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AN IRRATIONAL OVERSIGHT: APPLYING THE PLRA'S FEE RESTRICTIONS TO COLLATERAL PRISONER LITIGATION¹

Walker Newell[†]

The Federal Prison Litigation Reform Act precludes prisoners from filing lawsuits in forma pauperis and imposes significant limitations on the recovery of attorney's fees. Many states have followed the lead of Congress by prohibiting their courts from waiving filing fees in prisoner cases. The federal fee provisions have withstood a barrage of constitutional challenges, with courts uniformly holding that the provisions are rationally related to a legitimate government interest in deterring frivolous inmate litigation. Many courts, however, apply these fee restrictions in a manner that cannot be justified by the analysis generally supporting the constitutionality of the provisions. In both state and federal courts, fee restrictions are applied to litigation collateral to prisoners' incarceration, such as appeals of bankruptcy and divorce court rulings. The denial of in forma pauperis status to prisoners in these proceedings bears no relationship to the government interest in deterring frivolous inmate litigation, instead imposing a substantial burden on the ability of prisoners to pursue important matters that is not felt by other indigent litigants. To the extent that state and federal fee restrictions continue to be applied to certain collateral prisoner litigation, they are unconstitutional.

I. INTRODUCTION

As the United States prison system has grown astronomically over the past 30 years, there has been correspondingly robust growth in the amount of federal litigation brought by prisoners.² By the early 1990s, the per capita rate of prisoner filings and the absolute number of prisoner suits had reached levels that imposed

¹ The term "collateral inmate litigation" is used throughout the article to refer to litigation that is unrelated to a prisoner's status as a prisoner. It encompasses all forms of civil litigation unrelated to incarceration, such as appeals of adverse rulings in divorce and bankruptcy courts and § 1983 police brutality suits. Later in the article, a distinction will be drawn between the constitutionality of collateral civil rights suits and other collateral civil litigation, but for the most part, all prisoner litigation unrelated to incarceration will be termed "collateral."

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² See, e.g., Margot Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1578–87 (2003) (detailing the "deluge" of inmate litigation that occurred from 1970s to early 1990s).

a significant burden on the efficiency of federal courts.³ Concern with these developments, possibly bolstered by a desire to appear tough on crime in an election year,⁴ spurred legislative action. In 1996, Congress passed a new law that would effectively and severely curtail the ability of prisoners to vindicate their rights in federal court. With the enactment of the Prison Litigation Reform Act (PLRA), the United States became perhaps the only country “in which national legislation singles out prisoners for a unique set of barriers to vindicating their legal rights in court.”⁵

The drafters of the PLRA took a variety of approaches to restrain prison litigation, including rigid exhaustion provisions,⁶ a “physical injury” requirement,⁷ a ceiling on attorney’s fees,⁸ and a prohibition on in forma pauperis (IFP) lawsuits.⁹ These measures were specifically designed and intended to prevent prisoners from rabidly litigating over grievances arising during their imprisonment: mistreatment by correctional staff; inadequate medical care; and related issues. The first section of the Act, which addresses exhaustion, only applies to suits regarding “prison conditions.”¹⁰ However, the attorney’s and filing fees sections apply, respectively, to “any action brought by a prisoner”¹¹ and to “civil actions or appeals” brought by prisoners.¹²

It is clear that most prisoner litigation is covered by the PLRA’s restrictions on IFP filings and the recovery of attorney’s fees. But when confronted with certain types of litigation, the courts have had difficulty agreeing on whether the PLRA applies. There is a general consensus that habeas and mandamus actions are not covered by the IFP provision’s “civil action” language,¹³ but the applicability of the PLRA’s fee restrictions to other litigation is

³ *Id.* at 1584–87 (discussing a rise in both filing rates and the overall numbers of filings in the early 1990s).

⁴ See Julie M. Riewe, *The Least Among Us: Unconstitutional Changes in Prisoner Litigation Under the Prison Litigation Reform Act*, 47 DUKE L.J. 117, 142 (1998) (making the argument that the PLRA was motivated, at least in part, by such considerations).

⁵ HUMAN RIGHTS WATCH, NO EQUAL JUSTICE 2 (2009), available at <http://www.hrw.org/en/node/83713/section/2>.

⁶ 42 U.S.C. § 1997e(a) (2006).

⁷ 42 U.S.C. § 1997e(e) (2006).

⁸ 42 U.S.C. § 1997e(d) (2006).

⁹ 28 U.S.C. § 1915(b)(1) (2006).

¹⁰ 42 U.S.C. § 1997e(a) (2006).

¹¹ 42 U.S.C. § 1997e(d) (2006).

¹² 28 U.S.C. § 1915(b)(1) (2006).

¹³ See, e.g., *Reyes v. Keane*, 90 F.3d 676 (2d Cir. 1996) (holding that the PLRA does not apply to habeas corpus petitions), *overruled on other grounds by Nelson v. Walker*, 121 F.3d 828, 832–33 (2d Cir. 1997).

uncertain. In particular, litigation involving matters that arose before a prisoner's incarceration does not fit comfortably with the statute's purposes. Recognizing this incompatibility, a small minority of courts, relying on legislative intent or canons of statutory interpretation, has ruled that the PLRA's fee provisions do not apply to claims that arose prior to a litigant's period of incarceration.¹⁴ In contrast, the majority of courts implicitly consider all provisions of the PLRA to apply to all litigation brought by prisoners, while a few courts have explicitly held that the fee provisions are constitutional and applicable to all prisoner litigation.¹⁵ The Federal Bankruptcy Code adds additional texture to the discussion by singling out prisoners as ineligible for fee waivers when filing for bankruptcy or appealing a bankruptcy court ruling.¹⁶

IFP limitations have also been extended to collateral prisoner litigation through state law. By enacting laws modeled after the PLRA, several states have prevented prisoners from proceeding IFP in general matters such as appeals of divorce proceedings.¹⁷ A Wisconsin law modeled after the PLRA, for example, was enacted not only to target conditions of confinement litigation but also to "limit broadly prisoner litigation at taxpayers' expense."¹⁸ Similarly, Michigan's ban on prisoner IFP filings has been applied to inmate appeals of divorce court rulings.¹⁹ In Colorado, a statute mirroring the PLRA requires that all indigent prisoners bringing "civil actions" gradually pay full filing fees.²⁰ Prisoners in these states are faced with significant restrictions on their ability to file or appeal both state and federal litigation.

These developments represent a distortion of the central pur-

¹⁴ See *Robbins v. Chronister (Robbins I)*, 402 F.3d 1047, 1051–55 (10th Cir. 2005), *rev'd en banc*, *Robbins v. Chronister (Robbins II)*, 435 F.3d 1238 (10th Cir. 2006); *Hatchet v. Cnty. of Phila.*, No. 09-1708, 2010 WL 4054285, at *2 (E.D. Pa. Oct. 15, 2010); *Hall v. Gallie*, No. 05-975, 2009 WL 722278, at *7 (E.D. Pa. Mar. 17, 2009) (attorney's fees provisions of PLRA inapplicable to pre-conviction police brutality claim).

¹⁵ See, e.g., *Robbins II*, 435 F.3d at 1244 (PLRA's attorney's fees provision applies to all actions brought by prisoners); *United States v. Jones*, 215 F.3d 467 (4th Cir. 2000) (motion to have property seized at arrest returned is civil action for purposes of IFP provision of PLRA).

¹⁶ 11 U.S.C. § 523(a)(17) (2006).

¹⁷ See, e.g., *Sirbaugh v. Young*, 25 F. App'x 266 (6th Cir. 2001) (denying inmate challenge of state IFP provisions modeled after PLRA); N.Y. C.P.L.R. 1101(a), (f) (McKinney 2011) (New York statute mirroring PLRA's IFP provisions).

¹⁸ *State ex rel. Cramer v. Schwarz*, 613 N.W.2d 591, 601 (Wis. 2000); see also *State ex rel. Henderson v. Raemisch*, 790 N.W.2d 242 (Wis. Ct. App. 2010).

¹⁹ *Sirbaugh*, 25 F. App'x at 266.

²⁰ COLO. REV. STAT. ANN. § 13-17.5-103(2) (West, Westlaw through 2011 1st Reg. Sess.).

poses of the original PLRA, which was enacted to curtail frivolous prisoner litigation. As the Second Circuit held in denying an early challenge to the new IFP provisions, “the Act’s goal of relieving the pressure of excessive prisoner filings on our overburdened federal courts is a constitutionally legitimate one.”²¹ Although a legitimate government interest in preventing excessive and frivolous prisoner litigation has been comprehensively recognized by the courts, such an interest does not justify some of the litigation discussed in the preceding paragraphs. An appeal of a divorce court ruling cannot be easily categorized as the frivolous prisoner litigation that the PLRA was enacted to address. On the other hand, the plain language of the fee restrictions suggests that Congress intended the Act to have an extensive reach.

The remainder of this article will interrogate the jurisprudential trend of imposing fee restrictions on all inmate litigants, not merely those challenging their conditions of confinement. The first section will briefly outline the structure of the Federal PLRA’s fee restrictions, identify state laws imposing similar restrictions, and investigate the practical significance of these restrictions. Next, the article will discuss the few decisions to directly address the issue of fee restrictions in the context of litigation unrelated to conditions of confinement, ultimately finding that Congress intended the PLRA’s fee restrictions to be applicable to all collateral prisoner litigation. The final section will explore the possibility that the imposition of fee limitations on collateral prisoner litigation is prohibited by the Fifth and Fourteenth Amendments. It will conclude that the courts have a constitutional duty to refrain from imposing fee restrictions on certain categories of collateral inmate litigation. Independent of the constitutionality or interpretive validity of the practice, the extension of the PLRA’s fee restrictions to all inmate litigation is a sad and unnecessary coda to the statute’s symphony of discordant treatment of hundreds of thousands of Americans.

II. FEDERAL AND STATE FEE RESTRICTIONS ON COLLATERAL PRISONER LITIGATION

[P]risoners are now faced with impossible choices: choosing, for example, between spending money to bring a lawsuit after being brutalized or sending money home to a child; making co-payments for needed medical care or suing to protect one’s rights . . . non-prisoners do not have to make such stark

²¹ *Nicholas v. Tucker*, 114 F.3d 17, 20 (2d Cir. 1997).

choices.²²

By restricting the ability of prisoners to litigate as poor persons or recover full attorney's fees, federal and state governments have created an effective barrier to accessing the legal system. Although these fee restrictions are not as burdensome as the strict exhaustion requirements embodied in the PLRA,²³ they significantly limit the incentives of inmates and attorneys to litigate. The PLRA contains several fee restrictions, including a prohibition on filing fee waivers, a filing fee prepayment requirement for inmates who have had three previous suits dismissed, and a cap on attorney's fees. Several state statutes have followed all or part of this scheme, so that prisoners in those states are irrationally prevented from proceeding IFP in matters such as appeals of divorce court rulings. These laws combine to frustrate legitimate inmate litigation and impede prisoners from litigating important matters unrelated to their incarceration.

A. *Filing Fees*

When the PLRA was enacted, it included an amendment to the general federal IFP statute, which imposes unique burdens on prisoners not felt by other indigent persons. Title 28, § 1915(a) of the U.S. Code provides that federal courts may waive filing fees for litigants who cannot afford them. Prisoner litigants are the only group ineligible for this exercise of judicial discretion. Unlike all other indigent litigants, prisoners are "required to pay the full amount of a filing fee" and directed to make a 20% prepayment toward that obligation.²⁴ To ease the burden on prisoners who cannot afford filing fees at the outset of litigation, the statute allows for installment payments.²⁵ Prisoners who cannot pay up front have a lien placed on their prison account, with automatic deductions made until filing fees are repaid.²⁶ The statute also contains a savings clause which provides that no litigant shall be denied access to the courts because of his or her inability to prepay a portion of filing fees.²⁷ Finally, prisoner litigants who have had three or more lawsuits dismissed must pay full filing fees at the outset of subsequent litigation.²⁸

²² *Murray v. Dosal*, 150 F.3d 814, 820 (8th Cir. 1998) (Heaney, J., dissenting).

²³ 42 U.S.C. § 1997e(a) (2006).

²⁴ 28 U.S.C. § 1915(b)(1) (2006).

²⁵ 28 U.S.C. § 1915(b)(2) (2006).

²⁶ *Id.*

²⁷ 28 U.S.C. § 1915(b)(4) (2006).

²⁸ 28 U.S.C. § 1915(g) (2006).

Many states have followed the letter or spirit of the PLRA, imposing restrictions on the ability of prisoners to litigate IFP in state court. New York's statute, for example, is almost an exact replica of the PLRA, directing courts to seek partial payment at the outset of litigation, mandating the gradual repayment of all filing fees, and containing a savings clause preserving completely indigent inmates' access to the courts.²⁹ Statutes in Wisconsin,³⁰ Delaware,³¹ Virginia,³² Massachusetts,³³ Georgia,³⁴ and Missouri,³⁵ among others,³⁶ follow a similar formula, providing for some form of prepayment or subsequent installment plan payments for indigent inmates.

In each state, prisoners are denied IFP status without regard to whether or not they are challenging their conditions of confinement, creating disincentives for them to participate in litigation of any kind. The application of IFP prohibitions to all state prisoner litigation is puzzling. While federal prisoner litigation is largely made up of civil rights claims,³⁷ prisoners may find themselves in state court for a variety of reasons unrelated to alleged civil rights violations. By placing fee restrictions on this type of litigation, which has no relationship to the type of frivolous prisoner litigation targeted by the Federal PLRA,³⁸ state legislatures have exacted additional, unseen revenge on those convicted of crimes.

²⁹ N.Y. C.P.L.R. § 1101(f) (McKinney 2011).

³⁰ WIS. STAT. ANN. § 814.29 (West, Westlaw through 2011 Act 31, Acts 33 to 36, and Acts 38 to 44).

³¹ DEL. CODE ANN. tit. 10 § 8804(b) (West, Westlaw through 78 Laws 2011, chs. 1–203).

³² VA. CODE ANN. § 8.01-691 (LEXIS 2011).

³³ MASS. GEN. LAWS ANN. ch. 261, § 29(d)(1) (West, Westlaw through ch. 175 of 2011 1st Ann. Sess.).

³⁴ GA. CODE ANN. § 42-12-4 (LEXIS 2011).

³⁵ MO. ANN. STAT. § 514.040(2) (West, Westlaw through 2011 1st Extraordinary Sess.).

³⁶ See, e.g., Texas (TEX. CIV. PRAC. & REM. CODE ANN. § 14.006 (West, Westlaw through 2011 Reg. Sess.)); Minnesota (MINN. STAT. ANN. § 563.02 (West, Westlaw through 2011 1st Spec. Sess.)); and Louisiana (LA. REV. STAT. ANN. §15:1186 (West, Westlaw through 2011 1st Extraordinary and Reg. Sess.)).

³⁷ Schlanger, *supra* note 2, at 1558.

³⁸ See 141 Cong. Rec. S14, 629 (daily ed. Sept. 29, 1995) (statement of Sen. Jon Kyl describing the “frivolous” types of prison litigation the act’s sponsors intended to target, such as a lawsuit brought by a plaintiff who was served a “hacked up” piece of cake, a suit based on allegations that medical staff had implanted a mind control device in the plaintiff’s head, and a suit brought by a death row inmate against correctional staff for taking away his Gameboy). It is notable that there is no mention in this record of collateral prisoner litigation on the dockets of federal courts, suggesting the PLRA’s framers were unaware of this potential application of the act. *Cf.* Schlanger, *supra* note 2, at 1571–73.

Despite the allowance of gradual payment and the existence of savings clauses, the laws preventing inmates from proceeding IFP are extremely burdensome. IFP statutes exist because court costs, while manageable for most litigants, can be impossible for low-income plaintiffs to afford. The cost of filing a civil suit in United States District Court is \$350,³⁹ while the initial filing fee in New York County is \$210.⁴⁰ On top of filing fees, prisoners may be responsible for significant expenses that accrue during litigation, such as the costs of taking depositions and printing copies of the record.⁴¹ Since prisoners in federal and state prisons typically make less than a dollar per hour (while in some states, prisoners engage in unpaid labor) these costs may present an insurmountable obstacle.⁴² One prisoner who litigated pro se through trial and appellate proceedings racked up over \$1,300 in fees, an amount that, according to the Second Circuit, would have taken him nine years to repay at his weekly salary of around seven dollars.⁴³ The prospect of automatic monthly deductions from prison accounts (used to pay for essential goods, such as certain mailing and hygienic materials not provided by the prison)⁴⁴ lasting for years may operate as a substantial disincentive to even the most aggrieved prisoner litigants.

In addition to creating financial barriers to prisoner litigation, the prohibition on IFP filings in cases unrelated to conditions of confinement embodies a troubling culture within the legal system. The costs of incarcerating a greater percentage of the population than any other nation in the world have become increasingly clear: prisons have long been overflowing; spending on prisons has

³⁹ *Frequently Asked Questions*, U.S. COURTS, <http://www.uscourts.gov/Common/FAQS.aspx#filing> (last visited Oct. 4, 2011).

⁴⁰ *Court Fees*, NEW YORK SUPREME COURT, http://www.nycourts.gov/supctmanh/court_fees.htm (last visited Oct. 4, 2011).

⁴¹ *See, e.g.*, *Whitfield v. Scully*, 241 F.3d 264, 268–69 (2d Cir. 2001) (tallying IFP inmate litigant’s deposition and printing costs).

⁴² PETER WAGNER, *THE PRISON POLICY INITIATIVE, THE PRISON INDEX: TAKING THE PULSE OF THE CRIME CONTROL INDUSTRY* § III (2003), *available at* <http://www.prisonpolicy.org/prisonindex/prisonlabor.html>.

⁴³ *Whitfield*, 241 F.3d at 268–69. The Second Circuit eventually held that the PLRA’s cap on filing fee deductions from inmate accounts did not apply to deductions for costs owed for other court costs. *Id.* at 278. Accordingly, the court allowed 40% of the plaintiff’s income to be deducted toward his court costs. *Id.*

⁴⁴ *See, e.g.*, Matt Stiles, *Texas Prisoners Spent \$95 Million at Commissaries*, TEX. TRIBUNE, Apr. 8, 2010, <http://www.texastribune.org/texas-dept-criminal-justice/texas-prisoners-spent-95-million-at-commissaries> (detailing prisoner commissary expenditures on hygiene, mailing, and supplemental food).

grown astronomically at the expense of education;⁴⁵ and prisoner litigation has burdened the courts for years. The PLRA's filing fee limitations could have been a reasonable response to the last problem if they had been narrowly tailored to prevent truly frivolous litigation. Instead, the application of these provisions to all prisoner litigation is a reflection of government's unwillingness to admit to the devastating consequences of mass incarceration.

B. Attorney's Fees

Another provision of the PLRA that has had a significant impact on the practicability of prisoner litigation is the statute's restrictions on attorney's fees. Under 42 U.S.C. § 1997e(d), a prevailing plaintiff's recovery of attorney's fees from a defendant is limited to 150% of the money damages awarded. The statute also requires that up to 25% of the plaintiff's total money damages be put toward those fees.⁴⁶ Finally, the Act caps the effective hourly wage that lawyers representing prisoners can receive at rates comparable to the amount paid to lawyers working in indigent defense.⁴⁷ These provisions are extremely significant in cases where a plaintiff is victorious but only awarded nominal damages. When a prisoner is awarded one dollar in damages as symbolic vindication of his constitutional rights, his attorney is not compensated.

As a result of these provisions, it is difficult for attorneys to litigate on behalf of prisoners. The PLRA's fee limitations have "fundamentally altered an attorney's decision to represent prisoners by adding a heavy financial burden that impacts public and private attorneys alike."⁴⁸ Public interest organizations, which play a vital role in litigating civil rights cases, are always in need of funding, and restrictions on attorney's fees limit the number of cases they are able to accept.⁴⁹ Private attorneys seeking to litigate prisoners' rights cases are deterred to an even greater extent. The PLRA's limitations make representing prisoners almost a financial impossibility for lawyers seeking to make a profit.⁵⁰

⁴⁵ See, e.g., NAACP, MISPLACED PRIORITIES: OVER INCARCERATE, UNDER EDUCATE 7, 14 (2011), available at http://naacp.3cdn.net/01d6f368edbe135234_bq0m68x5h.pdf (finding that between 1987 and 2007 funding for corrections increased by 127%, while funding for education increased by only 21%).

⁴⁶ 42 U.S.C. § 1997e(d)(2) (2006).

⁴⁷ See Lynn S. Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Act's Disparate Restrictions on Attorney's Fees*, 89 CAL. L. REV. 999, 1007 (2001).

⁴⁸ Karen M. Klotz, *The Price of Civil Rights*, 73 TEMP. L. REV. 759, 790 (2000).

⁴⁹ *Id.* at 790–91.

⁵⁰ *Id.*

In *Walker v. Bain*, the Sixth Circuit Court of Appeals, while affirming the facial constitutionality of the PLRA's attorney's fees provisions, noted the deterrent effect that the law would have on viable civil rights claims.

[Section]1997e(d)(2) will have a strong chilling effect upon counsel's willingness to represent prisoners who have meritorious claims . . . 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.⁵¹

Although the plaintiff in *Walker* brought a successful retaliation claim against corrections officers, during which his attorneys amassed expenses and wages totaling roughly \$36,000, the total award of attorney's fees was limited to \$629.⁵² With these numbers in mind, private attorneys are likely to only accept prisoner cases with the potential for significant damages.⁵³

While attorney's fees are not typically part of remedies in the United States, they have long been awarded to indigent plaintiffs who succeed in causes of action under civil rights statutes. In the watershed Civil Rights Act of 1964, Congress authorized the recovery of reasonable attorney's fees, enabling a generation of civil rights litigants to enter the courts.⁵⁴ In *Newman v. Piggie Park Enterprises*, the Supreme Court recognized the systematic importance of allowing for attorney's fees in civil rights litigation, noting that "[i]f successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts."⁵⁵ The PLRA's attorney's fees provisions have frustrated this objective, preventing potential landmark cases from being litigated and won in the prison context. Even more significantly, the provisions prevent prisoners from litigating civil rights claims deriving from events that occurred before they were incarcerated.⁵⁶ Because of these limitations and the aforementioned prohibition on IFP fil-

⁵¹ *Walker v. Bain*, 257 F.3d 660, 670 (6th Cir. 2001).

⁵² *See id.* at 674 (remanding to trial court for reassessment of attorney's fees under the PLRA).

⁵³ *See, e.g.*, Fred Cohen, *The Limits of Judicial Reform of Prisons: What Works; What Does Not*, 40 CRIM. L. BULL. 1, 1 n.1 (2004).

⁵⁴ 42 U.S.C. § 2000a-3 (2006).

⁵⁵ *See Klotz, supra* note 48, at 764 (quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 401 (1968)).

⁵⁶ *See, e.g., Robbins II*, 435 F.3d 1238 (10th Cir. 2006) (limiting attorney's fees for successful § 1983 claim that arose prior to incarceration).

ing, prisoners are not only deterred from bringing legitimate claims arising out of their incarceration; they are prevented from bringing important claims that are not prison litigation at all.

III. APPLYING THE PLRA TO COLLATERAL PRISONER LITIGATION: RATIONAL OR ABSURD?

On scattered occasions, pro se litigants⁵⁷ and attorneys have forced the courts to consider whether the PLRA's fee restrictions should apply to litigation unrelated to a plaintiff's incarceration. Most courts to consider the question, including three courts of appeals, have determined that the fee restrictions are constitutional as applied to all civil litigation brought by prisoners, including bankruptcy appeals,⁵⁸ divorce appeals,⁵⁹ motions to return property seized by the state,⁶⁰ and civil rights claims that arose before the plaintiff was incarcerated.⁶¹ In contrast, a minority of courts to address the issue head-on has ruled that the PLRA's fee provisions do not apply to pre-incarceration claims. Finally, many courts apply the PLRA's fee provisions to collateral prisoner litigation without considering whether the application is warranted. The following section will consider each jurisprudential trend, highlighting the inadequate constitutional reasoning of the first group of cases, the failed analysis found in the second group of cases, and the willful blindness of the third group of cases.

A. *Unsubstantiated Findings of Rationality*

The interest most commonly asserted by the federal government in support of the PLRA is the prevention of frivolous and burdensome prisoner litigation.⁶² When considering constitutional challenges to the application of the PLRA's fee restrictions to conditions of confinement suits, the courts have uniformly found that the government interest in curbing excessive litigation satisfies the

⁵⁷ See, e.g., *Sirbaugh v. Young*, 25 F. App'x 266 (6th Cir. 2001).

⁵⁸ See *Lefkowitz v. Citi-Equity Group*, 146 F.3d 609 (8th Cir. 1998).

⁵⁹ See *Sirbaugh*, 25 F. App'x 266.

⁶⁰ See *U.S. v. Jones*, 215 F.3d 467 (4th Cir. 2000).

⁶¹ See *Robbins II*, 435 F.3d at 1238.

⁶² See, e.g., *Hampton v. Hobbs*, 106 F.3d 1281, 1286 (6th Cir. 1997) ("The legislation was aimed at the skyrocketing numbers of claims filed by prisoners—many of which are meritless—and the corresponding burden those filings have placed on the federal courts."); *Santana v. United States*, 98 F.3d 752, 755 (3d Cir. 1996) ("Congress enacted the PLRA primarily to curtail claims brought by prisoners under 42 U.S.C. § 1983 and the Federal Tort Claims Act, most of which concern prison conditions and many of which are routinely dismissed as legally frivolous.");

rational basis test.⁶³ Some courts have taken this argument beyond the boundaries of its logic, however, by assuming that the legitimate government interest in deterring frivolous prisoner litigation can be used to justify the imposition of fee restrictions on, for example, an inmate challenging the ruling of a divorce court.⁶⁴ These courts have employed shallow reasoning in rejecting as-applied constitutional challenges to the PLRA and state laws. In response to challenges not derived from the constitution, other courts have achieved a more thorough justification of the application of the PLRA's fee restrictions to collateral prison litigation as a correct exercise of statutory interpretation.⁶⁵ Thus, while the argument that Congress intended the PLRA to apply to collateral prison litigation is persuasive, this application's constitutionality is suspect.

i. Rejections of As-Applied Constitutional Challenges

Lefkowitz v. Citi-Equity Group was the first case to rule on a constitutional challenge to the PLRA's filing fee restrictions as applied to collateral prisoner litigation.⁶⁶ In *Lefkowitz*, the plaintiff was a prisoner appealing an adverse ruling by a bankruptcy court.⁶⁷ After the Eighth Circuit denied his petition to proceed IFP on appeal, the plaintiff raised an equal protection challenge to the application of the PLRA's fee restrictions to his case.⁶⁸ In summarily rejecting the plaintiff's arguments, the court of appeals held that "Congress has a legitimate interest in curbing meritless prisoner litigation" and that "making indigent prisoners partially responsible for the costs of their litigation would decrease the amount of such meritless litigation."⁶⁹ To support this argument, the court relied on earlier cases that had addressed the validity of the PLRA's fee restrictions in the context of conditions of confinement litigation.⁷⁰ The court did not address the possibility that the legitimate government interests generally justifying the PLRA might not apply in the instant case.

⁶³ *Hampton*, 106 F.3d at 1286; *see also* *Nicholas v. Tucker*, 114 F.3d 17, 20 (2d Cir. 1997); *Shabazz v. Parsons*, 127 F.3d 1246, 1248 (10th Cir. 1997) ("[courts have] uniformly concluded that the provisions pass constitutional muster.").

⁶⁴ *See Sirbaugh*, 25 F. App'x at 266.

⁶⁵ *See Robbins II*, 435 F.3d at 1238.

⁶⁶ *Lefkowitz v. Citi-Equity Group, Inc.*, 146 F.3d 609, 610 (8th Cir. 1998).

⁶⁷ *See id.* at 610–11.

⁶⁸ *See id.*

⁶⁹ *Id.* at 612.

⁷⁰ *Id.* (citing *Nicholas v. Tucker*, 114 F.3d 17, 20–21 (2d Cir. 1997); *Roller v. Gunn*, 107 F.3d 227, 233–34 (4th Cir. 1997)).

The court in *Sirbaugh v. Young* employed similarly superficial analysis in rejecting an equal protection challenge to a Michigan statute modeled after the PLRA.⁷¹ The plaintiff in *Sirbaugh* was a prisoner who had attempted to appeal an unfavorable ruling of a divorce court IFP. In processing his appeal, a state court applied Michigan's prohibition on IFP filings by prisoners and declined to waive the filing fee.⁷² The plaintiff challenged the application of the state act to his appeal, asserting that he was denied equal protection of the law.⁷³ The case made its way to the Sixth Circuit Court of Appeals, where a panel of judges held that the plaintiff's rights had not been violated.⁷⁴

Like the *Lefkowitz* court, the Sixth Circuit gave no reason why the rationales generally justifying the PLRA's IFP prohibition could be used to justify the imposition of filing fees on collateral prisoner litigation. Instead, the court ruled that because it had previously rejected a constitutional challenge to the PLRA's fee restrictions, and because Michigan's statute was modeled after the PLRA, the plaintiff's equal protection argument had no merit.⁷⁵ However, the precedent it cited in support of this blanket proposition dealt with the imposition of filing fees on a prisoner bringing a First Amendment claim against a correctional institution.⁷⁶ Without conducting any meaningful analysis, the court of appeals decided that the denial of IFP status to a prisoner appealing an adverse divorce ruling satisfied rational basis review.⁷⁷

Lefkowitz and *Sirbaugh* appear to be the only published opinions in which courts have considered the constitutionality of the PLRA's fees provisions as applied to collateral prisoner litigation. Perhaps this dearth of jurisprudence is due to the fact that the courts have long since agreed on the fee provisions' facial constitutionality⁷⁸ and thus overlook the fact that collateral prisoner litigation presents a different set of issues. The application of fee restrictions to collateral prisoner litigation, which is much less likely to be baseless than conditions of confinement litigation, can-

⁷¹ *Sirbaugh v. Young*, 25 F. App'x 266 (6th Cir. 2001).

⁷² *See id.* at 268.

⁷³ *See id.*

⁷⁴ *Id.* at 268–69.

⁷⁵ *See id.* at 268.

⁷⁶ *Id.* (citing *Hampton v. Hobbs*, 106 F.3d 1281, 1284–88 (6th Cir. 1997)).

⁷⁷ *See id.* (“The defendants’ actions did not violate Sirbaugh’s constitutional right of access to the courts because his state court case did not involve a fundamental human interest such as the termination of parental rights or the ability to obtain a divorce.”).

⁷⁸ *See, e.g.*, cases cited *supra* note 63.

not be justified by the government's interest in deterring frivolous litigation. The courts, however, have thus far failed to articulate another rational basis for the imposition of fee restrictions on these prisoner litigants.

ii. Cases Approving the Application of Fee Restrictions to Collateral Prisoner Litigation Based on Statutory Interpretation

Courts have also rejected statute-based challenges to certain applications of the PLRA's fee restrictions, dismissing arguments that Congress did not intend for the Act to apply to collateral prisoner litigation. These holdings generally rely on the plain language of the fee restriction provisions, which explicitly apply to "any action brought by a prisoner"⁷⁹ and "civil action[s] or . . . appeal[s]."⁸⁰ The analysis found in these cases is more substantial than that found in the cases considered in the preceding section, and their reading of the PLRA is persuasive. But they still neglect to identify any rational basis for applying the PLRA's fee restrictions to collateral prisoner litigation.

The most substantial decision in this category came in *Robbins v. Chronister (Robbins II)*,⁸¹ in which the Tenth Circuit, en banc, held that the PLRA's attorney's fees provisions applied to all prisoner litigation.⁸² Overruling an earlier panel decision, the court fixated on the legitimacy of the government's interest in deterring prisoners from litigating. According to the court, there was "nothing absurd about reducing [the incentive to litigate] for *all* civil-rights claims filed by prisoners, not just those challenging conditions in prison."⁸³ The court went on to reason that prisoners, because of their abundance of free time and access to free legal materials, should be discouraged from litigating all claims, not merely those related to their incarceration.⁸⁴ Though it acknowledged that "applying the PLRA cap to cases like this is not the most rational means for controlling litigation," the court found that this application was well within the "bounds of legitimate legislative compromise."⁸⁵

⁷⁹ 42 U.S.C. § 1997e(d)(1) (2006).

⁸⁰ 28 U.S.C. § 1915(b)(1) (2006).

⁸¹ *Robbins II*, 435 F.3d 1238 (10th Cir. 2006) (en banc).

⁸² *Id.* at 1244. *But see Reyes*, 90 F.3d at 676 (exceptions for habeas actions, and in some jurisdictions, writs of mandamus).

⁸³ *Robbins II*, 435 F.3d at 1244.

⁸⁴ *Id.*

⁸⁵ *Id.*

In defending the rationality of applying fee restrictions to collateral litigation, the *Robbins II* court focused on the differences between prisoner litigants and the general public. According to the court,

The balance of incentives and disincentives for filing suit is quite different for prisoners than for free persons, regardless of the subject matter of the claim, whether it be prison conditions or preincarceration conduct. Free persons must weigh the value of a possible victory in court against the burdens on their time and wallets in pursuing litigation. Prisoners, in contrast, have time in abundance, do not need money for their own necessities, and are entitled to free legal assistance or access to legal materials. And what may be perceived as burdens to free persons, such as taking time for depositions or court appearances, may well be considered an attractive change of scenery for prisoners.⁸⁶

While *Robbins II* affirmed the viability of attorney's fees restrictions, a different court of appeals has approved the application of the PLRA's IFP prohibition to collateral prisoner litigation. In *United States v. Jones*, the Fourth Circuit rejected the plaintiff's contention that "Congress intended for the PLRA to encompass only prisoner civil rights cases."⁸⁷ The court, while recognizing that the IFP prohibition was primarily intended to discourage frivolous civil rights litigation, stressed that the plain language of the statute covered all "civil actions."⁸⁸ Denying the plaintiff's petition to proceed in forma pauperis in his motion to recover property seized by the state, the court determined that Congress must have meant for the fee restrictions to apply to all civil actions.⁸⁹ In so ruling, the court did not identify any reasons why this application was presumptively rational or constitutional.

iii. Willful Blindness

The four cases discussed in the preceding subsections are the only instances in which federal courts have explicitly rejected challenges to the application of fee restrictions to collateral prisoner litigation. Many other courts, however, simply impose fee restrictions on all prisoner litigation, without any consideration of whether this practice is constitutionally or statutorily sound. Prison-

⁸⁶ *Id.*

⁸⁷ *United States v. Jones*, 215 F.3d 467, 469 (4th Cir. 2000).

⁸⁸ *Id.*

⁸⁹ *Id.*

ers challenging child support determinations,⁹⁰ appealing adverse bankruptcy court rulings,⁹¹ and litigating police brutality claims,⁹² have all been subjected to fee restrictions imposed or inspired by the PLRA. Moreover, these examples consist only of published federal court opinions. In practice, it appears that the courts comprehensively require prisoners to pay filing fees, regardless of the subject matter of the litigation.⁹³ In states such as Colorado and Wisconsin,⁹⁴ then, it may be that prisoners are deterred from litigating or appealing all important grievances. Even if one accepts the *Robbins II* court's argument that all civil rights litigation on the part of prisoners must be discouraged, it is difficult to justify the imposition of filing fees on inmates challenging divorce court rulings.

B. Contrary to Legislative Intent?

Only three courts have disagreed with the majority view regarding the application of the PLRA's fee restrictions to collateral inmate litigation. A court of appeals panel decision applied the absurdity exception of statutory interpretation to argue that Congress could not have meant to limit the award of attorney's fees to inmate plaintiffs who had brought successful collateral civil rights litigation.⁹⁵ However, that opinion was subsequently overruled by *Robbins II*,⁹⁶ discussed in Section III.A.ii, *supra*. Two later cases both came out of the Eastern District of Pennsylvania. These decisions cited the original *Robbins* decision but ultimately relied upon the "whole act" rule of statutory interpretation to determine that Congress had intended to limit the PLRA's application to conditions of confinement litigation.⁹⁷ These three cases stand in direct contrast

⁹⁰ See, e.g., *Grant v. State of New Jersey*, No. Civ. 04-1748 (DMC), 2005 WL 1528920, at *1 (D.N.J. June 28, 2005).

⁹¹ See, e.g., *In re Blumeyer*, No. 4:06CV1681 CDP, 2007 WL 209917, at *1 (E.D. Mo. Jan. 24, 2007).

⁹² See, e.g., *Hopper v. Rinaldi*, 2:07-CV-05323, 2008 WL 558049, at *1 (D.N.J. Feb. 29, 2008).

⁹³ Justice Emily Goodman of New York Supreme Court indicates that the New York court system does not allow any prisoner to proceed in forma pauperis, regardless of the substance of the litigation. Interview with Emily Goodman, Justice of the Supreme Court of New York, in New York, N.Y. (Feb. 2, 2011).

⁹⁴ See COLO. REV. STAT. ANN. § 13-17.5-103(2) (West 2010); *State ex rel. Cramer v. Schwarz*, 613 N.W.2d 591, 601 (Wis. 2000).

⁹⁵ *Robbins I*, 402 F.3d 1047, 1051–55 (10th Cir. 2005).

⁹⁶ *Robbins II*, 435 F.3d 1238 (10th Cir. 2006) (en banc).

⁹⁷ See *Hall v. Galie*, No. 05-975, 2009 WL 722278, at *1 (E.D. Pa. Mar. 17, 2009); *Hatchett v. Cnty. of Phila.*, No. 09-1708, 2010 WL 4054285, at *1 (E.D. Pa. Oct. 15, 2010).

to the majority interpretation of the PLRA and make valiant efforts to prove that collateral prisoner litigants should not be subjected to fee restrictions. There is, however, a reason that they represent the minority rule. The plain language of the PLRA frustrates the courts' creative attempts to achieve an equitable result.

In *Robbins I*, the court took the "extraordinary" step of holding that it would be "absurd" to apply the PLRA's attorney's fees restrictions to collateral prisoner litigation.⁹⁸ Confronted with the plain language of the PLRA's attorney's fee provisions, which apply to "any action brought by a prisoner," the court noted that it had a duty to interpret the Act in a way that would effectuate congressional intent.⁹⁹ After discussing the legislative history of the PLRA, the court concluded that there was no evidence that Congress had intended to "impose a fee limitation on *pre-incarceration civil rights claims* brought by plaintiffs who *subsequently* become prisoners."¹⁰⁰

Then, citing recent Supreme Court cases using the absurdity exception to depart from a statute's plain meaning, the court ruled that the PLRA could not be interpreted to apply to collateral prisoner litigation.¹⁰¹ Finding a dearth of any indication that Congress had intended to curtail pre-incarceration civil rights claims, the court held that "failing to distinguish between pre-incarceration cases and post-incarceration cases would lead to absurd results."¹⁰² However, the *Robbins I* order was overruled by *Robbins II* and is no longer good law.

The Eastern District of Pennsylvania is the only other court to find the PLRA's fee restrictions inapplicable to collateral prisoner litigation. In two published opinions, the district court relied on the "whole act rule" to arrive at a counterintuitive interpretation of the PLRA's plain language. As the court explained in *Hall v. Gallie*, "[t]he whole act rule directs that 'when interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law . . .'"¹⁰³ Applying this interpretative method to the PLRA's attorney's fees provision, the district court determined that the "prison conditions" language found in the first section of the Act should be imputed to the rest

⁹⁸ *Robbins I*, 402 F.3d at 1050.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1051.

¹⁰¹ *Id.* at 1051–52.

¹⁰² *Id.* at 1054.

¹⁰³ *Hall v. Gallie*, No. 05-975, 2009 WL 722278, at *1 (E.D. Pa. Mar. 17, 2009) (quoting *Hernandez v. Kalinowski*, 146 F.3d 196, 200 (3d Cir. 1998)).

of the statute.¹⁰⁴ Accordingly, the court found that the statute's limits on attorney's fees only applied to litigation concerning conditions of confinement.¹⁰⁵ This reasoning was echoed in a subsequent case in the Eastern District of Pennsylvania,¹⁰⁶ and it appears that the settled law of the district is to allow prisoners litigating matters collateral to their incarceration to recover full attorney's fees.

The Eastern District of Pennsylvania, however, is alone among the federal courts in its interpretation of the PLRA's attorney's fee restrictions. And while the court's application of the "whole act" rule is not unreasonable, the majority rule is much more consistent with the language and spirit of the PLRA. The animating purpose of the PLRA was to frustrate the ability of prisoners to access the courts, which at the time, were overburdened by prison litigation. The Act's apparent application of fee restrictions to all inmate litigation—not merely conditions litigation—is consistent with this goal. The "prison conditions" language of the first section of the Act¹⁰⁷ must be logically read as limited to that section; it would be nonsensical to impose an exhaustion requirement on litigation unrelated to conditions of confinement, because no administrative grievance process would be available. Additionally, the fact that different sections of the Act explicitly apply to different types of lawsuits ("conditions," "all actions brought by prisoners," and "civil actions or appeals") indicates that Congress consciously drafted certain portions of the statute to apply to collateral prisoner litigation. Despite the best efforts of the Eastern District of Pennsylvania, it is difficult to construe the PLRA's fee restrictions as applying exclusively to prison conditions litigation.

There is some evidence that Congress paid inadequate attention to detail in drafting the PLRA, a fact which could support the argument that the Act was sloppily worded and only meant to apply to prison conditions litigation. As critics have noted, the PLRA was hastily passed, failed to define key terms, and was inconsistent with preexisting law in some sections.¹⁰⁸ Perhaps, in a rush to respond

¹⁰⁴ *Id.* at *7.

¹⁰⁵ *Id.*

¹⁰⁶ *Hatchett v. Cnty. of Phila.*, No. 09-1708, 2010 WL 4054285, at *2 (E.D. Pa. Oct. 15, 2010).

¹⁰⁷ 42 U.S.C. § 1997e(a) (2010) ("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.")

¹⁰⁸ Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1277 (1998).

to a perceived crisis of unbounded prisoner litigation, Congress failed to accurately articulate the applicability of the PLRA's fee restrictions. But it is impossible to know whether this interpretation has any basis in fact: the PLRA's drafters left almost no legislative history behind, and the Act can therefore only be judged on the basis of its plain language. Through this language, in an internally consistent legislative structure, the PLRA's drafters indicated that the Act's fee provisions would apply to collateral prisoner litigation. Therefore, while the rationality of this operation of the Act is questionable, arguments that the PLRA's fee restrictions do not apply to collateral litigation are unpersuasive.

C. The Uncertain Status of Collateral Prisoner Litigation

Congress clearly intended for the PLRA's fee restrictions to apply to collateral inmate litigation. Yet courts have been unable to articulate a rational basis for this application. Part of the problem may be that few courts have addressed the constitutionality of this trend. But even the courts that have considered the issue have failed to demonstrate why the imposition of fee restrictions on collateral prisoner litigation is not an irrational policy in violation of the Equal Protection Clause. The remainder of the article will attempt to fill this analytical gap.

IV. THE CONSTITUTIONALITY OF FEE RESTRICTIONS ON
COLLATERAL PRISON LITIGATION

When a law draws distinctions between groups of United States citizens, imposing burdens or benefits on one group that are not experienced by another, it is subject to review under the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁹ Laws that differentiate between groups on the basis of a classification recognized as suspect by the Supreme Court are subjected to a heightened standard of review.¹¹⁰ In contrast, laws that place burdens upon individuals who are not members of a suspect class are evaluated under rational basis review. The traditional formulation of this test requires that laws be "rationally related" to a "legitimate government interest."¹¹¹ Rational basis review is largely deferential to the legislative goals enunciated by legislatures, but the test has been employed to invalidate irrational laws unconnected to any

¹⁰⁹ U.S. CONST. amend. XIV § 1.

¹¹⁰ *See, e.g.*, *United States v. Carolene Prod. Co.*, 304 U.S. 144, n.4 (1938) (establishing the concepts of strict scrutiny, rational basis).

¹¹¹ *See, e.g.*, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).

reasonable government purpose.¹¹²

Prisoners are not considered a suspect class by the federal courts. Although the Supreme Court has not addressed the issue, the lower courts “have uniformly held that prisoners are a non-suspect group because status as a prisoner is not an immutable characteristic; entry into the class is voluntary; and entry into the class requires commission of an illegal act.”¹¹³ As-applied constitutional challenges to the PLRA’s fee restrictions, therefore, are governed by the rational basis test. Even under this lax standard, however, the application of fee restrictions to certain collateral prisoner litigation is unconstitutional. These applications of fee restrictions are in no way rationally related to the legitimate government interest in deterring frivolous litigation, and it is impossible to conceive of any other legitimate government interest to which they are rationally related. As a result, the PLRA’s fee restrictions, as applied to certain collateral prisoner litigation, violate the Fourteenth Amendment. The courts have a duty to conduct a small, but significant, reversal of the general trend of abrogating prisoners’ constitutional rights by striking down this application of the PLRA.

A. *A Brief Discussion of the Rational Basis Test’s Viability*

It has been said that the Supreme Court’s infrequent use of the rational basis test to strike down statutes and regulations constitutes an “active”¹¹⁴ or “rational basis with bite”¹¹⁵ test more akin to intermediate scrutiny. But despite the efforts of commentators and dissenters to interpret these cases as having been decided under a heightened standard, the Court has been clear that its use of the rational basis test to find laws unconstitutional does not constitute intermediate scrutiny.¹¹⁶ This refrain is consistent with the scatter-shot character of rational basis equal protection claims that have

¹¹² See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down statute denying funding for education of children of aliens via rational basis review).

¹¹³ Jason Pepe, *Challenging Congress’s Latest Attempt to Confine Prisoners’ Constitutional Rights*, 23 *HAMLIN L. REV.* 58, 72. See also *Nicholas v. Tucker*, 114 F.3d 17, 20 (2d Cir. 1997) (“inmates are not a suspect class”); *Hampton v. Hobbs*, 106 F.3d 1281, 1286 (6th Cir. 1997) (“neither prisoners nor indigents are a suspect class”).

¹¹⁴ See, e.g., Alfonso Madrid, *Comment: Rational Basis Review Goes Back to the Dentist’s Chair*, 4 *TEMP. POL. & CIV. RTS. L. REV.* 167 (1994) (discussing what the author and some lower courts term the “active rational basis test”).

¹¹⁵ See, e.g., Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 *IND. L.J.* 779 (1987) (arguing that applications of rational basis test causing laws to be invalidated are functionally intermediate scrutiny).

¹¹⁶ See, e.g., *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457–58 (1988) (citing *Plyler*, 457 U.S. 202, for the proposition that laws must be rationally related to legitimate government interests).

been successful in the Supreme Court. As one study has found, the ten successful equal protection claims under the rational basis standard in the Supreme Court from 1973 to 1996 cannot be explained by reference to the “nature of the class disadvantaged” or “the government interest involved.”¹¹⁷ Indeed, it is difficult to argue that the Court has singled out “newcomers, out-of-staters, hippies, undocumented aliens, the mentally retarded, nonfreeholders, and gays”¹¹⁸ as quasi-suspect classes warranting intermediate scrutiny.

Although the Supreme Court’s occasional use of the rational basis review to invalidate laws has bedeviled academics and lower courts seeking a pattern in its jurisprudence, these cases are not inconsistent with the letter of the test itself. While most laws are enacted to specifically address legitimate government interests, it is clear that illegitimate government interests exist and likewise evident that some laws are in no way related to genuine legislative goals. Understandably, most statutes and regulations considered by the Supreme Court are not sufficiently flawed to violate the rational basis standard. However, when confronted with a law that, for example, seeks to promote “the creation and perpetuation of a subclass of illiterates,”¹¹⁹ the Court has demonstrated that rational basis does not operate as a rubber stamp for the irrational whims of legislatures.

B. The Government Interest in Deterring Frivolous Prisoner Litigation: Inapplicable to Certain Collateral Litigation

The PLRA has been challenged ad nauseum by prisoners and advocates to little effect. Throughout a vast body of jurisprudence upholding the Act’s constitutionality, the courts have echoed a consistent refrain: the government has a legitimate interest in preventing frivolous and excessive prisoner litigation, the existence of which has been thoroughly documented.¹²⁰ But though the va-

¹¹⁷ Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 411–13 (1999).

¹¹⁸ *Id.* (citing *Romer v. Evans*, 517 U.S. 620 (1996); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm’n*, 488 U.S. 336 (1989); *Quinn v. Millsap*, 491 U.S. 95 (1989); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612 (1985); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *Plyler v. Doe*, 457 U.S. 202 (1982); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973)).

¹¹⁹ *Plyler*, 457 U.S. at 230.

¹²⁰ *See, e.g.*, *Murray v. Dosal*, 150 F.3d 814, 818 (8th Cir. 1998); *Tucker v. Branker*, 142 F.3d 1294, 1300 (D.C. Cir. 1998); *Nicholas v. Tucker*, 114 F.3d 17, 20 (2d Cir. 1997); *Hampton v. Hobbs*, 106 F.3d 1281, 1286 (6th Cir. 1997); *Roller v. Gunn*, 107 F.3d 227, 233 (4th Cir. 1997).

lidity of this government interest is firmly established, there is no relationship between the denial of IFP status to a prisoner seeking to appeal a child support or bankruptcy ruling and the prevention of frivolous litigation. Collateral inmate litigation is not at all characteristic of the type of litigation that prompted Congress to pass the PLRA,¹²¹ nor is it especially vulnerable to frivolity.¹²² Instead, such litigation is representative of significant legal problems experienced by all Americans. A rational relationship simply does not exist between deterring prisoners from pursuing significant legal matters unrelated to their incarceration and preventing gratuitous and systematically burdensome civil rights litigation.

Although the Act's legislative history is limited,¹²³ the available evidence indicates that Congress had a clear and defined goal it sought to achieve by enacting the PLRA. Since there were no committee markups accompanying the bill and little debate within the legislature, the congressional intent behind the PLRA can only be determined by reference to the Act itself and to statements made on the floor of Congress in support of the Act.¹²⁴ In these endorsements, which have formed the foundation of the rational basis articulated by the courts in response to constitutional challenges to the PLRA, the Act's sponsors unambiguously stated that the Act was primarily intended to address *frivolous* prison litigation.

Senator Orrin Hatch, the chief sponsor of the PLRA, justified the Act on the floor of Congress by arguing that it would "help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits," "help restore balance to prison conditions litigation," and "ensure that Federal court orders are limited to remedying actual violations of prisoners' rights"¹²⁵ To demonstrate the types of litigation the PLRA was meant to deter, Senator Jon Kyl read a "Top Ten" list of frivolous prisoner suits into the *Congressional Record*, including cases in which prisoners challenged video-game confiscations and the provision of chunky, rather than

¹²¹ See 141 CONG. REC., S14,629 (daily ed. Sept. 29, 1995).

¹²² See, e.g., *Grant v. State of New Jersey*, No. Civ. 04-1748, 2005 WL 1528920, at *3 (D.N.J. June 28, 2005) (applying IFP prohibition to inmate appealing adverse child support determination).

¹²³ See Herman, *supra* note 108, at 1277 (discussing the lack of consideration or debate preceding the passage of the PLRA).

¹²⁴ See Ann H. Matthews, *The Inapplicability of the Prison Litigation Reform Act to Prisoner Claims of Excessive Force*, 77 N.Y.U. L. REV. 536, 560-61 (2002) (noting that the legislative intent behind the PLRA can only be determined by reference to statements made on the floor of Congress). See also Riewe, *supra* note 4, at 142 (discussing the dearth of legislative history in support of the PLRA).

¹²⁵ 141 CONG. REC. S14,418 (1995).

smooth, peanut butter.¹²⁶ These examples were used to build support for the proposition that the PLRA would “help put an end to the inmate litigation fun-and-games.”¹²⁷

It is necessary here to note that the PLRA’s consequences have extended far beyond the discouragement of “fun-and-games” enjoyed at the expense of the federal courts. While foundationless prisoner litigation was a tangible and significant problem during the early 1990s,¹²⁸ the PLRA’s provisions have operated to deny remedies to prisoners who have experienced serious violations of their legal and constitutional rights. The Act’s exhaustive requirements, in particular, have been responsible for a massive decrease in prisoner litigation, and the extent to which “the suits which the PLRA has evidently deterred were frivolous” is unclear.¹²⁹ Thus, although the PLRA has apparently succeeded in limiting foundationless prisoner litigation, it has also arbitrarily prevented “real abuses that take place within the prison system” from being litigated.¹³⁰ The ongoing *Plata* and *Coleman* litigation¹³¹ challenging horrific conditions of confinement in California prisons demonstrates the manifest necessity of effective legal avenues through which prisoners may vindicate their constitutional rights.

Notwithstanding these concerns, the courts have unvaryingly decided that the government interest in deterring frivolous inmate litigation is a legitimate one. These findings of legitimacy, however, have been predicated on the existence of a nexus between imposing fee limitations and forcing prisoners to carefully consider whether to litigate marginal issues such as those detailed by Senators Hatch and Kyl. Denying IFP status to prisoners filing for bank-

¹²⁶ 141 CONG. REC. S14,629 (daily ed. Sept. 29, 1995).

¹²⁷ 141 CONG. REC. S14,626 (daily ed. Sept. 29, 1995) (statement of Sen. Bob Dole).

¹²⁸ See Schlanger, *supra* note 2, at 1592–1627. Professor Schlanger affirms, with qualifications, the baseline presumption underlying the PLRA: that prisoner civil rights litigation in the federal courts was extremely common and had a low rate of success. According to Professor Schlanger’s data, about 80% of inmate civil rights suits were dismissed prior to trial during the period from 1990–1995. Notwithstanding the many factors that contribute to prisoners’ difficulty in successfully suing correctional institutions, including inadequate access to counsel and an oppositional culture within the correctional system, there is support for the proposition that baseless inmate litigation had become a problem in the early-to-mid 1990s. *Id.*

¹²⁹ Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1779 (2003).

¹³⁰ *Id.* at 1776.

¹³¹ See *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820 (E.D. and N.D. Cal. Aug. 4, 2009) (ordering release of California prisoners as remedy for gross constitutional violations), *aff’d*, *Brown v. Plata*, 131 S. Ct. 1910 (2011).

ruptcy¹³² or appealing the rulings of divorce courts cannot be seen as a rational means of curtailing frivolous inmate litigation. In contrast to the typical foundationless prisoner lawsuit, in which a prisoner may file and burden the court system without proving that any of his legal rights have been implicated,¹³³ a prisoner filing for bankruptcy will typically have compelling, and legally recognized, reasons to do so. Imposing fee restrictions on collateral prisoner litigation unrelated to civil rights issues is not a rational means of achieving the legitimate governmental goal of preventing frivolous litigation.

Courts applying the PLRA's fee restrictions to collateral litigation have drawn an arbitrary distinction between prisoners and other indigents without articulating any rationale for this discrimination. Senator Hatch's claim that prison conditions litigation was out of control was somewhat supported by the burden felt by federal courts and high rates of frivolous filings. There has been no such showing that collateral inmate litigation is burdensome, foundationless, or even more commonly brought by prisoners than by the general population. The presumption that prisoners consider the courts to be "an attractive change of scenery"¹³⁴ does not have any relevance to collateral litigation absent some indication that prisoners abuse bankruptcy or divorce proceedings as a means of temporarily escaping their cells. It is clear that the prisoner suits actually burdening the courts at the time of the PLRA's enactment were related to prison conditions.¹³⁵ A rational response to those frivolous filings does not include the imposition of fee restrictions on collateral prisoner litigation, which can only be brought under certain circumstances and which is not vulnerable to abuse.

Separately, the Due Process Clause unquestionably prohibits the imposition of fee restrictions on prisoners filing for divorce or contesting child custody determinations. Indigent litigants in divorce proceedings have a constitutionally protected right to proceed IFP.¹³⁶ This right is derived from the Due Process Clause of the Fourteenth Amendment and relates to court access rather than the nondiscrimination principle,¹³⁷ but it is applicable to all indigents, including prisoners. Due process also requires that indigents

¹³² See, e.g., *Lefkowitz v. Citi-Equity Group*, 146 F.3d 609 (8th Cir. 1998).

¹³³ See Schlanger, *supra* note 2.

¹³⁴ *Robbins II*, 435 F.3d 1238, 1244 (10th Cir. 2006) (en banc).

¹³⁵ See *Robbins I*, 402 F.3d 1047, 1050-54 (10th Cir. 2005).

¹³⁶ See *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that indigents must be allowed to bring divorce proceedings).

¹³⁷ *Id.* at 382-83.

be granted IFP status in cases and appeals affecting child custody rights.¹³⁸ It should be noted that the right to family-related court access does not extend to purely pecuniary divorce appeals relating to the distribution of marital property.¹³⁹ However, as detailed above, the application of fee restrictions to such collateral litigation is independently unconstitutional under the Equal Protection Clause.

The United States Congress and members of the Supreme Court have similarly acknowledged the importance of providing fee waivers to indigents in bankruptcy court. As discussed, the denial of IFP status to prisoners in bankruptcy filings and appeals is not rationally related to any legitimate government interest, a conclusion given further substance by the significance of fee waivers in these proceedings. The enactment of the Bankruptcy Abuse and Consumer Protection Act of 2005 (BAPCPA),¹⁴⁰ which provided indigent persons with the right to proceed IFP in bankruptcy proceedings, was meant to solve a longstanding paradox of bankruptcy filings: that “some of the poor are too poor even to go bankrupt.”¹⁴¹ Strangely, BAPCPA does not apply to inmate filings,¹⁴² although the Act reflects a congressional intent to demonstrate that “the court system is open to rich and poor alike,”¹⁴³ and although four Supreme Court Justices have ruled that a constitutional right to IFP bankruptcy proceedings exists for indigents.¹⁴⁴ Unlike divorce and child custody proceedings, there is no constitutional right to file IFP in bankruptcy proceedings, but the recognized importance of filing fee waivers in this context is further demonstration of the irrationality of federal law’s discrimination against prisoners in these matters.

In contrast, the application of fee restrictions to prisoner civil rights litigation unrelated to conditions of confinement is constitutional. Like conditions litigation, all prisoners have common experience from which to base civil rights claims related to police

¹³⁸ *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

¹³⁹ *Sirbaugh v. Young*, 25 F. App’x 266, 268 (6th Cir. 2001) (“The defendants’ actions did not violate Sirbaugh’s constitutional right of access to the courts because his state court case did not involve a fundamental human interest such as the termination of parental rights or the ability to obtain a divorce.”).

¹⁴⁰ 28 U.S.C. § 1930(f)(1) (2006).

¹⁴¹ *United States v. Kras*, 409 U.S. 434, 457 (1973) (Stewart, J., dissenting).

¹⁴² 11 U.S.C. § 523(a)(17) (2006).

¹⁴³ See Philip Tedesco, *In Forma Pauperis in Bankruptcy*, 84 AM. BANKR. L.J. 79, 79 (2010) (citing 144 CONG. REC. S10,572 (daily ed. Sept. 18, 1998) (statement of Sen. Durbin)).

¹⁴⁴ *Kras*, 409 U.S. at 457.

brutality, wrongful arrest, or other issues collateral to criminal conduct. Just as many prisoners have grievances with their treatment while incarcerated,¹⁴⁵ many prisoners believe their rights were violated in the course of their interactions with police.¹⁴⁶ While legal issues collateral to incarceration, such as divorce, are not faced by all inmates, many inmates share common experiences giving rise to civil rights litigation.¹⁴⁷ Additionally, unlike divorce court appeals or motions to have property returned, pre-incarceration civil rights litigation can be frivolously filed without any underlying basis. Accordingly, the courts have a rational basis for applying fee restrictions to collateral prisoner civil rights litigation.

There is a clear constitutional mandate to provide IFP status to prisoners in divorce and child custody proceedings. Insofar as they fail to contain savings clauses to this effect, the PLRA and analogous state statutes are unconstitutional. Additionally, the application of fee restrictions to collateral litigation such as bankruptcy proceedings, motions to recover seized property, and appeals of divorce court rulings is not rationally related to the government interest in deterring frivolous litigation and is therefore unconstitutional. Although actions such as appeals of property court determinations in divorce proceedings are not covered by Supreme Court precedent establishing a right to court access,¹⁴⁸ IFP filing has traditionally been seen as especially necessary in divorce and bankruptcy proceedings and it is patently irrational to deny prisoners this privilege enjoyed by all other indigents. In contrast, the application of fee restrictions to collateral civil rights litigation conforms to the requirements of equal protection. Although this application may have “little, if any, effect in terms of curbing frivolous litigation,”¹⁴⁹ it is at least rationally related to a legitimate government interest. The application of fee restrictions to other collateral inmate litigation, however, is unconstitutional and must cease.

V. CONCLUSION: TURNING THE TIDE OF MASS INCARCERATION

Federal courts have supported and enabled some of the most significant social change to occur throughout United States his-

¹⁴⁵ See Schlanger, *supra* note 2, at 1571–72 (noting that “leading topic” of inmate litigation is challenge to conditions of confinement).

¹⁴⁶ *Id.* (discussing the notable percentage of inmate litigation alleging mistreatment by police and other non-correctional actors).

¹⁴⁷ *Id.* (discussing the consistent subject matter underlying most inmate litigation).

¹⁴⁸ See *Sirbaugh v. Young*, 25 F. App’x 266, 268 (6th Cir. 2001).

¹⁴⁹ *Murray v. Dosal*, 150 F.3d 814, 821 (8th Cir. 1998) (Heaney, J., dissenting).

tory. From *Brown v. Board of Education*¹⁵⁰ to *Lawrence v. Texas*,¹⁵¹ the courts have been, at times, a progressive and countermajoritarian force, operating as a bulwark against the more pernicious tendencies of citizens and legislatures. Mass incarceration may be a more convoluted issue than segregation or homophobia, but as a social phenomenon, it is no less destructive. Sadly, the courts have participated in, rather than prevented, this destructive trend, particularly in the wake of the PLRA. Legislatures will always have incentives to promote strict crime control policies and are unlikely to be the vanguards of change. Courts have a duty to protect us from our baser instincts, such as the decision to imprison the young, black, and poor members of society in great numbers and deprive them of their constitutional rights.

For years, California has been one of the leaders in hyper-punitive criminal justice policy and over-incarceration,¹⁵² an experiment that has contributed to the state's fiscal crisis¹⁵³ and forced the federal courts to take drastic measures to correct the draconian conditions in its prisons.¹⁵⁴ As a result of the valuable political capital available in tough crime control policies, the influence of the powerful correctional industry, and a culture of bureaucratic disentanglement, the California legislature allowed the conditions in its prisons to deteriorate to levels that might be expected in the prisons of an unstable developing country.¹⁵⁵ For decades, the state staunchly defended against meritorious claims asserted in the *Coleman* and *Plata* class actions, a recalcitrance that finally caused a panel of three federal judges to order the release of a substantial number of prisoners.¹⁵⁶ Even after this order and in the face of an undeniable pattern of constitutional violations, California's legislative and executive branches continue to resist any significant re-

¹⁵⁰ 347 U.S. 483 (1954).

¹⁵¹ 539 U.S. 558 (2003).

¹⁵² See, e.g., Vincent Schiraldi, *Criminal Justice Reform: Public Turnabout on Three Strikes*, S.F. GATE, July 6, 2004, available at http://articles.sfgate.com/2004-07-06/opinion/17435648_1_three-strikes-third-strike-violent-crimes (noting that the number of California prisoners serving time under three-strikes law was equivalent to the aggregate prison population of forty other states).

¹⁵³ See, e.g., Michael P. Jacobsen, *Crisis and Opportunity in California's Prison System*, 13 BERKELEY J. CRIM. L. 319 (2008) (discussing the impact that prison growth in California has had on the fiscal crisis faced by the state).

¹⁵⁴ See *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *1 (E.D. and N.D. Cal. Aug. 4, 2009), *aff'd*, *Brown v. Plata*, 131 S. Ct. 1910 (2011).

¹⁵⁵ See Jacobsen, *supra* note, 153 at 320 (discussing the "toxic political mix" impeding meaningful prison reform and resulting in federal court intervention).

¹⁵⁶ See *Coleman*, 2009 WL 2430820, at *1.

forms. The circumstances surrounding this litigation are representative of a broad governmental unwillingness to reverse failed criminal justice policies. If meaningful and necessary change is to come, it must come from the judiciary.

Striking down the PLRA's IFP restrictions as applied to collateral prison litigation would be a small, but significant, step in a process of change led by the courts. While the rationality of the PLRA is generally unassailable, there is no constitutionally legitimate reason for the application of its fee restrictions to divorce and bankruptcy proceedings. It appears that a solution to the deeper problems of mass incarceration and prisoner litigation is not forthcoming. But, at the margins, the courts have the ability to deny legislatures their more irrational means of dealing with prisoners. If the courts are capable of establishing the high water mark beyond which prisoners' constitutional rights may not be diluted any further, perhaps the broader trend of the country's evolution into a carceral regime will begin to reverse itself.

