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CRYING WOLVES, PAPER TIGERS, AND BUSY BEAVERS—OH MY!: A NEW APPROACH TO PRO SE PRISONER LITIGATION

Justin C. Van Orsdol*

INTRODUCTION

> *Curious, how often you humans manage to obtain that which you do not want*.[1]—Leonard Nimoy as Mr. Spock

To say that the United States is infatuated with incarceration would be a gross understatement.[2] As a result of "tough-on-crime" laws,[3] the United States has "the largest prison population in the world, with more than 2.3 million persons behind bars on any given day" and it "also has the world's highest per capita rate of incarceration"[4] with a rate that is "five to ten times higher than those of other industrialized democracies like England and Wales . . . , Canada . . . , and Sweden."[5] Due in part to prison population increases, the conditions of U.S. prisons are atrocious. Prisons are often overcrowded, "which in turn leads to an increase in violence, neglect, and gross mistreatment."[6]

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1. *Star Trek: Errand of Mercy* (NBC television broadcast Mar. 23, 1967).

2. *See* Susan N. Herman, *Prison Reform Litigation Acts*, 24 FED. SENT'G REP. 263, 266 (2012) ("The volume of prison litigation is, first and foremost, a symptom of our unhealthy addiction to incarceration.").

3. *See Inhumane Jail and Prison Conditions*, FAIR FIGHT INITIATIVE, [https://perma.cc/L5D5-VHJL] (last visited Dec. 5, 2021) ("In the 1990s, the prison population saw the effects of 'tough-on-crime' laws passed over the previous decade. The numbers of incarcerated people skyrocketed . . . .").

4. DAVID FATHI, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 6 (Benjamin Ward et al. eds., 2009), [https://perma.cc/ZAM4-BG65].

5. *Id.*

6. FAIR FIGHT INITIATIVE, *supra* note 3.

"Imagine one of those dystopian movies in which some character inhabits a world marked by dehumanization and continual state of fear, neglect, and physical violence—*The Hunger Games*, for instance, or *Mad Max*."[7]

What may sound hyperbolic is anything but. Just last year the Supreme Court overturned the Fifth Circuit's grant of qualified immunity to correctional officers in *Taylor v. Riojas*.[8] Taylor, the petitioner, alleged that he was confined to "a pair of shockingly unsanitary cells. The first cell was covered, nearly floor to ceiling, in '"massive amounts" of feces.'"[9] Taylor feared his food and water would be contaminated and did not eat or drink for nearly four days. He was then moved to a second "frigidly cold cell, which was equipped with only a clogged drain in the floor to dispose of bodily wastes. . . . Because the cell lacked a bunk, and because Taylor was confined without clothing, he was left to sleep naked in sewage."[10] These conditions affect prisoners indiscriminately,[11] and sadly Taylor's story is just one of thousands.

The fall of government oversight, coupled with the rise of a private prison industry "backed by insurance companies with teams of lawyers, [has] made it [all but impossible for prisoners] to seek [any form of] justice and retribution for ill treatment."[12] Thanks to the Prison Litigation Reform Act (PLRA)[13] and the

7. Shon Hopwood, *How Atrocious Prison Conditions Make Us All Less Safe*, BRENNAN CTR. FOR JUST. (Aug. 9, 2021), [https://perma.cc/EY5L-69RX].

8. 141 S. Ct. 52 (2020) (per curiam).

9. *Id.* at 53 (footnote omitted) (quoting Taylor v. Stevens, 946 F.3d 211, 218 (5th Cir. 2019)).

10. *Id.*

11. *See, e.g.*, Rachel Scully, *Proud Boys Leader Alleges Inhumane Conditions at DC Jail in Bid for Release*, THE HILL (Nov. 16, 2021, 11:21 AM), [https://perma.cc/G252-D4JK] (noting allegations that a prisoner's cell was "regularly flooded with dirty toilet water," that meals were cold and inedible, and describing an "incident in which a prisoner had a seizure and was left to lay there for a half-hour before any medical help arrived").

12. FAIR FIGHT INITIATIVE, *supra* note 3. *But see* Andrea Wells, *Behind Bars: The Business of Insuring Correctional Facilities*, INS. J. (June 4, 2012), [https://perma.cc/9Z5R-ELSA] (noting that the vice president of HCC Specialty, Mike Davis, claims that "[f]rom a risk management perspective, [Davis] views privately-run correctional facilities as more cautious than publicly-owned facilities when it comes to policies and procedures").

13. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996).

Antiterrorism and Effective Death Penalty Act (AEDPA),[14] prisoners face an uphill battle. Often times, prisoners "proceed pro se" and "fare worse than their represented counterparts on average, raising concerns about equality before the law."[15] "[P]ro se litigants lack lawyers' relational capital, substantive legal knowledge, and familiarity with legal procedure" and "are less likely to present effective arguments and evidence and more likely to make procedural errors."[16]

On the other hand, there are numerous stories of pro se prisoner litigants who abuse the judicial system by filing frivolous pleadings. Take for example, "America's favorite serial litigant,"[17] Jonathan Lee Riches:

> By the time . . . Riches finished serving a ten-year prison sentence . . . he had gained a reputation as the most prolific jailhouse lawyer of all time. He'd contested his own case, naturally. But he'd also sued the president, sought to intervene in the bankruptcy proceedings against Bernard L. Madoff and filed civil complaints against public figures ranging from Allen Iverson to Timothy McVeigh.[18]

Although Riches may be the most infamous pro se prisoner litigant, he is not alone. Federal district and appellate court dockets are filled with cases of false claims with inaccurate information[19] and pro se prisoner litigants that have led a "paper

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14. Antiterrorism and Effective Death Penalty Act of 1996, Pub L. No. 104-132, 110 Stat. 1214. Even when habeas petitioners are successful, they still face uphill battles. *See, e.g.*, Petition for Writ of Certiorari at 3, Shinn v. Ramirez, 142 S. Ct. 1718 (2022) (No. 20-1009) (requesting cert to determine whether a prisoner, who won his habeas petition, was able to do so by presenting new facts related to his trial and appellate counsel who failed to present exculpatory evidence).

15. Mark D. Gough & Emily S. Taylor Poppe, *(Un)Changing Rates of Pro Se Litigation in Federal Court*, 45 L. & SOC. INQUIRY 567, 567 (2020).

16. *Id.* at 570 (citation omitted).

17. Michael Brick, *America's Most Prolific Jailhouse Lawyer and His Many Fans*, NEW REPUBLIC (July 11, 2013), [https://perma.cc/WT2T-AWGG].

18. *Id.* Riches later capitalized on his newfound fame, selling books and merchandise. *See, e.g.*, JONATHAN LEE RICHES ET AL., NOTHING IS WRITTEN IN STONE: A JONATHAN LEE RICHES COMPANION (2018); JONATHAN LEE RICHES, COMES NOW THE PLAINTIFF: SELECTED LAWSUITS (AND POEMS) BY JONATHAN LEE RICHES (Michael Sajdak ed. 2016). Both of these are still selling on Amazon.

19. *See, e.g.*, Daker v. Owens, No. 5:20-CV-354-TES-CHW, 2021 WL 1321335, at *4 (M.D. Ga. Jan. 5, 2021) ("In this case, Plaintiff has an undeniable and significant history of 'abus[ing] the judicial process by filing IFP affidavits that conceal and/or misstate his real assets and income.'" (alteration in original)).

assault"[20] on the courts. Unfortunately, Riches—and those like him—have stigmatized pro se prisoner litigants "in ways that influence assessments of pro se litigants and their claims."[21]

In response to Riches-like pro se prisoner litigants, Congress unsurprisingly made matters worse by enacting the PLRA and AEDPA and failed to attack the underlying issues regarding pro se prisoners. Facing a deluge of litigation, courts have been left to craft various gatekeeping techniques to weed out litigants who cry wolf, over-zealously roar in pleadings, and otherwise dam up the dockets. Whether the PLRA or AEDPA actually save judicial resources is questionable, but what is certain is that they do not combat the underlying problems with today's prison conditions. A new approach to pro se prisoner litigation is needed. That is, rather than treating the symptoms of pro se prisoner litigation, we should instead treat some of the causes.[22]

This Article argues for four possible reforms: (1) increasing the number of magistrate judges, (2) establishing a new specialty court, (3) increasing the number of law school clinics, and (4) adopting an agency approach similar to how the Equal Employment Opportunity Commission (EEOC) interacts with employment discrimination claims. Part I explores the historical data on pro se prison litigation and legislative approaches such as the PLRA and AEDPA. Part II turns to some of the major roadblocks prisoners face, such as pleading standards, exhaustion, prison mailbox rules, and sanctions. The Article concludes in Part III with a discussion of the possible reforms noted above and how these might better address the strain on the judicial system while also improving the conditions in America's prisons.

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20. *See, e.g.*, In re Henderson, No. MC 3:12-402, 2014 WL 198996, at *1-2 (S.D. Ga. Jan. 17, 2014) ("Nearly nine months following this Order, Henderson began a new *paper assault* on the federal court . . . ." (emphasis added)).

21. Gough & Poppe, *supra* note 15, at 570 (citation omitted).

22. Although beyond the scope of this Article, deficiencies in the criminal justice system at large and improving prison conditions would also go a long way towards preventing pro se prisoner litigation. *See* Herman, *supra* note 2, at 263 ("The number of nonfrivolous complaints could be reduced if the states were to ensure that prison conditions were minimally humane instead of waiting to be sued.").

I. HISTORICAL DATA ON PRO SE PRISONER LITIGATION

As Shakespeare once wrote, "[w]hereof what's past is prologue, what to come in yours and my discharge."[23] Thus, before discussing how to fix pro se prisoner litigation it is imperative to understand how we arrived here and the status of the current landscape resulting from the PLRA and AEDPA.

A. The Prison Litigation Reform Act

Nearly twenty-five years ago, "President Bill Clinton signed the Prison Litigation Reform Act."[24] The PLRA was enacted "in the wake of a sharp rise in prisoner litigation in the federal courts" and "contains a variety of provisions designed to bring this litigation under control."[25] Or, as the late Senator Bob Dole once stated: "This amendment will help put an end to the inmate litigation fun-and-games."[26] Some have even suggested that the PLRA's "limited legislative history has itself been treated as evidence of animus" against pro se prisoner litigants.[27] Not convinced? Consider the PLRA's legislative history for yourself.

The PLRA was first introduced on September 27, 1995, by a quartet of senators, including Bob Dole, Orin Hatch, Spencer Abraham, and Jon Kyl.[28] Under the guise of misleading statistics and one-sided stories, these senators collectively wove a narrative that liberal federal judges were "willing to grant any inmate any frivolous request."[29] Senator Dole asserted that "prisons should be just that—prisons, not law firms" and he promised that the

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23. WILLIAM SHAKESPEARE, THE TEMPEST act 2, sc. 1, ll. 289-90.

24. Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (Apr. 26, 2021), [https://perma.cc/Z7KB-QS69]; *see also* 42 U.S.C. § 1997e.

25. Woodford v. Ngo, 548 U.S. 81, 84 (2006) (citations omitted).

26. FATHI, *supra* note 4, at 1 (quoting Sen. Dole's comments during a Senate debate on an early version of the PLRA).

27. Katherine A. Macfarlane, *Procedural Animus*, 71 ALA. L. REV. 1185, 1213 (2020).

28. Ann H. Mathews, Note, *The Inapplicability of the Prison Litigation Reform Act to Prisoner Claims of Excessive Force*, 77 N.Y.U. L. REV. 536, 546 n.56 (2002); *see also* Prison Litigation Reform Act of 1995, S. 866, 104th Cong. (1995).

29. Terri LeClercq, *Rhetorical Evil and the Prison Litigation Reform Act*, 15 LEGAL COMM. & RHETORIC 47, 48 (2018). For those interested in a deep dive of the legislative history, LeClercq's article provides an excellent in-depth review of the hearing on the PLRA.

PLRA would reduce frivolous prison litigation.[30] Making sweeping allegations, Senator Dole asserted that "tough new guidelines" in the PLRA would "work to restrain liberal Federal judges who see violations on constitutional rights in every prisoner complaint and who have used these complaints to micromanage State and local prison systems."[31] Senator Dole further contorted statistics, noting the sharp increase in prisoner litigation but failed to "report the underlying statistics—the astronomical growth of the prison population."[32]

Senator Hatch, who retired in 2019, added that the PLRA was needed to "stop this ridiculous waste of the taxpayers' money. The huge costs imposed on State governments to defend against these meritless suits is another kind of crime committed against law-abiding citizens."[33] He also "emphasiz[ed] fear" and stated that "citizens should fear inmates who might win court cases and be released to commit 'vicious crimes.'"[34] Additionally, Senator Hatch claimed that only 3.1% of inmate cases were valid,[35] but this claim "ignored any statistical context to exaggerate a 'vast majority' [of prisoner lawsuits] as having 'validity.'"[36] And this statistic failed to "distinguish between cases, for instance[,] those disposed of in other forums, disposed of when inmates dropped suits[,] or [cases in which inmates] had their cases mediated."[37]

Senator Kyl criticized prisoner litigants for treating litigation as a "recreational activity" and explained that prisoners victimize society twice, "first when they commit the crime that put them in prison, and second when they waste our hard-earned tax dollars while cases based on serious grievances languish on the court calendar."[38] He argued that this "recreational activity" clogged

30. 141 CONG. REC. 26,548 (1995).

31. *Id.* at 26,549.

32. LeClercq, *supra* note 29, at 59.

33. 141 CONG. REC. 26,553 (1995).

34. LeClercq, *supra* note 29, at 53 (quoting 141 CONG. REC. S14,418 (daily ed. Sept. 27, 1995)).

35. *See* 141 CONG. REC. 26,553 (1995) ("[O]nly a scant 3.1 percent have enough validity to reach trial.").

36. LeClercq, *supra* note 29, at 65.

37. *Id.*

38. 141 CONG. REC. 26,553 (1995).

the courts and drained precious judicial resources.[39] Lastly, Kyl attacked the use of special masters, claiming that they were "improperly used" and cited choice examples to "tar the whole system."[40]

Finally, Senator Abraham attacked the federal judiciary directly. He claimed that "judicial orders entered under Federal law . . . effectively turned control of the prison system away from elected officials . . . over to the courts."[41] To Senator Abraham, this "control" undermined the legitimacy, deterrent effect, and punitive functions of prison sentences.[42] He also proclaimed that prisoners were being rewarded by being permitted to file lawsuits and that they "would receive an unearned profit" if allowed to continue.[43]

The 1995 version of the PLRA failed to "yield enough votes" to pass.[44] The PLRA was not subject to any serious debate; in fact, it received only a single hour-long hearing filled with the hostile rhetoric described above.[45] Undeterred, it was included in an appropriations bill, which President Clinton vetoed in December of 1995.[46] Senator Hatch, however, was able to get the PLRA passed in 1996 "as a rider to an omnibus appropriations bill that President Clinton signed into law on April 26, 1996."[47] The question of why President Clinton would sign such a law has been debated. Some scholars have suggested that President Clinton ultimately endorsed the tough-on-crime policies embedded into the PLRA and saw the appropriations bill that contained the PLRA as a victory over a Republican Congress that

39. *Id.*

40. LeClercq, *supra* note 29, at 55

41. 141 CONG. REC. 26,554 (1995).

42. *See id.*

43. LeClercq, *supra* note 29, at 58.

44. Mathews, *supra* note 28, at 546 n.56.

45. Anh Nguyen, Comment, *The Fight for Creamy Peanut Better: Why Examining Congressional Intent May Rectify the Problems of the Prison Litigation Reform Act*, 36 SW. U. L. REV. 145, 150 (2007) ("Both the proposal and objections to the PLRA were made in less than one hour during the Senate Hearing on September 29, 1995.").

46. Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 557 n.19 (2006).

47. Mathews, *supra* note 28, at 546 n.56.

"he effectively charged, had closed down the government in its prior budget efforts."[48]

As it stands, the PLRA contains six main filing provisions. First, under the *in forma pauperis* (IFP) provision, indigent prisoners—unlike other indigent plaintiffs—must pay filing fees in civil actions and appeals according to the formula set forth under 28 U.S.C. § 1915(b).[49] Second, the PLRA requires courts to conduct a frivolity screening of both a prisoner's IFP application and their complaint—if the allegations of poverty are found to be untrue or if the complaint is deemed frivolous, malicious, fails to state a claim, or seeks monetary relief from a defendant(s) immune from suit, the court may dismiss the action sua sponte.[50] Third, prisoners who abuse the judicial process and have three or more claims dismissed based on these issues become subject to the three-strikes provision and become barred from filing any complaints IFP without some allegation of imminent danger of serious physical injury.[51] Fourth, prisoners must exhaust all administrative remedies before bringing any action "with respect to prison conditions."[52] Fifth, the PLRA generally prohibits mental or emotional injuries, unless the prisoner can also show a physical injury.[53] Lastly, the PLRA caps attorney fees at "150[%] of the hourly rate established under section 3006A of Title 18 for payment of court-appointed counsel."[54]

48. 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, 21-22 (1997).

49. "[I]f a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner *shall be required* to pay the full amount of a filing fee. The court *shall* asses and, when funds exist, collect, as a partial payment of any court fees required by law, an initial filing fee of 20 percent . . . . After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent . . . ." 28 U.S.C. § 1915(b)(1)-(2) (emphasis added).

50. 28 U.S.C. § 1915(e)(2); 42 U.S.C. § 1997e(c)(1) (noting sua sponte dismissal).

51. 28 U.S.C. § 1915(g); 42 U.S.C. § 1997e(e).

52. 42 U.S.C. § 1997e(a).

53. 42 U.S.C. § 1997e(e).

54. 42 U.S.C. § 1997e(d)(3).

B. The Antiterrorism and Effective Death Penalty Act

Much like how the PLRA was the congressional answer to pro se prisoner § 1983 claims, the AEDPA was Congress' response to habeas petitions.[55] From 1948 to 1996, habeas petitions under 28 U.S.C. § 2255 were not subject to statutes of limitations and could essentially be filed at any time.[56] All that changed when Timothy McVeigh "blew up the Alfred P. Murrah [F]ederal [B]uilding in Oklahoma City on April 19, 1995."[57] A result of "the '[Newt] Gingrich Congress,'"[58] AEDPA was first introduced to Congress in January 1995 as a part of House Speaker Gingrich's "*Contract with America platform*."[59] The review and passage of AEDPA, however, was accelerated after the Oklahoma City bombing—and, like the PLRA, it was signed into law by President Clinton.[60]

Although "[t]he [stated] purpose of AEDPA is '[t]o deter terrorism, provide justice for victims, [and] provide for an effective death penalty,'"[61] its relation to the death penalty is tenuous at best.[62] AEDPA is the functional equivalent of the PLRA, in terms of adding roadblocks, for habeas petitions—namely by "restrict[ing] federal review of habeas corpus

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55. *See The History of Habeas Corpus in America*, 2255 MOTION, [https://perma.cc/4DNG-8LZC] (last visited Sept. 17, 2022) (noting that AEDPA "greatly complicated section 2255 proceedings"); *see also* NANCY J. KING ET AL., EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS 8 (2007), [https://perma.cc/7LVG-NB8K] (noting that in "93% of non-capital cases, the petitioner had no counsel").

56. Benjamin R. Orye III, Note, *The Failure of Words: Habeas Corpus Reform, the Antiterrorism and Effective Death Penalty Act, and When a Judgment of Conviction Becomes Final for the Purposes of 28 U.S.C. § 2255(1)*, 44 WM. & MARY L. REV. 441, 441 (2002).

57. Andrew Cohen, *Two of the Oklahoma City Bombing's Lasting Legacies*, BRENNAN CTR. FOR JUST. (Apr. 21, 2015), [https://perma.cc/Y8SB-ACP6].

58. James S. Liebman, *An "Effective Death Penalty?" AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 412 (2001).

59. *Id.*

60. *See* Lynn Adelman, *Who Killed Habeas Corpus?*, DISSENT, Winter 2018, at 3, [https://perma.cc/77QL-VV8H] ("[O]ver the objections of habeas scholars, civil libertarians, and his own counsel . . . President Clinton signed the bill in April 1996.").

61. Orye, *supra* note 56, at 441 (second and third alterations in original).

62. Certainly, AEDPA does keep people on death row, but the point here is that it affects many more people outside of death row.

appeals."[63] AEDPA proponents "sought to streamline the federal appellate process for claims arising out of state criminal cases"[64] because "[t]here were too many appeals taking too long . . . to the point where delays were eroding confidence in our justice system."[65] Another more likely reason behind AEDPA, however, was to further habeas petitions "as a vehicle for the racialization and subordination of disadvantaged groups and for normalizing excesses of government power."[66]

AEDPA "made sundry changes to habeas corpus practice"[67] both under § 2255 and § 2254, including the "impos[ition of] a gantlet of deadlines and procedural barriers."[68] Aside from all but effectively nullifying federal review of state court decisions, AEDPA "made it even harder for . . . prisoner[s] to present facts in federal court that his or her lawyer had (even incompetently) failed to present in state court"[69] and imposed a one-year statute of limitations.[70] The one-year statute of limitation period comes with a thicket of Catch-22s, all designed to complicate and stall the process.[71] AEDPA also limits successive habeas petitions except under two limited exceptions: (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable[,]"[72] and (2) when "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence."[73] The exceptions are so rare that Justice Souter and Justice Stevens

63. *Judges, Commentators Critical of Habeas Law That 'Keeps People on Death Row Despite Flawed Trials*,*'* DEATH PENALTY INFO. CTR. (July 28, 2015), [https://perma.cc/B8GW-RQGT]; *see also* Radley Balko, *Opinion: It's Time to Repeal the Worst Criminal Justice Law of the Past 30 Years*, WASH. POST (Mar. 3, 2021, 4:09 PM), [https://perma.cc/KL3S-Y5E9] ("The AEDPA's most destructive provision is arguably its deference to state courts.").

64. Cohen, *supra* note 57.

65. *Id.*

66. Leah M. Litman, *The Myth of the Great Writ*, 100 TEX. L. REV. 219, 222 (2021).

67. *The History of Habeas Corpus in America*, *supra* note 55.

68. Balko, *supra* note 63.

69. Liebman, *supra* note 58, at 416.

70. *See* 28 U.S.C. § 2255(f) (2008) ("A 1-year period of limitation shall apply to a motion under this section.").

71. *See* Liebman, *supra* note 58, at 416-17 (explaining the catch-22s regarding tolling and review by state courts).

72. 28 U.S.C. § 2244(b)(2)(A).

73. 28 U.S.C. § 2244(b)(2)(B)(i).

explained that, effectively, "federal habeas limits a prisoner to only one petition challenging his conviction or sentence."[74]

C. Current State of Affairs

The most recent data from the Judiciary Data and Analysis Office reports that "from 2000 to 2019, in 91[%] of prisoner petition filings, the plaintiffs were self-represented."[75] So what impact did the PLRA and AEDPA have on curbing filings? It turns out, not as much as what the tough-on-crime quartet promised.

In 1996, when the PLRA was enacted, the total incarcerated population of the U.S. was 1,654,574.[76] During 1996, these prisoners filed 38,262 filings, or 23.1 filings per 1,000 prisoners.[77] In 2020, the total incarcerated population was estimated at 1.8 million.[78] That year, prisoners filed 26,217 filings, or about 14.7 filings per 1,000 prisoners.[79] At first glance this seems like a substantial decline, but from 1997 to 2020 the number of filings per 1,000 prisoners stayed between 9.6 and fifteen.[80] Moreover, the total number of filings has generally remained constant at about 25,000.[81] Of these, roughly 12.8% of pro se prisoner civil rights cases resolve in favor of the prisoner, which is a surprising upward trend when compared to win rates of 9.5% in the early 2000s.[82]

AEDPA had similar results, with 14,591 habeas petitions filed in 1996 and an average of 19,662 petitions filed between 2003 and 2021.[83] Petitions have trended downward, but over the

74. Mayle v. Felix, 545 U.S. 644, 673 (2005) (Souter, J., dissenting).

75. *Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, U.S. CTS. (Feb. 11, 2021), [https://perma.cc/ZCM4-JNHN].

76. Margo Schlanger et al., *Data Update*, INCARCERATION & THE L. (Apr. 2022), [https://perma.cc/A5UH-G3YK].

77. *See id.* at tbl. A.

78. JACOB KANG-BROWN ET AL., PEOPLE IN JAIL AND PRISON IN 2020 1, 3 (2021), [https://perma.cc/4U3D-3JZ4].

79. *See* Schlanger et al., *supra* note 76, at tbl. A.

80. *See id.*

81. *See id.* (noting that the total number of prisoner filings in 1997 was 26,095 and in 2020 it was 26,217).

82. *See id.* at tbl. C.

83. *See infra* note 85.

2003-21 period, petition filings have remained more or less constant.[84]

Figure 1

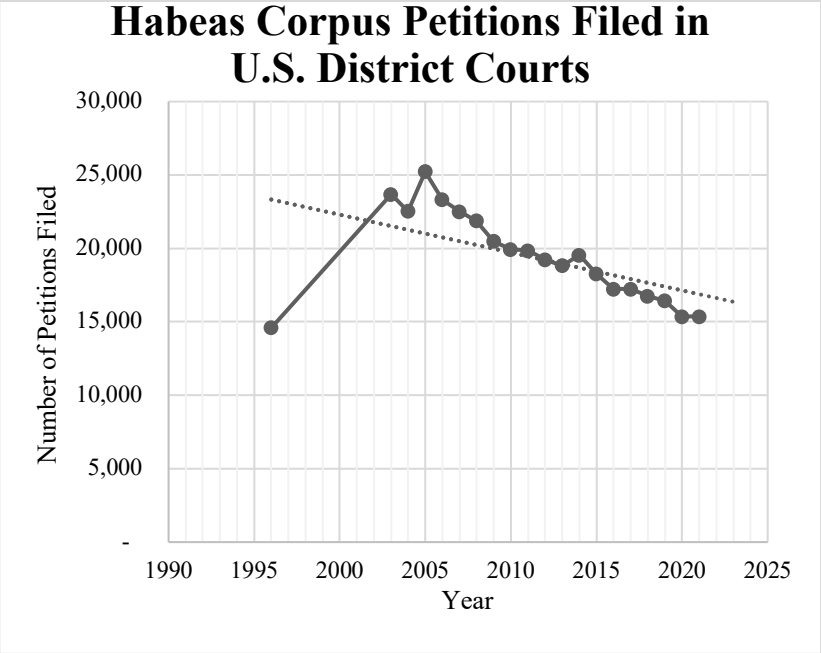

Figure 1: Habeas corpus petitions filed in U.S. district courts.[85]

Thus, although the PLRA and AEDPA had a sharp initial impact on pro se prisoner filings, both failed to address the root causes of prison-related lawsuits, namely questionable state court proceedings,[86] prison conditions, and civil rights violations.[87]

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84. *See infra* note 85 and fig. 1.

85. *Federal Judicial Caseload Statistics*, U.S. CTS., [https://perma.cc/6HK5-9UYR] (last visited Jan. 17, 2022) (filter by "U.S. District Courts" and then select each year and navigate to table C-2, titled "U.S. District Courts-Civil Cases Filed, by Jurisdiction and Nature of Suit"); *see also* Fred Cheesman et al., *Prisoner Litigation in Relation to Prisoner Population*, 4 NAT'L CTR. FOR STATE CTS. 1, 2 (1998), [https://perma.cc/F77U-FRBP].

86. *See* EVE BRENSIKE PRIMUS, LITIGATING FEDERAL HABEAS CORPUS CASES 1-2 (2018), [https://perma.cc/GWF5-RF6Y] (noting that evidence demonstrates that "states systemically violate criminal defendants' constitutional rights" and that there is "data documenting large numbers of wrongful state convictions").

87. *See* Schlanger et al., *supra* note 76, at tbl. B (noting that between 83.3% to 96.9% of all pro se cases filed in district courts are prison conditions or civil rights complaints).

Just as the PLRA and AEDPA did little to curb the total number of filings, they likewise did little to speed up the case disposition time. Like the number of filings, the PLRA and AEDPA initially had a sharp impact on the time it took for district courts to reach a disposition in pro se prisoner civil rights cases. In 1997, the average number of days to disposition in pro se prisoner civil rights cases was 125 days.[88] As of 2019, that number had increased to 161 days—which is puzzling considering all the technical and procedural tools district judges have in their toolboxes to resolve these cases quickly.[89]

Figure 2

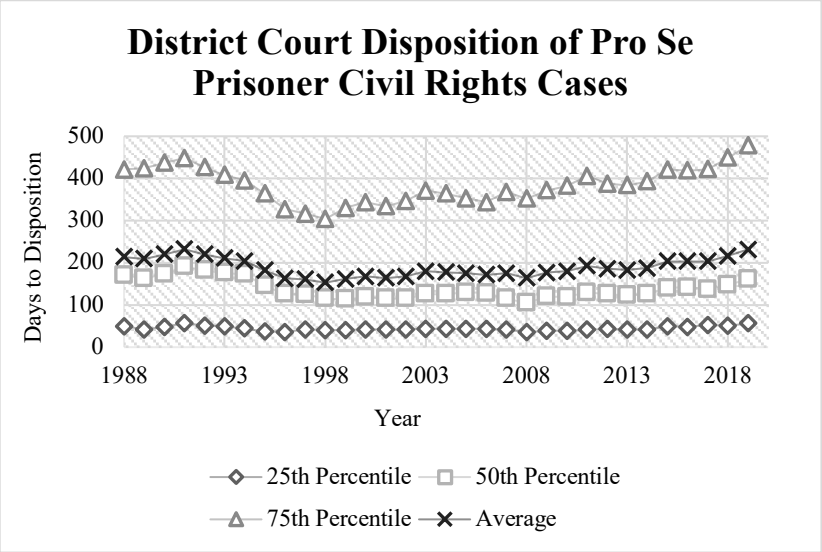

Figure 2: District court disposition of pro se prisoner civil rights cases.[90]

88. *See* Schlanger et al., *supra* note 76, at tbl. H.

89. *See* ROGER A. HANSON & HENRY W.K. DALEY, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 26 (1995), [https://perma.cc/X8N3-NARY] (noting that for cases disposed of within six months, "the most common reason being court dismissal for failure to meet the legal requirements of Section 1983 or to satisfy procedural requirements such as time deadlines. For these cases, there are clear and conspicuous deficiencies to the issues that permit quick dispositions").

90. *See* Schlanger et al., *supra* note 76, at tbl. H.

As to why the disposition timetable is trending upward is unsettled. One cause might be an increase in the number of complex cases as compared to routine cases. A 1994 Department of Justice (DOJ) study compared the disposition timelines for various types of § 1983 prisoner cases and discovered that challenges to physical conditions took an average of 490 days, whereas excessive force challenges took upwards of 721 days.[91] The report further suggests that courts appear to be more "sensitive to issues concerning the use of force. . . . For this reason, the courts are likely to take considerable time to review issues that concern the alleged used of excessive force with very close scrutiny."[92] Another possible reason is an increase in evidentiary hearings. For example, with physical security issues, the DOJ report calculates an 893-day processing time for cases with evidentiary hearings.[93] The number of judicial vacancies could also be a contributing factor. In 2021, for example, Judge Dale A. Drozd of the U.S. District Court for the Eastern District of California instituted a judicial emergency.[94] "The district, which serves 8 million Californians is supposed to have six full-time judges," but as of February 2020 was down to a single active judge.[95] Or it could be a shortage in U.S. Marshals, who are largely responsible for executing service of process for pro se prisoner claims that proceed past the frivolity review stage.[96] It could also be a function of delayed mail,[97] which pro se prisoners

91. HANSON & DALEY, *supra* note 89, at 31.

92. *Id.* at 31-32.

93. *Id.*

94. Steven Mayer, *Federal Judge Shortage 'Will Seriously Hinder the Administration of Justice' in Kern*, BAKERSFIELD (Feb. 20, 2020), [https://perma.cc/CF78-ZZK8]. As of August 19, 2022, there are sixty-six district court vacancies nationally. *See Judicial Vacancies*, AM. BAR INST. (Aug. 19, 2022), [https://perma.cc/79SY-XZK7].

95. Mayer, *supra* note 94.

96. *See* Whitney Wild, *US Marshals Service Has Manpower Shortage as it Faces Rising Threats Against Judges, Report Says*, CNN (June 16, 2021, 4:12 PM), [https://perma.cc/KA64-35GP] (reporting that the U.S. Marshals Service "is facing major staffing and operational challenges" due to increased threats and budget limitations); U.S. DIST. CT. FOR THE DIST. OF COLUMBIA, PRO SE PRISONER HANDBOOK 9 (2014), [https://perma.cc/B55L-77G6] ("If your request to proceed *in forma pauperis* is granted, the summons will be served by the U.S. Marshal when the judge so directs.").

97. Ellen Ioanes, *Mail Delays and Price Hikes are Coming to USPS. Here's Why.*, VOX (Oct. 3, 2021, 5:10 PM), [https://perma.cc/E3GR-WVEQ] ("The United States Postal service started slowing its mail delivery on Friday, part of an effort by Postmaster General Louis DeJoy to cut costs over the next 10 years.").

rely on to file and receive filings.[98] The likely cause is a combination of all these factors.

Like the PLRA, "even as the [AEDPA] has 'streamlined' appeals in some cases[,] it has bewildered lawyers, frustrated judges, and generated *countless* new procedural and substantive questions that the United States Supreme Court has been forced (with varying degrees of success) to address term after term after term."[99] Similarly, the AEDPA also "has neither sped up . . . nor prevented"[100] what it sought to and instead has resulted in additional litigation. Prior to the passage of AEDPA, the average disposition time for a non-capital habeas petition was six months.[101] As of 2006, the "average overall processing time for all terminated, non-transferred"[102] habeas cases "was 9.5 months, with a median of 7.1 months."[103] What is more striking is that "capital habeas cases that terminated in federal district court lasted an average 29 months, almost twice the 15 months they took before AEDPA."[104] Some potential reasons for the increase in disposition time include: (1) increased habeas caseloads, (2) an increase in stays in "capital habeas cases . . . under *Rhines v. Weber* (2005) to permit petitioners to return to state court to litigate their unexhausted claims," and (3) geographic effects, such as changing circuit precedent.[105]

98. Wayne T. Westling & Patricia Rasmussen, *Prisoners' Access to the Courts: Legal Requirements and Practical Realities*, 16 LOY. U. L.J. 273, 289 (1985) ("[T]he state must provide indigent inmates paper and pens to draft legal documents, notarial services to authenticate them, and stamps to mail them." (citing Bounds v. Smith, 430 U.S. 817, 824-25 (1977)).

99. Cohen, *supra* note 57 (emphasis added).

100. Dale Chappell, *25 Years of the AEDPA: Where do We Stand?*, PRISON LEGAL NEWS (June 1, 2021), [https://perma.cc/6YXF-KWLQ].

101. KING ET AL., *supra* note 55, at 56.

102. *Id.* at 41.

103. *Id.*

104. Jon B. Gould, *Justice Delayed or Justice Denied? A Contemporary Review of Capital Habeas Corpus*, 29 JUST. SYS. J. 273, 278 (2008); *see also* Chappell, *supra* note 100 ("But the AEDPA did not speed up the death penalty. Since the AEDPA was enacted in 1996, the wait time on death row has literally *doubled*.").

105. Gould, *supra* note 104, at 279-81.

II. PRO SE PRISONER LITIGATION ISSUES

As a result of the PLRA and AEDPA, pro se prisoner litigants face several roadblocks that stymie any efforts to right constitutional violations or improve prison conditions and do little to curb wasted judicial resources. Among the most powerful of these roadblocks are: (1) pleading issues, (2) dismissals for lack of exhaustion and violations of the prison mailbox rule, and (3) sanctions.

A. Howling at the Moon: Pleading Issues

It is no secret the vast majority of the U.S. prison population has lower-than-average literacy and writing skills compared to the general population. "Almost half of the imprisoned individuals in the United States do not have a high school diploma or its equivalent."[106] Even those with some level of high school education often "function[] at two or three grades below the level actually completed in school."[107] Additionally, "the rate of mental illness and developmental disability is three to ten times higher in prison"[108] and "more than half of prison and jail inmates suffer[] from some form of mental illness."[109] If that was not enough, prisoners also must contend with "limited resources available within prisons themselves [which] are often inadequate to allow prisoners to represent themselves effectively."[110] These factors may explain why it is common for district courts to

106. Jessica Feierman, *"The Power of the Pen": Jailhouse Lawyers, Literacy, and Civic Engagement*, 41 HARV. C.R.-C.L. L. REV. 369, 372 (2006).

107. *Id.*

108. Richard H. Frankel & Alistair E. Newbern, *Prisoners and Pleading*, 94 WASH. U. L. REV. 899, 902 n.9 (2017) (citing Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 442-43 (1993)).

109. *Id.* (citing DORIS J. JAMES & LAUREN E. GLAZE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), [https://perma.cc/DZW3-HCGK]).

110. Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 279 (2010).

dismiss pro se prisoner complaints for failing to meet Rule 8 pleading standards[111] or for simply being illegible.[112]

To combat these factors, federal courts have relied on requiring pro se prisoners to recast complaints via form complaints.[113] Prisoners often turn to jailhouse lawyers[114] and prisoner representatives[115] to assist with writing these complaints and motions. Although these solutions are well-intentioned, neither do much to mitigate wasted judicial resources or advance potentially meritorious § 1983 complaints or habeas petitions.[116]

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111. *See, e.g.*, Hammond v. Crum, No. 16-CV-00069-GPG, 2016 WL 687464, at *1 (D. Colo. Feb. 19, 2016) (dismissing a pro se prisoner complaint because he "failed to file an amended Prisoner Complaint that complie[d] with the pleading requirements of Rule 8"); Crownhart v. Major, No. 07CV-00854-BNB, 2007 WL 1686915, at *2 (D. Colo. June 7, 2007) (ordering a pro se prisoner to amend his habeas petition when he "failed to comply with Rule 8").

112. *See, e.g.*, Taylor v. Solano Cnty. Pub. Def.'s Off., No. 2:20-CV-02114-JDP (PC), 2020 WL 7695607, at *1 (E.D. Cal. Dec. 28, 2020) (dismissing a pro se prisoner's complaint "because it [was] mostly illegible"); Cotner v. Campbell, 618 F. Supp. 1091, 1096 (E.D. Okla. 1985) ("The judges, magistrates and law clerks of the federal branch, more accustomed to the style, grace, and thoroughness of pleadings filed by professional attorneys, must grapple with the sometimes illegible and almost always incomprehensible pleadings of the prisoners."), *aff'd in part, vacated in part sub nom.* Cotner v. Hopkins, 795 F.2d 900 (10th Cir. 1986).

113. *See, e.g.*, Jones v. Unknown Defendant, No. 1:18-CV-00017-WLS-TQL, 2018 WL 10799177, at *1 (M.D. Ga. Mar. 5, 2018) (ordering a pro se prisoner to "recast his complaint using the Court's standard complaint form for use by pro se prisoners" and providing additional instructions to complete the form).

114. *See* Johnson v. Avery, 393 U.S. 483, 500 (1969) (White, J., dissenting) (explaining how jailhouse lawyers "solicit[] business as vigorously as [they] can").

115. Some institutions require prisoners to first file complaints with a prisoner's representative as part of the grievance process. *See, e.g.*, Roberts v. Croft, No. 1:12 CV 0936, 2012 WL 3061384, at *9 (N.D. Ohio July 26, 2012) (noting that the "plaintiff was the designated prisoners' representative . . . and prisoners were required to lodge complaints with him as a prerequisite to accessing the courts").

116. *See* Evan R. Seamone, Fahrenheit 451 *on Cell Block D: A Bar Examination to Safeguard America's Jailhouse Lawyers from the Post-*Lewis *Blaze Consuming Their Law Libraries*, 24 YALE L. & POL'Y REV. 91, 98 (2006) (explaining that "the term 'jailhouse lawyer' also extends to incompetent, predatory inmates who possess no more than a 'gift of gab' because there exists no common standard"); *see also Johnson*, 393 U.S. at 499 (White, J., dissenting) ("'[I]t is indisputable' that jailhouse lawyers . . . 'are sometimes a menace to prison discipline and . . . their petitions are often so unskillful as to be a burden on the courts which receive them.'").

1. The Wolf in Sheep's Clothing: Recast Complaints and Form Pleadings

In the early 1980s, "a committee of federal judges took on the task of making recommendations for 'the more effective handling' of pro se prisoner litigation."[117] One response from this committee was the creation of a "model form complaint to be used by prisoners filing civil rights cases."[118] Form complaints for § 1983 actions have become quite popular with district courts and many pro se prisoner litigants are required to use them under the district court local rules.[119] Form complaints have proven useful, as "[t]hey tend to provide clear, straightforward instructions" and "often apprise prisoners of the risks of filing a nonmeritorious lawsuit."[120]

Form complaints, however, have not reduced the sheer number of illegible, unintelligible, or deficient pleadings filed in district courts. This failure is likely due to the inherent flaws in the form complaint itself. A 2017 study conducted by Professor Richard H. Frankel and former professor and now Magistrate Judge Alistair E. Newbern explains several issues with standardized complaint forms.[121] Of note, the study discovered that form complaints vary considerably in their requirements and instructions among districts, and often "hinder prisoners from pleading sufficient facts about the nature of their claim[s]" and "require prisoners to understand legal language or to draw legal conclusions based on terminology that they may not understand."[122]

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117. Frankel & Newbern, *supra* note 108, at 903 (quoting FED. JUD. CTR., RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS, at viii (1980)).

118. *Id.* Additionally, "[a]ppended to the Habeas Corpus Rules is a model form for habeas applications." Charles Alan Wright, *Procedure for Habeas Corpus*, 77 F.R.D. 227, 238 (1978); *see also* U.S. CTS., PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS BY A PERSON IN STATE CUSTODY 1 (2017), [https://perma.cc/WUK5-YK53].

119. Tracey I. Levy, Comment, *Mandatory Disclosure: A Methodology for Reducing the Burden of Pro Se Prisoner Litigation*, 57 ALB. L. REV. 487, 513 n.162, app. at 517 n.1 (1993).

120. Frankel & Newbern, *supra* note 108, at 913 (footnote omitted).

121. Judge Newbern and Professor Frankel provide a more in-depth analysis of other problems associated with form complaints not addressed in this Article. *See generally id.* at 918-946.

122. *Id.* at 914.

Although some reforms have been proposed to rectify these flaws, they do not fully solve the issues stemming from form complaints. First, form complaints do not solve illegibility issues. To be sure, most federal prisons generally provide inmates with access to electronic typewriters, but prisons are not constitutionally required to do so.[123] Pro se litigants in some state prisons have had typewriters revoked altogether.[124] Even the prisons that do provide typewriters generally require prisoners to pay an initial cost of $25 to $30 for print wheels and ribbons,[125] which may prove to be cost inhibitive. Whether due to costs, prohibitions, or for other factors, the vast majority of pro se prisoners file hand-written complaints.[126] Given the average educational limitations and limited access to typewriters, many pro se prisoner complaints are illegible.[127] Second, form complaints do not prevent the filing of unintelligible complaints. Prisoners who are fortunate enough to have access to legal resources still may not fully understand which facts are essential for their complaint or what documentation may be required. Last, many prisoners are not aware of the standardized forms and instead initially file complaints and petitions on regular paper. Even those who are aware are generally later directed to recast their complaint on a standardized form within a certain number of

123. Christopher Zoukis, *Prison Law Library: Jailhouse Lawyers*, ZOUKIS CONSULTING GRP. (Mar. 26, 2022, 9:27 PM), [https://perma.cc/QJQ9-LD5D]); *see also* Taylor v. Coughlin, 29 F.3d 39, 40 (2d Cir. 1994) ("[P]rison inmates do not enjoy a constitutional right to typewriters as implements of access to the courts . . . ."); 28 C.F.R. § 543.11(h) (1997) ("Unless clearly impractical, the Warden shall allow an inmate preparing legal documents to use a typewriter, or, if the inmate cannot type, to have another inmate type his documents.").

124. *See, e.g.*, *Ban on Typewriters in Prisons Upheld*, LAS VEGAS REV.-J. (Aug. 29, 2008, 9:00 PM), [https://perma.cc/PWX7-5QLA] (reporting that a "federal judge . . . upheld [a] ban on typewriters . . . [for] Nevada prison inmates . . . after two incidents in which typewriter parts were made into weapons.").

125. *See* Zoukis, *supra* note 123.

126. *See* Rebecca Wise, Note, *Five Proposals to Reduce Taxation of Judicial Resources and Expedite Justice in Pro Se Prisoner Civil Rights Litigation*, 52 U. TOL. L. REV. 671, 685 (2021) ("[A] large percentage of *pro se* prisoner civil rights complaints are handwritten."); Jon O. Newman, *The Supreme Court—Then and Now*, 19 J. APP. PRAC. & PROCESS 1, 3 (2018) (recounting handwritten pro se prisoner petitions at the Supreme Court).

127. *See* Wise, *supra* note 126, at 685 (explaining that "[h]andwritten complaints are often illegible" and lack punctuation, contain spelling errors, and lack a common writing structure).

days.[128] Due to delays in mail or the moving and transferring of inmates, pro se litigants are often late in meeting these deadlines only to have their complaint dismissed and forced to start the process over again.[129]

Because pro se pleadings must be construed liberally, federal courts are often taxed with redundant reviews of the same or similar iterations of a complaint or petition. Each complaint or petition takes time and resources to review adequately.[130] Furthermore, additional time may be expended when and if the prisoner chooses to object to a magistrate judge's order or recommendation, or if the prisoner chooses to file a motion for reconsideration of a district judge's order. By no means should form complaints and petitions be discarded; however, it is imperative to recognize that they are but a tool in a judge's toolbox to both assist pro se prisoner litigants and to reduce somewhat of a strain on judicial resources.

2. Keeping the Wolves at Bay: Lack of Resources and Reliance on Jailhouse Lawyers

Educational and legibility concerns aside, pro se prisoner litigants also face a severe lack of legal resources. The Constitution guarantees prisoners the right to meaningful access

128. *See, e.g.*, Amerson v. Dozier, No. 5:18-CV-00376-TES-CHW, 2019 WL 11908047, at *3 (M.D. Ga. Feb. 15, 2019) ("Plaintiff has filed a § 1983 complaint on the standard complaint form designed for *pro se* litigants and he must now recast his complaint as directed."); Serna v. O'Donnell, 70 F.R.D. 618, 620 (W.D. Mo. 1976) ("Since the adoption of these forms, it has been the practice of this Court, upon receipt of a *pro se* prisoner complaint under 42 U.S.C. § 1983 to immediately send the plaintiff sets of complaint and affidavit forms accompanied by detailed instructions . . . ."); Figures *ex rel* Johnson v. Donahue, No. 8:22CV2, 2022 WL 103312, at *3 (D. Neb. Jan. 11, 2022) (directing the Clerk of the Court to provide a pro se plaintiff with "a copy of the standard form" and "strongly encourag[ing the plaintiff] to use [the] form in drafting an amended complaint").

129. *See* Katherine A. Macfarlane, *A New Approach to Local Rules*, 11 STAN. J. C.R. & C.L 121, 151 (2015) (noting the "delays inherent in prison mail"). Mail delays have worsened due to COVID-19. *See, e.g.*, Schuh v. Clayton, No. 20-10468, 2021 WL 1823395, at *1 n.1 (E.D. Mich. Mar. 25, 2021) (explaining that "mail processing has been delayed because of the court closure and other issues relating to the public health crisis").

130. *See supra* fig. 2; Schlanger et al., *supra* note 76.

to the courts,[131] which imposes an affirmative duty on prison officials to either establish an adequate law library or provide adequate assistance from persons trained in the law.[132] Notably, in *Bounds v. Smith*, the Supreme Court stated that prison officials can choose between either of these to satisfy the constitutional requirement and need not provide both.[133] Moreover, courts are further permitted to "allow some restrictions on a prisoner's access to legal resources to accommodate legitimate administrative concerns that include (1) maintaining security and internal order; (2) preventing the introduction of contraband . . .; and (3) observing budget constraints."[134] To make matters worse, the Supreme Court further limited prisoner access to legal materials and legal assistance in *Lewis v. Casey*[135]—even after explicitly noting the "largely illiterate prison population."[136] This may explain why prisoners are often forced to litigate without "access to important resources, such as 'libraries, legal materials, computers, the Internet, and even . . . paper, pens, and telephones.'"[137] And with the current COVID-19 pandemic, access has become even more limited in the name of safety.[138]

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131. Arthur v. Dunn, 137 S. Ct. 1521, 1522 (2017) (Sotomayor, J., dissenting) ("Prisoners possess a 'constitutional right of access to the courts.'" (quoting Bounds v. Smith, 430 U.S. 817, 821 (1977)).

132. *See* Gomez v. Vernon, 962 F. Supp. 1296, 1298 (D. Idaho 1997) ("Prison officials have an affirmative duty to ensure that such access is 'adequate, effective and meaningful.'" (quoting *Bounds*, 430 U.S. at 822)).

133. *See Bounds*, 430 U.S. at 828 ("[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries *or* adequate assistance from persons trained in the law." (emphasis added)).

134. *Substantive Rights Retained by Prisoners*, 48 GEO. L.J. ANN. REV. CRIM. PROC. 1157, 1157-59 (2019) (footnotes omitted).

135. 518 U.S. 343, 354 (1996).

136. *Id.*

137. Hannah Belitz, Note, *A Right Without a Remedy: Sexual Abuse in Prison and the Prison Litigation Reform Act*, 53 HARV. C.R-C.L. L. REV. 291, 326 (2018) (quoting Robbins, *supra* note 110, at 273).

138. *See, e.g.*, Swiderksi v. Harman, 336 F.R.D. 98, 103 (E.D. Pa. 2020) (explaining that a pro se prisoner "stated [that] he did not have access to the law library and [had] limited access to his mail because of [a] COVID-19-related prison lockdown"); Corporal v. Weber, No. DKC-20-2681, 2021 WL 2949784, at *12 (D. Md. July 14, 2021) ("[D]elays in answering requests from inmates seeking copies of cases and addresses by the prison library when the COVID-19 pandemic greatly impacted the ability of prison staff to be on-site to timely respond to inmate requests sent to the library . . . .").

Strangely, even modernization efforts with prison law libraries have impeded prisoners' access to legal materials and assistance. For example, Professor Ira P. Robbins has recounted a prisoner's explanation of when Florida prisons replaced hardbound volumes of federal reporters with digital collections.[139] As the prisoner explained, "[p]risoners in Florida are not allowed to use the computers in the law libraries for research purposes," which means that the prisoner has to "know the name and citation of the case[s] he wants to read" and give those citations to a law clerk to pull.[140] The prisoner then is at the mercy of the schedule of the law clerk and may only take notes from the computer screen.[141]

The Supreme Court's limitation on access to legal materials has created both "a 'Catch-22' situation"[142] and further propounded the strain of judicial resources.[143] Justice Scalia's majority opinion in *Lewis* "made it extremely difficult for prisoners to prove that access to legal materials would be inadequate to fulfill the right of access to the courts."[144] In turn, he created a situation wherein "prisoners, including those with mental illnesses, illiteracy, or a lack of fluency in the English language, must successfully go to court on their own in order to prove that they are unable to successfully go to court without additional assistance."[145] So, what was lauded as a backstop to curb pro se prisoner litigation has effectively spurned a vicious cycle of increased litigation that challenges these limited

139. *See* Robbins, *supra* note 110, at 279.

140. *Id.*

141. *Id.*

142. Christopher E. Smith, Brown v. Plata, *The Roberts Court, and the Future of Conservative Perspectives on Rights Behind Bars*, 46 AKRON L. REV. 519, 536 (2013).

143. Additionally, the standards for a "right to access" challenge vary among the circuit courts and are resolved on a case-by-case basis—meaning a pro se prisoner's chance of success is somewhat dependent on where the prison they are housed at is located. *See* Jay W. Spencer, Note, *Habeas Corpus Law in the Ninth Circuit After* Mendoza v. Carey*: A New Era?*, 31 SEATTLE U. L. REV. 1001, 1012-13 (2008) ("As a practical matter, courts differ drastically in their understandings of the standard set forth by the *Bounds* and *Lewis* decisions."); *see also Substantive Rights Retained by Prisoners*, *supra* note 134, at 1158 n.3028 ("Courts have not established definitively what resources a library must maintain to satisfy the right of access.").

144. Smith, *supra* note 142, at 536.

145. *Id.*

resources.[146] And because of limited—or a complete lack of—resources, courts are again tasked with deciphering pro se prisoner claims on these issues.

In the face of limited access to resources, pro se prisoners have increasingly turned to jailhouse lawyers for assistance, who generally do little to help things.[147] "The value of jailhouse legal assistance is subject to debate."[148] Some jailhouse lawyers do provide valuable assistance and have been successful in assisting their clients advocate for themselves.[149] Professor Shon Hopwood, for instance, famously drafted a successful cert petition to the Supreme Court "on behalf of a fellow inmate in 2002 while serving a sentence for bank robbery."[150] Sadly, not every jailhouse lawyer is as talented and good-natured as Professor Hopwood. "While jailhouse lawyers play an essential role in providing legal services to federal inmates, the rule of caveat emptor certainly applies here."[151] In reality, the skill, training, and motive of jailhouse lawyers varies considerably.[152] Put simply, "[t]here are good jailhouse lawyers, and there are snake's oil salespersons."[153] This is why some scholars have reasoned that "[f]ar from assisting fellow prisoners draft pleadings that survive *sua sponte* dismissal, there is a body of

146. A quick search on Westlaw using the search terms: "access /5 law /5 library" returns over 300 results from just the last six months and over 1,800 in the last three years.

147. This is not to say that jailhouse lawyers are not ever useful. Their importance has been noted by the Supreme Court. *See* Johnson v. Avery, 393 U.S. 483, 487 (1969) ("[I]f such prisoners cannot have the assistance of a 'jail-house lawyer,' their possibly valid constitutional claims will never be heard in any court.").

148. Julie B. Nobel, Note, *Ensuring Meaningful Jailhouse Legal Assistance: The Need for a Jailhouse Lawyer-Inmate Privilege*, 18 CARDOZO L. REV. 1569, 1579 (1997).

149. *See, e.g.*, Beth Schwartzapfel, *'For $12 of Commissary, He Got 10 Years Off His Sentence,'* MARSHALL PROJECT (Aug. 13, 2015), [https://perma.cc/9WGG-AJQN] (telling the story of a jailhouse lawyer who helped his cellmate vacate his murder convictions and obtain a new trial).

150. Emma Cueto, *With No Legal Help in Sight, 'Jailhouse Layers' Fill the Void*, LAW360 (Jan. 13, 2019, 8:02 PM), [https://perma.cc/25Y3-XVCT]. Professor Hopwood now teaches at Georgetown University Law Center.

151. Zoukis, *supra* note 123.

152. *See* Kevin D. Sawyer, *Jailhouse Lawyering From the Beginning*, 68 UCLA L. REV. DISCOURSE 98, 105, 122 (2021) (explaining a pro se litigant's path to becoming a jailhouse lawyer and noting that he learned from another cellmate); *see also* Nobel, *supra* note 148, at 1574 ("Jailhouse lawyers learn their legal skills through a variety of means.").

153. Zoukis, *supra* note 123.

research pointing out that some jailhouse lawyers actually encourage their 'clients' to file non-meritorious suits."[154]

The use of jailhouse lawyers also presents another quandary: whether communications between a jailhouse lawyer and his or her client should be protected by privilege. Courts have varied in their approach on this issue,[155] but it is not inconceivable to assume that pro se prisoners seeking the aid of jailhouse lawyers fall victim to saying too much (without a privilege shield) or saying too little out of fear of not having privilege.[156] Although the former issue is problematic in its own right, the latter also further perpetuates complaints which may initially fail under § 1915A's screening stage provision or at the motion-to-dismiss stage—only later to be forced to recast, supplement, or amend the complaint—which uses even more judicial resources.

Ultimately, these fixes and obstructionist measures do little to stem the proliferation of pro se prisoner actions. They may, and likely do, make things more difficult for prisoners and inevitably the courts, which must liberally construe pro se pleadings.

B. Beaver Dams: Exhaustion, Mailbox Rules, and IFP Provisions

Another hurdle of the PLRA and AEDPA is their associated exhaustion rules. Under the PLRA, prisoners must adequately exhaust administrative remedies.[157] Under the AEDPA, a prisoner petitioning under § 2254 must adequately exhaust

154. Howard B. Eisenberg, *Rethinking Prisoner Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 445 (1993); Nobel, *supra* note 148, at 1579 ("The most common concern is that jailhouse lawyers encourage inmates to file frivolous lawsuits which significantly overburden federal courts.").

155. *See* Nobel, *supra* note 148, at 1592-93 (noting different outcomes of this argument among state courts).

156. *See* Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 912-13 (2006) ("The principal rationale for the attorney-client privilege is strongly rooted in the belief that it encourages open and candid communication between attorney and client, and thereby facilitates the rendition of effective legal services.").

157. *See* 42 U.S.C. § 1997e(a); Woodford v. Ngo, 548 U.S. 81, 90-91 (2006) (noting that exhaustion requires that prisoners conform to all administrative deadlines and requirements).

appeals in state court.[158] Because prisoners rely on mail to file documents, they also face timing issues under the prison mailbox rule—both at the district and appellate court levels.[159] These timing and procedural rules vary and often cause dismissals on technicalities.

1. The Not-So-Eager Beaver: Exhaustion and Procedural Hurdles

Before filing a § 1983 action in federal court, the PLRA requires prisoners to exhaust administrative remedies.[160] Generally, administrative remedies are in the form of internal prison grievance procedures.[161] Grievance procedures usually force prisoners to limit both their total number of active grievances and the number of issues within each grievance.[162] Normally, prisoners must file their grievance with a prison official who conducts the first review.[163] Assuming the decision is unfavorable, the prisoner must then appeal that decision to a higher authority—sometimes up to four levels of review.[164] Only

158. *See* Kernan v. Hinojosa, 578 U.S. 412, 413 (2016) (per curiam) ("The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a state prisoner seeking federal habeas relief first to 'exhaus[t] the remedies available in the courts of the State.'" (alteration in original) (quoting 28 U.S.C. § 2254(b)(1)(A)).

159. *See, e.g.*, United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004) (noting an issue of whether the mailbox rule applies to a prisoner who had counsel but later filed his appeal pro se); Knickerbocker v. Artuz, 271 F.3d 35, 37 (2d Cir. 2001) (noting that the mailbox rule did not apply to a pro se prisoner who gave his notice of appeal to his sister, who filed the notice late).

160. *See* 42 U.S.C. § 1997e(a).

161. *See* Sharon I. Fiedler, Comment, *Past Wrongs, Present Futility, and the Future of Prisoner Relief: A Reasonable Interpretation of "Available" in the Context of the PLRA*, 33 U.C. DAVIS L. REV. 713, 720 (2000) ("Under the PLRA, prisoners can sue in federal court only after exhausting the prison's administrative grievance system.").

162. *See, e.g.*, Rodriguez v. Clupper, No. 5:17-cv-387 (MTT), 2018 WL 3525161, at *3 (M.D. Ga. July 20, 2018) ("We are not persuaded that these aspects of the policy [where an inmate can have no more than two active grievances at any one time and cannot list multiple issues in a single grievance] render the grievance process unavailable for purposes of the PLRA." (alteration in original) (quoting Pearson v. Taylor, 665 F. App'x 858, 867-68 (11th Cir. 2016)); Harvard v. Inch, 411 F. Supp. 3d 1220, 1248 (N.D. Fla. 2019) (noting that the plaintiff "filed a grievance, which was improperly rejected for failing to comply with the one issue rule"); Johnson v. Meier, 842 F. Supp. 2d 1116, 1119 (E.D. Wis. 2012) (finding that defendants wrongly concluded that the plaintiff violated the single-issue rule).

163. *See* Fiedler, *supra* note 161, at 721-22.

164. *See* Allen E. Honick, Comment, *It's "Exhausting": Reconciling a Prisoner's Right to Meaningful Remedies for Constitutional Violations with the Need for Agency*

after the highest official has denied the grievance may the prisoner file his or her complaint in federal court.[165] The same process also applies to prisoners suing federal officials under *Bivens*.[166]

On the surface, this sounds like a logical process. Giving prison officials, who are closest to the problem, the first opportunity to correct it could—in theory—provide efficient relief to prisoners and avoid involving a court.[167] When scrutinized, however, a problem emerges: effectively, the fox is guarding the hen house.[168] How so? Well, this "proper exhaustion" tactic allows prisons to employ all sorts of hurdles for prisoners. In addition to the limitations mentioned above, there is no longer a set timeline for prison officials to review grievances.[169] Grievance procedures can also be written

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Autonomy, 45 U. BALT. L. REV. 155, 172 n.134 (2015) (explaining that under a California regulation, "a prisoner had to navigate four levels of administrative grievances and appeals before exhausting all administrative remedies").

165. Gray Proctor, Ngo *Excuses: Proving, Rebutting, and Excusing Failure to Exhaust Administrative Remedies in Prisoner Suits After* Woodford v. Ngo *and* Jones v. Bock, 31 HAMLINE L. REV. 471, 473 (2008) ("To properly exhaust all administrative remedies, a prisoner must bring her complaint to every level of the state's prison grievance system and follow all of its procedures.").

166. *See* Jamie Ayers, Comment, *To Plead or Not to Plead: Does the Prison Litigation Reform Act's Exhaustion Requirement Establish a Pleading Requirement or an Affirmative Defense?*, 39 U.C. DAVIS L. REV. 247, 255 n.38 (2005) ("[A]ctions brought against federal officers as *Bivens* actions must also first exhaust administrative grievance procedures before they can be brought in federal court." (citing Porter v. Nussle, 534 U.S. 516, 524 (2002)).

167. *See* Danielle M. McGill, Note, *To Exhaust or Not to Exhaust?: The Prisoner Litigation Reform Act Requires Prisoners to Exhaust All Administrative Remedies Before Filing Excessive Force Claims in Federal Court*, 50 CLEV. ST. L. REV. 129, 160 (2002-03) ("[A]dministrative adjudication can prove to be extremely valuable to the nation's prisons because such institutions regain the power over day-to-day decisions.").

168. *See* Proctor, *supra* note 165, at 473 ("[T]he fate of the prisoner's suit is in the state's hands . . . .").

169. *See, e.g.*, Webster v. Bosecker, No. 3:20-cv-00632-GCS, 2021 WL 1720278, at *2 (S.D. Ill. Apr. 30, 2021) (finding that a prisoner did not exhaust his remedies despite waiting three months for a decision because "prisoners must afford officials the time and opportunity to fully investigate their claims prior to filing suit"). *But see, e.g.*, Pirl v. Ringling, No. 19-208J, 2021 WL 1964461, at *8 (Mar. 29, 2021) (finding that administrative remedies were unavailable when prison officials did not "provide an initial review response . . . more than 17 months after [the p]lainitff submitted his original grievance"). This tactic can be extremely useful for two reasons. First, for pretrial detainees, it may prevent a lawsuit from being filed altogether if the review process is lengthy enough that the prisoner moves or is released before fully exhausting the grievance process. Second, the length of the process could dissuade prisoners from filing grievances if they know they are set to be released before the process would be completed.

unclearly,[170] making them difficult to follow,[171] such that prison officials can deny nearly any grievance filed.[172]

These problems are not bugs; rather, they are features designed to nullify relief in federal court. To be sure, courts have found that prisoners have exhausted administrative remedies when those remedies were unavailable. For example, this includes when "prison officers are unwilling or unable to redress the inmate's grievance, when the grievance process is incomprehensible, and when the administrative process fails because of 'machination, misrepresentation, or intimidation.'"[173] But a finding that administrative remedies were "unavailable" is rare, as circuit courts have added additional hurdles to show that administrative processes were unavailable. Under the intimidation exception, for instance, some circuits have employed a two-part test that requires prisoners to show that (1) the prisoner subjectively "believed prison officials would retaliate against him if he filed a grievance,"[174] and (2) the prisoner's "belief was objectively reasonable."[175] Although prisoners can *usually* meet the first prong,[176] the second prong is often insurmountable—

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170. *Cf.* Robin L. Dull, Note, *Understanding Proper Exhaustion: Using the Special-Circumstances Test to Fill the Gaps Under* Woodford v. Ngo *and Provide Incentives for Effective Prison Grievance Procedures*, 92 IOWA L. REV. 1929, 1964 (2007) (noting that the Illinois Department of Corrections previously had a grievance procedure that "lacked the necessary level of specificity" and only revised it after the Seventh Circuit found that its procedure was improper).

171. Unclear grievance policies may result in procedural dismissals for technical errors, such as "filing a grievance on the incorrect form, failing to correctly label a grievance, and sending the right form to the wrong official." Honick, *supra* note 164, at 182 (footnotes omitted).

172. *See* Melissa Benerofe, Note, *Collaterally Attacking the Prison Litigation Reform Act's Application to Meritorious Prisoner Civil Litigation*, 90 FORDHAM L. REV. 141, 159-60 (2021) ("[C]orrections staff have an interest in making it hard for prisoners to successfully exhaust administrative remedies, as the ability to properly exhaust directly impacts the viability of a future lawsuit that could hold those same individuals liable.").

173. Jacqueline Hayley Summs, Comment, *Grappling with Inmates' Access to Justice: The Narrowing of the Exhaustion Requirement in* Ross v. Blake, 69 ADMIN. L. REV. 467, 488 (2017) (quoting Ross v. Blake, 578 U.S. 362, 344 (2016)).

174. McBride v. Lopez, 807 F.3d 982, 987-88 (9th Cir. 2015) (adopting the Eleventh Circuit's test).

175. *Id.* at 987.

176. Prisoners have been unsuccessful on the first prong when they file multiple grievances after an incident underlying their case. *See, e.g.*, Millare v. Murphy, No. 2:20-cv-00451-WBS-JDP (PC), 2021 WL 4355455, at *3 (E.D. Cal. Sept. 24, 2021)

even when there is evidence of preexisting hostility[177]—so long as prison officials do not "explicitly reference the grievance system"[178] when making threatening comments. In short, this means that prison officials can make the grievance process cumbersome and confusing without much fear of recourse.[179]

Prisoners filing habeas petitions under § 2254 face their own procedural roadblocks.[180] First, similar to the PLRA administrative-exhaustion requirement, habeas petitioners challenging their state convictions must exhaust all state remedies.[181] This often means first directly appealing their conviction before seeking collateral review under state habeas review procedures.[182] The state review process can last well over

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(noting that the prisoner filed ten grievances between the date of an alleged incident and the date of his complaint).

177. *See, e.g.*, Thomas v. Reyna, No. 1:19-cv-01217-GSA-PC, 2019 WL 5079546, at *2 (E.D. Cal. Oct. 10, 2019) ("Hostile interaction between a prisoner and prison guards, even when it includes a threat of violence, does not necessarily render the grievance system unavailable . . . .").

178. *See McBride*, 807 F.3d at 988. Note, the Ninth Circuit continues to say that explicit references need not be made to meet the objective prong, but it is hard to imagine many circumstances where a prisoner would be successful without an explicit threat. *See, e.g.*, Gilmore v. Ormond, No. 19-5237, 2019 WL 8222518, at *2 (6th Cir. Oct. 4, 2019) (holding that there was a triable issue of fact "as to whether prison officials impeded [the plaintiff's] ability to exhaust his claims" when prison officials "threatened to show other inmates documents reflecting that he cooperated with law enforcement if he filed a grievance").

179. *See* Derek Borchardt, Note, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 472 (2012) ("Thus, if prison officials dismiss a grievance due to procedural defect, the dismissal not only forecloses a remedy within the prison, but also forecloses a remedy in federal courts.").

180. Jennifer F. McLaughlin, Comment, *Just DNA: Expansion of Federal § 1983 Jurisdiction Under* Skinner v. Switzer *Should Be Limited to Actions Seeking DNA Evidence*, 23 GEO. MASON U. C.R.L.J. 201, 204 (2013) (stating that "[h]abeas petitioners must navigate numerous procedural hurdles to secure release," including "exhaust[ion of] all state remedies as a prerequisite to bringing a habeas challenge."); 28 U.S.C. § 2254(b)(1)(A).

181. 28 U.S.C. § 2254(b)(1)(A) ("An application for a writ of habeas corpus . . . shall not be granted unless . . . the applicant has exhausted the remedies available in the courts of the State . . . ."); Wainwright v. Sykes, 433 U.S. 72, 78-79 (1977) (noting the four procedural hurdles habeas petitioners must face before review of the substantive merits of their petition).

182. *See* Carey v. Saffold, 536 U.S. 214, 219 (2002) ("In most States, relevant state law sets forth some version of the following collateral review procedures. First, the prisoner files a petition in a state court of first instance, typically a trial court. Second, a petitioner seeking to appeal from the trial court's judgment must file a notice of appeal within, say, 30 or 45 days after the entry of the trial court's judgment. Third, a petitioner seeking further review of an appellate court's judgment must file a further notice of appeal to the state supreme court (or seek that court's discretionary review) within a short period of time . . . ." (citations omitted)).

a year,[183] and given that states also "began implementing comprehensive reforms of state postconviction procedures contemporaneous to the AEDPA's enactment, which has led to unsettled state law,"[184] it is easy to see how pro se prisoners can become confused[185] or frustrated[186] and file their habeas petitions prematurely.[187]

Habeas petitioners also face a strict one-year statute of limitations.[188] And although the statute is tolled during the pendency of state court proceedings, this assumes the petitioner complied with the procedural timelines of the state, which, as discussed above, are often confusing.[189] To be sure, pro se petitioners can attempt to make an equitable tolling argument, but

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183. ROGER A. HANSON & HENRY W.K. DALEY, BUREAU OF JUST. STATS., FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 12 n.9 (1995), [https://perma.cc/RND9-X6BD] (noting a 1979 study that found the average time between conviction in state court to filing a federal habeas petition was 1.5 years); *see also* Weaver v. Amsberry, 535 F. Supp. 3d 1016, 1025 n.2 (D. Or. 2021) ("For instance, a 2007 empirical study found the average time elapsed between state court judgment and federal habeas filing was 6.3 years for non-capital cases and 7.4 years for capital cases."). Almost all states have collectively proposed model time standards of 180 days to complete habeas and other postconviction proceedings, but only two states have adopted the standards. *See* MODEL TIME STANDARDS FOR STATE TRIAL COURTS 3, 13 (NAT'L CTR. FOR STATE CTS. 2011), [https://perma.cc/FV8W-W5UT].

184. Aaron G. McCollough, Note, *For Whom the Court Tolls: Equitable Tolling of the AEDPA Statute of Limitations in Capital Habeas Cases*, 62 WASH. & LEE L. REV. 365, 378 (2005).

185. *See, e.g.*, Collier v. State, 834 S.E.2d 769, 784 (Ga. 2019) (Peterson, J., concurring) ("By allowing the out-of-time remedy to be applied on direct appeal, our post-conviction jurisprudence has, as Justice Fletcher observed 27 years ago, created a 'tangle of procedural rules' that is both 'confusing' and 'incredible.'"); McKay v. State, 520 S.W.3d 782, 787 (Mo. 2017) ("The confusing inconsistency in treatment of post-conviction motions filed under Rule 29.15 . . . will be abated in future cases . . . ."); *Ex parte* Ingram, 675 So. 2d 863, 866 (Ala. 1996) ("Because Ingram's newly appointed counsel was understandably confused as how to proceed with Ingram's ineffective-assistance-of-counsel claim . . . .").

186. *See, e.g.*, Griffin v. Wingard, No. 3:13-CV-00131, 2013 WL 4543441, at *5 (M.D. Pa. Aug. 26, 2013) (noting that the petitioner was "frustrated by a delay" and that he argued "that this six-month delay in obtaining transcripts from state court proceedings . . . excus[ed] him from compliance with th[e] legally mandated exhaustion requirement"); Matthews v. Cockrell, No. Civ.A. 3:02-CV-0913, 2002 WL 31452412, at *8 (N.D. Tex. Oct. 16, 2002) ("Frustrated by the delay in state court, petitioner sought habeas relief in federal court . . . .").

187. 28 U.S.C. § 2254(b)(1)(A).

188. 28 U.S.C. § 2244(d)(1).

189. *See, e.g.*, Johnson v. Simms, No. CV 18-00825 MV/SCY, 2022 WL 43500, at *3 (D. N.M. Jan. 5, 2022) ("Petitioner did not file his state post-conviction habeas corpus petition until . . . more than one year after his conviction and sentence became final. As a result, the state habeas proceedings did not toll the running of the limitations period.").

"[i]n recent years, the Supreme Court has struggled to define what circumstances warrant equitable tolling in the context of habeas petitions and AEDPA."[190] Some circuits, like the Eleventh Circuit, have even gone so far as to note that the equitable tolling doctrine "in the habeas context is a 'work in progress' and will require more judicial guidance to clarify the doctrine."[191] Moreover, for petitioners asserting a colorable claim of actual innocence, finding evidence to support this claim "takes years and is often a result of blind luck."[192] So, even if a pro se petitioner makes it past the procedural hurdles, the clock is still against them to gather evidence that might support relief on the merits.

2. Muddy Mailbox Rules

Another unique and shifting procedural issue involves the application of the prison mailbox rule. The prison mailbox rule, as first announced in *Houston v. Lack*,[193] provides that a pro se petitioner's "notice of appeal [is] filed at the time [a] petitioner deliver[s] it to the prison authorities for forwarding to the court clerk."[194] The same principle has also been applied to filings in district courts.[195] Like most pro se litigation rules, the prison mailbox rule is deceivingly simple on its face, but its application and protection has been eroded by district and circuit courts alike.

The mailbox rule has provided ample ammunition for courts to dismiss pro se prisoner complaints and habeas petitions. For example, some courts have held that if a prisoner uses a regular mailbox instead of the prison mail log system, the prisoner does

190. Mandi Rene Moroz, Note, *Protecting Access to the Great Writ: Equitable Tolling, Attorney Negligence, and AEDPA*, 51 GA. L. REV. 647, 649 (2017).

191. *Id.* (quoting Cadet v. Fla. Dep't of Corr., 742 F.3d 473, 475 (11th Cir. 2014), *vacated sub nom.*, Cadet v. Fla. Dep't of Educ., 853 F.3d 1216, 1218 (11th Cir. 2017)).

192. Tiffany R. Murphy, *"But I Still Haven't Found What I'm Looking For": The Supreme Court's Struggle Understanding Factual Investigations in Federal Habeas Corpus*, 18 U. PA. J. CONST. L. 1129, 1144 (2016).

193. 487 U.S. 266 (1988).

194. *Id.* at 276.

195. *See, e.g.*, Sulik v. Taney Cnty., 316 F.3d 813, 814 (8th Cir. 2003) (holding that the prison mailbox rule applies to district court filings in § 1983 cases), *overruled on other grounds*, 393 F.3d 765, 766 (8th Cir. 2005); Taylor v. Brown, 787 F.3d 851, 858-59 (7th Cir. 2015) ("Although the prison mailbox rule was first applied to notices of appeal, the rule applies to all district-court filings save for 'exceptional situation[s].'" (alteration in original) (citations omitted)).

not enjoy the benefit of the prison mailbox rule.[196] Even where district courts have given pro se prisoners the benefit of the doubt and considered evidence, such as declarations from the prisoner and fellow prisoners,[197] some circuit courts have been reluctant to stray from this bright-line rule. These courts reason that prison mail logs reduce "disputes and uncertainty over when a filing occurred and . . . [prevent] put[ting] all the evidence about the date of filing in the hands of one party."[198] Recently, due to COVID-19, prison legal mail procedures have been delayed or disrupted. Pro se prisoner litigants who have argued "discrepancies in the prison's mail logs" have generally been unsuccessful when they opt not to use the prison mail system, however.[199] Suffice it to say, pro se prisoners who place their mail in the wrong mailbox are placing a losing bet against the clock.

Pro se prisoners have also had actions dismissed as untimely when administrative rules or the Federal Rules of Appellate Procedure further defined when something was filed. In *Nigro v. Sullivan*,[200] for instance, a pro se prisoner filed a habeas petition, challenging a Bureau of Prisons officer's "determination that [he] had used narcotics."[201] The district court dismissed his petition due to procedural default, finding his appeal to the General Counsel's Office was untimely under agency regulations, and the

196. *See* Miller v. Sumner, 921 F.2d 202, 203 (9th Cir. 1990) ("We disagree that evidence of mailing by deposit in a regular mailbox, instead of through the prison mail log system, suffices, and dismiss the appeal."); Murphy v. Hylton, No. 07-3074-SAC, 2007 WL 3146389, at *2 (D. Kan. Oct. 25, 2007) ("The prison mailbox rule does not apply to the regular prison mail system." (citing United States v. Leonard, 937 F.2d 494, 495 (10th Cir. 1991))). *But see* United States v. Gray, 182 F.3d 762, 765-66 (10th Cir. 1999) (noting that normally "where a prison maintains a legal mail system separate from its regular mail system, a prisoner must use the legal mail system to be entitled to the benefit of the mailbox rule" but concluding that the prisoner was entitled to the prison mailbox rule because the prison's "legal mail system [did] not provide a log or other record" and thus there was no difference between the regular and legal mail drop boxes).

197. *Miller*, 921 F.2d at 203 (noting that "[t]he district court found that [the prisoner] had [timely mailed his notice], based on declarations by [the prisoner] and another prisoner indicating that the notice had been timeously put in a mailbox at the prison facility").

198. *Gray*, 182 F.3d at 765 (quoting Houston v. Lack, 487 U.S. 266, 275 (1988)).

199. *See* Burton v. Martin, 849 F. App'x 759, 760-61 (10th Cir. 2021) (affirming the district court's finding that the prison mail system was adequate despite evidence of discrepancies in the prison mail log system).

200. 40 F.3d 990 (9th Cir. 1994).

201. *Id.* at 993.

prisoner appealed to the Ninth Circuit.[202] When the prisoner argued that his appeal to the General Counsel's Office was timely under the mailbox rule, the Ninth Circuit disagreed.[203] In affirming the district court, the Ninth Circuit noted that the Supreme Court's mailbox rule "addressed an undefined term, 'file' or 'serve.'"[204] Unlike *Houston*, under 28 C.F.R. § 542.14, the term "file" *was* defined and was "simply not open to the interpretation given it in *Houston*."[205] Unpersuaded by policy arguments, the Ninth Circuit found that they were in no position to rewrite procedural legislative rules.[206]

Given 28 C.F.R. § 542.14's plain meaning, the Ninth Circuit found that the Bureau of Prison's interpretation of "filed" was "neither plain error nor inconsistent with the regulation" and thus the prisoner failed to timely appeal to the General Counsel's Office.[207]

Likewise, the Fifth Circuit applied similar logic in *Guirguis v. INS*.[208] In *Guirguis*, the pro se petitioner filed a petition for review of the Bureau of Immigration Appeals' (BIA) dismissal of his appeal from a deportation ruling—"thirty-one days after the BIA entered its order of dismissal."[209] The Fifth Circuit and the INS noted that under "8 U.S.C. § 1105a(a)(1), a petition for review in the case of an alien convicted of an aggravated felony must be filed 'not later than 30 days after issuance' of the final deportation order."[210] The prisoner argued that his appeal was timely under the prison mailbox rule, similar to the prisoner in *Houston*, but the Fifth Circuit distinguished *Houston* by explaining that here, the prisoner was "seeking review not from a district court but from an administrative agency."[211] Unlike *Houston*, which dealt with Rules 3(a) and 4(a) of the Federal Rules of Appellate Procedure, the prisoner's review of an

202. *Id.*
203. *Id.*
204. *Id.* at 994.
205. *Nigro*, 40 F.3d at 994.
206. *Id.* at 996.
207. *Id.*
208. 993 F.2d 508 (5th Cir. 1993).
209. *Id.* at 509.
210. *Id.*
211. *Id.* at 510.

administrative decision fell under Rule 15(a).[212] This meant that the prisoner was required to file his petition with the clerk of a court of appeals within thirty days and the prison mailbox rule did not apply.[213]

To add to the difficulties, pro se prisoners and courts have recently been grappling with another prison mailbox rule twist. What happens when a prisoner who is originally represented by counsel suddenly becomes pro se? Does she or he get to enjoy the benefits of the prison mailbox rule? As it turns out, courts have arrived at different conclusions.[214]

In *Cretacci v. Call*,[215] the Sixth Circuit answered this question in the negative. There, a plaintiff—a former pretrial detainee at a county jail—hired an attorney to represent him in a § 1983 suit against county jail officials.[216] The attorney, however, later realized that he was not admitted to practice in the district and likely would not be admitted pro hac vice in time to file the complaint.[217] The attorney gave a copy of the complaint to the plaintiff and told him that, as an inmate, he could take advantage of the prison mailbox rule since by the time the district court ultimately received it, the statute of limitations had run four days prior.[218] The Sixth Circuit held that the prisoner was not entitled to the prison mailbox rule because he "was not proceeding without assistance of counsel"[219] and further determined that, unlike notices of appeal, the prison mailbox rule did not apply to the filing of complaints.[220]

The Seventh Circuit reached a somewhat different conclusion in *United States v. Craig*.[221] In *Craig*, a pro se prisoner initially informed his trial lawyer that he would not

212. *Id.*

213. *Guirguis*, 993 F.2d at 510.

214. *See* Courtenay Canedy, Comment, *The Prison Mailbox Rule and Passively Represented Prisoners*, 16 GEO. MASON L. REV. 773, 779-80 (2009) (noting that the Fourth and Seventh Circuits have extended the prison mailbox rule to passively represented pro se prisoners but the Fifth, Eighth, and Ninth Circuits have not).

215. 988 F.3d 860 (6th Cir. 2021).

216. *Id.* at 864.

217. *Id.* at 864-65.

218. *Id.* at 865.

219. *Id.* at 866.

220. Cretacci, 988 F.3d at 867.

221. 368 F.3d 738 (7th Cir. 2004).

appeal his sentence but later changed his mind and "prepared and mailed a notice on his own because he thought that his lawyer would no longer represent him."[222] The prisoner alleged that he deposited his notice of appeal six days before the time to appeal had expired and that he was entitled to the benefits of the prison mailbox rule.[223] Judge Easterbrook found that the prisoner met the definition under Rule 4(c) as "an inmate confined in an institution" and was "unrepresented" though he was technically represented by counsel.[224] Judge Easterbrook, however, determined that the prisoner could not benefit from the prison mailbox rule because he did not meet the procedural requirements of Rule 4(c)(1), namely that the prisoner failed to submit an affidavit affirming he "prepaid first-class postage."[225]

3. "Chomp" Change: IFP Issues

One additional hurdle pro se prisoners face is a lack of money. Generally, both § 1983 litigations and habeas petitioners can proceed *in forma pauperis* (IFP) without prepayment of fees.[226] But unlike non-prisoner pro se plaintiffs, the PLRA still requires the eventual collection of the entire filing fee[227]—which as of now is $350 (exclusive of fees) to initiate a suit in district court[228] and $505 (inclusive of fees) to file an appeal.[229] Given that prisoners often have little or no money and usually share common complaints about prison conditions, many attempt to file class actions or multi-plaintiff actions IFP or intervene IFP to

222. *Id.* at 739.

223. *Id.* at 739-40.

224. *Id.* at 740.

225. *Id.*

226. *See* 28 U.S.C. § 1915(a)(1); Wright v. Benson, No. C18-4098-LTS, 2021 WL 2827295 at *1 (N.D. Iowa July 7, 2021) ("The doctrine of in forma pauperis allows a plaintiff to proceed without incurring filing fees or other court costs.").

227. *See* 28 U.S.C. § 1915(b)(1) ("[I]f a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee.").

228. *See* 28 U.S.C. § 1914(a) (stating, however, that "on application for a writ of habeas corpus the filing fee shall be $5").

229. *See Court of Appeals Miscellaneous Fee Schedule*, U.S. CTS., [https://perma.cc/PF5T-LA8W] (last visited Sept. 19, 2022) ("For docketing a case on appeal or review, or docketing any other proceeding, $500. . . . This fee is collected in addition to the statutory fee of $5 that is collected under 28 U.S.C. § 1917.").

share and minimize the filing fee cost among themselves.[230] But under the PLRA, appellate courts, like the Eleventh Circuit, have determined that this is impermissible.[231] The Eleventh Circuit reasons that "the Congressional purpose in promulgating the PLRA enforces an interpretation that each prisoner pay the full filing fee."[232]

Enforcing the "full filling fee" rule has led district courts within the Eleventh Circuit to foreclose Rule 24 motions to intervene because the PLRA prohibits collecting a filing fee that "exceed[s] the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment."[233] As the Eleventh Circuit district courts have explained, "[b]y allowing each plaintiff to pay his own fee in a single action, the 'filing fee collected' would exceed the amount normally permitted in a civil action."[234]

Ironically, by prohibiting class actions, multi-plaintiff actions, or interventions under the IFP statute, these courts have negated a chief component of the PLRA—limiting the total number of pro se prisoner lawsuits. As noted above, the PLRA has done little to curb § 1983 prisoner litigation.[235] So, instead of joining pro se prisoner plaintiffs with similar or related claims into single actions, these courts have either directed the clerks of courts to open new and separate actions for pro se prisoners who

230. Hubbard v. Haley, 262 F.3d 1194, 1195, 1197 (11th Cir. 2001).

231. *Id.* at 1198. Other courts have precluded pro prisoner class actions altogether. *See, e.g.*, Monge-Piedra v. Dep't of Homeland Sec., No. C14-0457-TSZ-MAT, 2014 WL 2931861, at *2 (W.D. Wash. Apr. 22, 2014) ("The Ninth Circuit has made clear that a *pro se* litigant has no authority to appear as an attorney for others.").

232. *Hubbard*, 262 F.3d at 1197-98 (noting Sen. Kyl's statement that the PLRA "will require prisoners to pay a very small share of the large burden they place on the federal judicial system. . . . The modest monetary outlay will force prisoners to think twice about the case and not just file reflexively" (quoting 141 CONG. REC. S7,526 (daily ed. May 25, 1995)); *see also* Gandy v. Bryson, 799 F. App'x 790, 792 (11th Cir. 2020) (per curiam) (holding the same in the context of Rule 24 motions to intervene).

233. 28 U.S.C. § 1915(b)(3).

234. Daker v. Wetherington, 469 F. Supp. 2d 1231, 1235-36 (N.D. Ga. 2007); *see also* Smith v. Fla. Dep't of Corr., No. 2:06-CV-14201, 2015 WL 500166, at *2-3 (S.D. Fla. Feb. 4, 2015) (denying a motion to intervene based on *Hubbard*).

235. *See* discussion *supra* Section II.A.2.

attempt to intervene or file class actions,[236] or the prisoners file a separate action on their own.[237] So much for judicial economy.

C. Paper Tiger Papercuts: Sanctions

Faced with overwhelming numbers of pro se prisoner cases, and despite the promised protections from the PLRA and AEDPA, courts have had to take matters into their own hands. The PLRA does offer courts some cover, like the three-strikes provision, but even then, some pro se prisoners consistently attempt to file frivolous actions or simply have fellow prisoners file actions on their behalf.[238] Thus, courts have turned to various forms of sanctions to curb abusive litigation further, like full prepayment and prohibition of filing certain actions for a set amount of time.

1. Curiosity Killed the Cat, But Satisfaction Brought It Back: The Three-Strikes Rule

A major tool for district courts dealing with abusive pro se prisoner litigants under the PLRA is the three-strikes provision. The three-strikes provision prohibits pro se plaintiffs from proceeding IFP "if [a] prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court . . . that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless [a] prisoner is under imminent danger of serious physical injury."[239] Recently, the Supreme Court

236. *Daker*, 469 F. Supp. 2d at 1236 (directing the clerk of court to open a new civil rights action on behalf of a pro se plaintiff who attempted to intervene).

237. *See, e.g.*, Chapman v. Rhodes, 434 F. Supp. 1007, 1008 (S.D. Ohio 1977) (noting that after an "action was first filed as a purported class action by . . . two inmates *pro se* and *in forma pauperis*," the court denied class certification and "[t]hereafter, competent counsel entered appearances on behalf of the plaintiffs and thereupon the case was certified as a class action").

238. Although beyond the scope of this Article, some scholars have voiced constitutional concerns with the three-strikes provision itself. *See generally* Kasey Clark, *You're Out!: Three Strikes Against the PLRA's Three Strikes Rule*, 57 GA. L. REV. (forthcoming 2023) (manuscript at 15-27) (on file with author) (arguing that the statutory filing fee violates indigent prisoners' right of access to the courts).

239. 28 U.S.C. § 1915(g).

strengthened the three-strikes provision by clarifying that the "failure to state a claim" language includes both cases dismissed with and without prejudice,[240] and that filing fees must be paid on a "per-case approach" rather than a "per-prisoner approach."[241] Again, although seemingly straightforward, problems and different interpretations of the three-strikes rule have made things more complex. Courts have had to grapple with whether: (1) mixed dismissal counts as a strike, (2) courts are bound by prior court determinations of the three-strikes provision, and (3) when and what actually counts as a strike.

Pro se prisoner complaints typically include multiple claims.[242] Some of those claims might have merit while the rest are frivolous, malicious, or fail to state a claim upon which relief can be granted. The question then, in these mixed cases, is whether courts can assess a strike against the plaintiff or not. Although certain district courts have concluded that a strike can be assessed on a per-claim basis, the circuit courts that have been presented this question have unanimously held that "[w]hen . . . presented with multiple claims within a single action, [courts] assess a PLRA strike only when the 'case as a whole' is dismissed for a qualifying reason."[243] And as the Fifth Circuit reasoned, "[i]mposing a strike only when the action itself is dismissed for one or more of the qualifying reasons is consistent with the [28 U.S.C. § 1915(g)'s] balance between deterring frivolous filings while maintaining access to the courts for facially valid claims."[244]

A trickier issue is determining whether a prisoner is barred under the three-strikes provision. Circuits have vastly different

240. *See* Lomax. v. Ortiz-Marquez, 140 S. Ct. 1721, 1727 (2020).

241. *See* Bruce v. Samuels, 577 U.S. 82, 84-85 (2016).

242. *See, e.g.*, Payton v. Kelly, No. 21-3088, 2021 WL 4543781, at *1 (10th Cir. Oct. 4, 2021) (noting that a pro se prisoner's § 1983 "complaint contained multiple claims"); Ellison v. Minnear, 388 F. App'x 544, 545 (7th Cir. 2010) (noting that the plaintiff, "an inmate in Illinois, filed a pro se suit under 42 U.S.C. § 1983, alleging numerous constitutional and state-law claims"); Branum v. Johnson, 265 F. App'x 349, 350 (5th Cir. 2008) (explaining that a pro se prisoner's § 1983 "complaints were long and rambling, linking numerous claims and defendants").

243. Harris v. Harris, 935 F.3d 670, 674 (9th Cir. 2019) (first alteration in original) (quoting Washington v. L.A. Cnty. Sheriff's Dep't, 833 F.3d 1048, 1057 (9th Cir. 2016)).

244. Brown v. Megg, 857 F.3d 287, 291 (5th Cir. 2017) (noting that the D.C., Fourth, Sixth, Seventh, Eighth, and Tenth Circuits have held the same).

approaches here. For example, the Second, Third, Sixth, and Seventh Circuit have held that "a district court that dismisses a prisoner's action lacks the authority to make a strike call under the statute that binds a later court."[245] Interestingly, how these circuits arrived at this conclusion has differed. The "Second and Third Circuits couch their holdings in constitutional, not statutory, terms."[246] But the Sixth and Seventh rely on the text of the PLRA, rather than the Constitution to reach this result.[247] Meaning, that perhaps if the PLRA was amended, district courts could bind other district courts on strike findings. In any case, most courts rely on other courts' strike findings in applying the three-strikes provision.[248] So while not officially binding, the findings made by prior district courts, and even other circuit courts, are functionally binding.[249]

Courts are split as to what counts as a strike and the requisite language needed to create a strike record.[250] The Third and Fourth Circuits appear to require a certain level of specificity or explicitness for a dismissal to count as a strike.[251] Conversely,

245. Simons v. Washington, 996 F.3d 350, 353-54 (6th Cir. 2021) (collecting cases from the Second, Third, and Seventh Circuits holding the same).

246. *Id.* at 354.

247. *See id.* (citing Hill v. Madison Cnty., 983 F.3d 904, 906 (7th Cir. 2020)).

248. *See, e.g.*, Snipes v. Palmer, 186 F. App'x 674, 675 (7th Cir. 2006) (noting strikes from the Central District of Illinois and applying another for a frivolous appeal); Gabel v. Hudson, No. 2:14-cv-1057, 2014 WL 7183940, at *3 (S.D. Ohio Dec. 16, 2014) (noting prior strikes from other district courts and further explaining that "district courts may apply the three strikes rule *sua sponte*"). *But see, e.g.*, Raleem-x- v. Washington, No. 2:21-CV-12141, 2021 WL 5768609, at *1 (E.D. Mich. Dec. 6, 2021) (dismissing the plaintiff's argument that the district court relied on another district's imposition of strikes and explaining that the court's order "listed seven qualifying cases from [its own] district").

249. *See* Stone v. United States, No. 7:05-CV-016-R, 2005 WL 221407, at *1 (N.D. Tex. Jan. 31, 2005) ("This Court enforces sanctions against inmates imposed by judges in other federal courts in Texas.").

250. *See* Samuel B. Reilly, Comment, *Where is the Strike Zone? Arguing for a Uniformly Narrow Interpretation of the Prison Litigation Reform Act's "Three Strikes" Rule*, 70 EMORY L.J. 755, 771-83 (2021) (explaining various circuit splits as to what counts as a dismissal and therefore a strike, including: (1) immunity, (2) failure to exhaust administrative remedies, and (3) mixed dismissals).

251. *See, e.g.*, Parks v. Samuels, 540 F. App'x 146, 150 (3d Cir. 2014) (holding that a dismissal did not count as a strike when a district court "did not dismiss the action '*explicitly* because it [was] "frivolous," "malicious," or "fail[ed] to state a claim" or . . . pursuant to a statutory provision or rule" (emphasis added) (quoting Byrd v. Shannon, 715 F.3d 117, 126 (3d Cir. 2013)); Everett v. Whaley, 504 F. App'x 245, 246 (4th Cir. 2013) ("[B]ecause the district court's dismissal did not turn on an *explicit* determination that Everett's entire action

the Eleventh Circuit is more lax and has held that "the dismissing court does not need to invoke any magic words or even use the word 'frivolous,' although such language certainly aids our review."[252] All that is required in the Eleventh Circuit is for the district court to "give some signal in its order that the action or appeal was frivolous."[253] In short, district courts that are not crystal clear as to whether a dismissal counts as a strike may be inadvertently leaving the door open for abusive pro se litigants to file further complaints.

Additionally, most courts count dismissals prior to the enactment of the PLRA in determining whether a pro se prisoner is barred under the three strikes-provision.[254] The Third, Sixth, Tenth, and Eleventh Circuits have both determined that such dismissals do count and that the PLRA is retroactive.[255] They reason that "[t]he language of § 1915(g) broadly refers to actions dismissed on 'prior occasions.'"[256] And they explain that Congress' intent "to curb frivolous prisoner litigation would not be furthered by interpreting the statutory command to apply only after a litigious prisoner files what may amount to three *additional* frivolous appeals."[257] The Fourth Circuit, however, noted one caveat—cases filed prior to the enactment of the PLRA are not subject to the three-strikes provision.[258] While the courts seem to be firmly rooted on this issue, scholars have debated the issue and

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failed to state a claim or was otherwise frivolous or malicious, it does not qualify as a strike." (emphasis added)).

252. Daker v. Comm'r, Ga. Dep't of Corr., 820 F.3d 1278, 1284 (11th Cir. 2016) (citations omitted).

253. *Id.*

254. *See* Altizer v. Deeds, 191 F.3d 540, 545 (4th Cir. 1999) ("[T]he circuits are split as to whether the 'three strikes' provision applies to a lawsuit filed prior to the effective date of the statute.").

255. *See* cases cited *infra* note 257.

256. Wilson v. Yaklich, 148 F.3d 596, 603 (6th Cir. 1998).

257. *Id.*; *see also* Rivera v. Allin, 144 F.3d 719, 728-29 (11th Cir. 1998) (holding that dismissals prior to the enactment of the PLRA count toward the three-strikes provision); Green v. Nottingham, 90 F.3d 415, 419 (10th Cir. 1996) ("[T]extual analysis . . . suggests that Congress intended § 1915(g) to apply to prisoner actions dismissed prior to its enactment."); Keener v. Pa. Bd. of Prob. & Parole, 128 F.3d 143, 144 (3d Cir. 1997) ("We . . . join those [other] circuits in holding that dismissals for frivolousness prior to the passage of the PLRA are included among the three that establish the threshold for requiring a prisoner to pay the full docket fees . . . .").

258. *See Altizer*, 191 F.3d at 546-47 (holding that the three-strikes provision is not retroactive to suits filed before the PLRA was enacted).

have argued that "[a]lthough . . . *in forma pauperis* status is a privilege, . . . it is a necessary tool for prisoners to exercise the fundamental right of access to the courts to challenge the conditions of his or her confinement."[259] By applying § 1915(g) to actions filed before the PLRA was enacted, these scholars argue that it "attaches new legal consequences to those prior dismissals."[260] Perhaps, given the Fourth Circuit's caveat, there is room for such an argument to win at some point.

Last, there is a split between the D.C., Tenth, and Eleventh Circuits as to whether an appeal dismissed for want of prosecution counts as a strike. The D.C. and Tenth Circuits have held that it does.[261] They "reason that [a] single judge's denial of the petition to proceed *in forma pauperis* on the grounds of frivolousness is the 'but for' cause of the panel's dismissal of the appeal for want of prosecution."[262] The Eleventh Circuit, however, explained that "but-for causation appears nowhere in the text of the [PLRA]," and even if it did, when an appeal is dismissed for want of prosecution, such as failure to pay a filing fee, that says nothing about the frivolity of the appeal itself.[263] Remarkably, the Eleventh Circuit even acknowledged that its "interpretation means that a prisoner can file unlimited frivolous appeals and avoid getting strikes by declining to prosecute the appeals after his petitions to proceed *in forma pauperis* are denied."[264]

Whether the three-strikes provision has mitigated pro se prisoner actions is suspect.[265] In any event, there appears to be a

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259. 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, 518 (1997).

260. *Id.*

261. Daker v. Comm'r, Ga. Dep't of Corr., 820 F.3d 1278, 1285 (11th Cir. 2016) (first citing Hafed v. Fed. Bureau of Prisons, 635 F.3d 1172, 1179 (10th Cir. 2011); and then citing Thompson v. DEA, 492 F.3d 428, 433 (D.C. Cir. 2007)).

262. *Id.*

263. *Id.*

264. *Id.* at 1286.

265. *See* Reilly, *supra* note 250, at 757 ("While this 'three strikes' rule was passed to reduce the number of cases on the federal docket, it has instead created myriad conflicting interpretations in federal courts . . . ."); *see also* Clark, *supra* note 238 (manuscript at 30) (noting that the imminent danger exception to the three-strikes rules "may not be [an] effective tool to weed out frivolous claims" and explaining that the rule "does not appear to be a wholly satisfactory method of curbing . . . abuse" (quoting *Procup v. Strickland*, 567 F. Supp. 146, 159 (M.D. Fla. 1983))).

permissible way to circumvent the rule altogether: filing in state court. Very recently, the Eleventh Circuit held that § 1915(g) does not apply to actions filed in state court that are removed to federal court.[266] The Eleventh Circuit reasoned that § 1915's "bring" language "has long meant to initiate or commence it, not to prosecute or to continue it."[267] Thus, when a case is removed, it has not been commenced by the plaintiff. The Eleventh Circuit also explained that § 1915's statutory definition does not include state courts, therefore, the statute was inapplicable.[268] Last, it found that the policy implications behind the three-strikes rule were not implicated in removal actions because defendants paid the filing fee.[269]

2. Payment Prowling: Monetary Sanctions

Pro se prisoners, like all litigants, are not immune to sanctions under the Federal Rules of Civil Procedure or a court's inherent authority.[270] Some courts have taken measures a step further by embedding specific sanctions procedures for vexatious pro se litigants. The Eastern District of Texas, for example, permits the court "after an opportunity to be heard [to] . . . order a *pro se* litigant to give security in such amount as the court determines to be appropriate to secure the payment of any costs, sanctions, or other amounts which may be awarded against a vexatious *pro se* litigant."[271] Similarly, the Eleventh Circuit has imposed sanctions in the form of attorney's fees and costs against a pro se litigant, meaning that such a sanction could easily be

266. *See* Maldonado v. Baker Cnty. Sheriff's Off., 23 F.4th 1299, 1306-07 (11th Cir. 2022).

267. *Id.* at 1304.

268. *Id.* at 1305.

269. *Id.* at 1306.

270. *See e.g.*, Kokinda v. Pa. Dep't of Corr., No. 16-1303, 2018 WL 1155999, at *4 (W.D. Pa. Mar. 5, 2018) ("deliberate attempts to mislead this Court exposes prisoner plaintiff to sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure, which apply to pro se litigants as well as to attorneys" (citing Rivera v. Pa. Dep't of Corr., C.A. No. 09-1604, 2010 WL 4318584 (W.D. Pa. Oct. 26, 2010); Milke v. City of Phoenix, 497 F. Supp. 3d 442, 467-68 (D. Ariz. 2020) (explaining that sanctions may be imposed on pro se prisoner litigants under Rule 37 or the court's inherent authority).

271. Cunningham v. Matrix Fin. Servs., No. 4:19-CV-00896-ALM-CAN, 2021 WL 2796645, at *3 n.3 (E.D. Tex. Feb. 12, 2021) (quoting E.D. Tex. Loc. Ct. Rule CV-65.1(b)).

imposed on a pro se prisoner litigant.[272] For especially abusive pro se prisoner litigants, some district courts have barred prisoners from filing future actions unless the entire filing fee was prepaid and only with permission from a magistrate, district court, or circuit court judge.[273] Not to mention that state statutes also permit monetary sanctions, and pro se prisoners who have attempted to challenge sanctions from state courts under federal habeas actions have often been unsuccessful.[274]

Conversely, other courts have cautioned against imposing high monetary sanctions against pro se prisoner litigants. The Seventh Circuit has stated that "a verbal or written warning, or a modest monetary sanction may have a sufficient effect."[275] And as some district courts have noted, pro se prisoners proceeding IFP would likely "be unable to pay a monetary sanction and the imposition of such a sanction would be futile,"[276] and others have determined monetary sanctions against pro se prisoners to be unjust.[277]

3. Changing Stripes: Pre-screening and Claim Limitations

What happens when the PLRA's three-strikes provision or monetary sanctions are ineffective in stopping an abusive pro se prisoner litigant? In these cases—or in cases of outright threats

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272. Watkins v. Cap. City Bank & Guar., 859 F. App'x 553, 554 (11th Cir. 2021) (per curiam).

273. *See, e.g.*, Stone v. United States, No. 7:05-CV-016-R, 2005 WL 221407, at *1 (N.D. Tex. Jan. 31, 2005).

274. *See, e.g.*, Parker v. Province, 415 F. App'x 19, 20 (10th Cir. 2011) (noting that the state court imposed sanctions under an Oklahoma statute and that the "federal district court denied [the plaintiff's] 28 U.S.C. § 2241 challenge to the imposition of sanctions"); Lawson v. Aleph Inst., Inc., No. 4:04-cv-00105-MP-AK, 2009 WL 4404720, at *1 (N.D. Fla. Dec. 2, 2009) (explaining that a Florida statute "also provide[d] for sanctions when a prisoner is found to have brought a malicious suit involving false information").

275. Ebmeyer v. Brock, 11 F.4th 537, 547 (7th Cir. 2021).

276. Arellano v. Blahnik, No. 16cv2412-CAB (MSB), 2019 WL 2710527, at *11 (S.D. Cal. June 28, 2019).

277. *See* Bradford v. Marchak, No. 1:14-cv-1689-LJO-BAM (PC), 2018 WL 3046974, at *8 (E.D. Cal. June 19, 2018) (noting that because the plaintiff was proceeding IFP, "which makes it unlikely that he would be able to pay any monetary sanction[,] . . . the imposition of such a sanction would be unjust" under Federal Rule of Civil Procedure 37(d)(3)); *see also* Benitez v. King, 298 F. Supp. 3d 530, 542 (W.D.N.Y. 2018) (declining to impose monetary sanctions and explaining that "the Second Circuit has often instructed that *pro se* litigants are deserving of 'special solicitude'").

of violence against judges—some courts have turned to a variety of sanctions outside the confines of the PLRA's three-strikes provision. The most common sanction is dismissal with prejudice,[278] which has been employed when pro se prisoners lie or conceal information in their IFP applications.[279] Even dismissals with prejudice for relatively minor misstatements in IFP applications have been upheld by circuit courts.[280]

Another common sanction that courts have turned to is the addition of pre-screening and claim-limitation requirements for set time periods, usually one to two years.[281] Because nothing in the PLRA prevents vexatious pro se prisoner litigants from physically mailing new complaints, motions, or other filings with the court, some pro se prisoners have taken their litigiousness to the extreme by filing numerous multi-page documents in excess of local rules page limitations.[282] To remedy this problem and cut down on the court's time, district courts have ordered clerks to open miscellaneous case files for these abusive filers and docket

278. *See* Oliver v. Gramley, 200 F.3d 465, 466 (7th Cir. 1999) ("Although dismissal with prejudice is a permissible judicial sanction[,] . . . the general rule is that before dismissing a suit with prejudice as a sanction for misconduct a court should consider the adequacy of a less severe sanction . . . ." (citations omitted)).

279. *See, e.g.*, Daker v. Owens, No. 5:20-CV-354-TES-CHW, 2021 WL 1321335, at *4 (M.D. Ga. Jan. 5, 2021) (finding that the plaintiff had "an undeniable and significant history of 'abus[ing] the judicial process by filing IFP affidavits that conceal and/or misstate[d] his real assets and income'" (first alteration in original) (quoting *In re* Daker, No. 1:11-CV-1711-RWS, 2014 WL 2548135, at *3 (N.D. Ga. June 5, 2014)).

280. *See, e.g.*, Dawson v. Lennon, 797 F.2d 934, 935 (11th Cir. 1986) (noting that the court had "upheld dismissal of a claim under 42 U.S.C. § 1983 of a prisoner who professed to have no money in his prison accounts, which in fact contained thirty cents, and who had a history of manipulating his accounts to support claims of indigency").

281. *See* Smith v. United States, 386 F. App'x 853, 857 (11th Cir. 2010) (per curiam) (noting that the Eleventh Circuit has "upheld an injunction prohibiting a frequent litigant from filing any new actions against his former employer without first obtaining leave of the court; an injunction directing the clerk to mark any papers submitted by a frequent litigant as received but not to file the documents unless a judge approved them for filing; and an injunction ordering a frequent litigant to send all pleadings to a judge for prefiling approval" (citations omitted)).

282. *See, e.g.*, *In re* Henderson, No. MC 3:12-402, 2014 WL 198996, at *1-2 (S.D. Ga. July 17, 2014) (noting that the plaintiff was "an abusive filer" and that he had filed ten separate filings plus an additional "80 pages of material" in the span of three months); Jackson v. Baisden, No. 1:20-CV-174 (LAG) (TQL), 2021 WL 4029268, at *2 (M.D. Ga. Aug. 20, 2021) (noting that the defendant filed a "Motion for Injunction regarding Plaintiff's numerous frivolous and duplicative filings" and listing thirty-six motions filed in the span of a few months).

any filings as notices,[283] which technically gives courts as much time as they want to review the filings, as they will not be subject to the Civil Justice Reform Act requirement to rule on motions within six months.[284] Generally, the district courts will limit the prisoner's future claims only to those that allege imminent danger. Each district has staff attorneys or pro se law clerks who then screen the prisoner complaint and filings to see if a plausible claim exists and make a recommendation to the district court judge as to whether an actual case should be opened or if the complaint should be dismissed.[285] Although this method does not stop abusive filers from continuing to file complaints or motions, it does significantly reduce the number of cases that proceed, and it does minimize the time it takes to review filings. And while necessary for those who cry wolf and might otherwise have a cognizable claim, such a sanction all but forecloses any suits that a prisoner might bring for other constitutional violations that do not put them in imminent danger—for the entire district—not just before a particular judge.[286]

III. REFORMS

Clearly, pro se prisoner litigation is broken. While the PLRA and AEDPA have helped in some respects, they are far from foolproof. Moreover, neither the PLRA nor AEDPA have helped solve some of the root causes of pro se prisoner litigation. Appropriate reforms should strike a balance between protecting judicial resources and the rights of prisoners. To be sure, various reforms have been proposed in the past—varying in degree on which end of the spectrum to lend support. These reforms involve stricter prepayment rules,[287] allowing attorneys to ghostwrite

283. *See In re Henderson*, 2014 WL 198996, at *4.

284. *See* 28 U.S.C. § 476(a) ("The Director of the Administrative Office . . . shall prepare a semiannual report . . . that discloses for each judicial officer—(1) the number of *motions* that have been pending for more than six months . . . ." (emphasis added)).

285. *See In re Henderson*, 2014 WL 198996, at *1 (explaining the miscellaneous case file pre-screening method).

286. *See, e.g.*, *Jackson*, 2021 WL 4029268, at *5 (noting that the sanction applied in the plaintiff's other cases).

287. *See* Levy, *supra* note 119, at 508 (recommending five reforms, including: (1) the imposition of "strict pretrial schedules and discovery requirements," (2) requiring "prepayment of filing fee and partial payments for claims sought to be filed [IFP]," (3)

pleadings for prisoners,[288] and revamping how orders drafted by pro se law clerks (or staff attorneys) are written and drafted to be "more accessible to an uneducated pro se reader."[289]

All of these reforms are great ideas, but there is further room for improvement. That is, we should build upon these ideas to better attack the root causes of pro se prisoner litigation on both ends of the problem by: (1) adding additional magistrate judges, (2) considering a specialty court to deal with pro se prisoner matters, (3) increasing funding and the number of law school clinics to assist in these matters, and/or (4) adopting an EEOC-like agency approach to assist with pro se prisoner claims, similar to workplace discrimination claims.

A. Multiplying Magistrate Judges and Incentivizing Consent

Most district courts use magistrate judges as the first filter for pro se prisoner litigant complaints and habeas petitions. Magistrate judges "exercise the key powers of district court judges: they decide motions, take evidence, instruct juries, and render final decisions."[290] District courts can "refer any nondispositive matter to a magistrate judge without party consent but [they] retain[] jurisdiction to 'reconsider any pretrial matter' for clear error."[291] Given the copious motions that pro se prisoner litigants often file, magistrate judges and staff attorneys provide invaluable support to district court judges in managing these cases and aiding litigants by interpreting and liberally construing their claims to provide an opportunity to amend or recast.[292]

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standardizing complaint forms, (4) the distribution of pro se handbooks, and (5) developing a "mechanism for tracking claims filed district-wide and circuit-wide by each inmate").

288. *See* Robbins, *supra* note 110, at 271 (arguing that "attorneys (and sometimes non-attorneys) should be permitted to ghostwrite pleadings" for pro se prisoner litigants).

289. *See* Katherine A. Macfarlane, *Posner Tackles the Pro Se Prisoner Problem: A Book Review of* Reforming the Federal Judiciary, 83 MO. L. REV. 113, 115 (2018). Interestingly, this was Judge Posner's idea and when the Seventh Circuit declined to implement it, he resigned. *See id.*

290. J. Anthony Downs, Comment, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. CHI. L. REV. 1032, 1033 (1985).

291. Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 490 (2002) (quoting 28 U.S.C. § 636(b)(1)(A)).

292. *See* Jillian M. Clouse, Comment, *Litigant Consent: The Missing Link for Permissible Jurisdiction for Final Judgment in Non-Article III Courts After* Stern v.

Although magistrate judges have the power to rule on these nondispositive orders, pro se prisoner litigants can, and usually do, object to these orders under Federal Rule of Civil Procedure 72 and 28 U.S.C. § 686.[293] The district court must then provide additional review utilizing the clear error standard.[294] The clear error standard is rarely met,[295] as most pretrial issues involve discretionary decisions. Thus, most magistrate orders on nondispositive matters are accepted and adopted by district court judges. Despite many courts having local rules discouraging the practice,[296] a persistent or abusive litigant, however, can take things a step further and ask the court to reconsider an order that accepts and adopts a magistrate judge's nondispositive order.[297] Motions to reconsider interlocutory orders—like orders adopting a magistrate judge's nondispositive order—are rarely granted because plaintiffs have a heavy burden of demonstrating manifest

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Marshall, 20 AM. U. J. GENDER SOC. POL'Y & L. 899, 920 (2012) (noting that "the motivation behind the grant of jurisdiction to act independently under [28 U.S.C.] § 636(c) is to promote judicial efficiency"); James G. Woodward & Michael E. Penick, *Expanded Utilization of Federal Magistrate Judges: Lessons From the Eastern District of Missouri*, 43 ST. LOUIS U. L.J. 543, 548 (1999) (explaining that one of the purposes behind the Judicial Improvement Act of 1990 was "to aid district courts in taking full advantage of the magistrate judges' capabilities by strengthening the consent provisions for civil trials").

293. *See* FED. R. CIV. P. 72(a) ("A party may serve and file objections to the order within 14 days after being served with a copy. . . . The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.").

294. *Id.*

295. *See In re* Namenda Direct Purchaser Antitrust Litig., No. 15 Civ. 7488 (CM), 2017 WL 3613663, at *3 (S.D.N.Y. Aug. 21, 2017) ("This is the rare case where I conclude that Magistrate Judge Francis committed clear error . . . ."); NAACP v. Fla. Dep't of Corr., 122 F. Supp. 2d 1335, 1337 (M.D. Fla. 2000) ("The standard for overturning a Magistrate Judge's Order is a very difficult one to meet.").

296. *See, e.g.*, Cont'l Cas. Co. v. Winder Lab'ys, LLC, No. 2:19-CV-00016-RWS, 2020 WL 7496240, at *1 (N.D. Ga. Sept. 1, 2020) ("Because of the interest in finality, courts discourage motions for reconsideration. Under Local Rule 7.2(E), motions for reconsideration 'shall not be filed as a matter of routine practice' . . . and should be brought only when 'absolutely necessary.'"); Covington 18 Partners, LLC v. Attu, LLC, No. 2:19-CV-00253-BJR, 2019 WL 6034867, at *1 (W.D. Wash. Nov. 14, 2019) (noting that motions for reconsideration are disfavored under "Western District of Washington Local Rule 7(h)(1)"); Elder-Keep v. Aksamit, 460 F.3d 979, 985 (8th Cir. 2006) ("Under the local rules for the . . . the District of Nebraska . . . . motions for reconsideration are disfavored and will ordinarily be denied . . . .").

297. Nondispositive orders are generally interlocutory and thus reviewed under Rule 54(b). *See, e.g.*, Patrick v. City of Chi., 103 F. Supp. 3d 907, 911 (N.D. Ill. 2015) ("Motions to reconsider interlocutory orders are governed by Federal Rule of Civil Procedure 54(b).").

errors of law or fact[298] or "newly discovered evidence."[299] Often, pro se prisoner litigants attempt to use motions for reconsideration to present new arguments or simply rehash objections or arguments.[300] These additional reviews, however, consume scarce judicial resources,[301] especially when pro se prisoner plaintiffs also attempt to appeal decisions on interlocutory orders, which the courts of appeal have no jurisdiction over,[302] thereby wasting even more time and resources.

Pro se prisoner litigants can consent to full proceedings before a magistrate judge under 28 U.S.C. § 636,[303] however, they "regularly refuse[] to consent to resolution of matters before [m]agistrate [j]udges" because they "appear to prefer the longer litigation times before [d]istrict [j]udges."[304] Given the benefits and resources that magistrate judges offer to district court

298. Garabrandt v. Lewis, No. 2:18-cv-93, 2018 WL 3370615, at *1 (S.D. Ohio July 10, 2018).

299. *Id.*

300. *See, e.g.*, Haywood v. Bedatsky, No. CV-05-2179PHX-DGC, 2006 WL 1663354, at *1 (D. Ariz. June 7, 2006) ("Plaintiff asserts a number of arguments not contained in his original summary judgment briefing. As noted above, a motion for reconsideration is not the place to assert new arguments."); Amin v. Konteh, No. 3:05-CV-2303, 2008 WL 5111091, at *2 (N.D. Ohio Dec. 1, 2008) (explaining that a pro se habeas petitioner "provide[d] no new evidence or arguments in [his] motion for reconsideration, and merely present[ed] again the arguments from his petition").

301. To be sure, district courts have discretion to reconsider interlocutory orders. *See* Leelanau Wine Cellars, Ltd. v. Black & Red, Inc., 118 F. App'x 942, 945 (6th Cir. 2004) ("The correct starting point in the analysis is the well-recognized principle that district courts posses[] the discretion to reconsider their interlocutory orders at any time.") (alteration in original); *see also* Austin v. Kroger Tex., L.P., 864 F.3d 326, 337 (5th Cir. 2017) ("The Fourth Circuit explained that '[t]he power to reconsider or modify interlocutory rulings "is committed to the discretion of the district court," and that discretion is not cabined by the "heightened standards for reconsideration" governing final orders.'" (quoting Saint Annes Dev. Co. v. Trabich, 443 F. App'x 829, 832 (4th Cir. 2011)).

302. *See* Medrano v. Thomas, 99 F. App'x 521, 522 (5th Cir. 2004) ("We have no jurisdiction to consider an interlocutory appeal from an order denying a request to communicate with another prisoner."); *see also* 28 U.S.C. § 1291 ("The court of appeals . . . shall have jurisdiction of appeals from all *final* decisions of the district courts . . . .") (emphasis added).

303. "Upon consent of the parties, a . . . magistrate judge . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case . . . ." 28 U.S.C. § 636(c)(1).

304. Michael J. Bolton, *Choosing to Consent to a Magistrate Judge*, 61 FED. LAW. 90, 92 n.23 (2014).

judges,[305] perhaps there is a way to incentivize pro se prisoner litigants to consent to proceedings before magistrate judges.

One option, which would require a statutory change, would be to require prisoners to opt out of consent instead of opting in. As the Seventh Circuit once stated, "[t]he system of magistrate reference of civil cases is a *flexible* mechanism, which seems well-tailored to helping to absorb the surge of litigation which has caused the crisis with which we are now coping—provided, of course, that the key constitutional values can be maintained and preserved."[306] That said, some have argued whether pro se litigants can actually meaningfully consent.[307] These arguments, however, have commonly been confined to criminal matters or non-prisoner cases where "litigants cannot afford to wait for their cases to be heard by district judges."[308] As explained above, pro se prisoners seem to prefer longer litigation times, so these concerns do not appear especially relevant here.

Another option might be to offer a discounted filing fee for pro se prisoner litigants who opt (or under the idea above chose not to opt-out) to consent to proceedings under a magistrate judge. As explained above, the PLRA and AEDPA still require prisoners to pay the full filing fee under the IFP provisions,[309] albeit under statutorily prescribed increments. Given that most prisoners are not well off financially and earn pennies on the dollar for their labor while in prison,[310] a substantial discount in the total filing

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305. *See* Benjamin H. Barton, *Against Civil* Gideon *(And for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1271 (2010) (noting the "creation of a special federal magistrate position in the Eastern District of New York assigned to hear significant categories of pro se matters").

306. Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1045 (7th Cir. 1984) (emphasis added).

307. *See* Bloom & Hershkoff, *supra* note 291, at 491 n.81.

308. Christopher E. Smith, *Assessing the Consequences of Judicial Innovation: U.S. Magistrates' Trials and Related Tribulations*, 23 WAKE FOREST L. REV. 455, 476 (1988).

309. *See supra* notes 226-29 and accompanying text.

310. *See, e.g.*, *Fair Wages for Prison Labor*, REFORM GA., [https://perma.cc/WB3P-ZD3Q] (last visited Sept. 26, 2022) ("In Georgia, incarcerated individuals are not guaranteed any compensation, so the minimum wage for Georgians working behind bars is zero."); Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), [https://perma.cc/C5ZA-3XNT] (listing the average low-end and high-end hourly rates for non-industry at $0.14 and $0.63, respectively, and reporting that the average daily wages paid to incarcerated workers has decreased "from $4.73 in 2001 to $3.45 today").

fee may encourage some pro se prisoners to consent to full proceedings under the magistrate judge. Likewise, prisoners could be further incentivized by permitting class actions and mass actions under the IFP provision if the prisoners consent to full proceedings before a magistrate judge.

Finally, perhaps through local rules, district courts could encourage consent to proceedings before magistrate judges if there was an increased focus on mediation. Magistrate judges are highly utilized for their mediation expertise in other non-prisoner cases,[311] and such expertise could be beneficial to both conserving judicial resources and improving the lives of prisoners. Although prisoner litigants usually include exorbitant demands for relief in their complaints, most are simply seeking to improve the heinous living conditions they face and want to feel heard.[312] In cases where a complaint passes frivolity and where several prisoners have sought to join an action or have attempted to instigate a class action IFP, perhaps the preferred method would be to offer consent in exchange for a mediation session between the prisoners and jail officials with a magistrate judge.[313] If an agreement can be made, this would save on judicial resources and offer an improvement in conditions for the prisoners. If no agreement is made, the case would still proceed under the magistrate judge and Article III review would still be an option if the prisoner loses and appeals to the proper court of appeals.

B. A New Specialty Court and Pro Se Assistance Programs

An alternative approach would be to remove prisoner litigation from federal district courts entirely and to create a

311. Many former magistrate judges have secured positions at JAMS, a well-renowned alternative dispute resolution firm. *See JAMS Federal Judges*, JAMS, [https://perma.cc/BZ8A-WMVE] (last visited Sept. 26, 2022) (listing retired Magistrate Judges Ted. E. Bandstra and Thomas M. Blewitt).

312. Margo Schlanger, *Trends in Prisoner Litigation as the PLRA Approaches 20*, 28 CORR. L. REP. 69, 70 (2017) ("As before the PLRA, litigation remains one of the few avenues for prisoners to seek redress for adverse conditions or other affronts to their rights."; Benerofe, *supra* note 172, at 148 "[F]ederal litigation has historically improved prison conditions, making the current conditions 'less brutal' and inhumane than in years past.").

313. This idea builds on Judge Bloom and Professor Hershkoff's idea that "the courts could require mediation in categories of cases" and applies it to pro se prisoner litigation. *See* Bloom & Hershkoff, *supra* note 291, at 511.

specialty court to handle prisoner litigations and habeas petitions. A number of specialty courts already exist today to handle discrete matters, including: the Court of Federal Claims, which handles disputes against the government for contract matters and vaccine compensation,[314] bankruptcy courts, tax courts, and the Court of International Claims. Likewise, state courts have already taken specialization to the extreme with "specialty courts that handle child support, child custody, domestic abuse/protective orders, landlord-tenant courts, small claims courts, and divorce courts."[315]

A specialty court for handling pro se prisoner litigation offers unique benefits, particularly with regard to habeas petitions. For example, consider "the collateral review procedure through which § 2255 claims are heard in the same court that oversaw the prisoner's conviction."[316] Although most trial judges do their utmost to maintain impartiality, it is human nature to "carry [some] bias from the original case into the consideration of the post-conviction claim."[317] A specialty court would help eliminate this bias and provide a fresh set of eyes to handle the prisoner's petition and may also provide additional time and resources to conduct evidentiary hearings under § 2255(b).[318]

Moreover, a specialty court would reduce overburdened district courts, which rarely find in favor of pro se prisoner litigants.[319] And for pro se prisoner litigants, a specialty court—

314. *See About the Court*, U.S. CT. OF FED. CLAIMS, [https://perma.cc/Q48A-9456] (last visited Sept. 26, 2022) (explaining that the court's jurisdiction "involves government contracts" and "vaccine compensation").

315. *See* Barton, *supra* note 305, at 1228 n.2

316. Frank Tankard, *Tough Ain't Enough: Why District Courts Ignore Tough-On-Paper Standards for a Federal Prisoner's Right to a Hearing and How Specialty Courts Would Fix the Problem*, 79 UMKC L. REV. 775, 777 (2011).

317. *Id.*

318. *See* 28 U.S.C. § 2255(b) ("Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing . . . .").

319. In fact, some scholars have suggested eliminating § 2254 habeas petitions altogether in noncapital cases due to the rarity in which they are granted. *See* Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 820 (2009) (proposing "habeas review of state criminal cases for [only] three categories of claims"). There are, of course, those—like Justice Blackmun, who are "skeptical of the ability of state courts to be as independent as necessary when prisoners take the state to court." HANSON & DALEY, *supra* note 89, at 4-5.

with dedicated resources—may be better suited to move their cases forward and to provide some legal assistance to counteract the educational and resource deficiencies discussed above. A model for such a court has already been implemented in San Antonio, Texas. In 1998, the Bexar County District Court started "the innovative San Antonio Pro Se Assistance Program"[320] that, among other things, provides pro se litigants with an ombudsman who can help answer questions and essentially "hold [the litigants'] hands to make the judicial process easier for them."[321] The Pro Se Assistance Program also connects litigants with a "pro bono coordinator" who can provide a volunteer attorney with "all required forms and information . . . need[ed] . . . to review the file."[322]

At the federal level, similar pro se assistance programs have been instigated.[323] The United States Patent and Trademark Office (USPTO), for instance, began a pilot program that "offers customer service to applicants filing patent applications without legal representation."[324] The USPTO's Pro Se Assistance Program does not provide legal advice but does "help applicants navigate"[325] the USPTO's website and "the Manual of Patent Examining Procedure (MPEP) to locate publicly available educational resources."[326] If we are willing to expend resources to assist people filing patent applications, surely it would be worthwhile to similarly expend resources to assist those attempting to vindicate constitutional violations and pursuing habeas actions. Notably, the Middle District of Alabama Federal Bar Center has started a similar pro se assistance program that provides pro se litigants with "information about federal court procedures; assistance in the preparation of pleadings and other

320. Anita Davis, *A Pro Se Program That is Also "Pro" Judges, Lawyers, and the Public*, 63 TEX. BAR J. 896, 896 (2000).

321. *Id.*

322. *Id.*

323. Some courts, like the Western District of North Carolina, have dedicated pro se settlement assistance programs; however, these programs "do[] not apply to prisoner civil rights cases." Adkins v. FNU Martin, No. 1:17-cv-343-FDW, 2018 WL 1770163, at *4 (W.D.N.C. Apr. 12, 2018).

324. Kristen Matter, *Pro Se Assistance Program*, U.S. PAT. & TRADEMARK OFF. (July 19, 2017 8:58 AM), [https://perma.cc/MA2Q-N9H2].

325. *Id.*

326. *Id.*

court documents; and referrals to other services, in appropriate cases."[327] But generally prisoners must move for the appointment of counsel to secure aid from such organizations—something that is not guaranteed for civil suits.[328]

C. Dedicated Law School Clinics

Another viable option would be to encourage more law schools to develop meaningful pro se prisoner litigation clinics.[329] Many law schools have clinics which provide representation to pro se litigants at the appellate level or for non-prisoner-related litigation; yet surprisingly, few focus on prisoner civil rights and habeas. One example of such a clinic is the Prisoners' Rights Clinic at UCLA Law,[330] which gives students a basic familiarity with the relevant constitutional doctrines and the statutory framework of the PLRA,[331] and introduces students to alternative avenues for advocacy, including through regulatory processes and media exposure.[332] Another example is Harvard Law School's Prison Legal Assistance Project, which "represent[s] people incarcerated in Massachusetts prisons"[333] and "provide[s] inmates with assistance in matters ranging from civil rights violations to confiscated property."[334]

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327. *The Pro Se Assistance Program*, U.S. DIST. CT., MIDDLE DIST. OF ALA., [https://perma.cc/L5BN-MR5E] (last visited Sept. 22, 2022).

328. *See, e.g.*, Mitchell v. Alabama, No. 2:17-cv-768-MHT-WC, 2018 WL 2107218, at *1 & n.1 (M.D. Ala. Apr. 10, 2018) (finding that "Plaintiffs' claims did not meet the Eleventh Circuit's standard to appoint counsel in a civil case because exceptional circumstances did not exist, and the legal issues asserted by Plaintiffs were not so novel or complex as to require the assistance of a trained practitioner" and noting that the court contacted the "District's Pro Se Assistance Program . . . to determine if the program could assist Plaintiffs").

329. Even the Supreme Court has noted the use of law school clinics in pro se prisoner litigation. *See* Johnson v. Avery, 393 U.S. 483, 489 (1969) ("At least one State employs senior law students to interview and advise inmates in state prisons.").

330. Although the UCLA Prisoners' Rights Clinic does not appear to focus on district court litigation, it is still a positive model for success as it also contains policy advocacy—which directly addresses the root causes of prisoner litigation. *Prisoners' Rights Clinic*, UCLA L., [https://perma.cc/3GVR-LL2Z] (last visited Sept. 26, 2022).

331. *Id.*

332. *Id.*

333. *Harvard Prison Legal Assistance Project*, HARV. L. SCH., [https://perma.cc/SRW9-YLPJ] (last visited Sept. 26, 2022).

334. *Id.*

These types of student-based legal assistance clinics provide a triple win: first for the students, second for prisoners, and third for the courts. For students, these clinics provide an opportunity to train in client-based advocacy and develop lawyering skills that cannot be gained in the traditional classroom environment.[335] Prisoners get free representation and access to legal resources,[336] both of which help counteract structural challenges they often face. The courts gain the benefit of legible, well-argued motions that help reduce the strain on judicial resources.[337] Additionally, the clinic provides a buffer to the prisoner to reduce frivolous motions as the clinic can help explain why certain arguments or claims may not be worthwhile to pursue.

Of course, starting and funding new law school clinics requires a cash infusion—either from private donors (like alumni) or from the state (for state law schools). To be sure, "lower enrollment law clinics have higher per academic credit instructional costs than large enrollment classes."[338] Such an investment, however, would be sensible considering the benefits described above.[339] The other positive aspect about this avenue is that it would not require any change in legislation and could be implemented rather quickly, i.e., as fast as it takes a law school to approve a new clinic.

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335. *See* Marisol Orihuela, *Crim-Imm Lawyering*, 34 GEO. IMMIGR. L.J. 613, 620 n.33 ("Because clinical education is often a space for experimenting with lawyering models and techniques, law students also stand to benefit from developments in lawyering theory."); Richard E. Redding, *The Counterintuitive Costs and Benefits of Clinical Legal Education*, 2016 WIS. L. REV. FORWARD 55, 64-65 (2016) ("Real-world learning experiences and skills are the mechanism by which legal knowledge is applied and understood in context, and skills practice provides students (and their professors!) with critical feedback on the validity and limitations of their legal knowledge.").

336. *Cf.* Paul McLaughlin, Jr., *Leveraging Academic Law Libraries to Expand Access to Justice*, 109 L. LIBR. J. 445, 456 (2017) (explaining how academic law libraries and law school clinics have "helped law schools meet the legal needs of their communities and the educational needs of their students").

337. *See, e.g.*, Johnson v Piatti, No. 5:19-cv-13461, 2021 WL 1923426, at *2 (E.D. Mich. May 13, 2021) (conditionally granting a pro se prisoner plaintiff's motion for the appointment of counsel and contacting the "U of D Mercy Law School Federal *Pro Se* Legal Assistance Clinic . . . to facilitate contact and determine a date for a settlement conference").

338. Robert R. Kuehn, *Pricing Clinical Legal Education*, 92 DENV. L. REV. 1, 20 (2014).

339. And "a typical law clinic course is slightly less per credit per student than . . . a seminar with fifteen students." *Id.* at 23.

D. The Agency Approach

Finally, another possible approach would be to borrow the litigation framework for workplace discrimination claims utilizing agency review and litigation or the issuance of right-to-sue letters. This idea stems from Justice White's dissent in *Johnson v. Avery*[340]—a habeas case—in which he explained that it may not be "practical nor necessary to require the help of lawyers"[341] but "[i]deally, perhaps professional help should be furnished and prisoners encouraged to seek it so that any possible claims receive early and complete examination."[342] As foreshadowed, using an agency-like approach modeled after the EEOC in Title VII lawsuits may just be the best remedy of all.

1. The EEOC Analogue

After Congress passed the Civil Rights Act, it created the EEOC through the passage of Title VII.[343] The EEOC's original mission was to "effectuat[e] the purpose of Title VII through conciliation and the issuance of guidelines interpreting the Act."[344] The EEOC later gained enforcement authority through the Equal Employment Opportunity Act of 1972.[345] "Despite the EEOC's rocky transition from a strictly administrative agency to an administrative and enforcement agency, the Commission did enjoy some success."[346] The EEOC is credited with largescale successes like a $45 million settlement agreement with AT&T that ended sex-segregated job categories,[347] and a $125 million jury verdict against Walmart for ADA discrimination.[348] And

340. 393 U.S. 483 (1969).

341. *Id.* at 502 (White, J., dissenting).

342. *Id.*

343. 42 U.S.C. § 2000e.

344. *See* Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 676 (2005).

345. *See id.* at 677 (noting the passage of the EEOC Act of 1972, "which amended Title VII" and "imbue[d] the EEOC with enforcement authority").

346. *Id.* at 679.

347. *See id.* at 679.

348. *See, e.g.*, Tom Spiggle, *What the EEOC's $125 Million Verdict Against Walmart Tells Us*, FORBES (Aug. 4, 2021, 12:19 PM), [https://perma.cc/KCN7-MM2E] (reporting the EEOC's victory over Walmart for an ADA discrimination claim).

"[t]he work of the EEOC in enforcing . . . civil rights laws has helped to transform the American workplace and achieve justice for countless individuals."[349]

Today, the EEOC "has the authority to investigate charges of discrimination against employers" and "to fairly and accurately assess the allegations in the charge and then make a finding."[350] When the EEOC finds that discrimination has occurred, it attempts to first settle the charge.[351] If unsuccessful, the EEOC can then "file a lawsuit to protect the rights of individuals and the interests of the public and litigate a small percentage of these cases."[352] The EEOC further "work[s] to prevent discrimination before it occurs through outreach, education, and technical assistance programs."[353] Given the EEOC's success, this framework seems adaptable—with some variations—to improving pro se prisoner litigation and protecting their civil rights while reaping the benefits associated with agency involvement.

2. Adapting the Workplace Discrimination Approach

To file a lawsuit alleging discrimination in the workplace, plaintiffs must first file a charge with the EEOC. As explained above, the EEOC then investigates the matter by appointing an investigator who "may interview witnesses, review employment documents . . . visit the work site[,] or engage in other efforts to find out what happened."[354] Alternatively, the EEOC may attempt mediation to negotiate a solution.[355] When the EEOC determines that discrimination has occurred, it may attempt to settle the charge or file a lawsuit on a plaintiff's behalf.

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349. *EEOC Celebrates Its 45th Anniversary*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (July 2, 2010), [https://perma.cc/2LCS-2BJ9].

350. *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, [https://perma.cc/JR66-4T6N] (last visited Sept.. 26, 2022).

351. *See id.*

352. *Id.*

353. *Id.*

354. Robert Ottinger, *Right to Sue Letters From the EEOC*, OTTINGER L. (Mar. 20, 2020), [https://perma.cc/24SM-9MDT].

355. *Resolving a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, [https://perma.cc/YTB9-TSTH] (last visited Sept. 26, 2022) ("If mediation is unsuccessful, the charge is referred for investigation.").

Conversely, "[a] Dismissal and Notice of Rights is issued when the EEOC is unable to find any solid evidence of discrimination" because the EEOC was "unable to find enough evidence to prove that discrimination occurred."[356] This starts a ninety-day clock for the plaintiff to file their lawsuit.[357]

A similar litigation mechanism could be implemented for pro se prisoner litigants. Instead of the EEOC, agency enforcement and investigations could be carried out by the Special Litigation Section of the DOJ if the Civil Rights of Institutionalized Persons Act[358] was amended and expanded[359] from its current limitation to "review conditions and practices"[360] run by "state or local governments."[361] Much like workplace discrimination claims, prisoners would be required to first file a charge with the DOJ's Special Litigation Section, which would in turn conduct an investigation and proceed to mediate, settle, or issue a right-to-sue letter accordingly. As an adaptation, the DOJ could also include a review of whether the claim is likely frivolous. Alternatively, or conjunctively, the DOJ could also be granted authority to refer matters to specially appointed attorneys or to law school clinics if resources became an issue or for particularized claims with merit that may not warrant DOJ action. The PLRA could be amended to make this process required or optional. For prisoners who opt not to utilize this process, however, the PLRA could further be amended to make prisoners proceed solely before the magistrate judge.

Admittedly, such a system would expend vast resources up front, but again, the investment would likely prove worthwhile for several reasons. First, given the root causes of pro se prisoner litigation (i.e., prison conditions and violence), merely permitting a DOJ investigation might result in both better prison conditions

356. Ottinger, *supra* note 354.

357. *See id.*

358. 42 U.S.C. § 1997a (1996).

359. *See Rights of Persons Confined to Jails and Prisons*, U.S. DEP'T OF JUST., [https://perma.cc/9N7J-AHM3] (June 7, 2022) (explaining that the DOJ "do[es] not assist with individual problems" and "cannot assist in criminal cases, including wrongful convictions" and is "not authorized to address issues with federal facilities or federal officials").

360. *Id.*

361. *Id.*

and a reduction in pro se prisoner civil litigation. The threat of agency action, as opposed to a pro se prisoner lawsuit, undoubtedly ups the pressure on prisons and jails to remedy grievances. Likewise, this threat also evens the scales in habeas actions by potentially providing counsel an opportunity to sift through the criminal proceedings and formulate rationale arguments that a pro se prisoner would likely not develop on their own. Second, the possibility of DOJ involvement during litigation aids the prisoner and reduces the burden on the court, similar to how the pro se law clinics would by submitting well-argued and legible motions compared to the current influx of incomprehensible and illegible ones. Third, such a system is also in line with the spirit of the PLRA but with a gentler touch. This mechanism would stall litigation, and with the pre-screening for frivolous claims, could reduce litigation or signal to courts that potential claims are meritless in a more efficient fashion.[362] And, with the optional approach requiring full proceedings to continue before a magistrate judge, district court judges would be able to escape the time-consuming process of resolving objections and motions for reconsideration. At the same time, this process would provide an opportunity to improve prison conditions and assist pro se prisoners with litigation.

CONCLUSION

Unless or until the United States ends its love affair with the carceral state—or at the very least improves prison conditions and issues with state court convictions—the federal docket will remain inundated with pro se prisoner complaints and petitions. Legislators who were hell-bent on being "tough on crime" and saw themselves as saviors of judicial resources did little, if anything, to help matters. Arguably, these legislators made matters worse. To borrow a phrase from the venerable Mr. Spock: "Curious, how often [we] humans manage to obtain that which [we] do not want."[363]

362. This is not to say that courts would be required to independently assess claims, but a pre-screening filter by the DOJ could send a signal to courts on the likely outcome.

363. *Star Trek: Errand of Mercy* (NBC television broadcast Mar. 23, 1967).

These reforms offer a chance to rethink the way federal courts manage pro se prisoner litigation in a way that benefits all parties: prisoners, the courts, and taxpayers alike. It is not a secret many individuals show a hostility toward prisoners. As an anonymous district court judge once opined: "Nobody pretends to like them, but every once in a while, one of these people is right. And a society is judged by how it treats the least among it, not the best. . . . The job of the Constitution is to make sure that everyone is treated properly."[364] Perhaps, by adding resources through additional magistrate judges, creating a specialty court, encouraging the creation of additional law school clinics, or by adopting similar litigation procedures like with workplace discrimination claims, we can better vindicate constitutional rights while simultaneously and efficiently allocating judicial resources.

364. *See* HANSON & DALEY, *supra* note 89, at 35.