55</sup> *See id.*

<sup>56</sup> 141 CONG. REC. 14,627 (1995) (statement of Sen. Dole). “Many prisoners filing lawsuits today in Federal court claim indigent status. As indigents, prisoners are generally not required to pay the fees that normally accompany the filing of a lawsuit,” Senator Dole stated during Senate debate over the Prison Litigation Reform Act. *Id.*

<sup>57</sup> 28 U.S.C. § 1915(a).

<sup>58</sup> 28 U.S.C. § 1915(b)(1) (emphasis added).

“average monthly deposits to the prisoner’s account” or “the average monthly balance in the prisoner’s account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.”<sup>59</sup> Thereafter, a prisoner is required to make monthly payments and the “agency having custody of the prisoner shall forward payments from the prisoner’s account to the clerk of court . . . until the filing fees are paid.”<sup>60</sup> Thus, by filing any civil litigation and seeking in forma pauperis status, a prisoner must agree to make installment payments towards the full cost of the filing fee.<sup>61</sup>

But what if a prisoner has no funds to contribute towards these installments? Under 28 U.S.C. § 1915(b)(4), “[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.”<sup>62</sup> Thus, the statute acknowledges that some prisoners may be unable to raise funds to make an *initial partial* payment of a filing fee. As discussed further in Part III, there is no similar

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<sup>59</sup> 28 U.S.C. § 1915(1)(A)-(B). To achieve the garnishment of filing fees from a prisoner’s account, courts generally require a prisoner to complete a form authorizing the deduction of funds. For example, the district court for the Eastern District of New York requires a prisoner to complete a “PLRA authorization” form that states:

I [name of plaintiff] request and authorize the facility institution or agency holding me in custody to send to the Clerk of the UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK . . . a certified copy of my prison account statement for the past six months. I further request and authorize the facility or agency holding me in custody to calculate the amounts specified in 28 U.S.C. § 1915(b), to deduct those amounts from my prison trust fund account (or institutional equivalent), and to disburse those amounts to the UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

*Podius v. Fed. Bureau of Prisons*, No. 16-CV-6121 (RRM)(PK), 2017 U.S. Dist. LEXIS 39092, at \*4 (E.D.N.Y. Mar. 16, 2017).

<sup>60</sup> 28 U.S.C. § 1915(b)(2).

<sup>61</sup> *Id.* In contrast, a non-prisoner who is granted in forma pauperis status does not have to make any payments towards the filing fee. *Compare* 28 U.S.C. § 1915(a) (applying to all litigants, including non-prisoners), *with* 28 U.S.C. § 1915(b) (adding the garnishment requirement for prisoners).

<sup>62</sup> 28 U.S.C. § 1915(b)(4).

provision for prisoners falling under subsection (g), colloquially known as the “three-strikes rule,” whereby a prisoner who accumulates three “strikes” must prepay the *entire* filing fee.<sup>63</sup>

The Second, Fifth, and Ninth Circuits have described 28 U.S.C. § 1915(b)(4) as a “saving provision [that] sufficiently guarantees that all prisoners will have access to the courts, regardless of their income.”<sup>64</sup> Other Circuits have also acknowledged the wisdom of this “saving” clause. In the words of the Third Circuit, 28 U.S.C. § 1915(b)(4) “plainly means that the courts may not prohibit a prisoner from filing a new complaint for the reason that he does not possess any assets at the time of filing.”<sup>65</sup> The Sixth Circuit has stated that “the PLRA itself has provisions that prevent assessments from being so burdensome that they would stop a prisoner from being able to bring suit.”<sup>66</sup> The Tenth Circuit has joined this reasoning, stating the “PLRA does not prohibit a prisoner from bringing a civil action or appealing a civil judgment when he has no assets or means to pay an initial partial filing fee.”<sup>67</sup> Thus, Circuits considering whether the garnishment procedure violated prisoners’ right to access the courts have rejected such challenges because the statute explicitly allows prisoner lawsuits even when a prisoner has no ability to pay the first installment of a court fee under the garnishment mechanism.<sup>68</sup>

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<sup>63</sup> Compare 28 U.S.C. § 1915(b)(4), with 28 U.S.C. § 1915(g).

<sup>64</sup> Norton v. Dimazana, 122 F.3d 286, 291 (5th Cir. 1997); see also Nicholas v. Tucker, 114 F.3d 17, 21 (2d Cir. 1997) (analyzing 28 U.S.C. § 1915(b)(2)’s requirements that prisoners pay the filing fee in installments and concluding that this does “not deny prisoners such meaningful access [to the courts],” as an “overriding theme of the *in forma pauperis* amendments is that in no event shall a prisoner unable to afford the filing fee be prevented from pursuing his claim.”); Taylor v. Delatoore, 281 F.3d 844, 848 (9th Cir. 2002) (“the safety-valve provision ensures that a prisoner cannot be barred from bringing a civil action or an appeal when he or she does not have enough money to pay the initial fee”).

<sup>65</sup> Abdul-Akbar v. McKelvie, 239 F.3d 307, 314 (3d Cir. 2001).

<sup>66</sup> Singleton v. Smith, 241 F.3d 534, 538 (6th Cir. 2001) (citing 28 U.S.C. § 1915(b)(4)).

<sup>67</sup> Cosby v. Meadors, 351 F.3d 1324, 1327 (10th Cir. 2003) (citing 28 U.S.C. § 1915(b)(4)).

<sup>68</sup> See *id.*

However, this begs the question: If 28 U.S.C. § 1915(b)(4) preserves prisoners' access to the courts by allowing litigation to proceed if a prisoner cannot pay a *partial* filing fee, then how can 28 U.S.C. § 1915(g) pass constitutional scrutiny if an indigent three-strikes prisoner is denied review of a nonfrivolous complaint because of their inability to pay an *entire* filing fee?

### III. THE “THREE STRIKES” RULE, 28 U.S.C. § 1915(G)

The PLRA's most problematic amendment to the *in forma pauperis* statute has been 28 U.S.C. § 1915(g), colloquially known as the “three strikes” rule.<sup>69</sup> Under this provision, “[i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding” without prepayment of filing fees

if the prisoner, on 3 or more 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.<sup>70</sup>

For prisoners who typically proceed *pro se*, lack legal skills, and are beholden to whatever resources are available in their prison's law library, accumulating three “strikes” is not difficult to do.<sup>71</sup> Filing an unsuccessful

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<sup>69</sup> 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 (2018) (providing an overview of 28 U.S.C. § 1915(g) and detailing some of the issues that have caused Circuit splits in interpreting what dismissals constitute a “strike”).

<sup>70</sup> 28 U.S.C. § 1915(g).

<sup>71</sup> See *U.S. Courts of Appeals—Judicial Business 2018*, ADMIN. OFF. OF THE U.S. CTS. (2018), <https://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2018> [<https://perma.cc/3DQD-QKTL>] (stating that “[e]ighty-five percent of the 13,475 prisoner petitions received were filed *pro se*, as were 87 percent of the 5,041 original proceedings and miscellaneous applications”).

complaint and appealing its dismissal can constitute two strikes; the filing of another unsuccessful complaint could be a third.<sup>72</sup>

There is a single exception to the “three strikes” rule’s fee requirement: if a prisoner sufficiently alleges “imminent danger of serious physical injury,” the prisoner may be allowed to proceed with a complaint without prepayment of the filing fee (although the filing fee would be gradually collected under the garnishment procedure in 28 U.S.C. § 1915(b)).<sup>73</sup> While the PLRA was supposed to ease the burden on federal courts, 28 U.S.C. § 1915(g) has produced a significant body of case law. Most cases are focused on determining whether particular types of dismissal orders constitute a strike—and Circuits are split on several discrete issues.<sup>74</sup> But one issue that courts generally agree upon is that this provision does not place an undue financial burden on prisoners.

Shortly after the PLRA became law, several Courts of Appeals considered whether § 1915(g) creates an unconstitutional obstacle for prisoners to access the courts, and all of them ruled that it does not. The Fifth Circuit reasoned in

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<sup>72</sup> See cases cited *supra* note 11.

<sup>73</sup> 28 U.S.C. § 1915(g) (providing the “imminent danger of serious physical injury” exception).

<sup>74</sup> See Manning, *supra* note 69. Since *Trouble Counting to Three* was published, the Supreme Court has ruled that any dismissal to state a claim—whether with or without prejudice—constitutes a strike. *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1727 (2020). However, in so ruling, the Supreme Court carved a significant exception from its holding: that a dismissal with leave to amend does *not* constitute a strike because “amendment can cure a deficient complaint” and “the suit continues.” *Id.* at 1724 n.4. This footnote may produce a new body of case law, as it is amenable to different interpretations. Does the footnote mean that *only* dismissals with leave to amend do not count as strikes? Or that dismissals based on a “curable deficiency” do not count as strikes because once the deficiency is cured the “suit continues?” *Id.* One basis for dismissal with leave to amend might be a failure to exhaust administrative remedies. This is a curable defect. However, one judge may dismiss a complaint for failure to exhaust and grant leave to amend once exhaustion is complete, while another judge may simply dismiss a complaint for failure to exhaust. Should the two be treated differently under 28 U.S.C. § 1915(g)? Time will tell how the federal courts interpret *Lomax* and the exception provided in footnote 4.

1997 that § 1915(g) “does not prevent a prisoner with three strikes from filing civil actions; it merely prohibits him from enjoying [in forma pauperis] status.”<sup>75</sup> The Fifth Circuit added: “He still has the right to file suits if he pays the full filing fees in advance, just like everyone else.”<sup>76</sup> This “just like everyone else” reasoning, however, ignores that non-prisoners can file more than three actions or appeals that are dismissed as frivolous or malicious, or for failing to state a claim, and can continue to seek and receive in forma pauperis status—and these non-prisoner in-forma-pauperis litigants pay nothing towards filing fees.<sup>77</sup> Examples include legions of non-prisoner in-forma-pauperis litigants filing dozens of meritless actions without paying a cent towards filing fees. By way of example, one litigant in North Carolina filed “no fewer than 17 federal lawsuits, seeking [in forma pauperis] status in most or all of them,” and he was simply “warned that federal courts have the authority to limit vexatious and repetitive litigants’ access to the courts by ordering a pre-filing injunction against those litigants.”<sup>78</sup> In the District of Columbia, a litigant who had filed forty-nine prior cases in less than eighteen months, and proceeded to file twenty-one complaints and applications to proceed in forma pauperis in a single month, was granted in forma pauperis status and ordered to show cause why an order should not issue “barring him from filing any new civil actions in this judicial district without payment of the applicable filing fee.”<sup>79</sup> The Tenth Circuit placed a “leave-to-file” restriction (the litigant had to request permission of the court before filing another pro se action) only after the litigant had filed twenty appeals

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<sup>75</sup> *Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997); *Rivera v. Allin*, 144 F.3d 719, 723 (11th Cir. 1998) (same).

<sup>76</sup> *Carson*, 112 F.3d at 821.

<sup>77</sup> 28 U.S.C. § 1915(a).

<sup>78</sup> *Emrit v. Bank of Am., Inc.*, No. 3:13cv547-RJC-DSC, 2013 U.S. Dist. LEXIS 189632 at \*5–6 (W.D.N.C. Oct. 7, 2013).

<sup>79</sup> *Colbert v. Cincinnati Police Dep’t*, 867 F. Supp. 2d 34, 34–37 (D.D.C. Dec. 16, 2011). Ultimately, this litigant was enjoined from proceeding in forma pauperis in the district court for the District of Columbia. Order, *Colbert*, 867 F. Supp. 2d 34 (No. 11-cv-2250).

(seeking in forma pauperis status in at least some of them).<sup>80</sup> Indeed, non-prisoners are granted tremendous leeway in securing in forma pauperis status despite patterns of abuse.

Thus, the Fifth Circuit’s reasoning that § 1915(g) treats prisoners like “everyone else” is flawed because it ignores the extraordinarily lenient treatment that non-prisoner in-forma-pauperis litigants receive in the federal courts and how these litigants do not make any contributions towards payment of their filing fees.<sup>81</sup> It also ignores how prisoners lack the same opportunities to earn and save funds as “everyone else.”<sup>82</sup>

Another rationale that several federal courts have offered in upholding the constitutionality of the three-strikes bar is that it does not deprive prisoners of the opportunity to file federal complaints or appeals—it simply requires that they pay the entire filing fee upon commencement of an action or appeal. Thus, prisoners need only “save up” and pay.<sup>83</sup>

Shortly after passage of the PLRA, the Ninth Circuit reasoned in *Rodriguez v. Cook*:

Section 1915(g) does not prohibit prisoners from accessing the courts to protect their rights. Inmates are still able to file claims—they are only required to pay for filing those claims. In reaching our conclusion, we recognize that some prisoners may be unable to prepay filing fees, and will thereby be unable to bring their actions immediately. However, non-prisoners face similar concerns [if proceeding without in forma pauperis status]. Some prisoners will be required to save money in order to prepay a filing fee and bring a claim . . . . Section 1915(g) does require prisoners to be fiscally responsible and make decisions concerning the merits of their case. If inmates are unwilling to save their money and prepay

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<sup>80</sup> *Kenney v. SSA ODAAR Hearing*, 640 F. App’x 803, 805–06 (10th Cir. 2016).

<sup>81</sup> *Carson*, 112 F.3d at 821.

<sup>82</sup> *See infra* Part IV.

<sup>83</sup> *Sanders v. Melvin*, 873 F.3d 957, 959–60 (7th Cir. 2017).

filing fees, such a decision may be a good indicator of the merits of the case.<sup>84</sup>

In so ruling, the Ninth Circuit did not consider the possibility that inmates may not be able to “save their money” to pay a filing fee—and that the size of an inmate’s bank account and earning capacity may be the “indicators” of whether an action can be brought—not a case’s merit.<sup>85</sup>

It bears noting that at the time of the Ninth Circuit’s 1999 decision in *Rodriguez*, federal filing fees were considerably less than they are today. In fact, the filing fee for a district court action at the time the PLRA was enacted in 1996 was \$150.<sup>86</sup> Since then, the filing fee cost was increased to \$250 in 2004 and \$350 in 2006.<sup>87</sup> Thus, in ten years’ time, between 1996 and 2006, the cost of filing a federal action more than doubled.<sup>88</sup> Despite this significant increase, federal courts have continued to endorse the fiction that inmates can “save up” if they wish to pursue litigation.

For example, in 2017 (when the docket fee for a district court action was \$350 plus a \$50 administrative fee), the Seventh Circuit considered whether a three-strikes litigant who had been in solitary confinement for eight years (with another ten years of such confinement planned) because of psychological diagnoses (“intermittent explosive disorder, schizoaffective disorder, and other conditions”) could pursue his complaint.<sup>89</sup> The plaintiff, Cordell Sanders, asked the Seventh Circuit to consider whether his asthma and psychological conditions constituted “imminent danger of serious

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<sup>84</sup> *Rodriguez v. Cook*, 169 F.3d 1176, 1180 (9th Cir. 1999).

<sup>85</sup> *Id.*; see also *infra* Part IV (discussing constraints on prisoners’ ability to earn and save income).

<sup>86</sup> *Id.*; 28 U.S.C. § 1914(a) (1996). Filing fees have increased dramatically since the passage of the Prison Litigation Reform Act in 1996. When the *in forma pauperis* statute was codified as 28 U.S.C. § 1915 in 1948, the filing fee cost was \$15 (and the fee for filing a habeas corpus application was \$5). 28 U.S.C. § 1914(a) (1948). By 1996, the fee was \$150. 28 U.S.C. § 1914(a) (1996).

<sup>87</sup> 28 U.S.C. § 1914(a) (2004); 28 U.S.C. § 1914(a) (2006).

<sup>88</sup> 28 U.S.C. § 1914(a) (2004); 28 U.S.C. § 1914(a) (2006); see *supra* note 86.

<sup>89</sup> *Sanders v. Melvin*, 873 F.3d 957, 959–60 (7th Cir. 2017).

physical harm” to fall within the exception to the three-strikes rule.<sup>90</sup> The Court ruled that “psychological deterioration” is not “physical” and that “[p]risoners facing long-term psychological problems can save up during that long term and pay the filing fee.”<sup>91</sup> However, the Seventh Circuit did not consider whether it was *possible* for Sanders to “save up” the filing fee. As explained below, by evaluating the district court record and the policies of Illinois state prisons, it appears highly unlikely that Sanders could amass \$400 to pay a filing fee.

Sanders was confined in an Illinois state correctional facility and had been convicted for murder.<sup>92</sup> Under the Illinois Administrative Code, the main work programs offered to state prisoners are the “Impact Incarceration Program” and the “Work Release Program.”<sup>93</sup> However, Sanders’ murder conviction and mental health render him ineligible for both programs—thus, contrary to the Seventh Circuit’s decision, he has no way of earning and “sav[ing] up during th[e] long term” of his solitary confinement.<sup>94</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* Sanders also claimed that he engaged in self-harm and attempted suicide twice; the Seventh Circuit remarked that these claims were “self-serving,” but they did constitute a “plausible allegation of imminent, serious physical harm,” and thus remanded the case for further proceedings. *Id.* at 961–62.

<sup>92</sup> *Federal Bureau of Prisons Inmate Locator*, ILL. DEP’T OF CORR., <https://www2.illinois.gov/idoc/Offender/Pages/InmateSearch.aspx> (last visited July 14, 2020) (select IDOC number; then search text box for “R41346”; or, select Last Name; then search text box for “Sanders, Cordell”) (listing his criminal history as including “murder/intent to kill/injure,” for which he is serving twenty years of imprisonment); *see also Sanders*, 873 F.3d at 959 (stating Sanders “has been in solitary confinement at Pontiac Correctional Facility for eight years, and the prison plans to keep him there for another ten” based on diagnoses for “intermittent explosive disorder, schizoaffective disorder, and other conditions”).

<sup>93</sup> ILL. ADMIN. CODE tit. 20, § 460.12 (defining the “Impact Incarceration Program” as including opportunities for “physical training and labor”; *see also* ILL. ADMIN. CODE tit. 20, § 455.30 (providing eligibility criteria for “Work Release Programs”).

<sup>94</sup> ILL. ADMIN. CODE tit. 20, §§ 460.20(c), (d), (f) (stating that, to be eligible for the Impact Incarceration Program, which included “labor” assignments, a person could not be convicted of first- or second-degree murder, could not be sentenced to a term of imprisonment of “more than 8 years,” and could “[n]ot have any mental disorder or disability which would prevent participation in the program”); *see also* ILL. ADMIN.

Additionally, a review of Sanders’ motion for in forma pauperis status filed in the district court revealed that he had “zero” in his checking and savings accounts and the only income he had recently received was a \$10 gift from a relative.<sup>95</sup> Based on these details, it is highly improbable that Sanders would be able to accumulate \$400 for a filing fee within the two-year statute of limitations for a deliberate indifference claim.<sup>96</sup> Thus, for Sanders to litigate his claims—no matter how meritorious they may be—he would have to fall within the “imminent danger of serious physical injury” exception.<sup>97</sup>

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CODE tit. 20, § 455.30(a)(1) (stating that a person serving “a sentence for murder” is ineligible for a “Work Release Program”); *Sanders*, 873 F.3d at 960.

<sup>95</sup> Motion for In Forma Pauperis Status, doc. 3, *Sanders v. Moss*, No. 16-cv-1366 (C. D. Ill. Oct. 18, 2019). Sanders’ claims—that the heat and “restricted air flow” in his cell were exacerbating his asthma, and the extended period of solitary confinement was “aggravating . . . his psychological problems”—have support in published case law. *See, e.g., Helling v. McKinney*, 509 U.S. 25, 35 (1993) (holding a prisoner could state an Eighth Amendment deliberate indifference to a serious medical need claim based on an allegation that the prisoner’s cell was situated so that he was forced to breathe a neighboring prisoner’s tobacco smoke and thus might suffer “serious damage to his future health”); *Duponte v. Wall*, 288 F. Supp. 3d 504, 513 (D. R.I. 2018) (holding that the plaintiff’s deliberate indifference claim was “plausible” because “placement of prisoners in solitary confinement poses a substantial risk of serious harm,” and it is “well documented that . . . prolonged solitary confinement produces numerous deleterious harms” (quoting *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015))). Sanders’ case was ultimately remanded to the district court to analyze whether Sanders’ allegations that he twice attempted suicide and had engaged in self-mutilation could satisfy the “imminent danger” exception to 28 U.S.C. § 1915(g) and thus allow Sanders’ complaint to proceed without prepayment of the entire filing fee. *Sanders*, 873 F.3d at 961.

<sup>96</sup> *Ruiz v. Williams*, 144 F. Supp. 3d 1007, 1012 (N.D. Ill. Nov. 17, 2015) (applying a “two-year statute of limitations . . . to Plaintiff’s Section 1983 claims”).

<sup>97</sup> 28 U.S.C. § 1915(g) (imminent danger exception). On remand, the district court permitted Sanders to proceed under the “imminent danger” exception. Amended Merit Review Order, doc. 34, *Sanders v. Moss*, No. 16-cv-1366 (C. D. Ill. Oct. 18, 2019). Thereafter, Sanders was able to secure counsel (from the law firm Sidley Austin LLP and the MacArthur Justice Center), and at the time this article was written, the case had proceeded to the summary judgment stage. Notice of Appearance, doc. 59, *Sanders v. Moss*, No. 16-cv-1366 (C. D. Ill. Oct. 18, 2019); Motion to Withdraw, doc. 75, *Sanders v. Moss*, No. 16-cv-1366 (C. D. Ill. Oct. 18, 2019) (noting the continued representation by Sidley Austin LLP and the MacArthur Justice Center); Summary Judgment Motion,

While Sanders is a state prisoner who has no earning capacity and negligible community resources, the Seventh Circuit’s reasoning could apply to other prisoners who have secured paid employment and could theoretically save their earnings. However, an examination of the limited prison employment opportunities, paltry hourly wages, and considerable constraints placed on prisoner bank accounts demonstrates that it is still highly unlikely that many prisoners are able to save sufficient funds to make a lump-sum payment of a filing fee.

#### IV. PRISONERS’ EARNING POWER AND SPENDING RESTRICTIONS

##### A. Overview

Because 28 U.S.C. § 1915 imposes a garnishment procedure on prisoners, the filing of any complaint in forma pauperis is a costly decision—the entire filing fee will gradually be paid.<sup>98</sup> Thus, when a

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doc. 184, *Sanders v. Moss*, No. 16-cv-1366 (C. D. Ill. Oct. 18, 2019). Considering that the case has attracted counsel and has proceeded to the late stage of summary judgment, it bears noting that this is not a case that lacks merits on its face—and is not the type of case that the senators who proposed the PLRA expressed a desire to curb. During Congressional hearings, Senator Dole stated that the PLRA was supposed to “put an end to the inmate litigation fun-and-games.” 141 CONG. REC. 14,626 (1995) (statement of Sen. Dole). Senator Reid also stated that it was supposed to keep courts from “spend[ing] their time on this garbage [referring to frivolous cases].” 141 CONG. REC. 14,627 (1995) (statement of Sen. Reid). However, senators also stated that they did “not want to prevent inmates from raising legitimate claims” and assured that the PLRA would “not prevent those claims from being raised.” 141 CONG. REC. 14,627 (1995) (statement of Sen. Hatch). The case of Cordell Sanders shows the fine line that prisoners must walk. If Sanders had not mentioned in his complaint that he had attempted suicide and had engaged in self-mutilation—allegations the district court initially ignored in finding Sanders barred under three-strikes rule—his colorable claims would never have received a merits analysis due to Sanders’ indigency.

<sup>98</sup> Compare 28 U.S.C. § 1915(a)(1) (requiring a person seeking in forma pauperis status to file an affidavit including a statement of all assets and stating the person cannot pay the filing fee), with 28 U.S.C. § 1915(b)(1) (stating that, “[n]otwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee”) (emphasis added). Thus, under 28 U.S.C. § 1915(a)(1), non-prisoners merely have to file an affidavit stating they are financially unable to pay the filing fee, and if a court grants in forma pauperis status, the

prisoner has accumulated three “strikes” under 28 U.S.C. § 1915(g), not only is a prisoner obligated to pay an entirely new filing fee up-front (\$400 for a district court action, or \$500 for an appeal), but the prisoner is already committed to making installment payments towards at least \$1,200 in filing fees (assuming that only three prior actions were filed in the district courts).<sup>99</sup> Further, as detailed below, if a prisoner has other financial obligations—such as court fees from their criminal trial or appeal, restitution, child support payments, alimony, student loans, outstanding tax obligations, etc.—whatever money a prisoner may earn or receive is typically earmarked to cover these expenses first.<sup>100</sup>

The main avenue for most prisoners to earn money would be to secure a job within a prison. However, of the 2.3 million people incarcerated in U.S. prisons (state and federal) in 2018, only “half of these inmates work.”<sup>101</sup> Of those who do work, if they are in “eight states—Alabama, Arkansas, Florida, Georgia, Mississippi, Oklahoma, South Carolina and Texas—[they] are not paid at all for their labor in government-run facilities.”<sup>102</sup> Thus, more than half of all prisoners in the United States either cannot obtain employment or cannot obtain *paid* employment. In other words, over one million prisoners cannot earn money to pay filing fees.<sup>103</sup>

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person can proceed with a civil action without paying the filing fees. 28 U.S.C. § 1915(a)(1). Prisoners, by contrast, can move for in forma pauperis status and state in an affidavit that they are indigent and cannot pay the filing fee, but prisoners are still required to make payments towards the filing fee until the entire fee is paid. 28 U.S.C. § 1915(b)(1).

<sup>99</sup> See *supra* note 17 and accompanying text.

<sup>100</sup> See, e.g., 28 C.F.R. § 545.11(a) (2020) (providing a list of payments, in their order of priority, that federal prisoners are expected to make while incarcerated and after).

<sup>101</sup> Daniel Moritz-Rabson, ‘Prison Slavery’: Inmates Are Paid Cents While Manufacturing Products Sold to Government, NEWSWEEK (Aug. 28, 2018), <https://www.newsweek.com/prison-slavery-who-benefits-cheap-inmate-labor-1093729> [<https://perma.cc/VRD3-7B9T>].

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

Of those who are able to secure paid employment within a prison, their hourly wages are shockingly meager. For example, the national average rate of compensation for maintenance work performed by prisoners ranges from \$.14 to \$.63 per hour.<sup>104</sup> Between these notoriously low wages and the poor conditions under which prisoners work, it is unsurprising that jobs in correctional facilities are referred to as “prison slavery.”<sup>105</sup>

Because each state formulates its own prison regulations for state-run facilities, each state can create unique limitations on the availability of prison jobs, the salary range for these jobs, and the manner in which prisoners’ funds are controlled. In order to provide a detailed and cohesive analysis of these issues, this article focuses on the Federal Bureau of Prisons.

### *B. Federal Policies and Regulations on Work and Prisoner Spending*

The Bureau of Prisons provides work programs in areas including food service, plumbing, painting, and groundskeeping, and federal prisoners performing these jobs are paid anywhere between \$.12 to \$.40 per hour.<sup>106</sup> But a job is not always available. Federal regulations provide a litany of reasons for why a prisoner may not be eligible to work. A federal inmate must be “physically and mentally able . . . to be assigned to an institutional, industrial, or commissary work program.”<sup>107</sup> Inmates participating in an “education, vocational, or drug abuse treatment program, on either full or part-time basis,” are typically exempt from seeking prison employment,

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<sup>104</sup> *Id.* Minnesota and New Jersey offer the highest state hourly rate to prisoners performing maintenance work within the prison: \$2. *Id.* Higher wages are typically the exception. For instance, 62,000 of the 2.3 million people incarcerated in the United States have access to “correctional industries programs, producing manufactured goods” to be sold—the hourly rate for these jobs run between \$.33 to \$1.41. *Id.*

<sup>105</sup> Moritz-Rabson, *supra* note 101.

<sup>106</sup> See *Work Programs*, FED. BUREAU OF PRISONS, [https://www.bop.gov/inmates/custody\\_and\\_care/work\\_programs.jsp](https://www.bop.gov/inmates/custody_and_care/work_programs.jsp) [<https://perma.cc/D8LP-AXAT>].

<sup>107</sup> 28 C.F.R. § 545.23(a) (1996).

particularly if their involvement in these rehabilitative programs “is mandated by Bureau policy or statute.”<sup>108</sup> Some inmates may not be considered for positions based on personal characteristics. Job assignments are made upon consideration of an “inmate’s capacity to learn, interests, requests, needs and eligibility, and the availability of the assignment(s).”<sup>109</sup>

Although jobs are unavailable to many, even assuming that a prisoner is able to secure employment, the hourly wages are so minimal that it can take over 1,000 hours of work to pay for a single filing fee.<sup>110</sup> To put this burden in perspective, the filing fees for two complaints and one appeal require 3,000 hours of work for a federal inmate earning the maximum of \$.40 an hour.<sup>111</sup> For those only earning \$.12 per hour, 8,750 hours of labor would result in earnings of \$1,050 (the total filing fees for three district court actions if in forma pauperis status was granted for the three actions).<sup>112</sup> And these calculations assume that a prisoner pays no other expenses or financial obligations.

To this end, many prisoners are not able to keep all that they earn. Federal prisoners who have any outstanding financial obligations are expected to repay them.<sup>113</sup> Every federal judgment in a criminal case details “criminal monetary penalties” that may include court assessments, restitution, fines, an “Amy, Vicky, and an Andy Child Pornography Victim Assistance Act of 2018” (“AAVA”) assessment, and/or a “Justice for Victims of Trafficking Act of 2015” (“JVTA”) assessment.<sup>114</sup> A federal

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<sup>108</sup> *Id.* Beyond required rehabilitation via educational and treatment programs, an inmate can be excluded from a work program if the inmate voluntarily wishes to enroll in an educational or treatment opportunity and obtains the relevant Warden’s permission. *Id.*

<sup>109</sup> 28 C.F.R. § 545.23(d) (1996).

<sup>110</sup> At \$.12 per hour, it would take an inmate 3,334 hours of work to earn \$400 for a district court filing fee. *See supra* notes 97, 104 and accompanying text.

<sup>111</sup> *See supra* note 106.

<sup>112</sup> *Id.*; *see supra* note 17.

<sup>113</sup> 28 C.F.R. § 545.11 (1999).

<sup>114</sup> Form, *Judgment in a Criminal Case*, ADMIN. OFF. OF THE U.S. CTS. at Sheet 5, <https://www.uscourts.gov/forms/criminal-judgment-forms/judgment-criminal-case> [<https://perma.cc/D36N-ZAY6>].

judge may also require a defendant to pay interest on any restitution or fines totaling over \$2,500, to cover the cost of prosecution, and/or to pay specific court costs.<sup>115</sup> Although a federal judge may “expressly order[] otherwise,” the default is for “payment of criminal penalties . . . during the period of imprisonment.”<sup>116</sup> According to the standard language of the federal criminal judgment template, “Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVT A assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.”<sup>117</sup>

While each criminal sentence is unique, there are certain financial obligations that typically arise. A special assessment is required “on any person convicted of an offense against the United States.”<sup>118</sup> While a mandatory special assessment can be as little as \$5 for a class C misdemeanor, it can be as high as \$100 for a felony.<sup>119</sup>

Restitution is another common monetary penalty. Whether restitution is discretionary, mandatory, or unnecessary depends on the nature of the crime committed.<sup>120</sup> For example, judges have discretion to order restitution when a defendant has been convicted of violating the Controlled Substance Act—such as by manufacturing, distributing, or possessing with the intent to manufacture or distribute a controlled substance.<sup>121</sup> Such restitution can address damage or loss to property, bodily injury to a victim, death of a

<sup>115</sup> *Id.*; see also *id.* at Sheet 6.

<sup>116</sup> *Id.* at Sheet 6.

<sup>117</sup> *Id.*

<sup>118</sup> 18 U.S.C. § 3013(a).

<sup>119</sup> Compare 18 U.S.C. § 3013(a)(1)(A)(i) (listing assessments for various misdemeanor convictions), with 18 U.S.C. § 3013(a)(2)(A) (listing assessments for felonies).

<sup>120</sup> Compare 18 U.S.C. § 3663 (discretionary restitution), with 18 U.S.C. § 3663A (mandatory restitution).

<sup>121</sup> 18 U.S.C. § 3663(a)(1)(A) (stating that the “court, when sentencing a defendant convicted of an offense under [various provisions] of the Controlled Substances Act . . . may order . . . that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim’s estate”).

victim, or a victim's lost income, among other things.<sup>122</sup> Restitution is a mandatory component of a criminal sentence when a person is convicted of an offense that is a "crime of violence," an "offense against property . . . including any offense committed by fraud or deceit," or a crime involving tampering with consumer products.<sup>123</sup> Between the mandatory special assessment and the wide range of crimes for which restitution can be owed, indigent federal prisoners may begin serving a term of imprisonment with significant financial debts hanging over their heads. According to the Office of the Inspector General, more than half of the Bureau of Prisons' "total inmate population . . . have financial obligations."<sup>124</sup>

Because payment of the special assessment, restitution, and a host of other possible costs and fees are supposed to begin while a federal prisoner is incarcerated, the Federal Bureau of Prisons operates an "Inmate Financial Responsibility Program" ("IFRP").<sup>125</sup> The purpose of the IFRP "is to encourage federal offenders to voluntarily pay their court-ordered financial obligations while incarcerated in [Bureau of Prisons] institutions."<sup>126</sup> Upon entry into a Bureau of Prisons facility, an "initial classification" is conducted to assess an inmate's liabilities and their ability to pay outstanding financial obligations.<sup>127</sup> These obligations include both those

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<sup>122</sup> 18 U.S.C. §§ 3663(b)(1), (b)(2), (b)(3), (b)(4).

<sup>123</sup> 18 U.S.C. § 3663A(c)(1)(A).

<sup>124</sup> U.S. DEP'T OF JUST. OFF. OF THE INSPECTOR GEN., THE FEDERAL BUREAU OF PRISONS' INMATE FINANCIAL RESPONSIBILITY PROGRAM, REP. NO. I-2000-023 (2000), <https://oig.justice.gov/reports/BOP/e0023/intro.htm> [<https://perma.cc/27BG-N3R8>].

<sup>125</sup> ADMIN. OFF. OF THE U.S. CTS., *supra* note 114, at Sheet 6 ("Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment."); *see also* U.S. DEP'T OF JUST. OFF. OF THE INSPECTOR GEN., *supra* note 124.

<sup>126</sup> ADMIN. OFF. OF THE U.S. CTS., *supra* note 114, at Sheet 6; *see also* U.S. DEP'T OF JUST. OFF. OF THE INSPECTOR GEN., *supra* note 124.

<sup>127</sup> U.S. DEP'T OF JUST., PROGRAM STATEMENT, NO. 5380.07, at 4 (2000), [https://www.bop.gov/policy/progstat/5380\\_007.pdf](https://www.bop.gov/policy/progstat/5380_007.pdf) [<https://perma.cc/J4PA-6FZC>].

flowing from the criminal judgment and non-criminal financial responsibilities (such as child support or alimony).<sup>128</sup>

Federal regulations specify the “priority order” in which an inmate’s financial debts must be paid.<sup>129</sup> First, an inmate must pay any special assessments imposed at sentencing, which typically amount to \$100 or less.<sup>130</sup> Second, an inmate’s funds are allocated for payment of any “[c]ourt-ordered restriction,” such as restitution.”<sup>131</sup> Third, payments are taken from an inmate’s funds to pay “[f]ines and court costs.”<sup>132</sup> Fourth, an inmate must pay “[s]tate or local court obligations,”<sup>133</sup> which can include court-ordered child support or alimony.<sup>134</sup> Lastly, an inmate must make financial contributions to any other “federal government obligations,” which encompasses a range of debts—from “student loans, Veterans Administration claims, tax liabilities, Freedom of Information/Privacy Act fees, etc.”<sup>135</sup>

Some inmates do not join the IFRP because they have “no documented financial obligation,” they are exempt from participating because of “medical or psychological restrictions that prevent the inmates from working,” or they refuse to do so.<sup>136</sup> A refusal to join, however, invites a

<sup>128</sup> *Id.* at 5 (explaining that “state or local court obligations” include things such as child support payments or alimony).

<sup>129</sup> 28 C.F.R. § 545.11(a) (1999).

<sup>130</sup> 28 C.F.R. § 545.11(a)(1) (1999); 18 U.S.C. § 3013(a). The need to make payments towards the special assessment ends five years after the date of the judgment. 18 U.S.C. § 3013(c). However, by the time the five years elapse, a prisoner’s account has likely already been depleted making minimum payments or it may never have had enough funds to begin paying the special assessment fee.

<sup>131</sup> 28 C.F.R. § 545.11(a)(2) (1999). “A defendant’s obligation to pay restitution ceases 20 years after the inmate’s release from incarceration for inmates convicted on or after April 24, 1996.” U.S. DEP’T OF JUST., *supra* note 127. However, when a prisoner is incarcerated—and is in an extremely disadvantageous position to earn meaningful wages for repayment—payments towards restitution are required. *Id.*

<sup>132</sup> 28 C.F.R. § 545.11(a)(3) (1999).

<sup>133</sup> 28 C.F.R. § 545.11(a)(4) (1999).

<sup>134</sup> U.S. DEP’T OF JUST., *supra* note 127, at 5.

<sup>135</sup> 28 C.F.R. § 545.11(a)(5) (1999); U.S. DEP’T OF JUST., *supra* note 127, at 5–6.

<sup>136</sup> U.S. DEP’T OF JUST. OFF. OF INSPECTOR GEN., *supra* note 124.

host of adverse consequences.<sup>137</sup> These include notification to the Parole Commission of the inmate's failure, ineligibility for an increase in pay, loss of a prison job, imposition of a "monthly commissary spending limitation," placement in quarters of "the lowest housing status," and ineligibility for placement in a "community-based program."<sup>138</sup> Thus, for federal prisoners, unless exempt, there is little choice but to partake in the IFRP and comply with the payment schedule for outstanding financial obligations. By participating, however, an inmate loses control over the funds in their inmate trust account. Upon a prisoner's decision to participate in the IFRP, a contract is signed that states the prisoner agrees to make "payments towards his or her financial obligations."<sup>139</sup>

An IFRP plan typically abides by a certain formula. To determine an installment schedule and amount for each installment, a member of an institution's IFRP unit team assesses the "total funds deposited into the inmate's trust fund account for the previous six months," deducts IFRP payments made during the preceding six months, and subtracts an assessment of \$75 per month (if this money exists) for funds to be transferred to the Inmate Telephone System.<sup>140</sup> In determining the installment amount for the IFRP, the IFRP staff considers funds in the inmate's trust account and phone credit account, and if they determine the amount in a phone credit account to be "surplus," the inmate is "encouraged

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<sup>137</sup> 28 C.F.R. § 545.11(d) (1999) (listing ten effects for failing to participate in the financial responsibility program and make requisite payments, and for failing to comply with a financial plan once one is created for a specific inmate).

<sup>138</sup> *Id.* This regulation consistently uses the acronym "UNICOR" without defining it. "UNICOR is the trade name of Federal Prison Industries, Inc., a self-sustaining government corporation that provides employment and job training to [Bureau of Prisons] inmates while producing marketable goods and services." *United States v. Lemoine*, 546 F.3d 1042, 1047 n.3 (9th Cir. 2008).

<sup>139</sup> U.S. DEP'T OF JUST., *supra* note 127, at 14.

<sup>140</sup> *Id.* at 6–7.

to refrain from additional deposits to the phone credit account to accommodate the new IFRP payments.”<sup>141</sup>

Most IFRP plans require an inmate to make a minimum payment each month or quarter; the amount of each payment depends on whether an inmate has a job with the Federal Prison Industries, Inc., and, if so, the “grade” assigned to the inmate’s work.<sup>142</sup> The majority of inmates with prison jobs “ordinarily will be expected to allot not less than 50% of their monthly pay to the payment process.”<sup>143</sup> Thus, the paltry salaries that federal prisoners earn are essentially cut in half because of the payments they must make under their “financial plans.”<sup>144</sup> When an inmate makes less than \$.46 per hour, the minimum IFRP payment is no longer 50% of the inmate’s earnings, it is a flat fee of \$25 per quarter.<sup>145</sup> According to the Zoukis Consulting Group, a firm that specializes in helping new prisoners acclimate to life in federal prisons, “most prisoners only make \$10 to \$20 per month, which is hardly enough to buy commissary items, call home, buy songs for their MP3 players, or email home.”<sup>146</sup> Assuming these figures are correct, if a prisoner earns \$10 per month, that would equal \$30 per quarter; to then make a minimum payment of \$25 per quarter would leave the prisoner with \$5 per quarter to save towards a future filing fee. At the rate of saving \$5 per month, it would take eighty months, or six years and eight months, to save \$400—at which time the statute of limitations for most, if not all, claims would have expired.<sup>147</sup> Thus it appears that most

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<sup>141</sup> *Id.* at 7.

<sup>142</sup> 28 C.F.R. § 545.11(b) (1999).

<sup>143</sup> 28 C.F.R. § 545.11(b)(2) (1999).

<sup>144</sup> *Id.*

<sup>145</sup> U.S. DEP’T OF JUST. OFF. OF THE INSPECTOR GEN., *supra* note 124, at tbl.1.

<sup>146</sup> *Inmate Work Assignments*, ZOUKIS CONSULTING, <https://www.prisonerresource.com/prison-life/things-to-do-in-prison/inmate-work-assignments/> [https://perma.cc/US5K-FKQJ].

<sup>147</sup> *Wilson v. Garcia*, 471 U.S. 261, 275 (1985) (holding that it is up to each state to identify the “most applicable statute of limitations for all § 1983 claims”); *see also* *Battle v. Ledford*, 912 F.3d 708, 713 (4th Cir. 2019) (“The Supreme Court has directed that we apply a state’s ‘statute of limitations governing general personal injury actions’ when

prisoners in the IFRP program would have an extremely difficult time in saving their institutional funds and prepaying a filing fee before expiration of a statute of limitations. Such prisoners would lose the opportunity to litigate a claim—not because the claim lacked merit, but because the prisoner lacked money.<sup>148</sup>

Another source of possible funds are “community” resources from friends and family members. However, a 2015 study found that “[n]early 2 in 3 families (65%) with an incarcerated member were unable to meet their family’s basic needs,” that “[i]n 63% of cases, family members on the outside were primarily responsible for court-related costs associated with conviction,” and that the “average debt incurred for court-related fines and fees [in the underlying criminal proceedings] alone was \$13,607.”<sup>149</sup> Thus, for the majority of prisoners, seeking funds from family to pay a filing fee is not feasible.<sup>150</sup>

In conclusion, an analysis of prisoners in federal custody demonstrates that it is no easy feat for a prisoner to earn income and earmark it for payment of a future filing fee. As of 2000, approximately 20,000 federal prisoners with financial obligations were enrolled in the IFRP and were contractually obligated to make payments towards pre-existing specified expenses.<sup>151</sup> For prisoners enrolled in the IFRP, money is automatically

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considering § 1983 claims.”) (quoting *Owens v. Okure*, 488 U.S. 235, 251 (1989)). Some states, like Virginia, “give[] a plaintiff only one year to assert his rights, plus exhaustion.” *Ledford*, 912 F.3d at 713. For a federal inmate to save \$400 within one year—while satisfying whatever other financial obligations may be placed on the funds in their prisoner trust account and earning cents per hour—would be a feat.

<sup>148</sup> Even if a prisoner receives “community” resources—funds from family or friends that can be deposited into the prisoner’s trust account—this money is not immune; IFRP “[p]ayments may be made from institution resources or non-institution (community) resources. U.S. DEP’T OF JUST., *supra* note 127, at 6.

<sup>149</sup> SANETA DE VUONO-POWELL ET AL., WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 12–13 (2015), <http://whopaysreport.org/who-pays-full-report/> [<https://perma.cc/2B2G-W5LZ>].

<sup>150</sup> *Id.*

<sup>151</sup> According to a 2000 report produced by the U.S. Department of Justice Office of the Inspector General, “[o]ver one-half (approximately 83,000) of BOP’s total inmate

deducted from their accounts periodically (usually quarterly), and thus they cannot “save up” funds for payment of a new filing fee.<sup>152</sup>

When indigent three-strikes prisoners wish to file nonfrivolous litigation but lack an ability to earn and save \$400 to \$500 within a statute of limitations period, it is hard to understand how their right to “access the courts” under the First Amendment is not violated by 28 U.S.C. § 1915(g).

## V. “ACCESS TO THE COURTS”

The constitutional right to access the courts is typically grounded in the First Amendment’s guarantee that Congress “shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances.”<sup>153</sup> However, courts have also linked access claims to other sources. As the Eleventh Circuit has stated, “[a]ccess to the courts is clearly a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment.”<sup>154</sup> However, each of these sources of constitutional authority brings its own legal standards, and some courts have struggled to analyze prisoner access-to-the-courts claims with any

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population (approximately 147,000) have financial obligations. Of those inmates with obligations, about one forth (approximately 20,000) are participating in the IFRP and making payments.” U.S. DEP’T OF JUST. OFF. OF INSPECTOR GEN., *supra* note 124. There is a dearth of public records that provide statistics on the number of federal prisoners who are currently enrolled in the IFRP and are making payments. However, even assuming the proportion of prisoners participating in the IFRP has not changed, it is significant that 20,000 prisoners may not be able to save their wages to pay a new filing fee. *Id.*

<sup>152</sup> If a prisoner with an IFRP plan decided to cease making payments under the plan to “save up,” the prisoner risks losing their prison job, which may be their only reliable source of income. 28 C.F.R. § 545.11(d)(4), (5) (1999). Thus, it is no exaggeration to state that a prisoner with an IFRP plan cannot “save up,” or earmark money in their own trust account, for payment of a future filing fee.

<sup>153</sup> U.S. CONST. amend. I; *see also* Bill Johnson’s Rests., Inc. v. NLRB, 461 U.S. 731, 741 (1983) (reaffirming that “the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances”).

<sup>154</sup> Chappell v. Rich, 340 F.3d 1279, 1282 (11th Cir. 2003) (citing Christopher v. Harbury, 536 U.S. 403, 415, n.12 (2002) (collecting cases)).

specificity.<sup>155</sup> A review of Supreme Court cases over the past several decades clarifies what a prisoner must allege to demonstrate a loss of access to the courts. These cases demonstrate that a prisoner who lacks funds to prepay a filing fee to litigate a nonfrivolous claim can allege the denial of access to the courts.

In 1974, the Supreme Court considered the case of *Wolff v. McDonnell*, in which a Nebraska state prisoner, Robert McDonnell, sought to challenge the “inmate legal assistance program” at his prison through a 42 U.S.C. § 1983 complaint.<sup>156</sup> Previously, the Supreme Court had ruled that prisoners were entitled to assistance in the preparation of their habeas corpus petitions, and McDonnell argued for the extension of this holding to civil rights proceedings.<sup>157</sup> The Supreme Court sided with McDonnell, holding “[t]he right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the

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<sup>155</sup> For example, in *Lewis v. Sullivan*, after a district court judge ruled that § 1915(g) could be unconstitutional unless judges are permitted to “dispense with prepayment whenever, in their discretion, they viewed the prisoners’ claims to be substantial, the United States “intervened to defend the constitutionality of § 1915(g)” via an interlocutory appeal to the Seventh Circuit. *Lewis v. Sullivan*, 279 F.3d 526, 527 (7th Cir. 2002). However, it seems the United States may not have identified under what precise constitutional theory the statute was constitutional. *Id.* Accordingly, the Seventh Circuit collected cases from other Circuits ranging from challenges based on “the due process right of access to the courts, the equal protection clause, the ex post facto clause, the first amendment right to petition for redress of grievances, and several others.” *Id.* at 528. The Seventh Circuit then reasoned that because all “seven decisions have held that § 1915(g) is constitutional,” and these “decisions [were] sound,” a constitutional challenge to § 1915(g) could not stand. *Id.*

<sup>156</sup> *Wolff v. McDonnell*, 418 U.S. 539, 542 (1974).

<sup>157</sup> *Id.* at 578–79. As described in *McDonnell*,

In *Johnson v. Avery*, an inmate was disciplined for violating a prison regulation which prohibited inmates from assisting other prisoners in preparing habeas corpus petitions. The Court held that ‘unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief,’ inmates could not be barred from furnishing assistance to each other.

*Id.* at 578 (quoting *Johnson v. Avery*, 393 U.S. 483, 490 (1969)).

judiciary allegations of violations of fundamental constitutional rights.”<sup>158</sup> As to whether there was a distinction between habeas corpus and civil rights cases insofar as access to the courts was concerned, the Supreme Court held that there was “no reasonable distinction between the two forms of action.”<sup>159</sup> Rather, the Court noted that the two actions sometimes redressed violation of the “the same constitutional rights,” and that civil rights actions were as essential as habeas corpus because “both actions serve to protect basic constitutional rights.”<sup>160</sup> The Court went so far as to state that “[i]t is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ.”<sup>161</sup>

The comparison between prisoner civil rights actions and habeas corpus in *McDonnell* is significant given the Supreme Court’s prior reluctance to address whether a filing fee waiver for indigent prisoners was appropriate in cases other than criminal proceedings or habeas corpus actions.<sup>162</sup> For

<sup>158</sup> *Id.* at 579.

<sup>159</sup> *Id.* at 580.

<sup>160</sup> *Id.* at 579 (“the demarcation line between civil rights actions and habeas petitions is not always clear. The Court has already recognized instances where the same constitutional rights might be redressed under either form of relief,” and “while it is true that only in habeas actions may relief be granted which would shorten the term of confinement, . . . it is more pertinent that both actions serve to protect basic constitutional rights.”).

<sup>161</sup> *Id.* *McDonnell* went on to state that “The recognition by this Court that prisoners have certain constitutional rights which can be protected by civil rights actions would be diluted if inmates . . . were unable to articulate their complaints to the courts.” *Id.* While *McDonnell* was considering the need for prisons provide assistance to inmates who were “totally or functionally illiterate” with the preparation of legal papers, the point that *McDonnell* seems to harp on is that prisoners must have the chance to seek protection of their constitutional rights by having the ability to present their claims in court. *Id.*

<sup>162</sup> *Burns v. Ohio*, 360 U.S. 252, 257–58 (1959) (ruling that fee waivers for indigent prisoners was appropriate for direct criminal appeals); *Smith v. Bennett*, 365 U.S. 708 (1961) (analyzing a habeas petitioner’s challenge to the imposition of a filing fee and holding that “to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny prisoners the equal protection of the laws”). The Supreme Court has recognized the same principle in direct criminal appeals. *Burns*, 360 U.S. at 257 (holding that the “imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law”).

example, in *Smith v. Bennett*, the Supreme Court acknowledged that a prisoner’s ability to bring a habeas corpus petition—a “civil action for procedural purposes”—could not be withheld because “an indigent prisoner [could not make] payment of a filing fee.”<sup>163</sup> The *Bennett* Court was careful to limit the extension of its holding, noting that waiving a filing fee for an indigent litigant’s habeas corpus petition “does not necessarily mean that . . . other actions involving civil rights must be on the same footing.”<sup>164</sup> *McDonnell*, however, explicitly placed civil rights complaints on the “same footing” as habeas corpus actions for purposes of access to the courts claims by stating that “no person will be denied the opportunity to present . . . violations of fundamental constitutional rights,” and that the Civil Rights Act of 1871—the precursor to 42 U.S.C. § 1983, the statute that enables prisoners to assert violation of their constitutional rights—has no “less importance in our constitutional scheme” than habeas corpus.<sup>165</sup>

In 1977, the Supreme Court heard arguments in *Bounds v. Smith*, which raised the issue of whether prisoners’ right to access the courts was violated based on an inadequate prison law library.<sup>166</sup> The Supreme Court held that it was “indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them.”<sup>167</sup> It went so far as to rule that “[s]tates must forgo collection of docket fees otherwise payable to the treasury and expend funds for transcripts,” and cautioned that while

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<sup>163</sup> *Bennett*, 365 U.S. at 712. While the filing fee for a habeas corpus action was only \$4 at the time *Bennett* was decided (it is \$5 in the year 2020), the Supreme Court remarked that although \$4 was a nominal sum, “if one does not have it and is unable to get it the fee might as well be \$400.” *Id.*; see also 28 U.S.C. § 1914(a) (2020) (“on [an] application for a writ of habeas corpus the filing fee shall be \$5). Ironically, the filing fee for a federal civil rights complaint is \$400 in 2020—a sum that is certainly not “nominal” when compared to the few dollars needed for the habeas corpus filing fee. *Id.*

<sup>164</sup> *Bennett*, 365 U.S. at 713.

<sup>165</sup> *McDonnell*, 418 U.S. at 579.

<sup>166</sup> *Bounds v. Smith*, 430 U.S. 817, 824–25 (1977).

<sup>167</sup> *Id.* at 828.

“economic factors may . . . be considered,” “the cost of protecting a constitutional right cannot justify its total denial.”<sup>168</sup> If states must “forgo collection of docket fees” to protect “a constitutional right,” why should the same principle not apply to federal court docket fees?<sup>169</sup> Whether it is to buy law books, pay the salary of a legal assistant, purchase necessary transcripts, or pay the price of materials needed for a prisoner’s legal papers (stamps, photocopies, transcripts etc.), the Supreme Court has held that such actions are “require[d]” by “the fundamental constitutional right of

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<sup>168</sup> *Id.* at 823, 825. Since *Bounds* involved the discrete issue of the adequacy of a prison law library, it is arguable that it is dicta when the Court stated that docket fees should go uncollected to protect a “constitutional right.” *Id.* However, this still provides a persuasive basis for the argument that the collection of court docket fees should not bar a prisoner from raising a claim that his or her constitutional rights have been violated. *Id.*

Another counterargument that could be raised is that the cases cited in *Bounds* in support of the waiver of docket fees involved attacks on criminal convictions (via direct appeal or habeas corpus)—and not civil rights cases. *Id.*; see *Burns v. Ohio*, 360 U.S. 252, 257–58 (1959) (ruling that the state of Ohio could not prohibit a criminal defendant from filing a motion for leave to appeal on the basis that the defendant could not afford to pay a filing fee for the motion); *Bennett*, 365 U.S. at 708 (determining that fee waiver for habeas petitioners must be waived for indigent criminal defendants and that “financial hurdles must not be permitted to condition its exercise”). The *Bennett* Court specified that its holding was narrow and that it was speaking about habeas—which are procedurally civil, and not criminal, proceedings—fees. *Id.* at 712–13 (“To require the State to docket applications for the post-conviction remedy of habeas corpus by indigent prisoners without the fee payments does not necessarily mean that all habeas corpus or other actions involving civil rights must be on the same footing. Only those involving indigent convicted prisoners are involved here and we pass only on them). However, the Supreme Court in *Wolff v. McDonnell* took this principle a step further and equated habeas cases to prisoner civil rights actions. *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

<sup>169</sup> While 28 U.S.C. § 1915(b)(4) memorializes that a prisoner’s lack of funds should not prevent the filing of a federal action in forma pauperis (and thus trigger the garnishment of funds from that prisoner’s trust account should any funds become available), no such safeguard exists for a meritorious complaint alleging constitutional violations by a penniless prisoner who has accumulated three “strikes.” Compare 28 U.S.C. § 1915(b)(4) (allowing a prisoner to file a complaint or appeal in forma pauperis despite evidence that the entire filing fee will never be paid), with 28 U.S.C. § 1915(g) (establishing a bar for the duration of a prisoner’s sentence once a prisoner has accumulated three “strike” dismissals and requiring the three-strikes litigant to pay an entire filing fee as a lump sum before commencing another action or appeal).

access to the courts.”<sup>170</sup> By extension, the waiver of the lump-sum prepayment of a federal filing fee for a three-strikes litigant who cannot make such a payment is a necessary measure to provide access to the courts for nonfrivolous complaints.<sup>171</sup> Without such a waiver, no matter how meritorious a complaint may be, an indigent three-strikes litigant’s failure to prepay the entire filing fee would bar the prisoner’s ability to protect “fundamental constitutional rights.”<sup>172</sup>

Nearly twenty years after *Bounds*, the Supreme Court reaffirmed the right of access to courts in the civil rights arena.<sup>173</sup> In *Lewis v. Casey*, the Supreme Court explained that an access-to-the-courts claim required allegations of “actual injury”—that “a nonfrivolous legal claim had been frustrated or was being impeded.”<sup>174</sup> To that end, “the injury requirement is not satisfied by just any type of frustrated legal claim”; rather, inmates challenging their direct appeals from conviction, filing habeas petitions, and

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<sup>170</sup> *Bounds*, 430 U.S. 825, 828 (“We hold, therefore, that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with law libraries or adequate assistance from persons trained in the law.”).

<sup>171</sup> This principle has been recognized in other contexts. For example, in an action to tax costs against a prisoner in a civil rights case, the Eastern District of California stated that “[p]rison civil rights suits are matters of substantial public importance,” and that, “[b]ecause the majority of prisoners are indigent, their access to the courts on potentially meritorious claims must not be compromised by their fear of incurring costs should they not prevail.” *Barker v. Yassine*, No. 2:11-cv-00246, 2016 U.S. Dist. LEXIS 174453, \*3 (E.D. Cal. Dec. 16, 2016). Should not the same rationale apply to prisoner litigation for purposes of the three strikes rule of 28 U.S.C. § 1915(g)?

<sup>172</sup> *McDonnell*, 418 U.S. at 579.

<sup>173</sup> *Lewis v. Casey*, 518 U.S. 343 (1996). In *Lewis*, twenty-two inmates sued the Arizona Department of Corrections (“ADOC”), alleging that they had been deprived of “adequate law libraries or adequate assistance from persons trained in the law.” *Id.* at 346. Specifically, there were inmates who were kept in “lockdown” confinement and were “‘routinely denied physical access to the law library’ and ‘experience[d] severe interference with their access to the courts,’” while there were other inmates who were “‘illiterate or non-English-speaking . . . who d[id] not receive adequate legal assistance.” *Id.* at 346–47. The district court ordered systemwide change, and the ADOC defendants challenged the scope of this state-wide mandate on appeal. *Id.*

<sup>174</sup> *Id.* at 351–52 (discussing actual injury).

“‘civil rights actions’—i.e., actions under 42 U.S.C. § 1983 to vindicate ‘basic constitutional rights’”—could raise successful access to the courts claims.<sup>175</sup> Thus, *Lewis* reinforces the argument that nonfrivolous prisoner civil rights cases should not be barred from review under 28 U.S.C. § 1915(g) simply because a prisoner cannot amass \$400 or \$500 for a filing fee.<sup>176</sup>

The most recent Supreme Court case to address prisoner access-to-the-courts claims was in 2002, in *Christopher v. Harbury*.<sup>177</sup> To begin, the Court acknowledged that “the basis of the constitutional right of access to courts” is “unsettled,” and that its “prior cases on denial of access to courts have not extended over the entire range of claims that have been brought under that general rubric.”<sup>178</sup> After considering the various types of access claims that the Courts of Appeals had encountered—ranging from prison-litigation cases to actions asserting the loss of an opportunity to sue because

<sup>175</sup> *Id.* at 354–55.

<sup>176</sup> *Id.* Just as 28 U.S.C. § 1915(b)(4) provides an avenue for relief for indigent prisoners who lack the means to begin paying a filing fee under the statute’s garnishment procedure, some avenue—whether it be by court recognition that not all indigent three-strikes prisoners can save hundreds of dollars to pay a filing fee, or Congressional amendment of the PLRA—must be paved so that three-strikes litigants are not barred from bringing nonfrivolous lawsuits simply because of an inability to pay a lump-sum filing fee.

<sup>177</sup> *Christopher v. Harbury*, 536 U.S. 403, 405 (2002) (explaining that the basis of the access to the courts claim was that U.S. Government officials “intentionally deceived [the respondent-plaintiff] in concealing information that her husband, a foreign dissident, was being detained and tortured in his own country by military officers of his government,” and that this “official deception denied respondent access to the courts by leaving her without information, or reason to seek information, with which she could have brought a lawsuit that might have saved her husband’s life”).

<sup>178</sup> *Id.* at 415, 412–13. In *Harbury*, the Supreme Court explained that there are two main types of access to the courts claims: (1) “claims that systematic official action frustrates a plaintiff or plaintiff class in preparing and filing suits at the present time”; and (2) “claims not in aid of a class of suits yet to be litigated, but of specific cases that cannot now be tried.” *Id.* at 412–14. The type of access to the courts claim this article considers falls within the second category—as the Supreme Court explained in *Harbury*, a person can be denied access to the courts when “specific litigation . . . could not have commenced.” *Id.* at 414.

officials withheld evidence—the Supreme Court stated that access claims generally fall within one of two categories.<sup>179</sup> The first category involved “claims that systemic official action frustrates a plaintiff or plaintiff class in preparing and filing suits at the present time.”<sup>180</sup> In illustrating the types of cases that fall within this category, the Supreme Court cited prisoner civil rights claims alleging the deprivation of an adequate prison law library, the need to provide a “reader” to an “illiterate prisoner” preparing legal papers, and the need for appointment of counsel.<sup>181</sup> The Court also specifically mentioned “denial-of-access cases challenging filing fees that poor plaintiffs cannot afford to pay, [in which] the object is an order requiring waiver of a fee to open the courthouse door for desired litigation, such as direct appeals or federal habeas petitions in criminal cases, or civil suits asserting family-law rights.”<sup>182</sup> In such cases, “the essence of the access claim is that official action is presently denying an opportunity to litigate,” and the “opportunity has not been lost for all time, however, but only in the short term.”<sup>183</sup> Hence, “the object of the denial-of-access suit, and the justification for recognizing that claim, is to place the plaintiff in a position

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<sup>179</sup> *Id.* at 413.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* (citing cases that illustrate the specific fact patterns and procedural postures described in the text). While the Supreme Court explicitly stated that it was “consider[ing] *examples*” of access cases, *id.* at 412–13 (emphasis added), some federal courts considering the constitutionality of § 1915(g) have connected the waiver of filing fees to the preservation of fundamental rights, and have insisted the fundamental rights exist in criminal, habeas, or family law cases. *Rivera v. Allin*, 144 F.3d 719, 723 (11th Cir. 1998). The Supreme Court has mandated waivers of filing fees in civil cases only where “the litigant has a ‘fundamental interest at stake’” . . . . The Fifth Circuit, collecting cases, outlined the boundaries: “Examples of proceedings that implicate fundamental interests are divorce actions . . . and terminations of parental rights.” *Id.* (quoting *Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997)). *Rivera* concluded that a prisoner’s 42 U.S.C. § 1983 complaint alleging an Eighth Amendment violation did not involve a “fundamental interest,” and thus the prisoner’s access-to-the-courts claim was denied. *Rivera*, 144 F.3d at 723–24.

<sup>183</sup> *Harbury*, 536 U.S. at 413.

to pursue a separate claim for relief once the frustrating condition has been removed.”<sup>184</sup>

A prisoner subject to the three-strikes bar of § 1915(g) who is unable to pay the entire filing fee upon submission of a complaint needs an avenue to request the removal of the “frustrating condition” of § 1915(g)’s lump-sum fee requirement. A “denial-of-access” suit, as described in *Wolff v. McDonnell*, *Bounds v. Smith*, *Lewis v. Casey*, and *Christopher v. Harbury*, is the path an indigent prisoner should take to challenge the application of § 1915(g) when this statute bars an otherwise non-frivolous complaint.<sup>185</sup> However, how can a three-strikes prisoner who cannot afford to pay a lump-sum filing fee commence an action alleging the denial of access to the courts?

## VI. THE NEED TO AMEND OR REPEAL § 1915(G)

The Supreme Court has stated that “[i]n denial-of-access cases challenging filing fees that poor plaintiffs cannot afford to pay, the object is an order requiring waiver of a fee to open the courthouse door for desired litigation.”<sup>186</sup> However, when a three-strikes litigant needs to raise a denial-of-access claim, the prisoner must overcome the very obstacle the lawsuit challenges: payment of the filing fee. In other words, to file an access-to-the-courts claim challenging § 1915(g), a three-strikes prisoner would have to pay the \$400 lump-sum

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<sup>184</sup> *Id.* The second category of access cases identified in *Harbury* involve cases “that cannot now be tried (or tried with all material evidence), no matter what official action may be in the future.” *Id.* Thus, the main difference between the two categories of access cases is that one class of cases that requires removal of a state-created obstacle so that the underlying lawsuit may proceed, while the other involves a lost opportunity to bring an underlying lawsuit. *Id.*

<sup>185</sup> *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Bounds v. Smith*, 430 U.S. 817 (1977); *Lewis v. Casey*, 518 U.S. 343 (1996); *Harbury*, 536 U.S. at 403.

<sup>186</sup> *Harbury*, 536 U.S. at 414.

filing fee that the prisoner is alleging they are unable to pay.<sup>187</sup> A prisoner can thus be denied access to the courts to challenge the denial of access to the courts.<sup>188</sup>

Yet, the denial of access to the federal courts does not seem to correspond with the legislative intent expressed during congressional debates over the PLRA. The bill's sponsors repeatedly assured that the new restrictions governing prisoners would not block nonfrivolous lawsuits. When the bill was first introduced to the Senate, Senator Bob Dole described it as a proposal for "several important reforms that would dramatically reduce the number of *meritless* prisoner lawsuits."<sup>189</sup> Days later, co-sponsor Senator Orrin Hatch stated, "I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised."<sup>190</sup> Another co-sponsor, Strom Thurmond, added that "[t]his amendment will allow meritorious claims to be filed, but

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<sup>187</sup> 28 U.S.C. § 1915(g) (requiring a prisoner to prepay filing fees before filing an action once three strikes have been accumulated, unless the prisoner alleged "imminent danger of serious physical injury"). Of course, a denial of access-to-the-courts claim has nothing to do with "physical injury," and thus it could not possibly fall within the exception to the lump-sum collection of the filing fee prescribed by § 1915(g).

<sup>188</sup> The Seventh Circuit has suggested that § 1915(g) poses no access to the courts violation because an indigent prisoner barred from filing a *federal* complaint without prepaying the filing fee could simply file a complaint in *state* court. *Lewis v. Sullivan*, 279 F.3d 526, 530 (7th Cir. 2002) ("A prisoner who suffers a threat to (or deprivation of) fundamental rights has ready access to the courts," and could "[s]ue in state court rather than federal court—for § 1915(g) does not apply in state court, and states must entertain § 1983 litigation on a parity with claims under state law."). However, the Seventh Circuit overlooks how several states have adopted nearly identical "three strikes" rules, and therefore prisoners may not be able to seek recourse in state courts without prepaying state court filing fees as well. *See, e.g.*, ARK. CODE ANN. § 16-68-607(b) (West 2017) (Arkansas three strikes rule); NEB. REV. STAT. ANN. § 25-3401(2)(a) (West 2018) (Nebraska three strikes rule); PA. STAT. AND CONS. STAT. § 6602(f) (West 1998) (Pennsylvania three strikes rule); WIS. STAT. ANN. § 801.02(7)(d) (West 2015) (Wisconsin three strikes rule).

<sup>189</sup> 152 CONG. REC. 14,413 (1995) (statement of Sen. Dole) (emphasis added).

<sup>190</sup> 141 CONG. REC. 27,042 (1995) (statement of Sen. Hatch).

gives the judge broader discretion to prevent frivolous and malicious lawsuits filed by prison inmates.”<sup>191</sup>

Yet, § 1915(g) allots no discretion to judges to evaluate the merits of a prisoner’s lawsuit—it requires automatic dismissal if a prisoner has three strikes and does not pay the entire filing fee.<sup>192</sup> Unless a prisoner can establish “imminent danger of serious physical injury,” the statute states that “[i]n no event shall a prisoner bring a civil action or appeal” once three strikes have been accumulated.<sup>193</sup> Thus, meritorious lawsuits can be dismissed simply because a prisoner cannot pay a lump-sum fee.

This article argues that § 1915(g) needs to be amended to ensure that indigent prisoners are not deprived of the opportunity to file a meritorious lawsuit. Some prisoners may be able to earn money from prison employment without having all or most of it garnished to repay restitution, child support, alimony, student loans, or other financial obligations.<sup>194</sup> Other prisoners may have community resources—family members or friends who can provide funds for payment of a filing fee. However, as detailed in Part IV, half of all U.S. prisoners are not able to obtain prison employment and thus cannot earn money while in prison, and the majority of prisoners’ families are saddled with debt from costs related to both the prisoner’s criminal conviction as well as the loss of whatever income the prisoner had earned before conviction.<sup>195</sup> Simply put, without earning power or community resources, prisoners will be forced to forgo litigation because they are poor—not because their case is poor.

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<sup>191</sup> 141 CONG. REC. 27,044 (1995) (statement of Sen. Thurmond).

<sup>192</sup> 28 U.S.C. § 1915(g) (providing “In *no event shall* a prisoner bring a civil action . . . under this section if the prisoner has, on 3 or more occasions, while incarcerated . . . brought an action or appeal . . . dismissed [as] frivolous, malicious, or fails to state a claim....”) (emphasis added). The mandatory language used—“[i]n no event shall”—deprives judges of all discretion to take any other action.

<sup>193</sup> *Id.*

<sup>194</sup> 28 C.F.R. § 545.11(a) (1999) (providing a list of payments, in their order of priority, that federal prisoners are expected to make while incarcerated and after).

<sup>195</sup> SANETA DE VUONO-POWELL ET AL., *supra* note 149, at 12–13.

To ensure that indigent prisoners are able to secure judicial review of nonfrivolous complaints, § 1915(g) should be amended to add a provision similar to § 1915(b)(4), stating “[i]n no event shall a prisoner be prohibited from bringing a [nonfrivolous] civil action or appeal[] . . . for the reason that the prisoner has no assets and no means by which to pay the . . . filing fee.”<sup>196</sup> This would eliminate the possibility of barring a colorable claim simply because a prisoner lacks the means to amass an entire filing fee.

Another way to cure the many problems that § 1915(g) creates—from Circuit splits on a variety of issues regarding what sorts of dismissals constitute “strikes,” to the time-consuming exercise courts are required to perform in identifying three strikes and then analyzing any claim of “imminent danger of serious physical injury”—is to repeal § 1915(g).<sup>197</sup> While this may sound drastic, it would empower courts to quickly dispose of prisoner actions that are frivolous through the PLRA’s screening mechanism of 28 U.S.C. § 1915A, and to use the full panoply of sanctioning authority courts have for vexatious litigants.<sup>198</sup>

Under § 1915A, courts “shall review, before docketing, . . . or . . . as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee,” and “shall identify cognizable claims or dismiss the complaint, or any portion of the complaint” that “is frivolous, malicious, or fails to state a claim upon which relief may be granted.”<sup>199</sup> The sponsors of the PLRA repeatedly emphasized facially meritless complaints to support the limits on prisoner litigation they were proposing—“insufficient storage locker space,

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<sup>196</sup> 28 U.S.C. § 1915(b)(4).

<sup>197</sup> 28 U.S.C. § 1915(g).

<sup>198</sup> As the Supreme Court has explained, “the PLRA mandates early judicial screening of prisoner complaints” under 28 U.S.C. § 1915A. *Jones v. Bock*, 549 U.S. 199, 202 (2007); *see also* 28 U.S.C. § 1915A (requiring courts to “screen” prisoner complaints and dismiss those that are “frivolous, malicious or fail[] to state a claim upon which relief may be granted”).

<sup>199</sup> 28 U.S.C. §§ 1915A(a), (b).

a defective haircut by a prison barber, the failure or prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety.”<sup>200</sup> Any patently frivolous lawsuits could be dismissed upon screening under § 1915A, saving courts from having to pour through a prisoner’s prior litigation, determine whether three dismissals constitute strikes, and then evaluate if the prisoner alleged “imminent danger.”<sup>201</sup>

For those litigants who repeatedly abuse the courts by filing frivolous or vexatious litigation, courts may impose a variety of sanctions on a litigant tailored to curb the specific behavior being evidenced. From monetary sanctions to filing injunctions, courts derive authority to sanction abusive litigants from 28 U.S.C. § 1927, the Federal Rules of Civil Procedure, and their “inherent powers that are ‘governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’”<sup>202</sup> The latter authority includes the imposition of filing injunctions against litigants who demonstrate a pattern of filing frivolous lawsuits.<sup>203</sup> To this end, “courts may resort to restrictive measures that except from normally available procedures litigants who have abused their litigation opportunities,” including “prohibit[ing] [a litigant] from obtaining *in forma pauperis* status,” “completely foreclosing the filing of designated categories of cases,” or “subjecting a vexatious litigant to a ‘leave of court’ requirement

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<sup>200</sup> 152 CONG. REC. 14,413 (1995) (statement of Sen. Dole).

<sup>201</sup> Compare 28 U.S.C. § 1915A(a), (b), with 28 U.S.C. § 1915(g).

<sup>202</sup> 28 U.S.C. § 1927 (“Any . . . person . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct”); FED. R. CIV. P. 11(c) (permitting a court to sanction a litigant to “deter repetition of the conduct” and stating that the sanction may consist of monetary or “nonmonetary directives”); FED. R. CIV. P. 26(g)(3) (providing for sanctions for improper certification); FED. R. CIV. P. 37 (permitting sanctions for discovery abuses); FED. R. CIV. P. 41(b) (providing for involuntary dismissal of an action for failure to prosecute); Dietz v. Boudlin, 136 S. Ct. 1885, 1891 (2016).

<sup>203</sup> *In re Martin-Trigona*, 9 F.3d 226, 228–29 (2d Cir. 1993).

with respect to future filings.”<sup>204</sup> Between the screening mechanism of 28 U.S.C. § 1915A and the scope of sanctions available to judges to curb vexatious litigation, courts already have far less arduous procedures to quickly dispose of frivolous lawsuits and penalize litigants who abuse the courts. In the end, 28 U.S.C. § 1915(g) does little to ease the burdens on the federal courts, and it oftentimes prevents courts from efficiently managing their dockets. Additionally, § 1915(g) does—in its present state—create a system whereby indigent prisoners may lose their right to access the courts.

## CONCLUSION

Since 1892, Congress and the federal courts have recognized that a person’s finances should not determine whether an action can be filed in federal court.<sup>205</sup> As the Supreme Court has stated, the *in forma pauperis* statute “is intended to guarantee that no citizen shall be denied an opportunity [to seek judicial redress] . . . ‘in any court of the United States’ solely because his poverty makes it impossible for him to pay or secure the costs.”<sup>206</sup> However, when the PLRA became law, no safeguard was provided to ensure that indigent prisoners falling under § 1915(g) would not be prevented from filing nonfrivolous actions because of their lack of funds. As this article details, the majority of prisoners lack employment that would enable them to earn money, many are constrained by outstanding financial obligations that take priority over the payment of newly accrued filing fees, and many cannot raise the necessary funds from outside community

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<sup>204</sup> *Id.* (collecting cases).

<sup>205</sup> Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252 (providing that “any citizen of the United States . . . may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs”); *Adkins v. E. I. DuPont de Nemours & Co.*, 335 U.S. 331, 342 (1948) (stating that “no citizen [sh]ould be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, in any court of the United States, solely because his poverty makes it impossible for him to pay or secure the court costs”).

<sup>206</sup> *Adkins*, 335 U.S. at 342.

resources.<sup>207</sup> It is foolish to contend that the bulk of U.S. prisoners are in a position to “save up” hundreds of dollars to pay a lump-sum filing fee.<sup>208</sup>

The courthouse doors are being slammed in the faces of impoverished § 1915(g) litigants who seek to file nonfrivolous lawsuits but cannot raise \$400 to do so. This is contrary to the stated intentions of the sponsors of the PLRA and falls afoul of the Supreme Court’s consistent holdings that nonfrivolous actions by impoverished litigants should be allowed to proceed in forma pauperis.<sup>209</sup> To ensure that the First Amendment’s guarantee of access to the courts is not eroded, § 1915(g) should be amended or repealed.<sup>210</sup>

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<sup>207</sup> See *supra* Part III.

<sup>208</sup> *Sanders v. Melvin*, 873 F.3d 957, 959–60 (7th Cir. 2017).

<sup>209</sup> See *supra* notes 191–192 (quoting the PLRA’s co-sponsors’ assurances that nonfrivolous lawsuits would not be barred from review under the PLRA); see also *Ellis v. United States*, 356 U.S. 674, 675 (1958) (per curiam) (“unless the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant, . . . the request of an indigent for leave to appeal in forma pauperis must be allowed”).

<sup>210</sup> U.S. CONST. amend. I (stating that Congress “shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances”).

