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# You're Out!: Three Strikes Against the PLRA's Three Strikes Rule

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## Cover Page Footnote

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# YOU'RE OUT!: THREE STRIKES AGAINST THE PLRA'S THREE STRIKES RULE

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*As federal court caseloads increased in the twentieth century, concerned jurists and academics pointed their fingers at many potential culprits. One culprit in particular, however, caught the attention of Congress: suits brought by prisoners. To curtail what it believed was an influx of frivolous prisoner litigation, Congress passed the Prison Litigation Reform Act (PLRA) in 1996. One provision of the PLRA, known as the "three strikes rule," prohibits a prisoner from proceeding* in forma pauperis *if three or more of the prisoner's prior actions or appeals have been dismissed as frivolous or malicious or for failure to state a claim unless the prisoner alleges he is under imminent danger of serious physical injury.*

*This Note argues that the courts should dismantle the PLRA's three strikes rule in the face of legislative inaction. First, the three strikes rule is contrary to Supreme Court precedent that recognizes a constitutional right for prisoners to file civil rights claims. Moreover, the rule's imminent danger exception does not cure its constitutional deficiencies. Finally, the rule has failed to accomplish its goal of filtering out frivolous claims while ensuring meritorious claims are heard.*

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## I. INTRODUCTION

This year, in virtually every first-year constitutional law course across the country, students will read Justice Marshall's seminal explanation of constitutional supremacy: "If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply."[1] But a jurisprudential principle so fundamental that it has become a rite of passage in American legal education now seems to ring hollow in the federal judiciary, at least under the courts' interpretations of the Prison Litigation Reform Act's (PLRA) three strikes rule.[2]

The three strikes rule provides that a prisoner may not file or appeal a civil action *in forma pauperis* (IFP)[3] in federal court if three or more of the prisoner's prior actions or appeals were "frivolous, malicious, or fail[ed] to state a claim upon which relief [could] be granted, unless the prisoner is under imminent danger of serious physical injury."[4] When applicable, this provision places a permanent prohibition on prisoners' abilities to proceed IFP, subject only to its imminent danger exception.[5] This Note argues not only that the three strikes provision is incompatible with the Constitution but also that its imminent danger exception does not cure its constitutional deficiencies and that it has managed to accomplish precisely what Congress sought to avoid. For those reasons, this Note concludes that the courts should heed Justice Marshall's words and begin the constitutional dismantling of the three strikes provision.

Part II of this Note provides background about the history of IFP laws in the United States as well as the legislative history of the PLRA. Part III explains why the three strikes provision is unconstitutional, particularly in the context of § 1983 suits, and

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[1] Marbury v. Madison, 5 U.S. 137, 178 (1803).

[2] *See* Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered sections of 18, 28 and 42 U.S.C.).

[3] Proceeding *in forma pauperis* means that the person filing an action or appealing a judgment is excused from paying filing fees and court costs due to indigency. *See* FED. R. APP. P. 24 (describing the process to proceed *in forma pauperis* in federal court).

[4] 28 U.S.C. § 1915(g).

[5] *See id.* (prohibiting a prisoner with three strikes from filing IFP "unless the prisoner is under imminent danger of serious physical injury").

why the imminent danger provision is not an adequate backstop for ensuring that prisoners' constitutional rights are protected. Part III also draws on recent data indicating—distinct from any constitutional argument—that the three strikes rule excludes meritorious prisoner claims from being heard, a result that Congress swore against. Finally, Part IV concludes that the courts, not Congress, are best positioned to stop the ongoing constitutional violations taking place under the three strikes rule.

## II. BACKGROUND

Providing indigent litigants access to justice is steeped in legal tradition, dating back to the Magna Carta.[6] Allowing indigent litigants to bring their claims to court is "deeply rooted in England's legal history,"[7] yet it took some time for Congress to make it the law of the United States.[8] Congress passed the first IFP statute in 1892 to prove, as one representative put it, that the government, "having established courts to do justice to litigants," would not "admit the wealthy and deny the poor entrance to them to have their rights adjudicated."[9] Since the passage of the IFP statute, access to the courts for indigent litigants has been established as a constitutional requirement and is considered fundamental by many because of the message it sends about our justice system.[10] For instance, some justices have contended that closing the courthouse doors to

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[6] *See* Wayne A. Kalkwarf, *Petitions to Proceed* In Forma Pauperis*: The Effect of* In Re McDonald *and* Neiztke v. Williams, 24 CREIGHTON L. REV. 803, 803–04 (1991) ("The Magna Carta first recognized the concept that indigents should not be barred from seeking justice.").

[7] Samuel B. Reilly, *Where Is the Strike Zone? Arguing for a Uniformly Narrow Interpretation of the Prison Litigation Reform Act's "Three Strikes" Rule*, 70 EMORY L.J. 755, 762 (2021).

[8] *See* Kalkwarf, *supra* note 6, at 803–05 (discussing the history of IFP laws in England and their adoption in the United States); Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1486–88 (2019) (same).

[9] H.R. REP. NO. 52-1079, at 1 (1892); *see* Mallard v. U.S. Dist. Ct. for S. Dist. of Iowa, 490 U.S. 296, 314 (1989) (Stevens, J., dissenting) ("The statute was passed to give federal courts the same authority to allow *in forma pauperis* actions that the courts in the most progressive States exercised."). For informative background on the common law history of IFP in the United States as well as the legislative history behind the IFP statute, see E. Elizabeth Summers, *Proceeding in Forma Pauperis in Federal Court: Can Corporations Be Poor "Persons"?*, 62 CAL. L. REV. 219, 221–27 (1974).

[10] *See* discussion *infra* section III.A.*2*.

indigent litigants "only reinforce[s] in the hearts and minds of our society's less fortunate members the unsettling message that their pleas are not welcome."[11] Unfortunately for those justices and indigent prisoner litigants, the legislature and courts lost sight of these lofty ideals somewhere along the way.

### A. IDENTIFYING A PROBLEM

During the 1970s and 1980s, judges and commentators became fixated on what they perceived to be a pressing issue: overburdened federal courts.[12] What commentators did not fully agree upon, however, was the cause of the problem. For example, then-Chief Justice Burger pinned the blame on an uptick in litigiousness in American society.[13] Others believed the strain on federal courts stemmed from a preference for having one's case heard by a federal judge rather than a state or local judge.[14] Without consensus about the source of the problem, however, commentators were unable to agree on a solution.[15] While some thought that additional

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[11] *In re* Demos, 500 U.S. 16, 19 (1991) (Marshall, J., dissenting). Justices Blackmun and Stevens joined Justice Marshall in dissent. *Id.* at 17.

[12] *See* Robert S. Want, *The Caseload Monster in the Federal Courts*, 69 A.B.A. J. 612, 615 (1983) ("[S]tatistics reveal that a monster is loose in the federal courts. Fed by 20,000 to 25,000 new cases each year, its rampant growth will not soon slow down."); Wayne McCormack, *The Expansion of Federal Question Jurisdiction and the Prisoner Complaint Caseload*, 1975 WIS. L. REV. 523, 523 ("More serious and less easy to dismiss, however, are the concerns of the federal judiciary itself over the caseload that is now said to be threatening the very structure and integrity of the federal court system.").

[13] *See* Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982) ("One reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal 'entitlements.'").

[14] *See* McCormack, *supra* note 12, at 526–30 (suggesting that the increased caseload resulted, among other things, from the Supreme Court's expanded interpretation of "arising under" jurisdiction and from litigants' preference for federal judges over state judges).

[15] The same is still true today. *See* Peter S. Mendell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 CAL. L. REV. 789, 794 (2020) (noting that "district and appellate court caseloads per judge have continued to mount" in recent decades as "[j]udiciary reform has become a legislative third rail, too dangerous for politicians—or even academics—to discuss").

judgeships were needed,[16] others believed that alternative dispute resolution was the best solution.[17] Still others believed that any uptick in federal litigation was no problem at all. Rather, these scholars believed that "a formidable amount of federal litigation [was] a good thing, particularly if insensitivities to constitutional rights [were] not being remedied by other social institutions."[18]

### B. LEGISLATIVE HISTORY AND CONGRESS'S GOALS

While Congress did not buy that a litigious American society or a preference for federal judges was causing federal courts to become overburdened, one potential source did catch its attention: prisoner litigation.[19] Prisoner litigation had been cited as another culprit for the increase in cases when caseloads became a salient topic in legal literature in the 1970s and 1980s, and these scholars' findings did not fall on deaf ears.[20] On May 25, 1995, Senator Bob Dole introduced in the Senate "a bill to reform prison litigation"—the Prison Litigation Reform Act of 1995.[21] According to Senator Dole, the law was necessary because, "[o]ver the past two decades, [the country had] witnessed an alarming explosion in the number of lawsuits filed by State and Federal prisoners."[22] Senator Dole perceived this influx of litigation as a problem because

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[16] *See* Todd Ruger, *Lawmakers in Both Parties Push to Add Judges to Overworked Federal Courts*, ROLL CALL (Mar. 16, 2021, 6:00 AM), https://www.rollcall.com/2021/03/16/lawmakers-in-both-parties-push-to-add-judges-to-overworked-federal-courts/ (discussing recent hearings in Congress on the subject of creating additional federal district court seats).

[17] *See* Burger, *supra* note 13, at 277 (promoting the use of arbitration as an alternative method of dispute resolution).

[18] Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 365 (1989). *But see* Christoph Engel & Keren Weinshall, *Manna from Heaven for Judges: Judges' Reaction to a Quasi-Random Reduction in Caseload*, 17 J. EMPIRICAL LEGAL STUD. 722, 733 (2020) (finding that judges with lighter caseloads spend more time on their cases, are more likely to hear witnesses, and are more likely to decide cases on the merits).

[19] *See infra* notes 23–27 and accompanying text.

[20] *See, e.g.*, McCormack, *supra* note 12, at 537–41 (citing an increase in prisoner petitions as a primary cause of the federal judiciary's overburdening); Want, *supra* note 12, at 615 ("The category of prisoner petitions has seen explosive growth. In 1972 there were 4,139 claims filed. Ten years later 17,016 were filed—an increase of more than 300 per cent.").

[21] 141 CONG. REC. S7,524 (daily ed. May 25, 1995) (statement of Sen. Robert Dole).

[22] *Id.*

"[u]nfortunately, prisoner litigation does not operate in a vacuum. Frivolous lawsuits filed by prisoners tie up the courts, waste valuable judicial and legal resources, and affect the quality of justice enjoyed by the law-abiding population."[23]

Presumably, legislators would have had no issue with allocating judicial resources towards prisoner suits if they perceived those suits to be meritorious. Senator Jon Kyl, however, a cosponsor of the bill,[24] told the Senate that "[m]ost inmate lawsuits are meritless"[25] and cited caselaw that he believed supported his assertion.[26] Otherwise, debate on the Senate floor following the bill's introduction focused very little on the caseload of federal courts. Instead, the senators seemed more eager to express their tough-on-crime agendas.[27] Senator Kyl led the discussion, saying that "[c]riminals should not be given a special privilege that other Americans do not have. The only thing different about a criminal is that he has raped, robbed, or killed. A criminal should not be rewarded for these actions."[28] Senator Kyl would later add that he believed the PLRA's value was that it "sen[t] a message that prison is not necessarily a nice place."[29]

While working its way through Congress, the PLRA received very little substantive debate.[30] When debate on the PLRA occurred, however, it usually featured "an emphasis on the most ludicrous and absurd prisoner lawsuits ever filed. Senators even compiled

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[23] *Id.*; *see also id.* at S7,526 (statement of Sen. Jon Kyl) ("[I]nmate suits are clogging the courts and draining precious judicial resources.").

[24] *See id.* at S7,524 ("By Mr. Dole (for himself, Mr. Kyl, and Mr. Hatch)[.]").

[25] *Id.* at S7,526 (daily ed. May 25, 1995) (statement of Sen. Jon Kyl).

[26] *See id.* ("[P]ro se civil rights litigation has become a recreational activity for state prisoners in our Circuit . . . ." (quoting Gabel v. Lynaugh, 835 F.2d 124, 125 n.1 (5th Cir. 1988) (per curiam))).

[27] *See, e.g.*, *id.* at S14,626 (daily ed. Sept. 29, 1995) (statement of Sen. Robert Dole) ("The time and money spent defending [prisoner litigation] are clearly time and money better spent prosecuting violent criminals, fighting illegal drugs, or cracking down on consumer fraud.").

[28] *Id.* at S7,526 (daily ed. May 25, 1995) (statement of Sen. Jon Kyl).

[29] *Id.* at S14,629 (daily ed. Sept. 29, 1995) (statement of Sen. Jon Kyl).

[30] *See* Molly Guptill Manning, *Trouble Counting to Three: Circuit Splits and Confusion in Interpreting the Prison Litigation Reform Act's "Three Strikes Rule," 28 U.S.C. § 1915(G)*, 28 CORNELL J.L. & PUB. POL'Y 207, 213 (2018) ("[T]he bill periodically reared its head on the Senate floor."). Little time was spent debating the legislation despite an admission on the Senate floor by the amendment's cosponsor that "[t]here is much that [the PLRA] has in it." 141 CONG. REC. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Harry Reid).

several David Letterman-style 'top ten' lists exploring the most farcical requests for relief."[31] Senator Dole gave the following examples on the Senate floor: "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."[32]

In addition to what they considered an overwhelming need for prison litigation reform, senators agreed that any reform should not bar prisoners' access to remedy meritorious claims.[33] Lawmakers' sentiment on this point is best summarized by Senator Orrin Hatch, who stated that "prison conditions that actually violate the Constitution should not be allowed to persist . . . . Indeed, I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised."[34] A few senators were skeptical, however, about Senator Hatch's diagnosis that the PLRA would allow prisoners to have meritorious claims heard, including Senator Joe Biden, who stated his reservations:

> [The PLRA] has two overriding problems—first, in an effort to curb frivolous prisoner lawsuits, the [PLRA] places too many roadblocks to meritorious prison lawsuits. Second, in an effort to relieve the courts and State and local governments from the overwhelming task of dealing with frivolous lawsuits, [the PLRA], in fact, creates restrictions on the power of those governments from voluntarily negotiating their own

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[31] Manning, *supra* note 30, at 213 (footnote omitted). The cases often cited were disseminated by the National Association of Attorneys General after it solicited states' attorneys general to submit lists of top ten frivolous prisoner lawsuits from their states. Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520 (1996). "Unfortunately, the lists included some accounts that were at best highly misleading and, sometimes, simply false." *Id.*

[32] 141 CONG. REC. S14,626 (daily ed. Sept. 29, 1995) (statement of Sen. Robert Dole). For an explanation of why Senator Dole's description of the "peanut butter case" is highly misleading, see Newman, *supra* note 31, at 521–22.

[33] *See, e.g.*, 141 CONG. REC. S14,628 (daily ed. Sept. 29, 1995) (statement of Sen. Harry Reid) ("If [prisoners] have a meritorious lawsuit, of course they should be able to file. I support that.").

[34] *Id.* at S14,626–27 (statement of Sen. Orrin Hatch).

> agreements and would place an even greater burden on the courts to litigate and relitigate these suits.[35]

Lawmakers in the House also expressed concerns that the PLRA "would prevent the Federal courts from remedying egregious abuses suffered by prisoners" and that its provisions "would apply to all prisoner initiated lawsuits, not merely frivolous lawsuits."[36]

In the end, the PLRA, as proposed by Senator Dole, never passed as a standalone bill.[37] Instead, the PLRA was enacted as an amendment to a very small subsection of a 382-page omnibus appropriations act.[38] Troublingly, the amendment passed via voice vote, meaning no record exists of which—or how many—senators voted in favor of the amendment.[39] Perhaps even more troubling is that the PLRA provisions became relatively unimportant legislative measures crammed into a massive omnibus bill, which some lawmakers were quick to point out.[40] Senator Ted Kennedy's

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[35] *Id.* at S14,628 (statement of Sen. Joseph Biden); *see also* 142 CONG. REC. S2,296–97 (daily ed. Mar. 19, 1996) (statement of Sen. Edward Kennedy) ("[T]he PLRA is a far-reaching effort to strip Federal courts of the authority to remedy unconstitutional prison conditions. The PLRA is itself patently unconstitutional, and a dangerous legislative incursion into the work of the judicial branch . . . . [T]he bill would set a dangerous precedent for stripping the Federal courts of the ability to safeguard this civil rights of powerless and disadvantaged groups.").

[36] 141 CONG. REC. H14,106 (daily ed. Dec. 6, 1995) (statement of Rep. John Conyers).

[37] *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (providing the enacted PLRA provisions as one small subsection of a much larger bill).

[38] For the complete text of the lengthy appropriations act and PLRA provisions, see *id.* What would become the substantive provisions of the PLRA were first introduced by Senator Hatch, along with a group of bipartisan cosponsors, as an amendment (Amendment Number 2838) to the Department of Commerce and Related Agencies Appropriations Act of 1996. *See* 141 CONG. REC. S27,177–80 (daily ed. Sept. 29, 1995) (providing a record of the proposed Hatch amendment). After President Clinton—for reasons unrelated to the prison litigation reform provisions—vetoed the Department of Commerce and Related Agencies Appropriations Act of 1996, the PLRA provisions were then placed into the Omnibus Consolidated Recissions and Appropriations Act of 1996. *See* §§ 801–10, 110 Stat. at 1321-66 to 1321-77 (providing the form of the Prison Litigation Reform Act that successfully passed in Congress).

[39] *See* 141 CONG. REC. S14,629 (daily ed. Sept. 29, 1995) (statement of Sen. Strom Thurmond) ("The question is on agreeing to the amendment. The amendment (No. 2838) was agreed to.").

[40] *See e.g.*, *id.* at H14,098 (daily ed. Dec. 6, 1995) (statement of Rep. Alan Mollohan) ("[The PLRA] amend[s] current law and [has] impacts that are not clearly defined . . . . The reasons

comments during debate over the omnibus bill shed light on the issue of placing the PLRA provisions into an omnibus bill:

> In my view, the effort to enact this proposal as part of an omnibus appropriations bill is inappropriate. Although a version of the PLRA was introduced as a free-standing bill and referred to the Judiciary Committee, it was never the subject of a committee mark-up, and there is no Judiciary Committee report explaining the proposal. The PLRA was the subject of a single hearing in the Judiciary Committee, hardly the type of thorough review that a measure of this scope deserves.[41]

### C. PASSAGE AND THE THREE STRIKES RULE

Notwithstanding the objections of Senator Kennedy and others, the PLRA became law on April 26, 1996, with President Clinton's signing of the Omnibus Consolidated Recissions and Appropriations Act.[42] The PLRA amended several different statutes, implementing a host of measures designed to curtail prisoner litigation.[43] In large part, the PLRA provisions are aimed at reducing frivolous lawsuits that are brought under 42 U.S.C. § 1983, which provides a cause of action for violations of constitutional rights by persons acting under color of state law.[44] Among other things, the PLRA (1) limits the amount of attorney's fees that may be awarded to a prisoner's counsel;[45] (2) requires indigent inmates who are proceeding IFP to repay in full any filing costs over time that they are unable to pay

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[the PLRA has] ended up in this appropriations bill are unclear to me . . . and I see no reason why an appropriations bill should contain such extensive authorizing language.").

[41] 142 CONG. REC. S2,296 (daily ed. Mar. 19, 1996) (statement of Sen. Edward Kennedy).

[42] *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, H.R. 3019, 104th Cong. (1996), https://www.congress.gov/bill/104th-congress/house-bill/3019/actions?r=2 (last visited Sept. 11, 2022) (showing the legislative history of the act).

[43] *See id.* (providing the full text of the PLRA).

[44] 42 U.S.C. § 1983.

[45] *See id.* § 1997e(d) (limiting attorney's fees to costs "directly and reasonably incurred in proving an actual violation of the plaintiff's rights").

upfront;[46] and (3) implements an automatic stay provision, which requires "[a]ny prospective relief subject to a pending motion [to] be automatically stayed" after a certain amount of time has passed after the filing of a motion.[47] The PLRA also added the three strikes provision to the federal IFP statute. The provision provides:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.[48]

Although no congressional debate about the three strikes provision occurred before its passage,[49] this Note argues that after twenty-five years, it is now time for the courts to step in and revisit the PLRA's three strikes rule. Specifically, the three strikes rule has three fatal flaws that warrant judicial action: (1) despite many crafty court holdings to the contrary, it is unconstitutional as applied to prisoners with nonfrivolous civil rights claims; (2) its imminent danger exception rarely cures its constitutional deficiencies and does not ensure that meritorious claims are heard; and (3) by filtering out meritorious claims, it has produced the precise effect that Congress sought to avoid.

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[46] *See* 28 U.S.C. § 1915(b)(1) ("[I]f 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.").

[47] Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 3626(e), 110 Stat. 1321, 1321-68 (1996) (current version at 18 U.S.C. § 3626(e)). For background about the PLRA's automatic stay provision, see generally Eugene J. Kuzinski, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361 (1998).

[48] § 1915(g).

[49] *See supra* note 30 and accompanying text.

## III. ANALYSIS

### A. UNCONSTITUTIONAL WHEN APPLIED TO NONFRIVOLOUS CIVIL RIGHTS CLAIMS

*1. Filing Costs and Prisoners' Need for IFP.* If a prisoner is to have access to the courts—say, to challenge the conditions of her incarceration under § 1983—then she must necessarily be able to file a complaint.[50] In 2023, filing a civil complaint in a U.S. district court costs the filing party $350.[51] When placed into historical context, this amount is relatively high. Before the PLRA was passed, prisoners paid only $120 to file a civil case,[52] which, when controlling for inflation, is less than $232 in April 2022 dollars. Moreover, the particular circumstances of prisoners make this $350 filing fee uniquely difficult to pay because it is well documented that a lack of economic opportunity is associated with a greater likelihood of being incarcerated.[53] Recent data indicates that the median annual income for incarcerated men prior to incarceration is $19,650, while non-incarcerated men in the same age group have median annual incomes of $41,250.[54] Women prior to incarceration

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[50] *See* FED. R. CIV. P. 3 ("A civil action is commenced by filing a complaint with the court."). While non-incarcerated individuals can skip straight to Rule 3 and file a complaint, prisoners must first, under the PLRA, exhaust available administrative remedies and only then may they properly file a § 1983 action. *See* 42 U.S.C. § 1997e(a) (laying out the applicability of administrative remedies).

[51] *See* 28 U.S.C. § 1914(a) ("The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $350 . . . .").

[52] 28 U.S.C. § 1914(a) (1994).

[53] *See* EXEC. OFF. OF THE PRESIDENT OF THE U.S., ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 41 (2016) ("Crime and poverty are correlated and criminal behavior is often motivated by a lack of economic opportunity."); *see also* ADAM LOONEY & NICHOLAS TURNER, BROOKINGS INST., WORK AND OPPORTUNITY BEFORE AND AFTER INCARCERATION 2 (2018) ("Boys who grew up in families in the bottom 10 percent of the income distribution (families earning less than about $14,000) are 20 times more likely to be in prison on a given day in their early 30s than children born in top-decile families . . . .").

[54] *See* Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), https://www.prisonpolicy.org/reports/income.html (comparing incomes of incarcerated men prior to incarceration with non-incarcerated men and revealing that incarcerated men had significantly lower incomes prior to incarceration than non-incarcerated men).

earn an average of only $13,890 per year[55] and are even less likely to have enough money to pay the filing fee once incarcerated when compared to their male counterparts.

If prisoners enter the system with very little expendable income, then circumstances are virtually certain to remain unchanged behind bars. Although prisoner wages and job availability vary tremendously across states, prison wages are uniformly low and even non-existent in some states.[56] Indeed, the courts of appeals agree that inmates who work in prisons are not considered "employees" who fall under the protective umbrella of the Fair Labor Standards Act, so compensation for prison labor is "by the grace of the state."[57] In fact, recent data shows that prisoners are being paid *less* today than they were in 2001,[58] despite Congress having twice since amended 28 U.S.C. § 1914 to increase the filing fee for civil suits.[59] And the situation is no better for prisoners in federal facilities, who earn "12¢ to 40¢ per hour" for their work assignments.[60] All told, it is exceptionally difficult for prisoners to earn enough money while in prison to pay a full filing fee.[61]

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[55] *Id.*

[56] *See* Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017) https://www.prisonpolicy.org/blog/2017/04/10/wages/ (discussing prison wages and pointing out that, "[w]ith a few rare exceptions, regular prison jobs are still unpaid in Alabama, Arkansas, Florida, Georgia, and Texas"). Also note that, in the context of § 1983 suits, it is important to look to state data because prisoners who are suing state actors will presumably be incarcerated in state-operated facilities rather than facilities operated by the Federal Bureau of Prisons.

[57] Vanskike v. Peters, 974 F.2d 806, 809 (7th Cir. 1992) (quoting Sigler v. Lowrie, 404 F.2d 659, 661 (8th Cir. 1968)); *see* Adams v. Neubauer, 195 F. App'x 711, 713 (10th Cir. 2006) (holding that prisoners working in prisons are not employees under the Fair Labor Standards Act); Loving v. Johnson, 455 F.3d 562, 563 (5th Cir. 2006) (same).

[58] *See* Sawyer, *supra* note 56 ("The average of the minimum daily wages paid to incarcerated workers for non-industry prison jobs is now 86 cents, down from 93 cents reported in 2001.").

[59] *See* Consolidated Appropriations Act, Pub. L. No. 108-447, § 307(a), 118 Stat. 2894, 2895 (2004) (increasing the fee to $250); Deficit Reduction Act of 2005, Pub. L. 109-171, § 10001(a), 120 Stat. 183, 183 (2006) (increasing the fee to $350).

[60] *See Work Programs*, FED. BUREAU PRISONS, https://www.bop.gov/inmates/custody_and_care/work_programs.jsp (explaining the types of jobs available to federal inmates and the wages paid for those jobs).

[61] Note, too, that even when they do file IFP, prisoners are eventually required to repay the full filing fee. *See* 28 U.S.C. § 1915(b)(1)–(2) ("[I]f a prisoner brings a civil action or files an

*2. The Constitutional Connection.* At its most basic, the conflict between proceeding IFP, the three strikes rule, and the Constitution is as follows:

> Since a vast majority of inmates are indigent, the constitutional right to access [courts] would be meaningless without the In Forma Pauperis Statute. Without these provisions, financial obstacles would likely prevent a prisoner from filing suit. This monetary preclusion would raise critical constitutional issues. An inmate's fundamental constitutional right is closely connected with the Federal In Forma Pauperis Statute.[62]

This constitutional right of access was laid down by the Supreme Court more than forty years ago in *Bounds v. Smith*, when it held that "[i]t is . . . beyond doubt that prisoners have a constitutional right of access to the courts."[63] In fact, the *Bounds* Court characterized the right of access as a "fundamental constitutional right."[64]

Despite the constitutional right declared in *Bounds* and the $350 filing fee required by § 1914(a), circuit courts are nonetheless in agreement that there is no general constitutional right to proceed IFP in civil cases.[65] Some minor distinctions exist among the circuits, however. Some circuits, for example, have recognized that a *statutory* right to proceed IFP exists.[66] According to the Third

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appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee.").

[62] Jody L. Sturtz, *A Prisoner's Privilege to File In Forma Pauperis Proceedings: May It Be Numerically Restricted?*, 1995 DET. COLL. L. REV. 1349, 1351 (1995).

[63] 430 U.S. 817, 821 (1977); *see also* Cruz v. Hauck, 475 F.2d 475, 476 (5th Cir. 1973) ("It is clear that ready access to the courts is one of, perhaps *the*, fundamental constitutional right.").

[64] *Bounds*, 430 U.S. at 828.

[65] *See id.* (recognizing a constitutional right to access courts); Sturtz, *supra* note 62, at 1361 ("Even though the In Forma Pauperis Statute affects a prisoner's right to access, which is a constitutional right, Congress may limit prisoner use of the statute without completely denying such persons this constitutional right. What Congress created Congress may limit or eliminate.").

[66] *See, e.g.*, Abdul-Akbar v. McKelvie, 239 F.3d 307, 316 (3d Cir. 2001) (finding a statutory right to proceed IFP).

Circuit, even if a "right" exists, Congress is still in the driver's seat: "What Congress gives it may also take away. The ability to proceed [IFP] is not a constitutional right. Congress granted the right to proceed [IFP] in 1892, and it has the power to limit this statutorily created right."[67] Some circuits, on the other hand, hold that proceeding IFP is purely a privilege granted by Congress, suggesting that no constitutional issues would be implicated whatsoever if Congress abolished the IFP statute altogether.[68] For instance, the Eleventh Circuit held:

> To be sure, proceeding IFP in a civil case is a privilege, not a right—fundamental or otherwise. As such, imposition of a modest filing fee on prisoners with "three strikes" is reasonable because "Congress is no more compelled to guarantee free access to federal courts than it is to provide unlimited access to them."[69]

Scholars have criticized courts that distinguish IFP as a privilege rather than a right, arguing that there is no basis for this conclusion.[70] Courts have also stretched the distinction between IFP access and court access. For example, the Eighth Circuit held that "Section 1915(g) does not prohibit prisoners from pursuing legal claims if they have had 'three strikes' or three prior dismissals. It only limits their ability to proceed in forma pauperis."[71] For prisoners with three strikes who are incarcerated in states with a $0 minimum wage for prison jobs, however, the Eighth Circuit's distinction is quite literally a distinction without a difference—and practically for all prisoners regardless of the state because of their uniformly low compensation.[72] "The proper perspective, then, is that

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[67] *Id.*

[68] *See, e.g.*, Roller v. Gunn, 107 F.3d 227, 231 (4th Cir. 1997) ("[T]he right of access to federal courts is not a free-floating right, but rather is subject to Congress' Article III power to set limits on federal jurisdiction.").

[69] Rivera v. Allin, 144 F.3d 719, 724 (11th Cir. 1998) (quoting *Roller*, 107 F.3d at 231).

[70] *See* Robert S. Catz & Thad M. Guyer, *Federal In Forma Pauperis Litigation: In Search of Judicial Standards*, 31 RUTGERS L. REV. 655, 662 (1978) ("[T]here has been little reasoning offered in support of the distinction between right and privilege . . . .").

[71] Lyon v. Krol, 127 F.3d 763, 765 (8th Cir. 1997).

[72] *See supra* notes 56–60 and accompanying text.

the privilege-not-right language used by the lower courts is more semantic than substantive."[73]

The circuits' blanket rejection of a constitutional right to file civil cases also seems to be at odds with other Supreme Court precedent, at least in the context of claims of civil rights violations. The Supreme Court has held that prisoners' constitutional right to access the courts is not just limited to their roles as criminal defendants.[74] Critically, in *Wolff v. McDonnell*, the Court clarified that the constitutional right to access courts extends not only to direct criminal appeals and habeas petitions but also to civil rights actions—particularly those brought under the Civil Rights Act of 1871, which includes § 1983 suits.[75] The Court reasoned that, because both habeas petitions and civil rights actions are used to vindicate constitutional rights and because the "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 . . . allegations concerning violations of fundamental constitutional rights," prisoners should be afforded the same protection regardless of whether they are bringing a civil rights suit or a habeas petition.[76] Thus, the Supreme Court's holding recognizes a constitutional right for prisoners to bring actions against prison officials for prison conditions that violate their rights.[77]

Nevertheless, in *Lewis v. Casey*, the Court used the doctrine of standing to limit the application of *Bounds* and *Wolff*.[78] In *Lewis*, the Court set forth the current rule: "an inmate alleging a violation of *Bounds* must show actual injury."[79] That is, the inmate must

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[73] Jared S. Sunshine, *The Putative Problem of Pestersome Paupers: A Critique of the Supreme Court's Increasing Exercise of Its Power to Bar the Courthouse Doors Against* In Forma Pauperis *Petitioners*, 46 HASTINGS CONST. L.Q. 57, 66 (2018).

[74] *See* Wolff v. McDonnell, 418 U.S. 539, 579 (1974) ("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.").

[75] *See id.* ("It is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ.").

[76] *Id.*

[77] *See* Lewis v. Casey, 518 U.S. 343, 354 (1996) (holding that the constitutional guarantee of access to courts extends to "actions under 42 U.S.C. § 1983 to vindicate 'basic constitutional rights'" (quoting *Wolff*, 418 U.S. at 579)).

[78] *See Lewis*, 518 U.S at 349 (explaining that the holding was rooted in "the doctrine of standing").

[79] *Id.*

show "actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim" in order to validly allege an unconstitutional deprivation of access to the courts.[80] Although this holding may seem to impose a profound limitation on prisoners' abilities to state a claim, in reality it has little practical impact in the context of the three strikes provision and prisoners' civil rights suits.

The Court's holding in *Lewis* had the obvious purpose of scaling back what prisoners, lawyers, and judges alike had interpreted from *Bounds* and *Wolff* as a constitutional guarantee to a prison library.[81] The *Bounds* holding in particular seemed to require that prisoners have access to a law library: "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 adequate law libraries or adequate assistance from persons trained in the law*."[82]

When a flood of litigation over prison libraries ensued after *Bounds*, the Court's holding in *Lewis* was simply its way of limiting prisoners' ability to sue over the lack of legal literature in prisons. That much is evident from the Court's constant emphasis on libraries throughout its *Lewis* opinion.[83] All told, however, the scope of the *Lewis* holding extends slightly past the context of prison libraries. Stated succinctly, *Lewis* requires a prisoner to prove that she has actually been prevented from having her claim heard due to some deficiency in the claim-bringing process; simply alleging that one would be prevented from having her claim heard if she were to attempt to bring it does not state a valid *Bounds* claim under *Lewis*.[84]

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[80] *Id.* at 348.

[81] *See, e.g.*, Hooten v. Jenne, 786 F.2d 692, 695 (5th Cir. 1986) ("[The defendant's] complaint about lack of access to a law library states a constitutional cause of action." (citing Bounds v. Smith, 430 U.S. 817, 817–18 (1977))).

[82] *Bounds*, 430 U.S. at 828 (emphasis added).

[83] *See Lewis*, 518 U.S. at 351 ("[P]rison law libraries . . . are not ends in themselves . . . . *Bounds* did not create an abstract, freestanding right to a law library . . . . [T]he inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library . . . hindered his efforts to pursue a legal claim.").

[84] *See id.* ("[A defendant] might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known.").

*3. The Constitutional Challenge.* Taken together, *Bounds* and *Wolff*'s guarantee that prisoners have a constitutional right to bring § 1983 claims is limited principally by *Lewis*'s standing requirement.[85] It follows, then, that so long as prisoners satisfy *Lewis*'s standing requirement, most prisoners should be procedurally free to state their *Bounds* and *Wolff* claims (assuming that those claims are meritorious). Prisoners who are prevented from filing § 1983 claims based on the PLRA's three strikes provision have valid arguments that their constitutional rights were infringed under *Bounds* and *Wolff* without being limited by *Lewis*'s standing requirement. Specifically, a prisoner who (1) is denied IFP status based on § 1915(g)'s three strikes provision; (2) cannot otherwise afford to file her complaint; and (3) actually attempts to file a nonfrivolous, arguable § 1983 complaint that alleges a violation of her constitutional rights satisfies the requirements of *Wolff*, *Bounds*, and *Lewis*.[86] First, under *Wolff*, because she is bringing a § 1983 claim, she has a constitutional right to access the courts.[87] Second, because she has actually been denied access to the court—owing from her inability to pay and the court's § 1915(g) denial—and is unable to bring her *Wolff*-protected civil rights claim, she has satisfied the requirements of *Bounds* and *Lewis*.[88] Specifically, she has suffered "actual prejudice with respect to contemplated . . . litigation, [resulting from] the inability . . . to present a claim" because of the § 1915(g) IFP denial.[89]

Prisoners who satisfy the above conditions should be able to formulate constitutional claims on an individual, as-applied basis within the framework of *Bounds* and *Lewis*.[90] There are, however,

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[85] *See id.* (describing the standing requirement).

[86] *See* Christopher v. Harbury, 536 U.S. 403, 415 (2002) (holding that the standard for a plaintiff alleging unconstitutional denial of access is proving the existence of a "nonfrivolous, arguable underlying claim").

[87] *See* Wolff v. McDonnell, 418 U.S. 539, 579 (1974) ("It is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ.").

[88] *See Lewis*, 518 U.S. at 349 ("[A]n inmate alleging a violation of *Bounds* must show actual injury . . . .").

[89] *Id.* at 348.

[90] Scholars have argued that an individual challenge should be subject to review under strict scrutiny because of the fundamental status of the constitutional right enumerated in *Bounds*. *See, e.g.*, Sunshine, *supra* note 73, at 92 ("Even to burden, let alone bar, a

even more constitutional hooks that prisoners could raise in the context of three strikes rule. Namely, if access to the courts is *constitutionally* guaranteed to prisoners seeking to vindicate their constitutional rights and a prisoner who seeks to do so is unable to pay the *statutorily* prescribed filing fee, it would seem to follow that the constitutional guarantee would—at the very least—require a temporary fee waiver.[91] This outcome seems to have been contemplated by the Framers themselves, like Alexander Hamilton, who wrote in the *Federalist Papers*:

> A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.[92]

Indeed, the Constitution's Petition Clause provides that: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."[93] Especially when taken together, these principles provide ample

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fundamental right requires the statute be 'narrowly tailored to serve a compelling government interest.'" (quoting Plyler v. Doe, 457 U.S. 202, 217 (1982))). Nevertheless, courts have not uniformly applied strict scrutiny to these challenges. *See, e.g.*, Rodriguez v. Cook, 169 F.3d 1176, 1179–81 (9th Cir. 1999) (refusing to apply strict scrutiny because, according to the court, a right of access claim does not implicate a "fundamental interest").

[91] *See* Sunshine, *supra* note 73, at 70 ("If prisons may not constitutionally restrict prisoners' meaningful access to justice . . . it is difficult to believe that a law effectively forbidding the courts entirely to such indigent prisoners by means of an unpayable fee could possibly stand.").

[92] THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Even the United States Courts' website explains in plain language (presumably for the benefit of laypeople) that "if any law passed by Congress conflicts with the Constitution, 'the Constitution ought to be preferred to the statute.'" *Overview—Rule of Law*, U.S. CTS. https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law (last visited Sept. 11, 2022).

[93] U.S. CONST. amend. I.

foundation upon which to mount a constitutional challenge to the three strikes rule.

### B. INSUFFICIENCY OF THE IMMINENT DANGER EXCEPTION

In addition to arguing that the three strikes rule only prevents the prisoner from enjoying the privilege of IFP status and not from filing a claim,[94] defenders of the three strikes rule are also likely to claim that the provision's imminent danger exception is its constitutional saving grace.[95] The gist of the argument is that because a prisoner can proceed IFP if he alleges imminent danger of serious physical injury, then it cannot be said that there has been complete depravation of access to the courts.[96] In addition to breaking with the spirit of IFP,[97] however, this argument would water down *Wolff*.

The Supreme Court did not condition the constitutional right announced in *Wolff* on a prisoner's being under imminent danger of serious physical injury. Instead, the Court held that "[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 judiciary *allegations concerning violations of fundamental constitutional rights*."[98] It follows, then, that so long as one can have his fundamental constitutional rights violated without being under imminent danger of serious physical injury, his ability to bring a constitutionally protected claim under *Bounds* should not be subject to proof that he is under threat. Otherwise, *Wolff*'s guarantee, which is really a Due Process Clause guarantee, only applies when

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[94] I argue that this is a distinction without a difference. *See* discussion *supra* section III.A.*2*.

[95] Courts have, in part, relied on the imminent danger exception when holding that there was not an absolute deprivation of access to the courts. *See, e.g.*, White v. Colorado, 157 F.3d 1226, 1234–35 (10th Cir. 1998) (holding that the three strikes rule does not unconstitutionally deny access to courts partly because the prisoner would have access were he to allege imminent danger of serious physical injury).

[96] *See id.* at 1234 (explaining that no violation exists since "[petitioner] simply must prepay the filing fee like most other litigants").

[97] *See* Catz & Guyer, *supra* note 70, at 663 ("[T]he federal courts recognized very early that Congress intended the first federal in forma pauperis statute as a remedial measure. Given its remedial purpose, section 1915 should be liberally construed, according to the ancient and fundamental rule of statutory construction.").

[98] Wolff v. McDonnell, 418 U.S. 539, 579 (1974) (emphasis added).

prisoners can meet a statutorily required showing of an imminent danger.[99]

This argument is not purely academic either. After all, "[w]hile many prisoner claims do involve danger of physical injury, many more involve constitutional issues unrelated to physical danger."[100] For example, many § 1983 suits allege violations of fundamental rights, like freedom of speech,[101] free exercise,[102] and freedom from cruel and unusual punishments,[103] without alleging imminent danger of physical injury. And because the imminent danger exception is the *only* exception to the three strikes rule, prisoners subject to the three strikes rule are perpetually without a remedy for fundamental constitutional claims unless they can allege that they are under an imminent danger.[104] These draconian measures are, once again, at odds with Supreme Court precedent. The Supreme Court has long emphasized the important role that the courts play in safeguarding prisoners' fundamental rights, stating that, "[w]hen a prison regulation or practice offends a *fundamental constitutional guarantee*, federal courts *will* discharge their duty to protect constitutional rights."[105] And the Supreme Court has not minced words: "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution. Hence . . . prisoners retain the constitutional right to petition the government

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[99] *See id.* ("The right of access to the courts . . . is founded in the Due Process Clause . . . .").

[100] Julie M. Riewe, *The Least Among Us: Unconstitutional Changes in Prisoner Litigation Under the Prison Litigation Reform Act of 1995*, 47 DUKE L.J. 117, 147 (1997).

[101] *See, e.g.*, Prison Legal News v. Livingston, 683 F.3d 201, 213–14, 221, 224 (5th Cir. 2012) (holding that the publisher had standing for First Amendment claim, that the First Amendment protects unsolicited communications to prisoners, that the censorship policy did not violate the First Amendment, and that the censorship policy did not violate due process).

[102] *See, e.g.*, Wilcox v. Brown, 877 F.3d 161, 168–69 (4th Cir. 2017) (holding that a prisoner's free exercise rights may have been violated when he was not allowed to practice his Rastafarian religion in prison).

[103] *See, e.g.*, Szubielski v. Pierce, 152 F. Supp. 3d 227, 230 (D. Del. 2016) (arguing that being locked in solitary confinement violates plaintiff's freedom from cruel and unusual punishment).

[104] *See* Sunshine, *supra* note 73, at 88 (noting that under the current regime, unless the imminent danger exception is met, prisoners are under a "permanent ban on all future petitions once the threshold of three dismissals [is] reached").

[105] Procunier v. Martinez, 416 U.S. 396, 405–06 (1974) (emphasis added).

for the redress of grievances."[106] Congress's statute is clearly incompatible with these constitutional commands.

Constitutional issues aside, courts have recognized that an imminent danger requirement may not be effective tool to weed out frivolous claims in the first place. For example, before the PLRA was passed, the Fifth and Eighth Circuits prevented one repeat filer from filing future suits IFP in those circuits' district courts unless he alleged a constitutional deprivation stemming from physical injury.[107] Elsewhere, when ruling on whether the repetitious filer should have been enjoined from filing additional cases, a district court judge in Florida noted that requiring a claim of physical danger "does not appear to be a wholly satisfactory method of curbing [the petitioner's] abuse."[108] The court expressed concern that a rule like this "merely ensure[d] that [the petitioner's] future allegations included a claim of physical harm to his person."[109] The court went on to explain that the particular filer in question had become "quite adept at finding ways to state a claim for relief. Once he finds one that withstands the Court's preliminary scrutiny . . . he tends to repeat the allegation by merely changing the dates and the names of the defendants allegedly involved."[110]

With respect to prisoners becoming "quite adept at finding ways to state a claim for relief," there is no reason to believe that the situation is any different for other prisoners under the PLRA's three strikes rule today.[111] That is, prisoners typically have ample time to test-file claims, and once they are able to state a claim that sufficiently alleges imminent danger of serious physical injury, that requirement simply becomes "an open invitation for [petitioners] to proceed apace with [their] abuse of the system by including the 'magic' allegation of physical injury to [their] person[s]."[112] Thus, the

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[106] Turner v. Safley, 482 U.S. 78, 84 (1987).

[107] *See* Green v. Carlson, 649 F.2d 285, 287 (5th Cir. 1981) (granting an exception to the ban on the prisoner proceeding IFP when he "specifically allege[s] constitutional deprivation by reason of physical harm or threats to petitioner's person"); Green v. White, 616 F.2d 1054, 1055 (8th Cir. 1980) (same).

[108] Procup v. Strickland, 567 F. Supp. 146, 159 (M.D. Fla. 1983).

[109] *Id.*

[110] *Id.* at 160 n.13.

[111] *Id.*

[112] *Id.* Courts, too, have recognized the free time that prisoners have and applied that against the prisoners when ruling on the constitutionality of the three strikes rule. *See, e.g.*,

imminent danger exception provides prisoners with an incentive to abuse the system by throwing as much proverbial spaghetti at the wall as possible until one noodle sticks. Once they find a sufficient imminent danger allegation, they are free to proceed IFP even if the underlying claim *is* frivolous. This form-over-substance regime has the potential to directly undercut Congress's goal to give courts fewer but better prisoner lawsuits.

### C. THE UNINTENDED CONSEQUENCES

As discussed earlier, in passing the three strikes rule, Congress sought to relieve the burden on the federal courts without preventing prisoners from having their meritorious claims heard.[113] According to the Supreme Court's interpretation, "[w]hat this country need[ed], Congress decided, [was] fewer and better prisoner suits."[114] How far has the PLRA and the three strikes rule taken Congress towards accomplishing this goal?

*1. Surface-Level Progress.* Congress seems to have achieved its objective according to one metric: the number of prisoner filings. Comparing data from before the PLRA to present data is illustrative. In 1995, the year before the PLRA passed, prisoners filed 39,053 civil rights cases—the highest number recorded since data has been collected.[115] Just two years later, prisoners filed only 26,095 cases, a decrease in filings of more than thirty-three percent in only two years. [116] This decrease, however, was not transitory. Data from the Administrative Office of the United States Courts shows that between March 31, 2001, and March 31, 2002, prisoners filed only 23,510 civil rights and prison condition cases combined in

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Carson v. Johnson, 112 F.3d 818, 822 (5th Cir. 1997) (finding that the three strikes rule is constitutional because it is rationally related to the state's interest in deterring frivolous lawsuits in light of the fact that prisoners "have substantially more free time than do non-prisoners" to file these suits).

[113] *See* discussion *supra* section II.B.

[114] Jones v. Bock, 549 U.S. 199, 203 (2007); *see also* Porter v. Nussle, 534 U.S. 516, 516 (2002) (finding that the PLRA was designed "to reduce the quantity and improve the quality of prisoner suits").

[115] *See* Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 157 (2015) (compiling and analyzing data about prisoner litigation).

[116] *Id.*

federal district courts.[117] Between March 31, 2019, and March 31, 2020, that number stood at 29,286, not even 6,000 more than nearly two decades prior.[118]

Although the 6,000-claim increase may seem to indicate that the number of prisoner petitions is now rebounding, we arrive at a different conclusion when controlling for prison population. In 1997, the first full year after the PLRA passed, 1,743,600 people were in prisons and jails in the United States,[119] filing 28,635 civil rights and prison conditions cases combined.[120] In 2018, the most recent year for which data is available at the time of this Note's writing, 2,122,300 people were in prisons and jails in the United States,[121] filing 27,914 civil rights and prison conditions cases combined.[122] This means that, for every 1,000 incarcerated individuals in 1997, 16.42 civil rights and prison conditions complaints were filed, compared to only 13.15 per 1,000 incarcerated individuals in 2018.

*2. The Unavoidable Byproduct.* While improved prison conditions over the last quarter-century could be causing the decrease in prisoner filings, it is more likely that the PLRA has driven down the number of filings.[123] Intuition also tells us that this dramatic decline in filings necessarily means that many meritorious claims that would otherwise be filed are currently being excluded by the PLRA.[124] Unfortunately, the merits of would-be claims that go unfiled are unobservable, so no data is available to capture the

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[117] *Federal Judicial Caseload Statistics 2002 Tables*, U.S. CTS., Table C-2, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2002 (last updated Mar. 31, 2020).

[118] *Federal Judicial Caseload Statistics 2020 Tables*, U.S. CTS., Table C-2, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020-tables (last updated Mar. 31, 2020).

[119] *Key Statistics*, BUREAU OF JUST. STAT. (Mar. 22, 2022), https://bjs.ojp.gov/data/key-statistics.

[120] U.S. CTS., TABLE C-2A—U.S. DISTRICT COURTS—CIVIL JUDICIAL BUSINESS (Sept. 30, 1997), https://www.uscourts.gov/sites/default/files/statistics_import_dir/c2asep97.pdf.

[121] *Key Statistics*, *supra* note 119.

[122] U.S. CTS., TABLE C-2—U.S. DISTRICT COURTS—CIVIL FEDERAL JUDICIAL CASELOAD STATISTICS (Mar. 31, 2018), https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018-tables.

[123] *See* Schlanger, *supra* note 115, at 163 (discussing the impact of the PLRA).

[124] *See id.* ("[G]iven the PLRA's very definite anti-plaintiff tilt, it seems nearly certain that the statute has caused at least some of the declining access to court remedies . . . .").

magnitude of this particular effect.[125] Nevertheless, a close proxy is prisoners' litigation success rates.

"[S]ince [the] passage of the PLRA, prisoners not only are filing fewer lawsuits, *but also are succeeding in a smaller proportion of the cases they do file*. . . . suggest[ing] that, rather than filtering out meritless lawsuits, the PLRA has simply tilted the playing field against prisoners."[126] Perhaps most concerning is the fashion in which prisoners are losing:

> In short, in cases brought by prisoners, the government defendants are winning more cases pretrial, settling fewer matters, and going to trial less often. Those settlements that do occur are harder fought; they are finalized later in the litigation process. Plaintiffs are, correspondingly, winning and settling less often, and losing outright more often . . . . Prisoner plaintiffs not only lose more often than other plaintiffs—they lose faster.[127]

These findings indicate that, at a minimum, the PLRA has failed to achieve Congress's goal of garnering "better prisoner suits."[128] The overall decrease in the proportion of wins by prisoner-plaintiffs, however, also suggests that more meritorious claims are being excluded from the courts—a consequence lawmakers swore against.[129] This conclusion follows from the fact that, if the PLRA caused meritorious and frivolous claims to be excluded at a one to one ratio, one would expect the *proportion* of prisoner wins to remain equal to pre-PLRA rates. Instead, the relatively decreasing rate of wins—especially as cases are being tossed out earlier—

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[125] In other words, while it is easy to count bad cases filed, a counterfactual number of good cases kept out of the courts is not ascertainable.

[126] *No Equal Justice: The Prison Litigation Reform Act in the United States*, HUM. RTS. WATCH (Jun. 16, 2009) (emphasis added), https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states.

[127] Schlanger, *supra* note 115, at 163, 165.

[128] Jones v. Bock, 549 U.S. 199, 203 (2007).

[129] *See* 141 CONG. REC. S14,626–27 (daily ed. Sept. 29, 1995) (statement of Sen. Orrin Hatch) ("[P]rison conditions that actually violate the Constitution should not be allowed to persist . . . . Indeed, I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised.").

indicates that the PLRA has a uniquely adverse impact on meritorious claims.

## IV. CONCLUSION

With three strikes against it and counting, the PLRA's three strikes rule has, itself, struck out. Now, after more than a quarter-century, it is incumbent upon the courts to step up to the plate. A provision that was whisked into law as part of an omnibus appropriations bill and that has accomplished exactly what its proponents swore against is the perfect candidate for a legislative makeover. Indeed, many scholars have proposed legislative solutions for the three strikes rule.[130] But calls for congressional action have long been ignored, and polarization and collective action problems hinder any legislative progress.[131]

Federal courts, which routinely see constitutional challenges to the three strikes rule, are best positioned to hit a home run. Not only is the judiciary the only branch competent to declare the three strikes rule unconstitutional, but it is also likely the only branch that can act with the speed that is imperative where, as here, ongoing constitutional violations are at play. I recognize that this will require some circuits to make an about-face and break with their precedent regarding IFP as a privilege, but this action is necessary if the constitutional guarantees of the Petition Clause, *Bounds*, and *Wolff* are ever to be realized.

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[130] *See, e.g.*, Sturtz, *supra* note 62, at 1378 (proposing that Congress limit the number of IFP filings per prisoner per year); Rebecca Wise, Note, *Five Proposals to Reduce Taxation of Judicial Resources and Expedite Justice in* Pro Se *Prisoner Civil Rights Litigation*, 52 U. TOL. L. REV. 671, 690–91 (2021) (proposing page limit requirements).

[131] *See* Edward G. Carmines & Matthew Fowler, *The Temptation of Executive Authority: How Increased Polarization and the Decline in Legislative Capacity Have Contributed to the Expansion of Presidential Power*, 24 IND. J. GLOB. LEGAL STUD. 369, 370 (2017) (arguing that because of polarization, Congress "no longer seems up to the challenge of taking effective action to deal with the major problems facing the country").