

REPORT ON THE PRISON LITIGATION REFORM ACT: WHAT HAVE THE COURTS DECIDED SO FAR?

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The Prison Litigation Reform Act was passed by Congress in 1996. It had a two-fold purpose: reduce the amount of prisoner litigation and curtail the involvement of the federal courts in the operations of state prison systems. Since its passage, the U.S. Supreme Court and numerous lower federal courts have had the opportunity to interpret several of its complicated and controversial provisions. This article looks at what the courts have decided thus far and predicts future court opinions.

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The Prison Litigation Reform Act (PLRA) was enacted in 1996. Members of Congress who opposed the legislation raised constitutional issues during debate on the bill (Butler, 1999). After its passage, many opponents continued to predict that some PLRA provisions would be held invalid (Decker, 1997; Herman, 1998). Nearly 6 years later, four U.S. Supreme Court cases have upheld the constitutionality of several of the PLRA's provisions and struck down none. Dozens of district and circuit court cases have defended various provisions against constitutional challenge, whereas very few courts have ruled against the act (Bennett & Del Carmen 1997; Branham, 2001a, 2001b). Much has been written about the phenomenal growth in inmate litigation since *Cooper v. Pate* abandoned the hands-off policy and opened the floodgates to the federal courts in 1964. There has been extensive criticism of the activist role many federal judges adopted as prison reform lawsuits made their way through the court system. The PLRA responded to two of Congress's concerns: (a) inmates who were perceived as clogging up the courts and costing taxpayers large amounts of money with frequently frivolous litigation and (b) federal judges who intervened in the operation of state prison systems; ordered extensive, detailed, and costly reforms; and monitored

compliance with court orders for often more than a decade. How much these related but distinct concerns merged in the legislators' minds when they considered the PLRA is not clear. It is clear that the PLRA has imposed significant restrictions on both prisoner litigants and federal judges. Six years later, it is also clear that courts will not take the PLRA to task.

This article reviews court cases that have considered the most important PLRA provisions. It is divided, like the act itself, into two sections. The first part looks at cases that have interpreted those parts of the statute aimed at reducing the amount of prisoner litigation. Three of the four Supreme Court decisions about the PLRA address the statute's inmate lawsuit reduction provisions. The second part of the article examines court cases that have interpreted the PLRA's attempts to curtail federal court intervention in state prisons. One Supreme Court case has been decided in this area. Federal courts of appeal cases are discussed throughout. Legal commentary is sprinkled where appropriate and most helpful. The Supreme Court has not resolved all the constitutional questions about the PLRA. It has, however, settled several key issues, and through the four cases it has decided, the Court has indicated its general stance toward the statute. There is little or no reason for opponents of the PLRA to anticipate that the courts will act to reduce the serious limitations the act imposes.

PART I. REDUCING INMATE LITIGATION

The PLRA includes several provisions that attempt to reduce the number of inmate lawsuits that impose financial and other restrictions on prisoner-plaintiffs thereby making it more difficult for them to file lawsuits under §1983. Congress passed these provisions in response to what it perceived to be a crisis in the federal courts created in part by the large number of inmate lawsuits, many of which are deemed frivolous and which also impose a severe burden on the state agencies that must defend them. According to Herman (1998), the legislative history of the PLRA indicates that concern about frivolous lawsuits dominated Congress's consideration of the statute. Stories about frivolous legal claims like the one filed by an inmate demanding chunky peanut butter abound. Although there was serious opposition to the bill, the PLRA was passed without a great deal of debate and in a hasty fashion as a rider to an appropriations bill and without a Judiciary Committee Report (Butler, 1999; Herman, 1998; Levy, 2000).

This part of the article reviews the most current case law interpreting the PLRA provisions that impose new restrictions on litigant prisoners including (a) the exhaustion of administrative remedies requirement, (b) the prohibition on recovery for claims of emotional injury only, (c) changes in the avail-

ability of *in forma pauperis* (IFP) status, (d) limits on prisoners who have filed frivolous lawsuits in the past, and (e) reducing the compensation for attorneys who represent inmates in civil rights cases. The Supreme Court has not spoken to all of these issues, but it has recently clarified the law in some areas.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

One of the most important provisions of the PLRA requires prisoners to exhaust any remedies available through their inmate grievance systems before they can file a lawsuit. The requirement to exhaust administrative remedies is not unique to the PLRA. It is a common doctrine found in many areas of administrative law and holds that a matter is not ripe for judicial review until a grievant first avails himself of all the remedies available through his administrative agency. Only after exhausting those remedies and failing to get relief can the grievant file a lawsuit. When a grievant files a lawsuit without first exhausting administrative remedies, the court must dismiss the suit or delay considering it until after the requirement has been met.

Requiring exhaustion is designed to serve several goals. First, and probably foremost, it seeks to reduce lawsuits thereby lightening the caseloads of overcrowded court dockets. Reducing lawsuits not only benefits the court system. Defending a lawsuit is much more expensive than resolving a complaint through an internal administrative dispute-resolution process. Reducing the numbers and types of lawsuits that an agency has to defend in court also benefits that agency. And because lawsuits generally take years to crawl through the judicial system, administrative remedies can offer grievants a much quicker and less cumbersome vehicle by which to get relief. Second, the exhaustion requirement permits the administrative agency to use its authority without court interference and manage its own affairs based on its expertise. The agency should be in a better position than a court to focus on the issues raised by the complaint and evaluate its merits (Branham, 2001a; Burton, 2001).

The exhaustion requirement was first introduced to the arena of prisoner litigation in 1980 in the Civil Rights of Institutionalized Persons Act (CRIPA). CRIPA authorized the U.S. attorney general to sue state and local officials whose institutions are operated in such a way that there is a pattern or practice of violating the residents' constitutional rights. This provision was very controversial, and, among other reasons, the exhaustion requirement was inserted into CRIPA in an attempt to address the opposition of the National Association of Attorneys General who considered it to be federal

encroachment on the states' authority to operate their prison systems. By requiring inmates to exhaust administrative remedies, state officials would have the opportunity to address problems in their institutions and avoid federal intervention (Branham, 2001a).

CRIPA also included a provision in §1997e(a) that specifically required prisoners to exhaust their grievance systems prior to filing a civil rights lawsuit under 42 U.S.C. §1983 when "plain, speedy, and effective" administrative remedies are available. For a prison grievance system to qualify as plain, speedy, and effective, the statute specified that correctional officials would have to apply to the Department of Justice for certification by demonstrating that their grievance system met certain minimal standards. Those standards included (a) an advisory role for employees and inmates in the formation, implementation, and operation of the grievance system; (b) the setting of specific maximum time limits for providing written replies to grievances to include reasons explaining the resolution to be provided by each decision level within the grievance system; (c) priority processing of emergency grievances including matters in which a delay could subject the grievant to substantial risk of personal injury or other damage; (d) safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and (e) independent review of a grievance's disposition by a person or entity not under the direct supervision or control of the institution where the grievance arose or where the prisoner was housed (Branham, 2001a; Mueller, 1995). Even if the state's grievance system met certification standards, the court could order exhaustion only if, in the particular case, the requirement was deemed "appropriate and in the interests of justice" (CRIPA, 1980, §1997e[a], [b]). CRIPA also gave the federal courts the discretion to stay a prisoner's lawsuit up to 180 days while the prisoner pursued administrative remedies, as opposed to dismissing the lawsuit.

CRIPA encouraged state prison systems to implement effective grievance systems so that prisoners would have to exhaust their administrative options before going to court. The CRIPA certification standards, however, were very high, and many correctional officials considered them too burdensome. The certification process itself was complicated, and many of the states that sought certification experienced extensive delays because of ineffective administration of the program by the Department of Justice (Harvard Law Review Association, 1991). Mueller (1995) reported that only 21 states had their grievance systems certified, 2 of which allowed their certifications to lapse.

In 1996, Congress amended 42 U.S.C. §1997e(a) via the PLRA. Section 1997e(a) now reads,

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Congress eliminated the requirement that exhaustion is necessary only if plain, speedy, and effective administrative remedies are available. Prisoners are now required to exhaust "such administrative remedies as are available," and failure to exhaust remedies must result in the dismissal of the suit. The PLRA amendment to §1997e is a significant change, and the provision raised numerous troublesome issues for the courts. The U.S. Supreme Court recently decided two cases that elaborate on the scope of the exhaustion requirement, one dealing with a request for monetary relief and the other with allegations of excessive use of force.

Money Damages

The new requirement quickly raised legal arguments concerning the definition of *administrative remedies as are available*. Federal appellate courts split over whether inmates who are seeking money damages as part of their claim must first exhaust the grievance system before filing a lawsuit. Money damages are not generally available to prisoners who are successful in a prison administrative grievance process. In those states where they are available, the damages are restricted to certain types of losses. No state prison grievance system allows inmates to recover money damages for an official's excessive use of force or unconstitutional conditions of confinement (Branham, 2001a). Before the PLRA amended §1997e, the U.S. Supreme Court decided in *McCarthy v. Madigan* (1992) that exhaustion of administrative remedies is not required when an inmate seeks only monetary relief and the grievance process offered none. Under the PLRA-amended §1997e, the Fifth, Ninth, and Tenth Circuits continued to interpret the exhaustion requirement to contain an exception when money damages were not available administratively. Prisoners incarcerated in prisons located in states governed by those circuits were able to initiate lawsuits for money damages without first filing a grievance through their correctional agency's administrative process (Branham, 2001a; Taylor, 2000). In contrast, the Third, Sixth, Seventh, and Eleventh Federal Courts of Appeal ruled that there was no exception under the new exhaustion requirements. Prisoners living in institutions located in those circuits were required to exhaust administrative remedies (Branham, 2001a; Taylor, 2000).

The split centered on the meaning of the words *remedies* and *available*. In 2001, the U.S. Supreme Court addressed the issue in *Booth v. Churner*.

Booth, an inmate in the Pennsylvania prison system, filed a §1983 lawsuit alleging that officials violated his Eighth Amendment rights when they used excessive force against him and denied him medical attention for the injuries suffered as a result of the force. Booth had not sought administrative review. The Third Circuit rejected his argument that exhaustion was not required, because the grievance process could not award damages. A unanimous Supreme Court agreed but acknowledged that the plain meaning of the words could lead to different interpretations. The Court, however, concluded that the broader statutory context in which the words are used suggests that a prisoner must exhaust processes, not forms of relief. Statutory history also convinced the Court that Congress intended to require administrative exhaustion regardless of the type of relief the prisoner requests. Congress specifically eliminated the condition that exhaustion is required only when a grievance process is plain, speedy, and effective. Significantly, Congress removed the term *effective*, which had been emphasized in the Court's 1992 decision in *McCarthy v. Madigan*. In the PLRA, Congress mandated exhaustion regardless of the type of relief offered through administrative procedures. Branham (2001a) noted that, as a result of the Supreme Court's decision in *Booth v. Churner*, unless prison officials develop a means for inmates to recover money damages through the internal grievance systems, in most states after they go through the administrative process, inmates will continue to file lawsuits to recoup monetary compensation.

Allegations of Excessive Use of Force

A year after the Supreme Court decided *Booth v. Churner* (2001), it rendered an opinion in *Porter v. Nussle* (2002). Nussle was an inmate in a Connecticut prison who alleged that officials subjected him to a prolonged and sustained pattern of harassment and intimidation. In 1999, he filed a §1983 lawsuit without first seeking administrative relief. The Second Circuit Court of Appeals reversed the trial court's decision to dismiss Nussle's case because he failed to exhaust administrative procedures. The Second Circuit concluded that §1997e(a), amended by the PLRA, only requires exhaustion with respect to prison conditions that affect everyone in the area and not single or momentary matters directed at particular persons. This put the Second Circuit in conflict with several other circuit courts. The issue again revolved around defining certain words or phrases in the statute. Specifically, what did Congress mean when it legislated that "no action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law" (PLRA, 1996, §1997[a])? Do prison conditions include isolated, single-episode incidents directed toward specific persons or only ongoing

conditions of confinement that affect larger numbers of persons? A unanimous Supreme Court reversed and remanded the case to the appeals court by concluding that the exhaustion requirement applies to all inmate lawsuits whether they address general conditions or particular incidents, excessive force, or some other wrong. The justices were persuaded that Congress clearly intended to require a firm exhaustion requirement for all inmate lawsuits involving §1983 or other federal laws.

The Supreme Court has made clear that the PLRA's exhaustion requirement is comprehensive and to be strictly enforced. Congress intended for prisoners to use their grievance systems before going to court, and the PLRA created no exceptions to that rule, even in those situations where a grievance system can not respond to a prisoner's request for relief. Despite evidence that inmates do not consider internal grievance systems responsive and have little confidence that they can correct the types of constitutional violations they experience, they must first exhaust that process or risk having their lawsuits dismissed (Alderstein, 2001).

TYPE OF INJURY

The PLRA also amended the CRIPA to include a provision in §1997e(e) that "no federal civil action may be brought by prisoners confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." This means a prisoner cannot claim compensatory damages for emotional injury that resulted from the unconstitutional conduct of correctional officials unless he or she can also show that they suffered a physical injury. This new provision has the potential to bar inmates from recovering monetary damages for such violations as the denial of mental health care, racial discrimination, denial of religious freedoms, psychological torture, and retaliation for filing grievances, to name a few (Boston, 1998; Pepe, 1999).

There is disagreement between the federal courts about how to interpret the physical-damage-only provision. In *Zehner v. Trigg* (1997) and *Jones v. Greninger* (1999), the courts of appeal decided that §1997e(e) clearly prohibited the recovery of damages for emotional injuries that did not involve physical injury. In contrast, *Canell v. Lightner* (1998) rejected the argument that §1997e(e) barred Canell's action, because he was alleging a deprivation of his First Amendment rights, which had not resulted in physical injury. The court concluded that a violation of a prisoner's First Amendment rights entitles him or her to judicial relief wholly aside from any physical, emotional, or mental injury that may have occurred. In *Mason v. Schriro* (1999), the district court ruled that §1997e(e) was inapplicable to a prisoner's equal protection

claim based on allegations that the state prison considered race when making housing assignments.

The Third Circuit ruled that a prisoner's First Amendment claim for compensatory damages was barred by §1997e(e), because the prisoner did not allege nor could he show that he suffered physical harm as a result of the violation in *Allah v. Al-Hafeez* (2000). The Tenth Circuit Court of Appeals ruled similarly in *Searles v. Bebbler* (2001). Interestingly, however, both the Third and Tenth Circuits found a way to circumvent the statute's restrictions and ruled that, although §1997e(e) bars compensatory damages for First Amendment violations, it does not bar an award of nominal damages for a constitutional violation when there is no showing of physical injury. In addition, both appellate courts concluded that §1997e(e) does not bar an award of punitive damages based solely on alleged constitutional violations and not on any mental or emotional injury that was caused by the violation. They reasoned that the language of the statute does not prohibit nominal and punitive damages and that in several previous decisions the Supreme Court has ruled that nominal damages are available to vindicate a constitutional right absent any proof of injury (*Carey v. Piphus*, 1978; *Memphis School District v. Stachura*, 1986).

Prisoner advocates are concerned that the amendment to CRIPA goes beyond denying compensatory relief for constitutional violations that did not include physical injury. Once officials' unconstitutional conduct has ceased, a prisoner has no grounds for injunctive relief and, now under the PLRA amendment to CRIPA, he or she has no grounds for compensatory damages if they cannot show physical injury (*Zehner v. Trigg*, 1997). Some prisoners will not be able to sue in state court seeking compensation for emotional injury, because many states deny recovery for intentional torts that involved only emotional injury. It is likely that §1997e(e) will result in circumstances where a prisoner has no remedy for an obvious constitutional violation (Pepe, 1999). Opponents of the PLRA's restrictions on prisoners attempting to recover damages for emotional injury argue that the restrictions also violate the Fifth Amendment's Equal Protection Clause. The restriction burdens prisoners' fundamental right of access to courts and takes away their right to a remedy for a constitutional violation. To pass muster, such a restriction, which discriminates against prisoners, must be rationally related to a legitimate government objective. Opponents argue that §1997e(e) does not serve legitimate penological interests (Pepe, 1999).

IFP

Before the passage of the PLRA, 28 U.S.C. §1915(a) authorized federal courts to allow prisoners to file lawsuits IFP if they filed an affidavit stating

they were unable to pay costs or give security for them and describing the type of lawsuit they wanted to file. About half of the federal district courts had local rules that required individuals seeking IFP status to pay some portion of the filing fee, and the statute permitted but did not require a court to dismiss a case if it discovered a prisoner's assertion of poverty was not true (Bennett & Del Carmen, 1997; Federal Judicial Center, 1996). The vast majority of prisoner civil rights lawsuits are filed IFP (Mueller, 1995).

Section 1915 was significantly rewritten by the PLRA. A prisoner must state in his or her affidavit seeking IFP status all of the assets they possess and must file a certified copy of their trust fund account statement for the 6-month period immediately preceding the filing of the lawsuit. Section 1915(b)(1) requires federal courts to collect some or the entire filing fee from IFP prisoners. In a somewhat complicated formula, the revised law provides that a court assess an initial partial filing fee consisting of 20% of the greater of the average monthly deposits to a prisoner's account or the average monthly balance in the prisoner's account for a 6-month period immediately preceding the filing of the lawsuit. After the initial filing fee is paid, the prisoner is required to make monthly payments of 20% of the preceding month's income credited to the prisoner's account until the full fee is paid. The correctional institution is responsible for forwarding those payments to the court each time the prisoner's trust account has more than \$10. The new provisions were designed to force an inmate to engage in a cost-benefit analysis before filing a lawsuit. The provisions provide economic disincentives to sue on the theory that prisoners file lawsuits, in no small part, because they are a diversion from the boredom of prison life and a way of hassling prison officials (Kuzinski, 1998).

The courts of appeal are in consensus that the PLRA's extensive revisions to 28 U.S.C. §1915 are constitutional and that the filing fee requirements do not deprive prisoners of adequate, effective, and meaningful access to the courts (*Lucien v. DeTella*, 1998; *Norton v. Dimazana*, 1997; *Shabazz v. Parsons*, 1997; *Tucker v. Branker*, 1998). They have also concluded that the requirements do not violate the Equal Protection Clause or the First Amendment (*Hampton v. Hobbs*, 1997; *Mitchell v. Farcass*, 1997; *Nicholas v. Tucker*, 1997). The courts agree that the new IFP provisions are aimed at inmate lawsuits challenging prison conditions and therefore do not apply to habeas corpus petitions (Bennett & Del Carmen, 1997).

Several appellate courts have considered what should happen to a civil rights lawsuit in the event a prisoner with IFP status fails to pay the initial filing fee assessed by the district court. In *Taylor v. Delatoore* (2002), the court interpreted §1915(b)(4), which creates a safety valve for prisoners who cannot afford to pay the partial filing fee. According to that provision, a prisoner

cannot be prohibited from bringing a civil lawsuit, because he or she has no means by which to pay the initial filing fee. Inmate Taylor was granted permission to file his complaint IFP and assessed an initial filing fee of \$6.62 to be paid within 30 days with the requisite monthly installments toward the full filing fee. When Taylor failed to pay the \$6.62, his case was dismissed without prejudice. Before the dismissal, Taylor submitted a copy of his inmate trust fund account that showed his account balance was \$0, and it had been at \$0 for more than 2 months before he filed his lawsuit. Although the Ninth Circuit upheld the \$6.62 assessment as proper, the court concluded that §1915(b)(4) prohibits a district court from dismissing an IFP prisoner's case based on his failure to pay the initial filing fee because he lacks the funds when payment is ordered. The safety-valve provision is intended to protect prisoners without money where there is no evidence that they depleted their accounts to avoid paying the assessment. The Tenth Circuit reached the same conclusion in *Bell v. Whethel* (1997).

Perhaps an even more important burden on prisoners who litigate in federal court is found in 28 U.S.C. §1915(f), which governs the taxation and collection of costs against litigants. It provides that a court has the discretion to require a prisoner to pay the full costs associated with a lawsuit under the same payment scheme provided for paying filing fees (20% of the prisoner's weekly earnings). In *Whitfield v. Scully* (2001), Whitfield was taxed \$595.96 in the district court for deposition costs and \$711.40 in the court of appeals for printing costs. Although he lost his lawsuit against officials of the New York Department of Correctional Services, his case was not ruled malicious or frivolous. Whitfield had a weekly income of \$7.75. He was assessed a \$3.10 a week payment to the court to cover both the deposition and printing costs, which represented 20% for each expense because each was treated as a separate judgment. The Second Circuit upheld the constitutionality of assessing court costs against prisoners who do not prevail in their lawsuits. The Sixth Circuit agreed in *Singleton v. Smith* (2001).

The *Whitfield* (2001) case, however, raised another important issue for IFP litigant prisoners: whether multiple assessments on a prisoner's trust fund account should be collected sequentially or simultaneously. The court ruled in Inmate Whitfield's favor, concerned that the simultaneous collection of multiple assessments could potentially expose 100% of a prisoner's income to recoupment and cause an undue burden to be placed on a prisoner's right of access to courts. The Second Circuit held that §1915(b)(2) generally requires the recoupment of multiple assessments sequentially at a constant rate of 20% of the monthly receipts to a prisoner's account. The *Whitfield* decision is contrary to the decisions of other federal courts of appeal. In *Atchison v. Collins* (2002), the Fifth Circuit concluded that

§ 1915(b)(2) requires a per-case interpretation of the assessment requirement thereby resulting in an assessment of 60% of Atchison's monthly income to pay for three filing fees on which he owed money. The Seventh Circuit also adopted the per-case approach in *Newlin v. Helman* (1997).

Obviously, interpreting 28 U.S.C. § 1915 to require the simultaneous collection of fees could have a significant impact on a prisoner's decision to file a lawsuit. If he or she is already paying a monthly assessment toward a filing fee or costs taxed at the conclusion of unsuccessful litigation, they may not be able to afford filing additional lawsuits. Although this result supports the PLRA's goal to reduce prisoner litigation, it can easily chill a prisoner's right to access the court system. Although it may be true that a small group of inmates file a large percentage of prisoner civil rights lawsuits (Collins & Grant, 1998; Vandenbraak, 1998), sometimes that group is composed of the persons best prepared and capable of articulating grievances and constitutional violations that affect many prisoners (Herman, 1998). Some of those repeat litigators are the voices for a significant segment of the population that cannot or are afraid of speaking for themselves (Roots, 2002).

The appellate courts have supported Congress's intent to make it more difficult for prisoners to claim IFP status. They have consistently found that requiring inmates to pay filing fees and court costs does not violate the Constitution as long as a safety-valve provision is in place. The burden of keeping track of the money owed and collecting the fees falls on the federal courts and correctional officials. Branham (1997) surveyed federal judges and court personnel involved in administering the filing fee provisions. Many expressed concern that the benefit to the courts in discouraging prisoner lawsuits might be outweighed by the administrative costs involved in collecting the partial installments.

FRIVOLOUS LAWSUITS

Related to the new requirements for establishing IFP status are the PLRA's amendments to 28 U.S.C. § 1915 that preclude a prisoner from proceeding IFP if he or she, while incarcerated or detained, has on three or more occasions brought an action or appeal that was dismissed on the grounds that it was frivolous, malicious, or failed to state a claim upon which relief could be granted. The only exception to what has become known as the *three-strikes* restriction is if prisoners can show they are under imminent danger of serious physical injury. Interestingly, the statute makes a distinction between rich prisoners who file frivolous lawsuits and indigent prisoners who also frequently litigate frivolous claims. Section 1915(g) precludes prisoners who have filed three previous frivolous actions from filing with IFP status;

however, if they are able to prepay the filing fee and do not seek leave to file IFP, they are not restricted from filing a new lawsuit or appeal.

The three-strikes provision is obviously designed to reduce the large number of prisoner civil rights lawsuits that allege frivolous claims. There is little disagreement between practitioners and scholars in the area of inmate litigation that a significant number of prisoner civil rights lawsuits are legally frivolous (Jeffrey, 2001; Newman, 1996). The disagreement focuses on what Chief Judge of the U.S. Court of Appeals, Second Circuit, the Honorable Jon O. Newman (1996) described as the appropriate way to approach the “task of looking through the ‘haystacks’ of prisoner lawsuits for the ‘needles’ of meritorious prisoner claims” (p. 25).

To date, seven courts of appeal have considered constitutional objections to §1915(g) based on the due process right of access to courts, the Equal Protection Clause, and the First Amendment’s right to petition for redress of grievances. All seven courts have found the three-strikes provision constitutional (*Abdul-Akbar v. McKelvie*, 2001; *Carson v. Johnson*, 1997; *Higgins v. Carpenter*, 2001; *Rivera v. Allin*, 1998; *Rodriguez v. Cook*, 1999; *White v. Colorado*, 1998; *Wilson v. Yaklich*, 1998). Other appellate courts have emphasized the authority of Congress to limit the pursuit of civil lawsuits, because proceeding IFP in civil actions is a privilege, not a right (Jeffrey, 2001).

In *Lewis v. Sullivan* (2002), the appeals court for the Seventh Circuit considered a case where the federal district court excused prepayment of the filing fee for an inmate with a long history of frivolous litigation because the judge concluded that §1915(g) is unconstitutional unless it is interpreted to allow judges to dispense with prepayment whenever, in their discretion, they believe the prisoner’s claim is substantial. The court of appeals reversed the district judge’s decision by ruling that judges do not have discretion to excuse prepayment when they think a prisoner is alleging a substantial claim. The only exception to the three-strikes provision is provided in the statute itself, and that involves an inmate who is in imminent danger of physical injury. The Seventh Circuit opinion listed several options for a prisoner who finds himself or herself *stuck out* under §1915(g), including pay the filing fee or save up in advance to pay the fee, refrain from frivolous litigation, borrow the filing fee, or sue in state court, which must entertain federal civil rights claims and where §1915(g) does not apply. Finally, the inmate with a track record of frivolous litigation can file IFP if the inmate can show he or she is in danger of serious physical harm.

The PLRA did not establish a mechanism for identifying prisoners who have had more than three dismissals. It also did not define *malicious* or *frivolous*. Pre-PLRA case law suggests that maliciousness is typically found only

after the court concludes that an inmate has filed several identical or closely similar lawsuits and the issues have already been decided (Federal Judicial Center, 1996). A number of cases have defined *frivolous*. Courts consider a lawsuit frivolous if it lacks an arguable basis either in law, meaning the alleged facts do not amount to a legally cognizable claim, or in fact, meaning that the facts are essentially fanciful or delusional. Failure to state a claim means that it appears beyond a reasonable doubt the plaintiff cannot prove the facts to support his claim and entitle him to relief. Tushnet and Yackle (1997) proposed that judges who have to define what constitutes a frivolous claim under §1915(g) should consider the law that has developed pursuant to Federal Rule of Civil Procedure 11, which authorizes courts to sanction attorneys who file pleadings that are not based on either existing law or nonfrivolous arguments in favor of modifying or reversing existing law. Courts have been reluctant to establish hard and fast criteria under Rule 11 for evaluating which arguments are frivolous, not wanting to impede the evolution of new legal theories and doctrines. Instead, courts have asked whether the attorneys did the necessary research and presented a cogent argument. Judges may want to take a similar approach to pro se inmates who litigate under less-than-ideal circumstances. The vast majority of prisoner civil rights lawsuits are filed pro se (Alderstein, 2001; Mueller, 1995; Roots, 2002). Tushnet and Yackle encouraged judges to evaluate carefully the benefit of imposing sanctions on a prisoner who presents a nonfrivolous but not legally cognizable claim.

Only a few cases have addressed at what point in time a prisoner must experience imminent danger for purposes of avoiding the three-strikes restriction. The Third Circuit Court of Appeals decided in *Gibbs v. Roman* (1997) that the imminent danger must occur at the time of the alleged incident. In that case, Inmate Gibbs waited 6 months after he alleged he was attacked by other prisoners to file a complaint. The district court decided he could not file IFP because he had three previous lawsuits dismissed as frivolous; however, the appellate court allowed him to proceed by ruling the inmate must have been in danger at the time of the alleged incident. In contrast, three other appeals courts have ruled that to avoid dismissal because of previous frivolous lawsuits, an inmate must allege that he or she is in imminent danger at the time they file their lawsuit (*Ashley v. Dilworth*, 1998; *Banos v. O'Guin*, 1998; *Medberry v. Butler*, 1999).

Finally, the PLRA added 28 U.S.C. §1932 as an additional sanction for inmates in the federal penitentiary system who file frivolous claims. The statute provides that a federal prisoner who files a claim for a malicious purpose, to harass another party, or who knowingly presents false evidence to the

court may have any earned release credits, or good time, revoked that has not yet vested. Revocation can occur upon the motion of the court or any party.

The three-strikes provision supports the overall IFP restrictions by making it almost impossible for an IFP prisoner to file a lawsuit if he or she has on three or more occasions brought an action or appeal that was dismissed as frivolous, malicious, or failed to state a claim upon which relief could be granted. Congress has persuaded the courts of appeal that the availability of IFP status encourages inmates to file frivolous lawsuits, and a three-strikes provision is necessary to combat the large number of those suits that have no basis in fact or law. Critics of the PLRA's three-strikes provision have not convinced the courts that the statute violates the right of indigent prisoners to access the courts in a manner equal to both nonindigent prisoners and indigent nonprisoners. Nor have they convinced the courts that it violates the Equal Protection Clause because it treats indigent prisoners differently than those two groups (Jeffrey, 2001).

ATTORNEY'S FEES

Enacted in 1976, 42 U.S.C §1988 authorizes a court, in its discretion, to award reasonable attorney's fees to the prevailing party in a lawsuit initiated under 42 U.S.C §1983. Section 1988 is designed to encourage individuals whose rights have been violated to seek relief and to encourage attorneys to take on the representation of civil rights cases. Civil rights claims often require attorneys to spend a substantial amount of time preparing a case for what is often a small monetary judgment. Without §1988, many attorneys could not afford to represent a client whose civil rights had been violated. In *Hensley v. Eckerhart* (1983), the Supreme Court held that courts should generally award attorney's fees to the prevailing plaintiff, absent special circumstances that would make such an award unjust. Prevailing defendants are seldom awarded fees. The statute provides that the court can order a plaintiff to pay the defendant's fees only if the plaintiff's case was frivolous or unreasonable. To determine what is a reasonable fee award, the court calculates a lodestar figure by multiplying the number of hours reasonably expended by the attorneys who represented the prevailing party times a reasonable hourly fee. If the parties do not agree to this figure, the party seeking the award must prove that the number of hours spent on the case and the hourly rate are reasonable. After the lodestar figure is determined, the court considers additional factors that may cause the fee to be adjusted upward or downward (Branham, 2001b).

The PLRA amended 42 U.S.C. §1997e(d) to impose substantial restrictions on the attorney fees awarded under 42 U.S.C. §1988 to prevailing plaintiffs in prisoner civil rights cases. The PLRA allows the court to award fees only when they were “directly and reasonably incurred in proving an actual violation” of a prisoner’s rights and the fee amount is “proportionately related to the court ordered relief for the violation” or the fee was “directly and reasonably incurred in enforcing the relief ordered” to correct a violation (PLRA, 1996, §1997e[d]). In addition, whenever a monetary judgment is awarded to a plaintiff, a portion of that judgment, not to exceed 25%, must be applied toward the amount of the attorney’s fees awarded against the defendant. If the attorney fee award is not greater than 150% of the judgment, the defendant must pay the excess. No attorney fee award can be based on an hourly rate greater than 150% of the hourly rate established by the Criminal Justice Act, the statute that governs compensation for attorneys appointed by the court to represent indigent criminal defendants in federal court.

Under the PLRA, attorney’s fees must now be proportionate to the amount of relief ordered by the court regardless of the fact that an actual money judgment might be quite modest. The amount of the fee award is capped at 150% of the hourly rate set by the Judicial Conference for court-appointed criminal attorneys. That fee is currently not more than \$75 an hour for both in-court and out-of-court work; however, because of funding constraints, the \$75 fee is not available in many federal districts where attorneys are paid \$55 an hour for out-of-court time. At this time, the maximum that attorneys for prisoners can be awarded is \$112.50 an hour with many of them receiving only \$82.50 an hour for out-of-court work (Branham, 2001b). Finally, unlike nonprisoner civil rights cases brought under §1983, if a plaintiff prisoner is awarded a money judgment, up to 25% of that judgment has to be applied to the attorney fee award.

In *Martin v. Hadix* (1999), the Supreme Court considered whether the PLRA’s cap on attorney’s fees awards applied to cases that were pending when the statute was enacted. In that case, the Michigan prison system had been under federal court orders stemming from two lawsuits, filed in 1977 and 1980, by prisoners challenging the conditions of their confinement. In both cases, the federal district court ruled that the prisoners were the prevailing parties entitled to attorney’s fees under 42 U.S.C. §1988 for postjudgment monitoring of the defendant prison system’s compliance with remedial orders. The fees were awarded on a semiannual basis, and a specific market rate had been set at \$150 an hour. When the PLRA went into effect in 1996, the State of Michigan requested the court to cap the attorney fee award to \$112.50 an hour both for services that were rendered before the act went into effect but had not yet been compensated and for services performed after

the act was effective. The Supreme Court held that the PLRA limits attorney's fees for postjudgment monitoring services performed after the statute's effective date but does not limit fees for monitoring performed before that date. Several courts of appeal have applied the same reasoning used in *Martin v. Hadix* to cases involving awards of attorney's fees in civil rights cases for legal work performed prior to the PLRA's enactment but had not yet been awarded, deciding that the PLRA's limit on attorney's fees does not apply to services performed prior to the act's effective date (*Altizer v. Deeds*, 1999; *Chatin v. Coombe*, 1999; *Madrid v. Gomez*, 1999).

The Supreme Court has not considered the constitutionality of the PLRA's cap on attorney's fees. Several courts of appeal, however, have ruled that the cap does not violate the Equal Protection Clause and passes constitutional muster. These courts have determined that calculating attorney's fees under §1988 for prisoner plaintiffs differently than the way they are calculated for nonprisoner plaintiffs under the same statute does not trigger equal protection concerns. Under the rational basis test for analyzing equal protection arguments, the caps imposed in prisoner cases further a rational and legitimate governmental interest, that is, curtailing the filing of frivolous inmate lawsuits (*Boivin v. Black*, 2000; *Collins v. Montgomery County Board of Prison Inspectors*, 1999; *Volk v. Gonzalez*, 2001; *Walker v. Bain*, 2001).

Interestingly, the Sixth Circuit Court of Appeals expressed dismay in reaching the conclusion that the PLRA's cap on attorney's fees does not violate the Constitution. The court wrote in *Walker v. Bain* (2001) at 667:

We are aware that §1997e(d)(2) will have a strong chilling effect upon counsel's willingness to represent prisoners who have meritorious claims. We are mindful that the "marginal or trivial" claims that result in a judgment for a prisoner, such as *Walker*, do in fact arise out of an actual, proven civil rights violation. We admit to being troubled by a federal statute that seeks to reduce the number of meritorious civil rights claims and protect the public fisc at the expense of denying a politically unpopular group their ability to vindicate actual, albeit "technical," civil rights violations. However, we are aware that we are not authorized to act as a "superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *Heller v. Doe*, 509 U.S. 312, 125 L.Ed.2d 257, 113 S.Ct. 2637 (1993; quoting *New Orleans v. Dukes*, 427 U.S. 297, 303, 49 L.Ed.2d 511, 96 S.Ct. 2513 (1976; per curiam). Moreover, our role is not "to judge the wisdom, fairness, or logic of legislative choices." *Id.* (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 124 L.Ed.2d 211, 113 S.Ct. 2096; 1993). Accordingly, we must conclude that §1997e(d)(2) survives rational review.

PLRA'S AFFECT ON THE VOLUME OF INMATE LAWSUITS

Congress intended and expected to reduce the amount of prisoner litigation when it enacted the exhaustion requirement, restrictions on types of injuries, changes in the availability of IFP, limits on inmates who have filed frivolous lawsuits, and reduced attorneys fees in civil rights cases. Cheesman, Hanson, and Ostrom (2000) explored whether those hopes and expectations have yet to be achieved. They noted that, between 1972 and 1996, state prisoner §1983 lawsuits filed in U.S. district courts increased by 1,153%, whereas the state prisoner population increased 517%. They tracked the rise in inmate population against the rise in prisoner litigation and concluded that the number of prisoner lawsuits during that time period was most closely associated with the number of inmates in state prisons. Specifically, between 1972 and 1998, every increase in the state prisoner population of 10,000 inmates is associated with an increase in 269 lawsuits. The data show that immediately after the PLRA was enacted, §1983 lawsuits dropped. Since about the end of March 1997, however, the drop stabilized and the number of lawsuits has fluctuated between 2,000 and 2,500 per month. Unless the PLRA provisions have broken the link between the number of lawsuits and the size of the state prisoner population, there will be more lawsuits, although a smaller proportion of prisoners will be filing them because fewer inmates are eligible or able to file. Cheesman et al. used three different growth scenarios—rapid, moderate, and slow growth—of prisoner populations from 1999 to 2008 and assumed that a lower number of §1983 lawsuits per 10,000 prisoners is likely post-PLRA. The researchers then forecasted that, although the statute may have reduced the proportion of prisoners who file civil rights cases, the driving force of a growing population will eventually reverse the downward trend. Under each of the growth scenarios, the number of suits filed in 2008 will be fewer than the number filed in 1996, but the upward trend in filings will continue.

PART II. REDUCING FEDERAL COURT INVOLVEMENT IN INSTITUTIONAL REFORM**THE HEYDAY OF INSTITUTIONAL REFORM**

The other important area in prisoners' rights litigation the PLRA sought to address is what many in Congress consider to be the federal courts' overreaching micromanagement of state prison operations. Based on the Supreme Court's interpretation of the Eighth Amendment's prohibition

against cruel and unusual punishment, prisoners have filed lawsuits, many of them class actions, challenging not just specific institutional rules or procedures but the everyday conditions under which they live. A large percentage of these lawsuits have resulted in court-approved, detailed consent decrees that the parties drafted addressing, among other issues, the minimum living space per prisoner, staffing requirements and staff training, exercise opportunities for inmates, renovating facilities to provide working toilets and sufficient heat, and providing nutritious, clean food and adequate medical care. Many prison administrators elected to enter into consent decrees rather than litigate the alleged constitutional violations and agreed to wide-ranging changes that exceeded the constitutional minimum. In this way, they avoided expensive and time-consuming litigation and the possibility of losing the lawsuit. In some circumstances, especially in the earliest institutional reform lawsuits, prison officials realized there were constitutional violations and the decrees would force the state to appropriate the funds needed to address the problems (Herman, 1998). Other times, administrators entered into consent decrees after a court found a constitutional violation. The decree addressed how the violation should be remedied, and it gave the state the opportunity to participate in fashioning an appropriate and practical relief. The courts that approved the decrees were bound to enforce them and remained active in the remedial phase of the litigation by monitoring the prison systems' implementation of the various provisions. Judges used different approaches to help them monitor a state's compliance. Federal District Court Judge Frank Johnson appointed a citizen's committee charged with overseeing the Alabama prison system's compliance. Other judges appointed special masters or compliance monitors to make certain the reforms were implemented. Some judges met regularly with the attorneys for the state and the prisoners through the entire implementation process (Smith, 2000). At the time the PLRA was enacted, many state prison systems had been under consent decrees monitored by the federal courts for 20 years or longer. Georgia, Texas, Puerto Rico, and Rhode Island are just a few of the jurisdictions whose prisons had been functioning under long-term court intervention as a result of lawsuits that challenged the constitutionality of the living conditions in those states' institutions. Unfortunately, in the history of prison reform litigation, there are also many examples of prison officials who did not diligently move their agencies into compliance with consent decree provisions and others that openly obstructed compliance and disobeyed court orders (Crouch & Marquart, 1989; Yackle, 1989).

During the 1980s, Republican governors railed against the consent decrees because they put severe restrictions on how prison superintendents

could manage the states' institutions (Tushnet & Yackle, 1997). The decrees usually required significant expenditures of funds. Prohibitions on overcrowding forced new expenditures for prison construction and the renovation of already-existing facilities, additional staff had to be hired, and more money spent on health care. Other decree provisions established standards for disciplining inmates and using force against them (Smith, 2000). Not only were the decrees that resulted from these lawsuits costly, the lawsuits were very expensive to defend. In addition to the taxpayers' money needed to pay the salaries of the states' attorneys, the states were often ordered to compensate the prisoners' attorneys and special masters to the tune of millions of dollars. The governors were supported in their displeasure by members of the Reagan administration who had philosophical problems with what they believed was the unconstitutional judicial activism of many federal judges (Tushnet & Yackle, 1997).

The attack on the courts' remedial role in institutional reform prison litigation was joined by more conservative federal judges in a series of decisions beginning in the 1980s that questioned the significant role some district judges were playing in the remedial phase of dozens of lawsuits filed against prison and jail systems. In more recent cases such as *Sandin v. Conner* (1995) and *Lewis v. Casey* (1996), the Supreme Court made it increasingly more difficult for inmates to establish a violation of a constitutional right (Harvard Law Review Association, 2002; Herman, 1998; Smith, 2000). In 1992, the Supreme Court decided *Rufo v. Inmates of the Suffolk County Jail* (1992) by considering the standard a court should apply when deciding requests for modifying consent decrees in an institutional prison reform case. In *Rufo*, a consent decree required a county to build a new jail that would hold one prisoner per cell. Construction of the jail was delayed, and the jail population grew more than projected. The county sought to modify the decree to allow two prisoners to be housed per cell. The Court recognized there had been an upsurge in institutional reform litigation and that decrees resulting from such suits remain in place for long periods of time. The Court rejected the prisoners' argument and the circuit court's ruling that officials must show a grievous wrong to modify a decree. Instead, the High Court ruled that, once a defendant shows a significant change in the facts that led to the consent decree and modification is warranted, the district court should tailor a new remedy to the changed circumstances. A court considering modification should focus on whether the proposed changes resolve the problems and must keep the public interest in mind. Several years before the PLRA was even before Congress, *Rufo* had made it considerably easier for officials to seek modification of consent decrees in prison reform lawsuits.

**APPROPRIATE REMEDIES WITH
RESPECT TO PRISON CONDITIONS**

Despite arguments of many legal commentators that by the mid-1990s courts had already significantly deaccelerated the judiciary's intervention in state prisons (Herman, 1998; Smith, 2000; Tushnet & Yackle, 1997), Congress included severe restrictions in the PLRA on federal court involvement in institutional reform cases. First, the PLRA amended 18 U.S.C. §3626(a)(1)(A) to provide that a federal court shall not grant or approve any prospective relief in a prison conditions lawsuit unless the court makes written findings that such relief is narrowly drawn, extends no further than is necessary to correct the violation of the federal right, and is the least intrusive means necessary to correct the violation. Prospective relief is defined as any relief other than compensatory or money damages that may be granted or approved by the court including consent decrees—but not private settlements. The court must give substantial weight to any adverse impact the relief might have on public safety or the operation of the criminal justice system. The PLRA prohibits prospective relief, whether ordered by the court or provided in a court-approved consent decree that does not comply with the statute's provisions. No longer can federal courts sanction consent decrees in which the parties agree to remedies beyond the constitutional minimum. The Ninth Circuit characterized the PLRA's restrictions on consent decrees as evidence of Congress's intent to revive the hands-off doctrine (*Gilmore v. State of California*, 2000).

In the past, prison administrators often found it is in the state's best interest to enter into consent decrees in which they specifically stated they were not admitting to violating prisoners' constitutional rights. In this way, the decrees could not be used as evidence against the state in other litigation. Under the PLRA, state officials must agree that the relief addresses a violation of a federal right. Elizabeth Alexander (1998) argued that consent decrees are still possible post-PLRA. Parties who enter into them may indicate in the decree that the findings of a constitutional violation cannot be used against them in any lawsuits seeking damages that involve the same conditions or conduct. In addition, they can still enter into private settlement agreements, because PLRA provisions do not preclude private agreements that are not subject to federal court enforcement. If prison officials fail to comply with the terms of a private settlement, the plaintiffs must reinstate the litigation or, if possible under state law, they can seek to enforce the agreement, which is a contract, in a state court.

The second restriction imposed by the PLRA on federal court intervention is found in 18 U.S.C. §3626(b)(1), which controls how long prospective

relief can remain in effect including in its ambit the many court orders that were already in force at the time the PLRA was enacted. Under this section, prospective relief should be terminated upon the motion of any party or intervener (a) 2 years after the date the court granted or approved the relief, (b) 1 year after the court entered an order denying termination of the relief under the statute, or (c) in the case of an order issued before the enactment of the PLRA, 2 years after the date of enactment. The PLRA provisions are in sharp contrast to what has occurred in the past with district court judges who found it necessary to remain actively involved in the remedial phase of institutional prison reform litigation. This provision places significant temporal restraints on courts' abilities to make certain that state officials abide by consent decrees and court orders—an issue that has proved very troublesome in previous lawsuits and the reason why courts continued their intervention. Clearly, Congress does not want the federal judiciary to engage in extended intervention in prison conditions lawsuits.

The third significant change imposed by the PLRA is in §3626(b)(2), which provides that in any prison conditions' lawsuit a defendant or intervener is entitled to immediate termination of any prospective relief if it had been granted or approved without a finding by the court that the relief was narrowly drawn, extends no further than is necessary to correct the violation of law, and is the least intrusive means necessary to correct the violation. Prospective relief should not be terminated if the court makes written findings that the relief is still necessary to correct a current and ongoing violation of a federal right, extends no further than is necessary to correct that right, and is narrowly drawn and the least intrusive means necessary. Few if any of the court orders and consent decrees that were granted or approved prior to the PLRA have the requisite findings required by §3626(b)(2), because at the time, there was no legal requirement for such recitations (Collins & Grant, 1998). Many prison systems operating under pre-PLRA orders and consent decrees have gone to federal court seeking termination, and many terminations have been granted (Roots, 2002).

A fourth important PLRA provision is 18 U.S.C. §3626(e), which provides that if a party or intervener files a motion for termination, the court must issue an automatic stay of any prospective relief that begins 30 days after the filing of the motion and ending on the day the court issues a final order. In a 1997 amendment to the PLRA, Congress permitted courts to delay entering an automatic stay for not more than 60 days for good cause, which cannot include a congested court docket.

Finally, the PLRA places extremely tight restrictions on prisoner release orders that are population caps designed to reduce unconstitutional overcrowding. A court cannot enter a prisoner release order unless it or another

court has previously entered an order for less-intrusive relief that failed to fix the problem. Furthermore, release orders can only be issued by a panel of three judges that must find by clear and convincing evidence that crowding is the primary cause of the constitutional violation and that no other remedy will correct it. One of the judges on the panel will be the district judge assigned to the lawsuit. The chief judge of the circuit court determines which other two judges will serve on the panel, at least one of which must be on the court of appeals. The governor and state attorney general are to receive notice of the proceedings to consider a population cap, and the statute gives standing and the right to intervene to a number of parties to oppose such a cap or seek termination of it. The parties include any state or local official including a legislator or unit of government whose jurisdiction or function includes appropriating funds for constructing, operating, or maintaining prison facilities or prosecuting or holding in custody people who may be released from or not admitted to prison as a result of a release order. Obviously, the detailed PLRA requirements make a population cap an unlikely occurrence (Harvard Law Review Association, 2002).

Like the PLRA provisions that attempt to reduce inmate lawsuits, the provisions targeted at reducing federal court intervention have raised numerous, but very different, constitutional questions. The primary argument is that the PLRA's termination provisions violate the Constitution's separation-of-powers' doctrine, because consent decrees and court orders are final judgments that cannot be reopened by Congress. The statute allows a party to seek termination of a decree or order that has already been sanctioned by a court, which, in effect, reopens a final judgment. The same argument has been extended to the automatic stay provisions, which stay prospective relief that has been agreed to in a consent decree or ordered by the court for a 30-day to 60-day period. Another alleged violation of the separation of powers doctrine occurs because the PLRA unlawfully prescribes a rule of decision in pending lawsuits. Through the PLRA, Congress directs a particular decision in a case without amending or repealing the law that provided the basis for that decision. The Constitution prohibits Congress from adjudicating particular cases through legislative action. The PLRA requires that prospective relief should be terminated if it does not contain findings that the relief was narrowly drawn, extends no further than is necessary, and is the least intrusive means necessary. Without these findings, the substantive court-ordered relief based on the court's interpretation of the Constitution is considered invalid. Another significant challenge to the PLRA argues that the statute violates prisoners' due process rights, because inmates have a vested right in the finality of the judgments entered before 1992 (Bennett & Del Carmen, 1997; Butler, 1999; Decker, 1997; Herman, 1998; Kuzinski, 1998).

Several circuit courts of appeal have considered these constitutional challenges to the PLRA provisions aimed at federal court intervention, and the majority of courts have upheld them as valid (Bennett & Del Carmen, 1997; Butler, 1999). In 2000, the U.S. Supreme Court considered constitutional challenges to the automatic stay provisions in *Miller v. French* (2000). In that case, the state of Indiana filed a motion under §3626(b) to terminate an injunction issued by a federal district court in 1975 and modified by the court in 1988 to remedy Eighth Amendment violations at the Pendleton Correctional Facility. The injunction addressed double-celling and overcrowding, the use of mechanical restraints, staffing, and the quality of food and medical services. The prisoners responded with a motion to enjoin the operation of the §3626(e) automatic stay, which went into effect immediately upon the filing of the motion for termination. The Seventh Circuit Court of Appeals affirmed the district court's decision to enjoin the stay because it violated the separation of powers' doctrine. The Supreme Court disagreed and upheld the automatic stay provisions against constitutional challenge. According to the Court, the stay is mandatory under the language of the statute. It does not reopen a final judgment, nor does it interfere with judicial functions. The stay, ruled the Court, helps implement the change in the law legislated under the termination provisions of the PLRA. The only constitutional issue the Court left unresolved about the stay is whether the 30-day to 60-day stay period, during which the court considers whether the prospective relief should be permanently terminated, is too short a period of time and deprives prisoners of a meaningful opportunity to be heard by violating their due process rights.

The Supreme Court did not consider the constitutionality of the termination provisions in *Miller v. French* (2000); however, before *Miller*, several courts of appeal had entertained constitutional challenges and ruled that the statute is valid (Bennett & Del Carmen, 1997; Butler, 1999; Decker, 1997; Herman, 1998; Kuzinski, 1998). In two decisions rendered after the Supreme Court's decision, two additional federal appellate courts have upheld the termination provisions. Noting that the Supreme Court's decision in *Miller* does not control, the Ninth Circuit in *Gilmore v. State of California* (2000) and the Fifth Circuit in *Ruiz v. Johnson* (2001) both concluded that the provisions do not violate the Constitution.

CONCLUSION

It is apparent by now that the restrictions imposed by the PLRA are here to stay until such time as Congress significantly amends the act or repeals it.

Perhaps a scandal in a state prison system will surface and convince legislators that certain provisions have contributed to problems, made them difficult to discover, or impossible to remedy. As unpopular as prisoners are, it is hard to imagine elected officials revisiting legislation that seems reasonable to a public that does not want to hear about the terrible injustices that have occurred and may still be occurring in America's prisons. Then again, perhaps the explosive growth in the prisoner population will inspire average moms and dads to consider more thoughtfully how their sons and daughters should be treated while they are incarcerated.

It is one thing for courts to strictly interpret constitutional provisions so as to narrow the constitutional protections available to prisoners. It is quite another for legislation to restrict the ability of prisoners to access courts and limit severely a judge's ability to remedy violations of the law. A strict constitutional interpretation is subject to revision and exception as judges distinguish cases with slightly different facts and sets of circumstances. A prisoner who cannot file a lawsuit does not have the opportunity to be heard. A judge, who is intimately familiar with the evidence and understands how parties to a lawsuit relate to each other and the court, cannot fashion a remedy outside the PLRA's restrictions.

There is some evidence that over time, the PLRA will not cause a significant drop in prisoner litigation. What remains to be seen is if and how the PLRA affects conditions' in our prisons and jails over time. Future research in this area might concentrate on how the restrictions on federal court involvement affect conditions lawsuits including how the parties craft their pleadings, present evidence, and draft consent decrees. The next step would be to look at what happens in institutions subject to PLRA-restricted orders and decrees. What happens in institutions where entire pre-PLRA decrees or parts of decrees have been terminated? Will attorney fee restrictions on prisoner civil rights cases affect the willingness of attorneys to take on these cases or the quality of their work? Will states seek to improve their inmate grievance systems, or will the exhaustion requirement increase these case-loads thus making improvements difficult? Will inmates seek money damages in state courts for emotional-only injuries, and, if so, how will those courts respond? The data are already mounting on some of these research questions.

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