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INTRODUCTION

Let us review the numbers. By the mid-1990s, state prisoners challenging the conditions of their confinement accounted for the single largest category of civil lawsuits filed in U.S. district courts. During the peak year of 1996, the number of prisoner lawsuits filed had grown to 41,302, a total representing more than one in every six federal civil lawsuits filed that year.[1] These cases were noteworthy not only for their sheer number and rapid growth, but also for being the

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1 The Administrative Office of the U.S. Courts counts cases on a July 1 to June 30 basis. Hence, the 41,302 cases represent the number of lawsuits filed by state prisoners in U.S. district courts between July 1, 1995 and June 30, 1996. The data used to investigate terminations of § 1983 lawsuits filed by state prisoners in U.S. district courts were prepared by the Federal Judicial Center and stored in a publicly accessible database maintained by the Inter-university Consortium for Political and Social Research (ICPSR) *at* http://www.icpsr.umich.edu. *See* Federal Judicial Center, *Federal Court Cases: Integrated Data Base, 1970–2000* (ICPSR No. 8429) Nos. 87–88, 98, 103–04, 115–17 [hereinafter ICPSR 8429]. Aggregate statistics on prisoner litigation are also available at Theodore Eisenberg & Kevin M. Clermont, *Federal District-Court Civil Cases, at* http://teddy.law.cornell.edu:8090/questcv3.htm (last visited Mar. 26, 2003) [hereinafter *Federal District-Court Civil Cases*]. This site utilizes a database of about five million federal district-court civil cases terminated over the last twenty-two fiscal years. The data were gathered by the Administrative Office of the U.S. Courts, assembled by the Federal Judicial Center, and disseminated by the ICPSR.

federal court case type with the lowest plaintiff win rate: prisoner litigants were successful in only 1.4% of lawsuits filed.[2] These three basic facts—volume, trend, and outcome—underlay passage by the U.S. Congress of the Prison Litigation Reform Act (PLRA).[3] Going into effect in April, 1996, the PLRA significantly altered the legal circumstances under which prisoners could file a lawsuit challenging the conditions of their confinement.[4] Four years later in 2000, the total number of prisoner lawsuits filed in federal courts had fallen by over 40% to just over 24,400.[5] Such dramatic change deserves closer scrutiny, and, by looking inside the numbers, we gain critical perspective on the world of prisoner litigation post-PLRA.

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2 *Federal District-Court Civil Cases*, *supra* note 1.

3 Prison Litigation Reform Act (PLRA) of 1995, Pub. L. No. 104-134, §§ 101, 801-810, 110 Stat. 1321, 1321–1377 (1996) (codified in scattered sections of U.S.C.).

4 A prisoner begins the litigation process by filing a complaint. This document is submitted to a court of clerk's office. The clerk of court makes an initial decision whether to accept the complaint and place it on the court's docket as a lawsuit with a case number. Almost all complaints follow the same format because virtually all district courts have accepted a "model" complaint form developed by the Federal Judicial Center (FJC). The FJC created a standard complaint form to assist prisoners in stating their issues as clearly as possible and simultaneously to assist the courts in discerning the basis of the complaint. The FJC encouraged courts to follow particular procedures in initially assessing these complaints for the purpose of docketing them. Courts responded positively to these suggestions as a way to avoid spending unnecessary time determining whether to accept a complaint as a § 1983 lawsuit. See generally FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS (1980) for descriptions of the procedures and the "model" complaint form. The PLRA modified the requirements for a complaint to be docketed (i.e., accepted by a court as a lawsuit under 28 U.S.C. § 1983 (2000)). See 42 U.S.C. § 1997(e) (2000), *infra* note 26, for discussion of the new requirement that administrative remedies be exhausted; see also 28 U.S.C. § 1915A (2000), *infra* note 28. Under the discussion of screening, the PLRA states what a court is supposed to do in reviewing a complaint "before docketing, if feasible or, in any event, as soon as practicable after docketing." *Id.* The prescribed action includes dismissing a complaint "if the complaint is frivolous, malicious, or fails to state a claim on which relief may be granted; or seeks monetary relief from a defendant who is immune from such relief." *Id.* Failure to meet the requirements means that a complaint does not become a lawsuit if the failufe is detected "before docketing." *See id.* Hence, it seems fair and valid to infer from such provisions that the PLRA is an effort to limit the number of lawsuits. *See also infra* notes 25 & 29. Whether it achieves this goal depends on whether the sorts of complaints filed by prisoners meet the new requirements.

5 JOHN SCALIA, BUREAU OF JUST. STAT., U.S. DEP'T OF JUSTICE, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000 WITH TRENDS 1980–2000, at 2, 2002 NCJ 189430.

Reaction to the PLRA was immediate and contentious. Many critics argued the Act was unconstitutional,[6] while proponents heralded the PLRA as necessary and effective reform.[7] Given the substantive complexity of the PLRA, much legal scholarship has been directed to analyzing the numerous constitutional challenges resolved and being resolved in federal courts. Considerably less attention has been given, however, to another area of uncertainty—that is, the actual impact of the new legislation on volume, trend, and outcomes.

The PLRA had two major features. The first focused on governing the judicial role following a court determination of unconstitutional prison conditions such as overcrowding and inadequate medical care.[8] The second dealt with complaints brought by individ-

6 *See, e.g.*, Thomas J. Butler, *The Prison Litigation Reform Act: A Separation of Powers Dilemma*, 50 ALA. L. REV. 585 (1997); Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You're Out of Court—It May Be Effective, But Is It Constitutional?*, 70 TEMP. L. REV. 471 (1997); Catherine G. Patsos, *The Constitutionality and Implications of the Prison Litigation Reform Act*, 42 N.Y.L. SCH. L. REV. 205 (1998); Julie M. Riewe, *The Least Among Us: Unconstitutional Changes in Prisoner Litigation Under the Prison Litigation Reform Act of 1995*, 47 DUKE L.J. 117 (1997); James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly" Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105 (2000).

7 *See, e.g.*, Peter Hobart, *The Prison Litigation Reform Act: Striking the Balance Between Law and Order*, 44 VILL. L. REV. 981 (1999); Eugene J. Kuzinski, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361 (1998).

8 There is a coherent body of literature on "conditions cases." Leading contributors include BRADLEY CHILTON, PRISONS UNDER THE GAVEL: THE FEDERAL COURT TAKEOVER OF THE GEORGIA PRISONS (1991); BEN M. CROUCH & JAMES W. MARQUART, AN APPEAL TO JUSTICE: LITIGATED REFORM OF TEXAS PRISONS (1989); JOHN DIIULIO, JR., GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT (1987); MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1999); STEVE J. MARTIN & SHELDON EKLAND-OLSEN, TEXAS PRISONS: THE WALLS CAME TUMBLING DOWN (1987); LARRY W. YACKLE, REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM (1989); and Malcolm M. Feeley & Roger A. Hanson, *The Impact of Judicial Intervention on Prison and Jails: A Framework for Analysis and a Review of the Literature*, *in* COURTS, CORRECTIONS, AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS (John J. DiIulio, Jr. ed., 1990). There are provisions in the PLRA that bear on "conditions" cases. One key provision is that time limitations are placed on the duration of court-ordered temporary injunctive and prospective relief. Additionally, limitations are placed on the amount of fees that can be paid to attorneys representing successful prisoner plaintiffs. Finally, compensatory damages to successful prisoner plaintiffs must first be paid to satisfy any outstanding restitution orders against the prisoners. Interestingly, scholars are not necessarily overly anxious or fearful that these provisions spell the end of conditions cases. *See, e.g.*, FEELEY & RUBIN, *supra*, at 382–84 (noting that the era of "mega-conditions cases" has already wound down and that the real effect that these laws will have

ual prisoners. This latter component, designed to limit "frivolous" litigation, drove much of the congressional debate and was clearly intended to reduce the number of prisoner lawsuits filed. Because a large proportion of prisoner lawsuits were being dismissed, the presumption by many drafting the PLRA was that most were frivolous,[9] and numerous examples were assembled in support of that viewpoint.[10] As a consequence, the PLRA provisions for dealing with frivolous litigation, primarily restrictions on filing in forma pauperis for previous frivolousness and the assessment of filing fees, focused on increasing the costs to prisoners of even proceeding to the filing stage. The goal was to purge the frivolous cases before they ever enter the system.

In this Article, we step outside the larger debate on constitutionality to examine the empirical record. Our goal is to assess the manner in which the PLRA has affected the volume, trend, and outcomes of prisoner lawsuits. The specific objectives are threefold. In Part I we set the stage by examining the nature of prisoner litigation just prior to the enactment of the PLRA. This involves a recap of filing trends as well as pertinent literature, case law, and congressional action in the area of prisoner litigation. The stated rationale for the PLRA was to curb "frivolous" litigation; yet, the term frivolous can be more provocative than descriptive. Prisoner lawsuits are dismissed for many reasons, and the debate over the latest congressional effort at reform will benefit from a more nuanced understanding of why cases were being dismissed pre-PLRA and how the manner of disposition has changed post-PLRA. Drawing on a previous individual case level study,[11] combined with data gathered by the U.S. Administrative Office of the Courts (AO), we examine more closely the nature of prisoner litiga-

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on conditions cases is unknown). For the purposes of setting an appropriate and manageable limit to the scope of the current research, Feeley and Rubin's views of these provisions are accepted. Hence, our cynosure is dedicated exclusively to understanding the changes brought by the PLRA in the number of § 1983 lawsuits filed by individual prisoners, which should bear on past policy debates among practitioners.

9 *See, e.g.*, 141 CONG. REC. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) (urging legislation to "bring relief to a civil justice system overburdened by frivolous prisoner lawsuits").

10 *See, e.g.*, 141 CONG. REC. S14,629 (daily ed. Sept. 29, 1995). Proponents of the PLRA presented "top ten" lists of frivolous prisoner litigation nationally and in Arizona. Making the list were cases such as a prisoner suing for the right to have smooth rather than chunky peanut butter, a suit over a Nintendo Gameboy, and a suit involving a prisoner's right to eat ice cream. *Id.*

11 ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEP'T OF JUSTICE, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION, 1994 NCJ 151652 (1995).

tion at the dawn of the PLRA. These results also provide a benchmark for assessing subsequent changes in filing patterns and dispositional outcomes.

In Part II we introduce an approach to modeling the trend in prisoner litigation and testing statistically the impact of the PLRA on national and circuit court filing patterns. The analysis uncovers and confirms the differential impact of the PLRA at the circuit court level. This Part also provides a preliminary analysis of how the PLRA has affected the resolution of prisoner litigation. The Article concludes that the impact of the PLRA on observed patterns of prisoner litigation is largely in line with the goals stated by the authors of the legislation in that filings are down in all circuits. Yet despite the common theme of fewer prisoner lawsuits, there is considerable variation circuit by circuit in how these cases are being resolved.

I. HISTORY, LITERATURE, AND PRACTICE

A. A Short History

The U.S. Supreme Court made a series of ground-breaking decisions in the 1950s and 1960s, providing a foundation for state prisoners to challenge the conditions of confinement.[12] Whereas prisoners historically had the opportunity to file writs of habeas corpus to challenge the validity of their detention and imprisonment, the parallel opportunity to challenge the conditions of confinement did not emerge until more recently. The Court reversed a "hands-off" approach to incarceration with its decision in 1964 that state prisoners could avail themselves of the federal trial process and file lawsuits seeking money damages when correctional policies, procedures, and practices violated the prisoners' rights.[13] Beginning in the 1970s, a wide ranging category of rights were defined by the U.S. Supreme Court and the U.S. courts of appeal.[14] Because these cases are filed

12 The development of the prisoner rights movement, which the U.S. Supreme Court's decisions fostered, is described well in JAMES B. JACOBS, STATEVILLE: THE PENITENTIARY IN MASS SOCIETY *passim* (1977).

13 *See* Cooper v. Pate, 378 U.S. 546, 546 (1964).

14 Prisoners' rights recognized in these decisions included religious freedom to members of minority religions in *Cruz v. Beto*, 405 U.S. 319 (1972), adequate medical treatment in *Estelle v. Gamble*, 429 U.S. 97, 103 (1976), protection against excessive force by correctional officers in *Hudson v. Mcmillian*, 503 U.S. 1 (1992), protection against violence by other inmates in *Farmer v. Brennan*, 511 U.S. 825 (1994), due process in disciplinary hearings in *Wolff v. McDonnell*, 418 U.S. 539 (1974), and access to law libraries in *Bounds v. Smith*, 430 U.S. 817 (1977). A description of the cases establishing prisoners' rights is available in SHELDON KRANTZ, THE LAW OF CORRECTIONS AND PRISONERS' RIGHTS IN A NUTSHELL (1983).

under § 1983 of Title 42 of the U.S. Code, they are commonly called § 1983 lawsuits.

Initially, the number of § 1983 lawsuits filed nationally in the 1960s was small. The Administrative Office counted only 218 cases in all U.S. district courts during 1966, the first year that state prisoners' lawsuits were recorded as a specific category of litigation.[15] The debate over prisoner litigation heated up as the numbers of lawsuits filed in U.S. district courts rose to a visible level. Within five years of *Cooper v. Pate*,[16] the number of cases had reached approximately 2500 and continued to grow without any appreciable decrease through 1995.[17] Critics contend that most prisoner lawsuits are frivolous, that they crowd already crowded court dockets, and, in the few cases when meritorious, that they resemble small claims cases best handled outside the federal courts. In response, defenders of prisoners' rights asserted that § 1983 lawsuits are not burdensome and that they cannot and should not be screened out of the court system because no one knows how many are frivolous or without merit. Furthermore, they should not be siphoned out of the federal system because the state courts might not be sufficiently independent when prisoners take the state to court.[18]

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15 HANSON & DALEY, *supra* note 11, at 2.

16 378 U.S. 546 (1964).

17 Annual data on the number of prisoner civil rights and prison conditions lawsuits filed in any given year can be found in Table C-3 of the corresponding volume of ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, an annual publication produced by the AO.

18 The composition of the critics includes a former Chief Justice of the U.S. Supreme Court, other federal judges, law professors, and correctional officials. *See, e.g., Federalism and the Federal Judiciary: Hearings Before the Subcomm. on the Separation of Powers of the Senate Comm. on the Judiciary*, 98th Cong. 220–26 (1983) (statement of John R. Manson); A.E. DICK HOWARD, I'LL SEE YOU IN COURT: THE STATES AND THE SUPREME COURT (1980); FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985); Patrick Baude, *Federal Courts and Prison Reform*, 52 IND. L.J. 761 (1977); Warren E. Burger, *An Agenda for Crime Prevention and Correctional Reform*, 67 A.B.A. J. 988 (1981); Warren E. Burger, *Annual Report on the State of the Judiciary*, 62 A.B.A. J. 443 (1976); and Warren E. Burger, A Proposal: National Conference on Correctional Problems, (1969) (paper presented at the American Bar Association Meeting, Dallas) (on file with author). Interestingly, the advocates of prisoners' rights and federal court resolution of § 1983 lawsuits look very similar to the critics in terms of their positions. The advocates include a former Associate Justice of the U.S. Supreme Court, other federal judges, and law professors. *See* Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1 (1985); Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Reme-*

A major congressional response to the increasing volume of prisoner litigation occurred in 1980 when Congress passed the Civil Rights of Institutionalized Persons Act (CRIPA).[19] Under CRIPA, state correctional agencies could voluntarily seek certification of their grievance procedures from the Attorney General and federal courts. If certified, the procedures then would have to be exhausted prior to the filing of lawsuits against state correctional officers.[20] CRIPA never really took hold because few states sought certification, and, with the exception of the U.S. Court of Appeals for the Ninth Circuit, few federal judges showed an inclination to certify state mechanisms.[21]

The expansion of prisoners' rights and the limited impact of CRIPA created the potential for increasing prisoner lawsuits, but it was unprecedented growth in prison population that made it a reality. Between 1972 and 1996,[22] the number of state prisoner § 1983 lawsuits filed in U.S. district courts increased by 1153% (from 3348 to 42,522), while state prison population increased by 517% (from 174,379 to 1,076,625).[23] As shown in Figure 1, the increase in both trends was remarkably consistent until the enactment of the PLRA in 1996. The close visual correspondence between the number of state prisoners and the number of § 1983 lawsuits since the early 1970s is borne out by statistical analysis.[24]

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dies, 68 IOWA L. REV. 871 (1983); William Bennett Turner, *When Prisoners Sue: Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610 (1979).

19 Civil Rights of Institutionalized Persons Act (CRIPA) of 1980, Pub. L. No. 96-247, 94 Stat. 349 (codified as amended at 42 U.S.C. § 1997).

20 Feeley & Hanson, *supra* note 8, at 31–32.

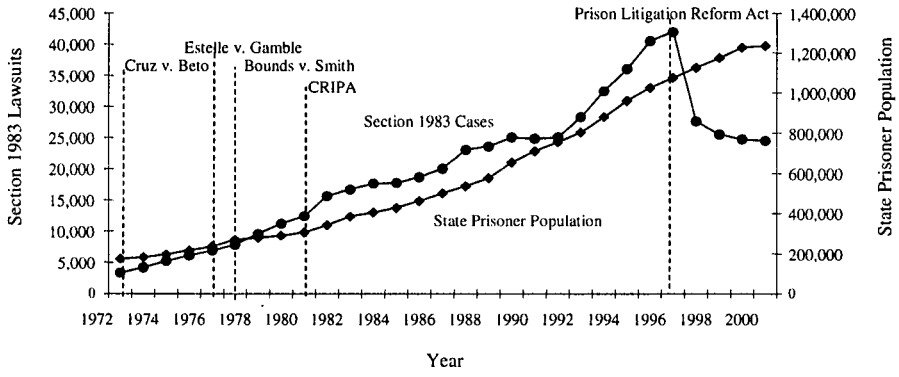
21 *Id.*

22 While 1966 was the first year that state prisoners' lawsuits were recorded as a specific category of litigation by the AO, data supplied by the AO commenced in 1972.

23 Fred Cheesman II et al., *A Tale of Two Laws: The U.S. Congress Confronts Habeas Corpus Petitions and Section 1983 Lawsuits*, 22 LAW & POL'Y 89, 94 (2000).

24 See *id.* for a complete analysis of the link between prison population and the volume of prisoner litigation. Cheesman and his co-authors developed a dynamic regression model using state prisoner population as the independent variable to forecast the expected number of prisoner lawsuits in the future. In addition, the model was used to estimate the volume of prisoner litigation ten years down the road. The approach used was based on the observed trend in prisoner litigation following the implementation of the PLRA, an appreciation for the initial uncertainty in the litigation environment created by the passage of new law, and the strong established relationship between prison population and the volume of prisoner litigation. Finally, this effort to chart the future course of prisoner litigation was the basis for estimating how changing filing patterns affected the work of the federal bench. *Id. passim.*

FIGURE 1. NUMBER OF SECTION 1983 LAWSUITS FILED BY STATE PRISONERS AND STATE PRISONER POPULATION, 1972–2000



Lukens succinctly sums up the perspective of reformers in the mid-1990s: "[b]ecause the number of state and federal prisoners continue[d] to increase at an alarming rate, it [was] clear that Congress had to take some steps to address the increasing burden on the federal courts arising out of the tremendous increase in prisoner civil rights litigation."[25] And the PLRA was born.

B. PLRA Provisions

There are three provisions of this statute especially relevant to understanding the trends in case filings. They are:

First, inmates must exhaust all available administrative remedies before filing the case, even if a facility's grievance procedures have not been certified by the U.S. Department of Justice or a federal court.[26]

Second, inmates filing lawsuits in forma pauperis (as an indigent without liability for court fees and costs) are required to pay the appropriate filing fees (and costs, where applicable) from their existing

25 Lukens, *supra* note 6, at 491–92 (footnote omitted).

26 The PLRA amended suits by prisoners of the Civil Rights of Institutionalized Persons Act, CRIPA § 7, 42 U.S.C. § 1997e (2000). The PLRA added the following language: "(a) Applicability of Administrative Remedies. 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." 42 U.S.C. § 1997e. This provision does not prohibit prisoners from bringing challenges to prison conditions under a state law or constitution without exhausting state remedies, but that action would be precluded from being filed in federal court. It would have to be filed in state court.

assets or any funds available to them through their trust fund accounts within the correctional system.[27]

Third, inmates are prohibited from filing lawsuits in forma pauperis if the inmates have filed three or more actions in federal court that were dismissed as frivolous or malicious or for failing to state a claim on which relief can be granted.[28]

The import of these requirements is that until and unless they are satisfied, federal trial courts need not accept a prisoner's rights case simply because a prisoner has filed a complaint. The courts are not required to docket the complaint as a case, give it a case number, and place it in the queue for court action.

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27 The PLRA amended § 1915 of Title 28 of the United States Code. The following language was added: "(b)(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1)(a). Procedures were specified in the PLRA on how the fees were to be paid.

28 The PLRA amended § 1915 of Title 28 of the United States Code by adding the following language:

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

28 U.S.C. § 1915(g). Again, this provision pertains to complaints filed in federal court and does not bear on suits filed in state court.

The PLRA amended Chapter 123 of Title 28 of the United States Code. The following language was added:

> §1915A Screening. (a) Screening. The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity.
>
> (b) Grounds for Dismissal. On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint
>
> > (1) is frivolous, malicious, or fails to state a claim on which relief may be granted; or
> >
> > (2) seeks monetary relief from a defendant who is immune from such relief.

28 U.S.C. § 1915A.

C. *Literature*

The plain intent of the PLRA is to reduce the volume of prisoner litigation.[29] While the post-PLRA decline in prisoner lawsuits is apparent now, at the time the legislation was introduced there was considerable uncertainty over whether the PLRA would lead to a decrease, increase, or no change in the volume of prisoner litigation.[30] Yet this issue has received little attention in the academic literature. Because the primary focus of the sizable and growing number of law review articles on the PLRA tends toward critical analysis of the PLRA's constitutional validity, the authors are typically agnostic or silent on the legislation's observable effects on the volume of litigation.[31] This brief review of the literature helps shape the subsequent analyses by

29 *See, e.g.*, Kincade v. Sparkman, 117 F.3d 949, 951 (6th Cir. 1997) (stating that "the text of the Prisoner Litigation Reform Act itself reflects that the drafters' primary objective was to curb prison condition litigation"); Mitchell v. Farcass, 112 F.3d 1483, 1488 (11th Cir. 1997) (stating that "Congress promulgated the act to curtail abusive [prisoner litigation]"); Hampton v. Hobbs, 106 F.3d 1281, 1286 (6th Cir. 1997) (stating that "[t]he 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").

30 While many in the 104th Congress argued that the PLRA would reduce the number of § 1983 cases filed, others disagreed. During congressional debate, Senator Paul Simon stated his concern that the new legislation would actually increase the volume of lawsuits. 142 CONG. REC. S2297 (daily ed. Mar. 19, 1996) (statement of Sen. Simon).

31 *See, e.g.*, Gigette M. Bejin, *The 1995 Legislation for Prisoner Litigation Reform: Has the Pendulum Swung the Other Way?*, 74 U. DET. MERCY L. REV. 557 (1997); Hobart, *supra* note 7; Jason E. Pepe, *Challenging Congress's Latest Attempt to Confine Prisoners' Constitutional Rights: Equal Protection and the Prison Litigation Reform Act*, 23 HAMLINE L. REV. 59 (1999); Robertson, *supra* note 6. In contrast, practitioners who have been following the trends in prisoner litigation and who are aware of past debates understandably are more cognizant of possible and actual changes in the number of lawsuits than either legal scholars or the law and society scholars focused on conditions cases. As it turns out, Chief Justice William Rehnquist, who fits the description of an interested practitioner, responded with alacrity to the immediate consequences of PLRA. He extolled and heralded the changes that he could discern. *See* William H. Rehnquist, *Soluble Problems for the Federal Judiciary: Curtailing the Expansion of Federal Jurisdiction and Other Matters*, 35 CT. REV. 4 (Fall 1998). Media covering the PLRA and its impact actually responded even more quickly. *See* Harvey Berkman, *Reform Act Cuts Prisoner Suits*, NAT'L L.J., Aug. 18, 1997, at A10. Interestingly, legal scholars continued to be skeptical of the PLRA's effects on the trends in filings. For example, Tushnet and Yackle observed that despite the report of a decrease in filing rates by the National Law Journal that they "think that evidence from a rare extended period of time is necessary before one could confidently attribute such a decline to the statute." Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 64 n.316 (1997).

making explicit several issues that are best addressed through empirical study.

Initial skepticism over the impact of the PLRA on prisoner litigation was stated most cogently and bluntly in a closely reasoned analysis of the new law conducted by Tushnet and Yackle.[32] They argued that the federal courts will work to "harmonize the [PLRA's] provisions with preexisting law,"[33] therefore leading courts to interpret the new provision in a manner as to make only "marginal changes to preexisting law."[34] They go on to predict that the "PLRA's provisions dealing with frivolous individual litigation probably will have [little] practical impact" and will result in "little change" in the volume of prisoner litigation.[35] While it is difficult to say how individual judges gauge the statutory consequences of individual provisions of the PLRA, it is possible to measure the change in the number of § 1983 lawsuits filed. By benefit of hindsight we know the number of prisoner lawsuits has fallen, but statistical analysis is needed to determine whether the decline is only "marginal" or if the PLRA marks a significant breaking point in the long-term trend of prisoner litigation.

Many authors examine constitutional challenges to the PLRA and often reference the variation in interpretation at the circuit court level. Butler neatly summarizes the legal environment following passage of the PLRA: "[t]he Act raised constitutional separation of powers concerns immediately after it was passed. As a result, prison rights activists began challenging the PLRA . . . [and t]he current status of PLRA litigation varies from circuit to circuit."[36] Hobart goes further, analyzing the current state of the PLRA with respect to eleven separate provisions of the Act. His analysis is necessarily at the circuit level as he explores the extent of agreement and disagreement over interpretation of each provision.[37] Such analysis carries the assumption, at

32 Tushnet & Yackle, *supra* note 31.

33 *Id.* at 74.

34 *Id.* at 48. In summary, they state,

> Whatever the PLRA achieves, then, cannot be very far different from what existing law prescribes—or what the courts themselves prescribe were they faced with some of the issues that statute addresses. The basic standard set out in the PLRA . . . either restates existing law, is unconstitutional, or changes existing law in minor ways.

Id. at 58.

35 *Id.* at 64.

36 Butler, *supra* note 6, at 586.

37 Hobart, *supra* note 7, at 986–87. Hobart states, for example, that

> Like many other aspects of the PLRA, controversy revolves around the retroactivity of the attorney fee provision. For example, the United States Court of Appeals for the Fourth Circuit has concluded that all attorney fees

least implicitly, that judicial interpretation of the PLRA provisions affects the operation of the law in practice. Given non-uniformity in legal interpretation at the circuit level, a natural question is whether this translates into differences in observed patterns of prisoner litigation at the circuit level.

As the observed reality of a decline in prisoner lawsuits became apparent, some authors raised the fundamental question of whether the PLRA was sufficient to differentiate the frivolous from the meritorious. Lukens states that the PLRA "is much broader than necessary to achieve the intended reduction in frivolous prisoner litigation, and brings within its broad sweep meritorious claims as well as frivolous claims."[38] The concern is that the blunt character of the PLRA restrictions will allow the circuits too easily to reject a prisoner's lawsuit regardless of merit. A somewhat different tack is taken by Kuzinski, who argues, "However deserving some claims are, the majority of inmate claims are either meritless or overtly frivolous."[39] As a consequence, courts are awash in "junk litigation"[40] to the detriment of prisoners with valid claims. Recognizing that an overabundance of lawsuits without merit can usurp the meritorious, one circuit judge notes the prisoner with a valid claim "must hope that in the sea of frivolous prisoner complaints, [their] lone, legitimate cry for relief will be heard by a clerk, magistrate or judge grown weary of battling the waves of frivolity."[41] The empirical question, then, is how does the composition of prisoner lawsuits pre-PLRA compare to the composition post-PLRA? One measure of success for proponents of the PLRA is showing that the elimination of frivolous lawsuits has been the source of decline in § 1983 filings.

D. Practice

Understanding the reality of prisoner litigation requires taking a closer look at how, in fact, § 1983 cases are resolved. Examining the

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awarded after the passage of the PLRA must conform to its restrictions. Conversely, the United States Courts of Appeals for the Seventh and Eighth Circuit [sic] maintain that is would be manifestly unjust to apply the PLRA's restrictions to cases pending at the time of its passage.

Id. (footnote omitted).

38 Lukens, *supra* note 6, at 472.

39 Kuzinski, *supra* note 7, at 364.

40 J.W. HOWARD, JR., COURTS OF APPEAL IN THE FEDERAL JUDICIAL SYSTEM 283 (1981) (implying that prisoner litigation is an exemplar of "junk litigation," forcing virtually all federal circuit courts to shift part of their business from hand-crafted to mass-production decision techniques).

41 Kuzinski, *supra* note 7, at 369 (footnote omitted).

data compiled by the AO (Figure 2) for the years immediately preceding enactment of the PLRA confirms that the majority of prisoner lawsuits are dismissed outright (78% in 1993). Only about 3% were resolved by jury or non-jury trial in 1993. Moreover, the manner of disposition is very consistent for the period 1993–1996.

FIGURE 2. MANNER OF DISPOSITION FOR § 1983 LAWSUITS[42]

Year		Resolution w/o Judgment	Court Dismissal	Voluntary Dismissal	Settled	Jury Trial	Non-Jury Trial	Other	Total
Pre-PLRA									
1993	N	1536	24,195	2354	1976	273	552	81	30,967
	%	5.0	78.1	7.6	6.4	0.9	1.8	0.3	100.0
1994	N	1778	27,186	2405	2379	377	614	312	35,051
	%	5.1	77.6	6.9	6.8	1.1	1.8	0.9	100.0
1995	N	2058	31,954	2476	2347	335	644	194	40,008
	%	5.1	79.9	6.2	5.9	0.8	1.6	0.5	100.0
1996	N	2071	33,369	2494	2168	373	643	184	41,302
	%	5.0	80.8	6.0	5.2	0.9	1.6	0.4	100.0
Post-PLRA									
1997	N	1330	27,574	2242	1722	396	524	141	33,929
	%	3.9	81.3	6.6	5.1	1.2	1.5	0.4	100.0
1998	N	1166	23,803	1677	1457	353	356	127	28,939
	%	4.0	82.3	5.8	5.0	1.2	1.2	0.4	100.0
1999	N	1342	21,098	1260	1140	338	255	183	25,616
	%	5.2	82.4	4.9	4.5	1.3	1.0	0.7	100.0
2000	N	1497	19,686	1291	936	329	236	207	24,182
	%	6.2	81.4	5.3	3.9	1.4	1.0	0.9	100.0

SOURCE: Federal Judicial Center, *supra* note 1.

For the period following the enactment of the PLRA (1997–2000), the most obvious change, of course, has been the rapid and precipitous decline in the volume of prisoner litigation. Courts are using the PLRA:

42 The dispositional categories used in this study were constructed by combining dispositional categories used by the AO to classify dispositions as follows: *Resolution w/o Judgment* (transfer to another district, remanded to state court, multi district litigation transfer, remanded to U.S. agency, and statistical closing), *Court Dismissal* (want of prosecution, lack of jurisdiction, default, consent, motion before trial, other dismissals, and judgment on other), *Voluntary Dismissal* (voluntarily dismissed), *Settled* (settled dismissal), *Jury Trial* (jury verdict), *Non-Jury Trial* (directed verdict and court trial), and *Other* (award of arbitrator, stayed pending bankruptcy, appeal affirmed (magistrate judge), and appeal denied (magistrate judge)).

> Given the crush of inmate litigation, it was quite predictable that judges would be quick to use this new weapon to clear their dockets. . . . The courts have also started apprising inmate litigants of the law's ramifications, in an attempt to have inmates regulate their own actions before the new procedures authorized by the PLRA are used against them.[43]

If inmates observe the provisions of the PLRA and listen to warnings emanating from the courts, the observed drop should primarily be a drop in frivolous litigation. Although the overarching pattern of dispositions remains unchanged (most cases are dismissed and few cases are resolved at trial), subtle and suggestive changes have occurred. Relatively more cases are being dismissed with little or no judicial involvement (e.g., dismissed for want of prosecution and for lack of jurisdiction), fewer cases are being resolved through voluntary dismissal or settlement, and jury trial rates are up. Part II provides a more detailed look at the resolution of § 1983 lawsuits post-PLRA at the circuit court level.

The data clearly show the prevalence of dismissals in the resolution of § 1983 lawsuits. As a consequence, speculation on the potential impact of the PLRA would benefit from a more nuanced understanding of the lawsuits being dismissed. What is the reason for dismissal? What share of the cases meet even the most basic procedural requirements and would remain eligible under the provisions of the PLRA? While the AO does not compile this information, one extensive study casts light on the nature of prisoner litigation prior to the enactment of PLRA. Hanson and Daley examined over 2700 § 1983 cases resolved by U.S. district courts in nine states (Alabama, California, Florida, Indiana, Louisiana, Missouri, New York, Pennsylvania, and Texas) during 1993.[44]

Focusing strictly on the cases dismissed, Hanson and Daley's careful review of case files showed that the most frequent reason for a court's decision to dismiss a § 1983 lawsuit was because the prisoner failed to respond to a court order within a required time period (Figure 3).[45]

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43 Kuzinski, *supra* note 7, at 387–88 (citations omitted).

44 HANSON & DALEY, *supra* note 11. The case-level analysis conducted by Hanson and Daley found disposition patterns closely in line with data reported by the AO: 74% of § 1983 lawsuits were subject to a court dismissal, 20% were dismissed on defendant's motion, 4% were stipulated dismissals, and 2% were resolved at trial. *Id.* at 19.

45 For example, a prisoner might have failed to respond to a report prepared by the correctional institution on the treatment of the prisoner. The court notifies the prisoner that the report will be treated as a motion for summary judgment and that

FIGURE 3. REASONS FOR COURT DISMISSALS OF § 1983 LAWSUITS

Reasons	N = 3136
Plaintiff failed to comply with court rules (e.g., did not respond to court's requests for information in a timely manner, nonindigent prisoner failed to pay filing fees)	38%
No evidence of constitutional rights violation (e.g., action by correctional officer might have been negligent but there is no evidence of a deliberate intent to harm the prisoner)	19%
Frivolous (i.e., no arguable basis in law or fact)	19%
Issue is noncognizable under § 1983 (e.g., habeas corpus)	7%
Defendant has immunity (e.g., judge, prosecutor)	4%
Defendant is not acting under color of state law (e.g., wife, fellow prisoner)	3%
Other reasons (e.g., the issue is moot because the prisoner is no longer incarcerated and sought declaratory relief)	9%
Total	99%

SOURCE: HANSON & DALEY, *supra* note 11, at 20.

Additionally, if the court could determine no evidence of a constitutional rights violation, the case was dismissed (19%).[46] Other reasons for court dismissals were that the lawsuits were truly frivolous (e.g., the prisoner complained because he received chunky rather than creamy peanut butter) (19%).[47] Alternatively, cases were dismissed because the issue raised was not covered by the scope of § 1983 (e.g., the case is a challenge to the validity of conviction) (7%);[48] the defendant (e.g., state trial judge) had immunity (4%);[49] or the defendant (e.g., privately retained criminal defense attorney) was not acting under color of state law (3%).[50]

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the motion will be granted, unless the prisoner files an objection. If the court neither receives a response to the notice nor receives any objection to the motion, the court thereby grants the motion.

46 For example, a prisoner may be injured after slipping on a wet floor outside the cell. The court will dismiss this claim if there is no evidence of deliberate intent by correctional officials to harm the prisoner by failing to maintain adequate physical conditions. The slippery floor might be the result of negligence, but ordinary negligence is not a cognizable cause of action under § 1983. For this reason, the federal court will dismiss the case as an invalid § 1983 cause of action and might suggest that the prisoner pursue the matter as a tort action in state court. *Id.* at 19–20.

47 *Id.* at 20.

48 *Id.*

49 *Id.*

50 *Id.* at 20–21.

What emerges from Figure 3 is that only 19% of the dismissed cases survived even the most elemental procedural or substantive hurdles. This fraction was not dismissed because the prisoner-plaintiff failed to comply with court rules or because the case was found to be without a basis in fact or law. Instead, a court found that these cases failed to meet the criterion of implicating a constitutional standard. For example, a prison official might have been negligent in allowing water to remain on a walkway, but a prisoner did not show that such conduct was a product of deliberate indifference or wanton neglect. What this extensive case study suggests is that just prior to the enactment of the PLRA, a sizable percentage of the prisoners' dismissed § 1983 lawsuits, perhaps as high as 81%, would likely find it difficult to satisfy additional procedural requirements, such as those eventually established under PLRA.

This empirical profile of how prisoner litigation was resolved pre-PLRA provides a framework and benchmark for examining prisoner litigation in the post-PLRA world. As such, it provides three testable propositions. First, if the PLRA is implemented in good faith, we would expect to see an immediate and significant drop in the number of prisoner litigation filings. The Hanson and Daley results suggest that the number of lawsuits that will not sustain additional and new procedural scrutiny may well be a majority of the cases. Of the 74% of cases dismissed by a court before the enactment of the PLRA, as few as 19% were potentially robust enough to sustain strengthened procedural review. Hence, if the PLRA operates as conceived by its authors, as many as 60% fewer § 1983 lawsuits will be filed after PLRA than before.[51]

Second, the twin factors of unsettled law and judicial independence lead us to expect non-uniformity in the trend and disposition of prisoner lawsuits at the circuit level. The constitutional legitimacy of the PLRA and its provisions is still being determined in the federal courts. Although a majority of federal circuits have upheld the PLRA

51 Taking 81% of 74% yields 60%. The upper-bound prediction of a 60% decrease is a mid- to long-term projection. Initially, the decrease could be considerable because many prisoners will be filing complaints with limited information on the PLRA's provisions. As a result, in the short run there may be more than a 60% decrease in the number of § 1983 lawsuits as the initial wave of post-PLRA petitions fail one or more of the new provisions and, thus, are not accepted as § 1983 lawsuits. Over time, prisoners will gain information on the new rules (e.g., from jail house lawyers or prisoner assistance groups). It is likely that, ultimately, prisoners will adapt to the new system and file complaints that meet the new requirements. As a result, the trend in § 1983 lawsuits will eventually reach a new, albeit lower, equilibrium relationship with prison population.

and many constitutional challenges have been settled, the circuits have moved at varying speeds and with varying levels of internal opposition. Each circuit has evolved its own style in implementing the PLRA. This is hardly surprising given the substantive complexity of the Act, and that, by virtue of jurisdictional and administrative independence, no two circuit courts are alike.[52]

Despite the adoption of uniform rules of appellate procedure in 1968, the power of circuit courts to define subsidiary rules lends surprisingly little standardization to internal decisionmaking or administrative practice. Therefore, the characteristics of each region of the country within the jurisdiction of a particular circuit tend to be reflected in the business of each court.[53] To understand the regional forces underlying the national trend and to understand differences in the implementation strategies of different circuits, we conduct an analysis of the impact of the PLRA at the circuit court level. This analysis also contributes to our knowledge about policy-implementation in the federal court system.

Third, if the PLRA is operating as intended, we have definite expectations for where the decrease in filings should occur: the procedurally weak cases. To conclude that the PLRA is meeting a sound and legitimate public policy goal, it is necessary to show that the new provisions succeed in differentiating and eliminating the non-meritorious cases. The odds that federal judges will successfully discern the meritorious cases increases considerably if the system is not overcrowded with the frivolous. Therefore, to evaluate fully the impact of the PLRA, it will be necessary to determine whether the nature of prisoner lawsuits, their handling and outcomes have changed in line with stated goals.

II. THE RESULTS

A. National Trends

Two previous studies examined the effects of the PLRA on a national level. An inquiry by Cheesman, Hanson, and Ostrom examined historical patterns of filing of § 1983 lawsuits in U.S. district courts as well as factors that were hypothesized to influence the rate of filing.[54]

52 *See* HOWARD, *supra* note 40 *passim.*

53 Among circuit courts there are differences in the composition of caseloads. *See* Lawrence Baum et al., *The Evolution of Litigation in the Federal Courts of Appeals: 1895–1975*, 16 LAW & SOC'Y REV. 291 *passim* (1981) (analyzing the different caseloads faced by different circuits). The rate at which litigants challenged decisions subject to appeal has been previously documented. HOWARD, *supra* note 40, at 23–33.

54 *See* Cheesman et al., *supra* note 23.

They established a clear and strong relationship between the size of the state prison population and the number of § 1983 lawsuits filed.[55] What is not obvious about this relationship is that it persisted over previous decades despite substantial changes in legal doctrines and legislation (e.g., CRIPA) designed to affect the rate of filing of such lawsuits before the implementation of the PLRA.

Although Cheesman and his co-authors find that the PLRA has significantly lowered the number of prisoner lawsuits filed, they hypothesize that the new lower, stable level of filings is a short-run phenomenon.[56] They assert that prisoner litigation filing rates remain tied to the number of state prisoners: the PLRA has merely altered the proportion of inmates eligible or able to afford to litigate. The PLRA is designed to discourage frivolous lawsuits, not all lawsuits. Provisions of the PLRA will not affect all prisoners in the same way: "[h]ence, whereas some share of the original pool of prisoners filing Section 1983 lawsuits will be eliminated because of eligibility or fiscal restrictions, prisoner litigation will remain related to state prison population."[57] Cheesman and his co-authors hypothesize that the fundamental linkage between state prison population and the number of § 1983 lawsuits has not been broken, and that future increases in prison population will lead to more lawsuits, albeit from a smaller proportion of prisoners.

John Scalia provides a second, refined study.[58] He examines the rate of monthly § 1983 case filings from October 1991 to September 2000. Using the statistical technique of interrupted time-series analysis,[59] Scalia demonstrates that the observed decline in § 1983 lawsuits

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55 *Id.* at 94.

56 Cheesman and his co-authors explain:

> Examining monthly data over the last six years shows that the PLRA produced an immediate drop in the volume of Section 1983 lawsuits. It also is evident that the decreasing trend in the number of Section 1983 lawsuits ended around March of 1997—almost exactly one year after the enactment of the PLRA. Since then, the number of lawsuits has [stabilized at] between 2,000 and 2,500 per month.

Id. at 96 (citations omitted).

57 *Id.* at 99.

58 SCALIA, *supra* note 5.

59 Essentially, interrupted time series involves three steps: (1) fitting an AutoRegressive Integrated Moving Average (ARIMA) model to the pre-intervention time series, (2) modeling the intervention, usually as a persistent change in level (a "step") or a temporary change in level (a "pulse"), and (3) assessing the fit of the pre-intervention ARIMA model combined with the intervention model for the combined pre- and post-intervention time series. The test of significance for the intervention factor can be interpreted to assess the impact of the intervention. The time series

that occurred after the implementation of the PLRA was statistically significant. Scalia, measuring the filing rate as the number § 1983 lawsuits per 1000 prisoners, concludes "the PLRA resulted in approximately 3.4 fewer civil rights petitions filed per month for every 3,000 State prison inmates."[60]

Our analysis of the national trend in prisoner lawsuits extends the work of Scalia to determine the size of the drop as well as examining the trend for evidence that it has re-established its relationship with state prison population. We define the pre-PLRA period from April 1992 to April 1996 and the post-PLRA period from May 1996 to December 2001, a slightly longer time period than Scalia employed.[61] The following analyses are based on the number of lawsuits per 1000 prisoners (national level) and per 10,000 prisoners (circuit court level). It is appropriate to compare filing rates when examining the possible effects of the PLRA because, as discussed above, there is evidence that the number of lawsuits is propelled by the number of prisoners.[62] The use of rates minimize the chances of confusing the effects of a change in prisoner population with the effects of PLRA.

As shown in Figure 4, the number of § 1983 lawsuits decreased abruptly after enactment of PLRA. The trend continues downward, although at a slower pace, during the remainder of the post-implementation period (i.e., after April 1996). There is a considerable difference in the average monthly number of lawsuits when the pre- and post-implementation periods are compared (4.1 vs. 2.4 lawsuits per 1000 prisoners, respectively).[63]

Section 1983 lawsuits have dropped significantly since passage of the PLRA, confirming our first testable proposition at the national

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data must either be stationary or be made stationary (usually by "differencing") before the interrupted time series can be performed. The Augmented Dickey-Fuller test is often used to test for stationarity. *See, e.g.*, JEFF B. CROMWELL ET AL., MULTIVARIATE TESTS FOR TIME SERIES MODELS 23 (1994).

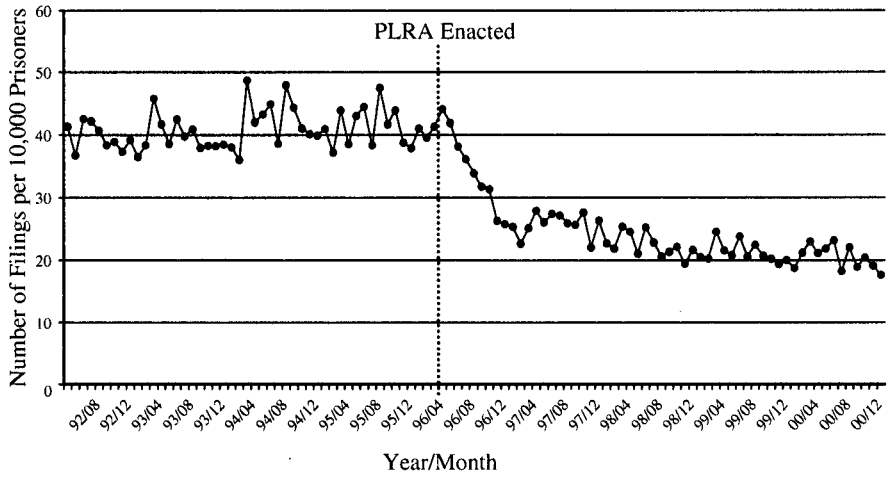
60 SCALIA, *supra* note 5, at 7.

61 We also use the technique of interrupted time-series analysis that Scalia employs, after first conducting unit root tests to determine whether the national time series is stationary. *See, e.g.*, James G. Mackinnon, *Critical Values for Cointegration Tests*, *in* LONG-RUN ECONOMIC RELATIONSHIPS: READINGS IN COINTEGRATION (R.F. Engle & C.W.J. Granger eds., 1991). The Augmented Dickey-Fuller test indicated that the national time series was stationary.

62 *See* Cheesman et al., *supra* note 23, at 98–102.

63 Pre-PLRA period Average: 4.1
Post-PLRA period Average: 2.43
Standard Deviation: .31
Standard Deviation: .56

FIGURE 4. TOTAL FEDERAL QUESTION CIVIL RIGHTS CASE FILINGS PER 10,000 PRISONERS (BY MONTH, APRIL 1992–DECEMBER 2000)



level.[64] Figure 4 reveals that the PLRA has affected both the volume and trend of prisoner litigation: the PLRA has resulted in a 40% decrease in the average monthly number of § 1983 cases filed nationally.

The post-PLRA trend is suggestive for two related issues. First, based on the analysis of § 1983 cases dismissed pre-PLRA (Figure 3), we hypothesized that as many as 60% of § 1983 complaints might not withstand the additional procedural requirements established by the PLRA. Clearly the size of the decrease is in line with this prediction. But the extent to which the drop in § 1983 filings constitutes a drop in the volume of "frivolous" litigation awaits further inquiry. The precise nature of the cases *not* filed because of the PLRA's provisions (meritorious vs. nonmeritorious) is unknowable. However, in a subsequent Section of this Article, we infer how the PLRA has affected the handling of prisoner lawsuits filed when we compare the manner of disposition for § 1983 lawsuits pre- and post-PLRA.[65] Second, there is no evidence that the number of § 1983 lawsuits filed has resumed its earlier linkage with state prison population. Given that the provisions of the PLRA remain a somewhat unsettled area of law, it remains an open question as to whether the PLRA has successfully broken the connection with state prison population.

64 $P < .05$. See Figure 16 for details.

65 *See infra* Part II.C.

B. Circuit Trends

The U.S. circuit courts are prisms through which to view the effects of the PLRA on the filing rates in U.S. district courts.[66] Variation in terms of geography and demographics provides one rationale for decomposing the national data on § 1983 filing trends to the circuit court level.[67] Of more importance, though, the circuits are recognized as the legal policymaking bodies in the federal court system. They are in fact, if not in theory, the final arbiters of most legal disputes. They are in a position to render their distinctive takes on doctrine and to inform and guide U.S. district courts within their respective jurisdictions.[68] Most of the expansion and the delineation of prisoners' rights have been the product of circuit court decisions with the U.S. Supreme Court rendering a handful of landmark decisions. As noted, because the courts of appeals have differed in their interpretation of the PLRA provisions,[69] it bears investigating whether the impact of the PLRA on prisoner litigation filing trends is consistent across the circuits. Thus, because the circuits reflect possible variations both in context and statutory interpretation, an issue for

66 In this Part of the Article, we continue to use a U.S. District Court database. The national level findings discussed above are the national level aggregation of all U.S. district courts, whereas this section is grouping U.S. district courts into one of eleven sets with each set corresponding to the boundaries of a particular circuit's jurisdiction. Hence, the data presented in this section are not appeals filed by prisoners under § 1983 in each of the circuits. They remain U.S. district court case filings. The U.S. district court database used in this analysis was produced by the AO at the request of the authors. As required by the terms of the grant from NIJ that funded this research, 2001-IJ-CX-0013 (on file with authors), this data set will be sent to the ICPSR at the end of the project (Aug. 2003), whereupon it will be available to other researchers. Much of this data can also be found in ICPSR 8429, *supra* note 1.

67 Even conceding the arguable claim that the United States has a relatively homogenous culture compared to other countries, the states comprising virtually every pair of non-adjoining Circuits intuitively seem different. For example, contrast the Second Circuit (New York and Connecticut) and the Eighth Circuit (North Dakota, South Dakota, Nebraska, Missouri, and Arkansas). Or the Eleventh Circuit (Florida and Georgia) and the First Circuit (Maine, New Hampshire, Vermont, Massachusetts, and Rhode Island).

68 Recent literature on the U.S. courts of appeals concludes that doctrinal differences among the circuits have declined in the last seventy years. However, differences are believed to remain especially in the area of constitutional rights. For a discussion of the decline in doctrinal differences among the circuits and the differences that still remain, see generally, for example, DONALD SONGER ET AL., CONTINUITY AND CHANGE IN THE U.S. COURTS OF APPEAL (2000) (including in its discussion, seemingly, § 1983 and the new provisions of the PLRA).

69 *See* Butler, *supra* note 6, at 586 (noting that the "status of PLRA litigation varies from circuit to circuit").

examination is whether the consequences of the PLRA are similar or different in the U.S. district courts among the circuits.[70]

The basic research question of whether all individual circuits experienced a decrease in § 1983 lawsuits similar to that observed at the national level is answered using interrupted time-series analysis (also known as "intervention analysis"). The individual circuit court filing trends are shown in Figures 5 to 15. Figure 16 displays the statistical results that confirm the drop in the rate of prisoner litigation filings observed following the passage of the PLRA is statistically significant at the circuit level.[71] The lone exception is the Fifth Circuit,[72] although the trend in that circuit was downward before the enactment of PLRA and has since continued apace. Hence, there is overall consistency in the sense that, apart from the Fifth Circuit, the PLRA produced a statistically significant decrease in both the volume and trend of § 1983 lawsuits per 10,000 state prisoners in all circuits.

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70 Court scholars make a dual assertion on how circuits manage to influence U.S. district courts in desired ways. One element of influence is that the leadership of each circuit's bench (i.e., chief judge and senior judges) will assign themselves opinion writing opportunities and will author precedent-setting opinions that define the law and settle issues. Those opinions become cues for the U.S. district courts to use in resolving cases before them by applying the law in a way consistent with the circuit decisions. *See* HOWARD, *supra* note 40 *passim*. Additionally, each circuit is viewed by some scholars as a separate, closed system of communication. U.S. district court judges look first and primarily to decisions by their respective circuit judges, who, in turn, look first and primarily to their respective colleagues. *See, e.g.*, Robert A. Carp, *The Scope and Function of Intra-Circuit Judicial Communication: A Case Study of the Eighth Circuit*, 6 LAW & SOC'Y REV. 405, 422–33 (1972). Following the suggestions of this literature, the current research discusses legal decisions concerning the PLRA by circuit courts of appeals judges. That discussion follows the analysis of the trends among the circuits.

71 Prior to the interrupted time series analysis, the pre-intervention times series for each Circuit was pre-tested for stationarity using the Augmented Dickey-Fuller test, after the recommended procedure of Francis X. Diebold & Lutz Killian, *Unit-Root Tests Are Useful for Selecting Forecasting Models*, 18 J. BUS. & ECON. STAT. 265, 269–71 (2000). These tests revealed that the time series for each circuit were stationary.

72 To understand the unexpected results for the Fifth Circuit, we examined filing patterns in the three states that comprise this circuit (Texas, Louisiana and Mississippi) by means of interrupted time series analyses. While statistically significant declines were noted for both Louisiana and Mississippi, the decline was not significant in Texas. Because Texas has a much larger prison population than either of the other two states, the pattern noted for this state tended to define the pattern observed for the entire circuit. It is not clear at the present time why the PLRA did not affect the filing rate of § 1983 lawsuits in Texas.

FIGURE 5. FIRST CIRCUIT FEDERAL QUESTION CIVIL RIGHTS CASE FILINGS BY MONTH, APRIL 1992–DECEMBER 2000

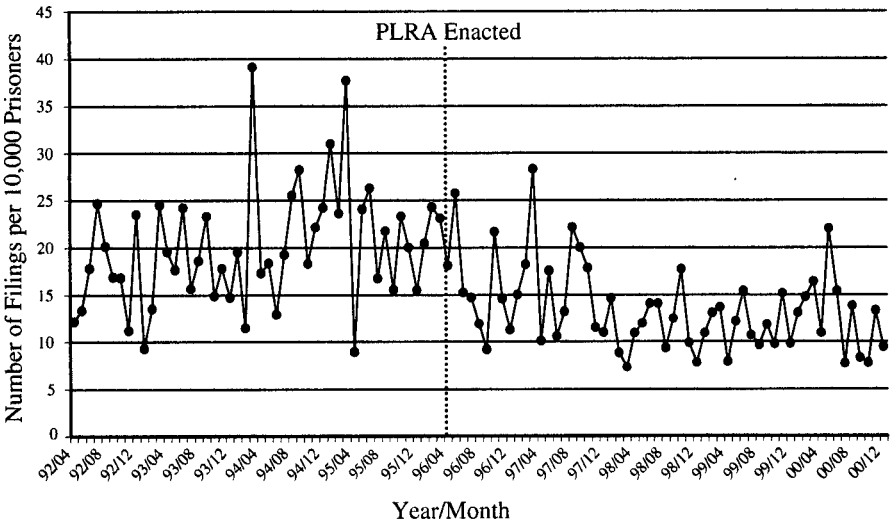


FIGURE 6. SECOND CIRCUIT FEDERAL QUESTION CIVIL RIGHTS CASE FILINGS BY MONTH, APRIL 1992–DECEMBER 2000

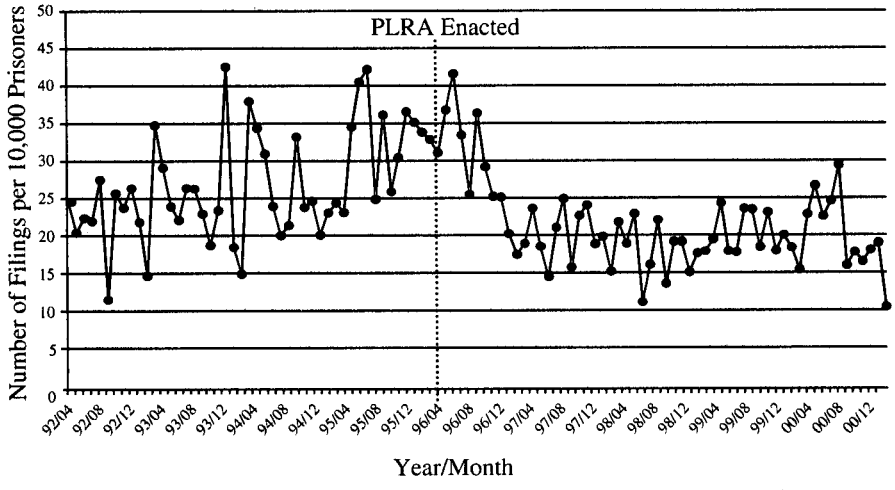


FIGURE 7. THIRD CIRCUIT FEDERAL QUESTION CIVIL RIGHTS CASE FILINGS BY MONTH, APRIL 1992–DECEMBER 2000

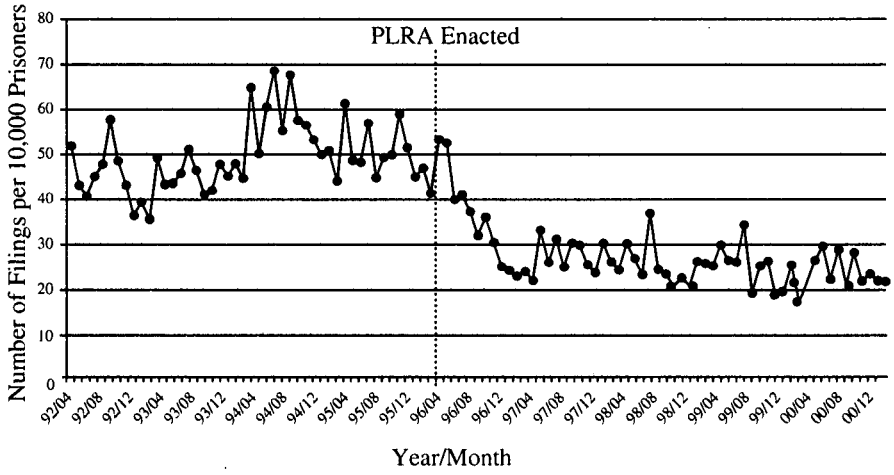


FIGURE 8. FOURTH CIRCUIT FEDERAL QUESTION CIVIL RIGHTS CASE FILINGS BY MONTH, APRIL 1992–DECEMBER 2000

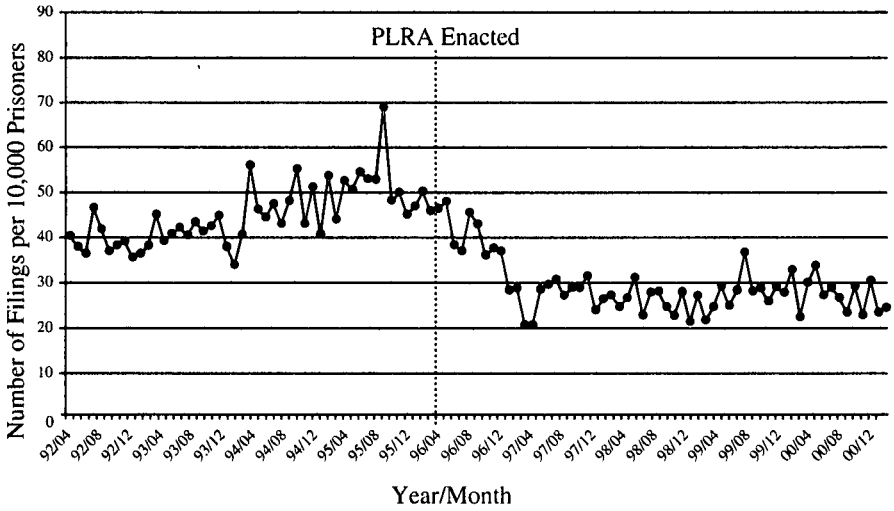


FIGURE 9. FIFTH CIRCUIT FEDERAL QUESTION CIVIL RIGHTS CASE FILINGS BY MONTH, APRIL 1992–DECEMBER 2000

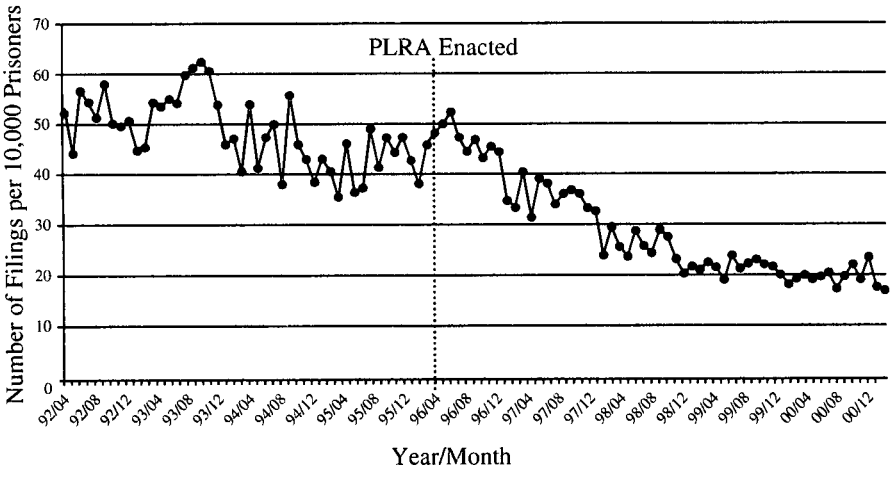


FIGURE 10. SIXTH CIRCUIT FEDERAL QUESTION CIVIL RIGHTS CASE FILINGS BY MONTH, APRIL 1992–DECEMBER 2000

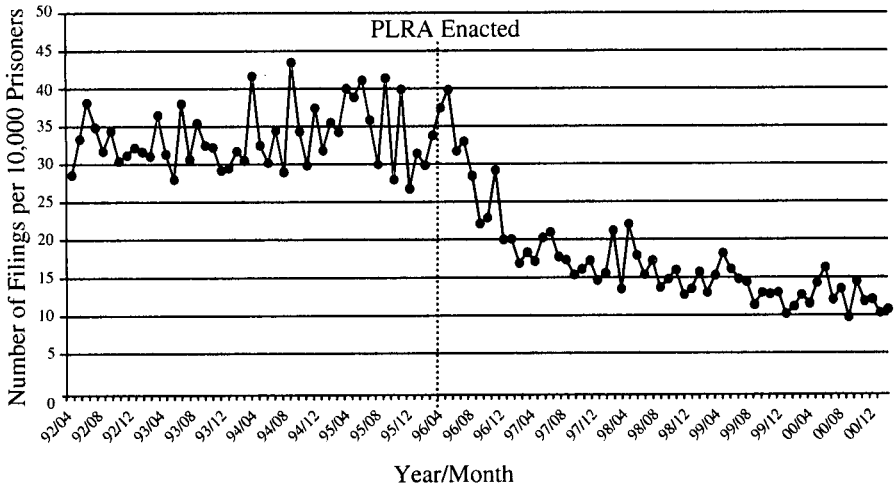


FIGURE 11. SEVENTH CIRCUIT FEDERAL QUESTION CIVIL RIGHTS CASE FILINGS BY MONTH, APRIL 1992–DECEMBER 2000

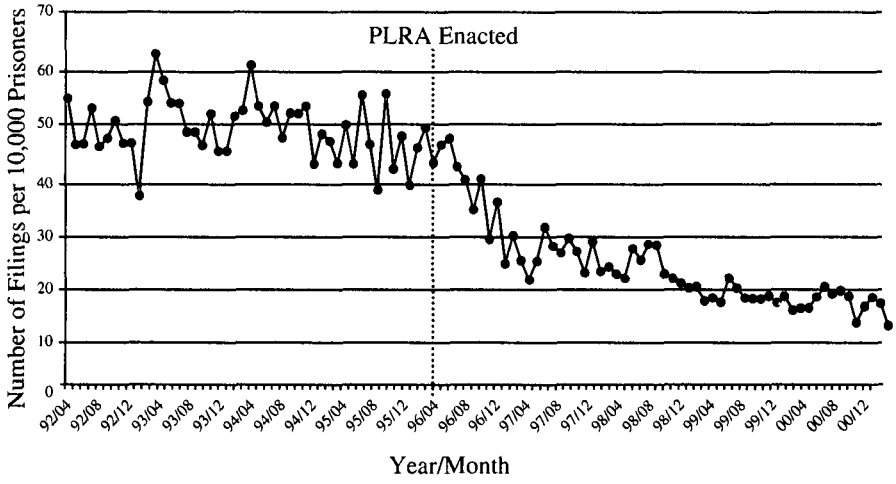


FIGURE 12. EIGHTH CIRCUIT FEDERAL QUESTION CIVIL RIGHTS CASE FILINGS BY MONTH, APRIL 1992–DECEMBER 2000

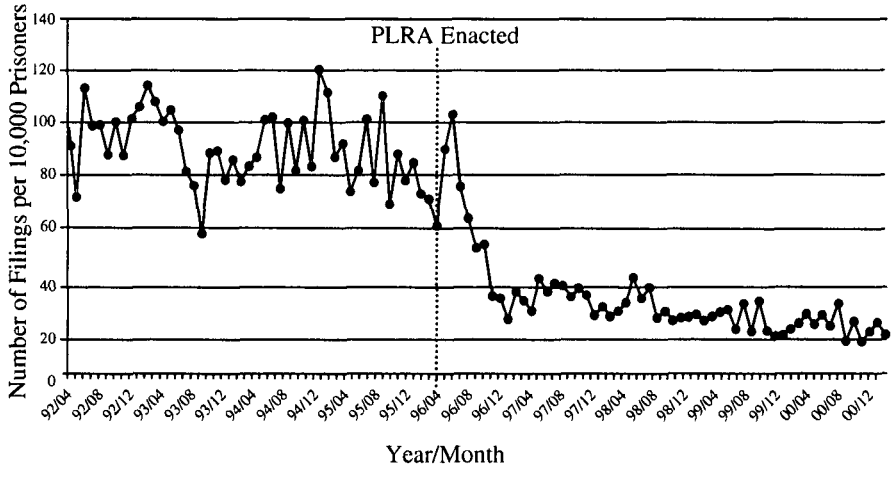


FIGURE 13. NINTH CIRCUIT FEDERAL QUESTION CIVIL RIGHTS CASE FILINGS BY MONTH, APRIL 1992–DECEMBER 2000

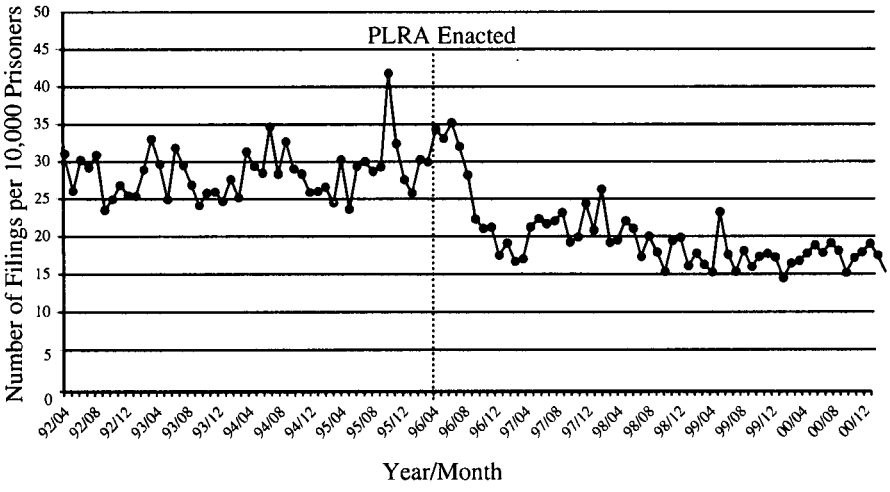


FIGURE 14. TENTH CIRCUIT FEDERAL QUESTION CIVIL RIGHTS CASE FILINGS BY MONTH, APRIL 1992–DECEMBER 2000

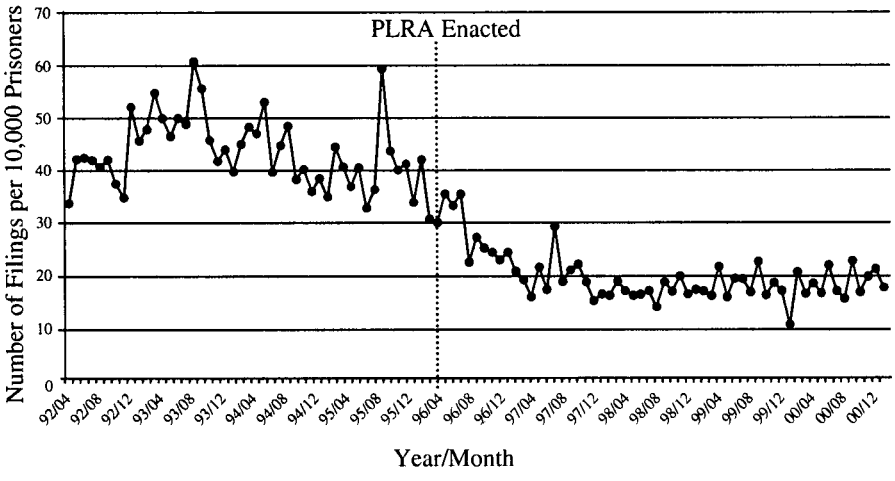
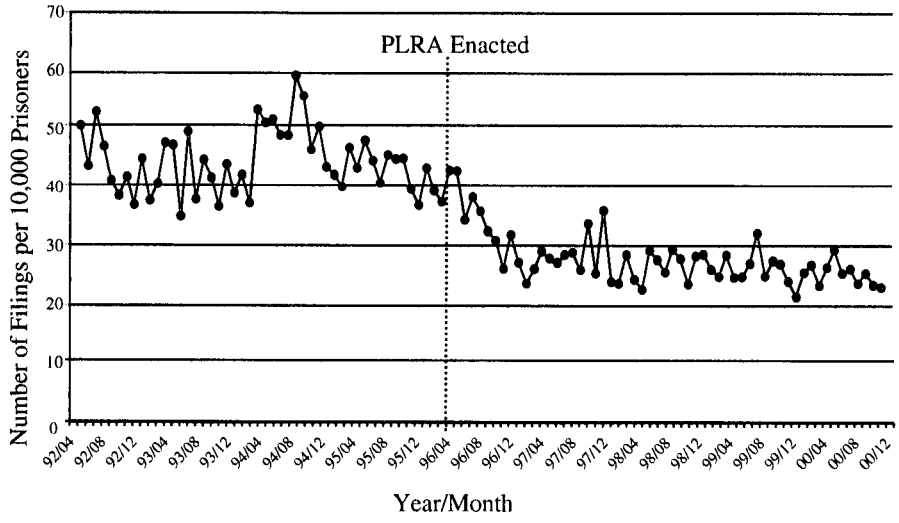


FIGURE 15. ELEVENTH CIRCUIT FEDERAL QUESTION CIVIL RIGHTS CASE FILINGS BY MONTH, APRIL 1992–DECEMBER 2000



Although all circuits (except the Fifth) showed a statistically significant drop in prisoner litigation following enactment of the PLRA, the *extent* of the decline varied considerably. As shown in Figure 16, the percentage change in the average monthly filing rates ranged from a decrease of 31% in the Ninth Circuit to 74% in the Second Circuit. The size of the drop between the pre-PLRA and post-PLRA time periods is measured using the "step" statistic. A negative and statistically significant step indicates that the PLRA demarcates a fundamental decrease in the filing rate. The larger the value of the step statistic, the greater the difference in the trends. As Figure 16 shows, the step statistic is significant in all but the Fifth Circuit, and the size of the step varies from -47.84 in the Eighth Circuit to -5.39 in the Second Circuit.

FIGURE 16. § 1983 LAWSUITS PER 10,000 PRISONERS BEFORE AND AFTER PLRA

	PRE-PLRA (April 1992-March 1996)	POST-PLRA (April 1996 - December 2000)			
Circuit[1,2]	Average	Average	% Change: Pre- to Post-PLRA	Step	Standardized Step
1	20.02	13.54	-32.37	-5.94	-0.30
2	26.78	21.31	-20.43	-5.39	-0.20
3	48.96	27.01	-44.84	-17.99	-0.37
4	44.49	27.64	-37.86	-12.11	-0.27
5	48.72	28.65	-41.19	-0.2 (NS)[3]	0.00
6	34.81	18.87	-45.78	-14.06	-0.40
7	49.23	24.03	-51.19	-18.88	-0.38
8	87.10	34.48	-60.41	-47.84	-0.55
9	28.88	20.06	-30.54	-8.66	-0.30
10	43.73	20.49	-53.16	-22.02	-0.50
11	44.18	27.73	-37.23	-13.99	-0.32
National	4.08	2.43	-40.41	-1.36	-0.33

1. Circuits are rate of filing per 10,000 prisoners
2. National are rate of filing per 1000 prisoners
3. NS: No statistically significant change between the before and after trends

The step statistic confirms that the PLRA has led to a significant decrease in § 1983 cases in all circuits (except the Fifth Circuit), but that the level of change varies by circuit. In addition, this analysis helps clarify whether the extent of change in each circuit post-PLRA is related to the volume of litigation pre-PLRA. Perhaps circuits with high pre-PLRA filing rates (e.g., the Eighth Circuit) had proportionately more filings of procedurally weak lawsuits than circuits with low filing rates (e.g., the First Circuit), and so would be impacted more profoundly by the PLRA than circuits with low filing rates. To adjust for the pre-PLRA § 1983 caseload volume, a standardized measure of change is calculated. This measure—the "standardized step"—is the ratio of the step to the average pre-PLRA filing rate for each circuit. The circuits were ranked according to the size of their standardized step and also by their pre-PLRA § 1983 lawsuit filing rate and the rankings. Spearman's Rank Order Correlation was then calculated between the two sets of rankings and found to be non-significant (Spearman's $r = .382$, $p < .247$).[73] Thus, the § 1983 lawsuit filing rate

73 *See, e.g.*, DAMODAR N. GUJARATI, BASIC ECONOMETRICS 372 (2001).

prior to the PLRA is not significantly related to the size of the decrease in prisoner litigation post-PLRA. We can conclude, then, that the PLRA is having a differential impact in the circuits and is operating in a more subtle manner than would be expected based on the size of the pre-PLRA filing rate alone.[74]

C. *Manner of Disposition*

If the PLRA is operating as envisioned by its authors, we have certain expectations about the types of cases that will no longer be filed in the federal courts or that will be summarily dismissed. The Act prohibits inmates from bringing suit until all available administrative remedies have been exhausted as well as mandating dismissal for claims found to be frivolous, malicious, or failing to state a claim. Such a change in filing behavior would also be expected to produce a corresponding change in the pattern of case resolutions in U.S. district courts. For example, if the PLRA is serving to distinguish and reduce the number of nonmeritorious cases relative to meritorious cases, there should be relatively fewer court dismissals for frivolousness, relatively more cases dismissed for failure to implicate a constitutional standard, and relatively more trials than before the PLRA. While a complete analysis of this issue will require systematic investigation at the individual case level, we can examine AO data on the manner of resolution to gain preliminary insight into the changing nature of prisoner litigation.

We select four disposition categories employed by the AO in reporting resolutions of § 1983 cases for closer examination: court dismissal rates (typically early dismissals), voluntary dismissal rates, settlement rates, and jury trial rates. Using the AO data, Figure 17 compares the proportion of cases resolved by each of the four dispositional categories at the circuit court level in 1995 (the last full year before implementation of the PLRA) and in 2000 (the latest year for

74 Potential (but currently unmeasured) factors that may explain the size of the standardized step include differences in (1) the vigor with which the circuits have implemented the provisions of the PLRA; (2) the composition of § 1983 lawsuits at the circuit level, particularly with regards to the proportion that could be classified as frivolous; and (3) the availability of procedural remedies for inmates to resolve their grievances without recourse to federal courts. In addition, several states have implemented their own versions of the PLRA, and such legislation may be associated with larger decreases in § 1983 lawsuits: "[f]rom 1994 through 1996, 21 states had passed or were considering legislation similar to the PLRA." Kuzinski, *supra* note 7, at 375 n.78 (citing Joseph Wharton, *Courts Now Out of Job as Jailers: New Law To End Prison Oversight Applauded by State Attorneys General*, 82 A.B.A. J. 40, 41 (1998)).

which resolution data were available).[75] A "test of proportions" was used to determine whether there was a statistically significant change in the composition of dispositions pre- and post-PLRA. The significance tests summarized in Figure 18 confirm that aspects of the manner in which § 1983 lawsuits are disposed changed between 1995 and 2000 in all circuit courts. However, the structure and direction of change varies considerably from circuit to circuit.[76]

FIGURE 17. CIRCUIT COURT MANNER OF DISPOSITION FOR § 1983 LAWSUITS: COMPARING 1995 AND 2000

	Court Dismissals		Voluntary Dismissals		Settled		Jury Verdict	
Circuit	1995	2000	1995	2000	1995	2000	1995	2000
First	70.3	82.5	12.0	7.0	7.1	4.8	0.5	1.3
Second	82.4	75.4	3.3	4.2	4.7	9.3	1.0	3.3
Third	58.8	67.1	3.4	3.2	29.6	9.5	0.9	1.1
Fourth	89.2	88.2	4.7	4.1	2.6	2.3	0.4	0.5
Fifth	78.5	78.6	4.0	8.0	6.6	3.6	1.0	2.0
Sixth	83.9	88.2	6.7	2.2	2.9	3.0	1.3	1.0
Seventh	82.8	74.8	6.2	10.6	3.7	7.2	1.1	2.1
Eighth	70.0	82.6	16.6	5.0	2.0	2.1	1.4	1.6
Ninth	83.0	85.6	6.1	5.3	4.5	3.0	0.5	0.8
Tenth	81.1	65.1	6.0	8.8	1.4	2.2	0.0	0.3
Eleventh	84.4	87.7	4.8	3.5	3.2	1.0	0.7	1.2

SOURCE: ICPSR 8429, *supra* note 1.

75 Aggregate statistics at the national level are shown in Figure 2.

76 A '+' indicates that the proportion is significantly higher in 2000, a '–' indicates the proportion is significantly lower in 2000, and a blank cell indicates no significant change between 1995 and 2000. Significance measured at $P < .10$.

FIGURE 18. CIRCUIT COURT MANNER OF DISPOSITION FOR § 1983 LAWSUITS: STATISTICALLY SIGNIFICANT CHANGE BETWEEN 1995 AND 2000

Circuit	Court Dismissals	Voluntary Dismissals	Settled	Jury Verdict
First	+	−	−	+
Second	−	+	+	+
Third	+		−	
Fourth		−		
Fifth		+	−	+
Sixth	+	−		
Seventh	−	+	+	+
Eighth	+	−		
Ninth	+	−	−	+
Tenth	−	+	+	+
Eleventh	+	−	−	+

SOURCE: ICPSR 8429, *supra* note 1.

On closer inspection, three patterns emerge. First, if the PLRA is serving to siphon off nonmeritorious cases, then we expect that jury trials will account for an increased proportion of resolutions post-PLRA. If some procedurally weak cases are no longer filed, then the relative share of meritorious cases should rise and we should see an increase in the jury trial rate. Figure 18 shows that jury trial rates have risen significantly in seven circuit courts and are up (but not significantly) in three others (the lone decrease is in the Sixth Circuit). However, the proportion of resolutions accounted for by jury trial remains small in all circuits.

Second, of the eight circuit courts that show a significant change in both court dismissals and voluntary dismissals, the changes are in the opposite direction. That is, post-PLRA, if fewer prisoner lawsuits are resolved by court dismissal, then more are resolved by voluntary dismissal and vice versa.

Third, and related, in the seven circuit courts where there has been a significant change in both court dismissals and settlements, the change is also consistently in the opposite direction. When court dismissals are down, settlements are up.

Our interpretation of these changes in dispositional outcomes begins with the fact that the total number of prisoner lawsuits has dropped significantly, and, with the assumption that the reduction in

cases docketed post-PLRA implies that, on average, the remaining cases are given more time and attention. Moreover, we look for evidence that the Act is serving to reduce the proportion of nonmeritorious cases, while increasing the likelihood that the meritorious will receive appropriate judicial review. Given the bluntness of the dispositional categories employed by the AO, this reading of the data is necessarily speculative.

That the PLRA is operating as intended is most apparent in the disposition patterns observed in the Second, Seventh, and Tenth Circuits. Here, the proportion of cases resolved by court dismissal has declined and the proportion resolved by voluntary dismissal, settlement, and jury trial have increased. Proponents will likely take the decline in court dismissals as evidence that inmates are learning of the PLRA's legal consequences and modifying their actions so as to prevent the provisions of the legislation being used against them. On the other hand, if one still questions the inmate learning curve, the drop in litigation may signal more effective "pre-screening" of prisoner complaints at the district court level and the elimination of frivolous petitions prior to docketing. Regardless of why court dismissals are down, increases in the other dispositional categories suggest the remaining prisoner petitions (potentially more meritorious) are receiving greater court consideration. This observation follows from the recognition that voluntary dismissals, settlements, and jury trials represent litigation that typically received closer judicial attention and where the prisoner plaintiff might have gained some type of favorable outcome.

The proportion of cases resolved by court dismissal rose in six circuits between 1995 and 2000. This increase was accompanied by a statistically significant decline in either the proportion of cases resolved by voluntary dismissal (i.e., Sixth and Eighth Circuits) or settlement (i.e., Third Circuit) or both (i.e., First, Ninth, and Eleventh Circuits). Because cases voluntarily dismissed and cases settled potentially signal more extensive judicial review, the decrease will be viewed by some as evidence that the PLRA is making it more difficult for cases with possible merit to succeed.

An alternative perspective is that the PLRA contributed in two ways to the decrease in these two dispositional categories without violating the basic value of due process through dismissal of possible meritorious lawsuits. A primary way arises from the administrative remedy procedures that prisoners are required to exhaust under the new terms of the PLRA. These forums are precisely the mechanism that can produce the same result as gained in court for particular kinds of cases. Simply stated, the cases that were settled or resulted in

a voluntary dismissal before the PLRA was adopted are amenable to administrative resolution in lieu of litigation. These may be cases where neither the prisoner nor state government wants or needs to litigate to vindicate its position. They might, for example, involve a prisoner receiving an apology, receiving a new prosthetic, or having an infraction removed from a disciplinary record. This situation is consistent with reports from states that the "win" rate for prisoners under the administrative remedies is many times greater than victories in court.

A secondary way that the PLRA might have contributed to fewer settlements is because the reduction in the number of cases docketed after the PLRA increases the time that courts can devote to each case. An increase in judicial time and attention might have detected more clearly the true strengths and weaknesses of cases. As a result, weaker cases are more subject to court dismissal rather than settlement, and stronger cases are more subject to jury trial rather than voluntary dismissal or settlement. Consistent with this perspective, jury trial rates are up after the PLRA.

Thus, the PLRA's successful effort to curtail prisoner litigation is not necessarily achieved by introducing barriers that unfairly deny even "little" wins to prisoners. On the contrary, the PLRA by design and effect might be a sound public policy response that fairly, but firmly, differentiates cases for the most appropriate handling.

CONCLUSION

The Prison Litigation Reform Act has produced a significant reduction in the number of prisoner lawsuits coming to the federal courts. There are simply fewer cases filed under § 1983 of the U.S. Code in U.S. district courts than there were before the provisions of the PLRA took effect. This Article shows that the decrease in § 1983 litigation, which occurred throughout the U.S. circuit courts of appeal, is striking in both magnitude and scope. The Fifth Circuit is an exception, where a decrease in § 1983 filings occurred before the new law was adopted and continued after the law was passed.

Proponents of the PLRA will point to this dramatic change in the volume and trend of prisoner litigation as evidence of the Act's success: prisoner lawsuits dropped by 40% between 1996 and 2000. Clearly, the goal of reducing the share of federal judicial workload devoted to prisoner litigation has been achieved. Moreover, supporters of the PLRA can justify the rationale for the decrease: most cases filed pre-PLRA did not meet basic procedural requirements and were resolved by court dismissal. The problematic nature of these lawsuits

was clarified in the findings of Hanson and Daley.[77] Their extensive examination of prisoner lawsuits filed just prior to the PLRA show few able to withstand scrutiny and pass the basic, existing requirements of suing someone acting under color of state law without immunity over an issue cognizable under § 1983 that rises to the level of a deprivation of their constitutional rights.

Yet, we do not know the nature of the lawsuits no longer filed or dismissed through the new procedures authorized by the PLRA. Critics of the PLRA are concerned that the new provisions such as those related to filing fees and three strikes will preclude filing of the meritorious as well as the frivolous.[78] Proponents have not proven that the elimination of frivolous lawsuits has been the source of the drop in § 1983 filings. Looking to the available data is suggestive but incomplete.

In the aggregate, there is evidence of little change when the manner of disposition for prisoner litigation is compared pre- and post-PLRA. The proportion of cases dismissed outright remains at about 80%. It appears prisoners continue to file procedurally weak lawsuits in large numbers and, in response, they continue to be dismissed by the U.S. district courts.

However, going inside the manner of disposition numbers offers some support to those concerned that the PLRA has inhibited meritorious claims in their battle for recognition. If operating as intended, the new PLRA provisions allow the federal courts to deny complaints that in the past were accepted only to be dismissed for having fundamental flaws. In fact, three circuits show a proportional decline in court dismissals and a proportional increase in voluntary dismissals, settlements, and jury trials. On the other hand, court dismissals have risen proportionally in six circuit courts, while dismissals, settlements, and jury trials have proportionately declined. The bluntness of the AO data precludes us from determining what this pattern implies about the differentiation between meritorious and nonmeritorious cases. Interpretation largely rests on one's views about the use and effectiveness of the new administrative remedy procedures that prisoners are required to exhaust under the PLRA.

This Article goes a long way in informing the effect of the PLRA on the volume, trend, and outcome of prisoner litigation and focuses attention on directions for future inquiry. The dramatic change in volume and trend highlights the need to better understand the implementation process of the PLRA and the roles of key constituencies

77 HANSON & DALEY, *supra* note 11 *passim.*

78 *See, e.g.*, Lukens, *supra* note 6.

that stood to benefit most from the legislation (U.S. district and circuit court judges, state attorneys general, and state and local correctional officials). The apparent success of the PLRA in accomplishing the primary objective of reducing the volume of § 1983 litigation in federal courts is remarkable, given Congress's previous unsuccessful efforts to regulate prisoner lawsuits.

A comprehensive assessment of the change in the manner of case resolution pre- and post-PLRA demands a case-level examination of its effect on the composition of § 1983 lawsuits docketed and resolved. Have the cases changed in subject matter of the issues? Which cases are resolved quickly under the PLRA? And which ones go to trial? Is the number of prisoners who prevail at trial after the PLRA larger, smaller, or about the same as before the PLRA? Answers to these questions are ultimately needed to assess the fairness and "efficiency" of the PLRA in eliminating procedurally weak cases but not impeding the flow of meritorious cases into federal courts. Until these questions are addressed—through case level inquiry—the final chapter on the PLRA cannot be written.