



## Inmates' Need for Federally Funded Lawyers: How the Prison Litigation Reform Act, *Casey*, and *Iqbal* Combine With Implicit Bias to Eviscerate Inmate Civil Rights

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### ABSTRACT

The United States incarcerates a larger percentage of our population than any other country. Minority populations make up a substantially disproportionate percentage of those incarcerated. For a variety of reasons, violence perpetrated against incarcerated persons, including sexual assault, is endemic and inmates have very limited opportunities to protect themselves. The state has an obligation to protect these people whom it has chosen to strip of the ability to protect themselves and to provide for inmates' other "basic human needs" such as adequate nutrition and housing.

The only legal avenue of redress available for inmates to enforce their constitutional rights lies with the courts. But in recent decades, inmates' access to the courts has been undermined by Congressional acts (principally the Prison Litigation Reform Act) and Supreme Court decisions (such as *Casey* and *Iqbal*), leading to a sharp reduction in the success rate of meritorious inmate Constitutional claims. Additionally, pro se inmates, who file the vast majority of claims, have substantially lower success rates in civil rights cases than do represented inmates.

I therefore propose that a new program called Prison Lawyers be designed and implemented. Prison Lawyers would work for the state, much like public defenders do, and would guide inmates through increasingly complicated administrative grievance processes to achieve exhaustion. Should grievances not be successfully settled, Prison Lawyers would then help inmates file civil rights claims in federal courts. This system would potentially save the state money by reducing the courts' burden in processing pro se inmate civil rights claims, and would ensure the enforcement of constitutional carceral conditions.

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## INTRODUCTION

The United States incarcerates more persons per capita, as well as more persons in total, than any other country in the world.<sup>1</sup> Especially troubling are the tremendously disparate incarceration rates for minorities, largely due to systemic bias:<sup>2</sup> African American men,<sup>3</sup> Latino/Hispanic men,<sup>4</sup> LGBT people,<sup>5</sup> and people with mental disabilities are dramatically overrepresented in prison popula-

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1. *See Highest to Lowest - Prison Population Total*, INT'L CTR. FOR PRISON STUD., [http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All) (last visited July 13, 2014); *see also* Nick Wing, *Here Are All of the Nations That Incarcerate More of Their Population Than the U.S.*, HUFFINGTON POST (Aug. 14, 2013), [http://www.huffingtonpost.com/2013/08/13/incarceration-rate-per-capita\\_n\\_3745291.html](http://www.huffingtonpost.com/2013/08/13/incarceration-rate-per-capita_n_3745291.html) (citing the International Centre for Prison Studies).
  2. *See generally* MICHELLE ALEXANDER, *THE NEW JIM CROW, MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (arguing that racial and sexual minorities are disproportionately represented in prison populations because of systemic bias both in the criminal justice system, and in the country at large). *See also* Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J., SEPT. 2011, at 87S, 90S, *available at* <http://sentencingproject.org/doc/publications/Prison%20Journal%20-%20racial%20disparity.pdf> (arguing that “disproportionate law enforcement and sentencing practices . . . adversely affect African Americans”).
  3. *See Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/pages/criminal-justice-fact-sheet> (last visited Sept. 23, 2014) (“African Americans now constitute nearly 1 million of the total 2.3 million incarcerated population[.]”); Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States*, CTR. FOR AM. PROGRESS (Mar. 13, 2012), <http://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states> (“1 in every 15 African American men . . . are incarcerated in comparison to 1 in every 106 white men.”).
  4. *See Criminal Justice Fact Sheet*, *supra* note 3 (“Together, African American and Hispanics comprised 58% of all prisoners in 2008, even though African Americans and Hispanics make up approximately one quarter of the US population[.]”); Kerby, *supra* note 3 (“1 in every 36 Hispanic men are incarcerated in comparison to 1 in every 106 white men.”). I use the term “Hispanic” in this paper rather than “Latino” because Hispanic is the term used by the United States government in demographic data collection. Hispanic refers to the ethnicity of a person who describes herself as “Mexican American, Chicano, Mexican, Mexicano, Puerto Rican, Cuban, Central American, South American, or from some other Spanish culture or origin, regardless of race.” *Race/Ethnicity*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=tp&tid=922> (last modified Sept. 9, 2014).
  5. *See* JEROME HUNT & AISHA MOODIE-MILLS, CTR. FOR AM. PROGRESS, *THE UNFAIR CRIMINALIZATION OF GAY AND TRANSGENDER YOUTH: AN OVERVIEW OF THE EXPERIENCES OF LGBT YOUTH IN THE JUVENILE JUSTICE SYSTEM 1–2* (2012), *available at* [http://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/juvenile\\_justice.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/juvenile_justice.pdf) (explaining “the disproportionate pipelining of gay and transgender youth into the juvenile justice system”). “Though gay and transgender youth represent just 5 percent to 7 percent of the nation’s overall youth population, they compose 13 percent to 15 percent of those currently in the juvenile justice system.” *Id.* at 1 (citations omitted). One of the best predictors for incarceration as an adult is incarceration in the juvenile system as a child. NPR Staff, *Burning Down the House’ Makes the Case Against Juvenile Incarceration*, NPR (June 4, 2014), <http://www.npr.org/2014/06/04/318801651/burning-down-the-house-makes-the-case-against-juvenile-incarceration>.

tions.<sup>6</sup> Once the government has chosen to strip someone of her freedom, no matter how justified that act may be, we as a people are then responsible for making sure that her “basic human needs,” such as food, shelter, safety, and medical care, are met.<sup>7</sup> When those needs are not provided for, our society is diminished, both through the lack of morality inherent in such a deed,<sup>8</sup> and in the negative impact it has on our communities when persons victimized while in state control are released.<sup>9</sup>

The U.S. Constitution guarantees various protections for prisoners in order to ensure that their basic needs are met.<sup>10</sup> The court system is tasked with ensuring that prisons and jails operate within the bounds of the Constitution; there is no other systemic oversight of carceral systems.<sup>11</sup> Courts provide the only route

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6. See Arthur J. Lurigio, *People With Serious Mental Illness in the Criminal Justice System: Causes, Consequences, and Correctives*, 91 PRISON J., July 2011, at 66S, 67S, available at [http://tpj.sagepub.com/content/91/3\\_suppl/66S.abstract](http://tpj.sagepub.com/content/91/3_suppl/66S.abstract) (click on “Full Text (PDF)” link to access full length article) (“Research suggests that the percentages of most types of mental illness are significantly higher in correctional populations than in the general population.”).
  7. See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 921 (2009) (“[T]he state’s obligation to meet the basic human needs of its prisoners stems from . . . the state’s own decision to incarcerate those it has convicted of crimes.”).
  8. See *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, J., dissenting) (“The standard of extreme cruelty [under the Eighth Amendment] is not merely descriptive, but necessarily embodies a moral judgment.”). As the *Farmer* Court noted, “[h]aving incarcerated ‘persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct,’ having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.” *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526 (1984)).
  9. Over 700,000 people are released from prison every year, and millions more are released from jail. Margo Schlanger et al., *ABA Criminal Justice Standards on the Treatment of Prisoners*, CRIM. JUST. MAG., Summer 2010, at 14, 24. Local jails admitted 11.6 million persons in 2012. *Infra* note 47. If the Department of Justice’s conservative estimate is that 13 percent of inmates suffer sexual abuse while incarcerated, that is more than 90,000 people per year released from prisons who have been sexually abused. And if even half of those in jails are released, that is over 1.5 million people who are released from jails having been sexually abused. See Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601, at § 2(2) (2006). Pub. L. No. 108-79, 117 Stat. 978 (2003) [hereinafter PREA]. The Department of Justice further estimates that the one-year maximum monetizable cost to society of rape and sexual abuse of persons in U.S. prisons and jails is about \$46.6 billion. U.S. DEPT OF JUSTICE, NATIONAL STANDARDS TO PREVENT, DETECT, AND RESPOND TO PRISON RAPE: EXECUTIVE SUMMARY 10 (2012), available at [http://www.ojp.usdoj.gov/programs/pdfs/prea\\_executive\\_summary.pdf](http://www.ojp.usdoj.gov/programs/pdfs/prea_executive_summary.pdf). Costs to society include such things as medical care, mental health care, and lost wages for those abused. *Id.* This cost estimate does not include an additional \$5.2 billion annually for persons sexually abused nationwide in juvenile facilities. *Id.*
  10. See generally *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.”).
  11. See Anne Morrison Piehl & Margo Schlanger, *Determinants of Civil Rights Filings in Federal District Court by Jail and Prison Inmates*, 1 J. EMPIRICAL LEGAL STUD. 79, 80 (2004) (“The only universal accountability mechanism is the inmate lawsuit seeking damages or some kind of remedial action for injury inflicted by official misconduct.”).

for inmates to seek redress for constitutional violations.<sup>12</sup> In light of this fact, the U.S. Supreme Court has held that inmates must be given “meaningful access” to the courts, so that they can try to enforce the minimal constitutional and civil rights afforded to them.<sup>13</sup> As a practical matter, many states attempt to ensure meaningful access to the courts by providing law libraries to inmates who wish to pursue civil claims, while some states provide some combination of legal forms, which are basic fill-in-the-blank documents, and minimal legal assistance.<sup>14</sup>

Ensuring a right to legal counsel is an important aspect of preserving meaningful access to the courts. But while the U.S. Supreme Court held in *Gideon v. Wainwright*<sup>15</sup> that some criminal defendants have the constitutional right to counsel,<sup>16</sup> there is no corresponding right for persons in civil cases.<sup>17</sup> Some jurisdictions have considered implementing a form of civil *Gideon*, which would provide attorney representation for indigent persons in civil cases that implicate “basic human needs”<sup>18</sup> such as food, shelter, and safety; however, no jurisdiction has implemented civil *Gideon* for inmates. Instead, inmates and other civil litigants who cannot afford an attorney may proceed pro se.<sup>19</sup> Because almost all

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12. See *Hudson v. McMillian*, 503 U.S. 1, 15 (1992) (Blackmun, J., concurring) (“The right to file for legal redress in the courts is as valuable to a prisoner as to any other citizen. Indeed, for the prisoner it is more valuable. . . . [T]he right to file a court action stands . . . as his most ‘fundamental political right, because preservative of all rights.’” (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886))).
  13. See *Bounds v. Smith*, 430 U.S. 817, 828–32 (1977).
  14. For example, Florida provides inmates with access to legal materials only through interlibrary loans from libraries outside the prison system, and only so long as those materials cover applicable law (materials are limited to direct appeal of a criminal conviction, a collateral attack on a conviction through a petition for habeas corpus, or a civil rights claim). 41 FLORIDA JURISPRUDENCE PRISONS AND PRISONERS § 74 (2d ed. 2014). Missouri gives inmates “limited access to law clerks” and a “stripped” version of LexisNexis. *Bromwell v. Nixon*, 361 S.W.3d 393, 398 (Mo. 2012) (en banc). California gives inmates access to a well-stocked law library but limits the time that inmates may spend there. CAL CODE REGS. tit. 15, § 3122–3123 (2014).
  15. 372 U.S. 335 (1963).
  16. *Id.* at 344.
  17. See *id.* (finding a constitutional right to counsel for criminal defendants while remaining silent as to whether a constitutional right to counsel extends to civil litigants); see also Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step With the Rest of the Developed World?*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 769–70 & n.5 (2006) (noting that after *Gideon* was decided, many activists for the poor hoped that the Court would grant a parallel right to counsel for low-income civil litigants, however, that hope has yet to be realized).
  18. See generally WORKING GRP. ON CIVIL RIGHT TO COUNSEL, AM. BAR ASS’N, ABA TOOLKIT FOR A RIGHT TO COUNSEL IN CIVIL PROCEEDINGS 6, 13 (2010) [hereinafter ABA TOOLKIT] (adopting a resolution providing a right to counsel for civil litigants in certain situations).
  19. “Pro se” is a Latin term meaning “on one’s own behalf” or “without an attorney.” *Pro se*, MERRIAM WEBSTER, <http://www.merriam-webster.com/dictionary/pro%20se> (last visited Mar. 31, 2014).

inmates cannot afford representation, 94 to 96 percent file pro se.<sup>20</sup> But inmates representing themselves pro se are much less likely to win or settle cases than are inmates with attorneys,<sup>21</sup> which raises a serious question about whether inmates have meaningful access to courts in the absence of legal assistance.

Moreover, both the U.S. Congress and the Supreme Court have taken affirmative steps in recent years to limit inmate access to the courts. In 1996, Congress passed the Prison Litigation Reform Act (PLRA),<sup>22</sup> which substantially limits inmates' ability to file claims in federal courts, as well as the courts' ability to provide relief. From Congress's perspective, the PLRA was necessary to combat the perceived deluge of frivolous federal civil rights claims filed by inmates in the 1990s.<sup>23</sup> Pro se claims are particularly time-consuming for courts because of the difficulty in trying to decipher the legal claims in a complaint filed by someone not trained in the law. Interestingly, the "deluge" of inmate filings in the 1990s was caused not by inmate "hyperlitigiousness"—as was assumed by the courts and by Congress—but by the precipitous increase in prison and jail populations during that time.<sup>24</sup> The PLRA has succeeded in the last two decades in drastically reducing the number of federal claims brought by inmates.<sup>25</sup> But the PLRA has affected not only frivolous litigation—which was the legislation's asserted purpose—but also potentially meritorious inmate claims.<sup>26</sup>

In the same year that Congress passed the PLRA, the Supreme Court decided *Lewis v. Casey*.<sup>27</sup> *Casey* further limits inmate access to the courts by reinterpreting *Bounds v. Smith*'s<sup>28</sup> guarantee of meaningful access to require no more

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20. This assertion is based on 2010 data regarding prisoner filings in federal courts. U.S. COURTS, CIVIL PRO SE AND NON-PRO SE FILINGS, BY DISTRICT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2010 (2010), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/tables/S23Sep10.pdf>.

21. Margo Schlanger, *The Political Economy of Prison and Jail Litigation*, PRISON LEGAL NEWS, June 2007, at 1, 5 [hereinafter Schlanger, *Political Economy*].

22. 42 U.S.C. § 1997e (2012).

23. *Review of the Prison Litigation Reform Act: A Decade of Reform or an Increase in Prison and Abuses?: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 100th Cong. 3 & n.6 (2007) (statement of Margo Schlanger on behalf of the American Bar Association) [hereinafter Statement of Margo Schlanger]. This Comment focuses only on the ability of inmates to challenge conditions of confinement through civil rights litigation. A substantial portion of inmate civil litigation is in the realm of habeas corpus (collateral attack on a criminal conviction, which is classed as a civil claim). Though habeas litigation is important, this Comment does not address those claims.

24. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1586–87 (2003) [hereinafter Schlanger, *Inmate Litigation*].

25. Statement of Margo Schlanger, *supra* note 23, at 2.

26. *Id.* at 2–3.

27. 518 U.S. 343 (1996).

28. *Bounds v. Smith*, 430 U.S. 817 (1977).

than minimal assistance for inmates seeking to file a limited category of claims in federal court.<sup>29</sup> Additionally, *Casey* limits the right of access to habeas and civil rights claims only, denying inmates any constitutional right to assistance or access to legal materials for important civil claims such as child custody and property rights.<sup>30</sup> The *Casey* standard is of no avail to inmates who, through lack of education, poor English literacy, limited mental acuity, or mental illness, are unable to file appropriately worded paperwork so that a federal judge can understand and accept their claims as meritorious.<sup>31</sup>

Finally, in 2009 the Supreme Court decided *Ashcroft v. Iqbal*,<sup>32</sup> which raised the pleading standard under Federal Rule of Civil Procedure 8(a)(2).<sup>33</sup> By replacing the earlier pleading standard—which called for a “plain statement” of the claim—with a requirement that a plea for relief must be “plausible on its face,” *Iqbal* makes it easier for judges to dismiss even meritorious cases at the pleading stage.<sup>34</sup> *Iqbal* has had a profound effect on civil litigation, substantially increasing dismissals of civil rights claims, pro se claims, and inmate claims,<sup>35</sup> which are often both civil rights claims and brought by pro se claimants. Additionally, there is substantial evidence that *Iqbal* has had a disparately negative impact on civil rights claims brought by (non-inmate) racial minorities, likely due in part to implicit bias on the part of judges.<sup>36</sup> These findings are likely applicable in the in-

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29. *Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration. *Id.* at 355; *see also infra* Part II.B.

30. *Casey*, 518 U.S. at 354–55.

31. The U.S. Supreme Court has held that inmates have the right to seek help from other inmates who act as “jailhouse lawyers,” who may or may not choose to help another inmate. *Johnson v. Avery*, 393 U.S. 483, 487, 490 (1969). But it bears keeping in mind that many future attorneys are already well-educated before enrolling in law school and yet still require three full years of intensive legal education—often followed by years of training in actual practice—before they are reasonably competent to represent clients. It strains belief to think that a typical prisoner—who is (demographically speaking) likely poor and undereducated, and probably using a poorly-stocked prison library—could draft and file a constitutional claim that avoids dismissal.

32. 556 U.S. 662 (2009).

33. *Id.* at 679.

34. *See* Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 126 (2011) [hereinafter Reinert, *Costs*] (arguing that thinly pleaded claims often proved meritorious before *Iqbal* and *Twombly*).

35. Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(B)(6) Motions*, 46 U. RICH. L. REV. 603, 617–19 & fig.4, tbl.2 (2012).

36. *See* Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal's Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1, 5 (2011).



mate context as well, both because most inmates are racial minorities,<sup>37</sup> and because inmates themselves are a disfavored, “politically unpopular” group.<sup>38</sup>

Viewed in context with the PLRA and *Iqbal*, *Casey* represents a substantial retreat from the level of protection afforded by the Supreme Court in *Bounds*. But *Casey* creates a constitutional floor, not a ceiling. *Casey* specifies the minimum amount of assistance required under the current Court’s interpretation of the Constitution, which is not necessarily the best framework for meeting society’s burden to ensure humane treatment of all our citizens. In this Comment I propose that in light of the restrictions on inmate litigation described above, the Ninth Circuit create and implement a program called “Prison Lawyers,” which would provide meaningful attorney assistance to inmates filing civil rights claims. This novel proposal would serve the interests of inmates by increasing the likelihood that prisoners with meritorious claims would secure relief, and it would further the interests of the courts both in reducing the burden of dealing with inmate pro se claims and in enforcing constitutional carceral conditions. I propose several alternate schemes that would effectively reduce the amount of pro se claims filed by inmates. Each scheme has the necessary components to pass constitutional muster, ensuring that inmates continue to have “meaningful access” to the courts.

The Comment proceeds in five Parts. In Part I, I discuss the importance of preserving inmates’ access to the courts. In Part II, I discuss inmates’ right to access the courts pro se, and I explore what it means to have meaningful access. In Part III, I review the legal barriers inmates face in attempting to make a legal claim, including substantive law, the PLRA, and *Iqbal*. Furthermore, I show how the PLRA and *Iqbal* in particular have placed substantial burdens on potentially meritorious inmate claims, decreasing the amount of meritorious claims that survive dismissal. In Part IV, I review current and proposed schemes for providing legal support for indigent persons, including civil *Gideon* and legal aid organization models, and I discuss how these schemes fail to provide adequate support for inmates. Finally, in Part V, I introduce the concept of a Prison Lawyers program. I conclude that introducing such a program would be beneficial to both the state, with its interest in achieving constitutional conditions and efficiency, and to inmates, who have no other real option for redress than the courts.

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37. *Race/Ethnicity*, *supra* note 4.

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

## I. UNITED STATES PRISON POPULATION

The United States has 25 percent of the world's prisoners<sup>39</sup> but only 4.4 percent of the world's population,<sup>40</sup> and it incarcerates more people than any other country in the world.<sup>41</sup> "2.2 million people are now incarcerated in the U.S.—a rate of incarceration far higher than that of any other industrialized nation, and unprecedented in U.S. history."<sup>42</sup>

As the size of our carceral communities has grown, so have problems of prisoner abuse and unconstitutional prison conditions.<sup>43</sup> As facilities approach and exceed designed capacity, and as state budgets for incarceration have dwindled, most prisons find it almost impossible to provide constitutional levels of protection, basic necessities, and medical care for inmates. Problems with the provision of medical care are currently the largest subject of inmate litigation.<sup>44</sup> An examination of California's carceral system can be illustrative of nationwide conditions, since California, until recently, operated the nation's largest prison system.<sup>45</sup> As an example of unconstitutional conditions, in 2009, 12 percent of California inmate deaths resulted from "extreme [] lapses in [medical] care."<sup>46</sup>

39. Wing, *supra* note 1.

40. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock> (last visited Sept. 24, 2014) (showing the U.S. population at around 319 million and the world population at around 7.1994 million).

41. Wing, *supra* note 1.

42. *Race and Justice Clearinghouse*, SENT'G PROJECT, [www.sentencingproject.org/clearinghouse](http://www.sentencingproject.org/clearinghouse) (last visited Mar. 31, 2014).

43. *See, e.g.*, *Brown v. Plata*, 131 S. Ct. 1910, 1932–34 (2011) (finding that prison overcrowding was the primary cause of inadequate medical care for inmates).

44. Margo Schlanger, *Inmate Litigation: Results of a National Survey*, LARGE JAIL NETWORK EXCHANGE 1, 11 (2003).

45. *See* DEBORAH LAMB-MECHANICK & JULIANNE NELSON, NAT'L INST. OF CORRECTIONS, PRISON HEALTH CARE SURVEY: AN ANALYSIS OF FACTORS INFLUENCING PER CAPITA COSTS 6 tbl.3 (2000), available at <https://s3.amazonaws.com/static.nicic.gov/Library/015999.pdf>; *see also* Don Thompson, *California's Prison Population Eclipsed By Texas*, HUFFINGTON POST S.F. (June 13, 2012), [http://www.huffingtonpost.com/2012/06/13/california-prison-population\\_n\\_1594926.html](http://www.huffingtonpost.com/2012/06/13/california-prison-population_n_1594926.html). California has reduced its state prison population through realignment, which transfers the responsibility of some felons to the county jails. Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 186 (2013). Unfortunately, realignment has led to more overcrowding in local jails, facilities which are not equipped to provide adequate housing or programming for persons serving sentences longer than one year.

46. KENT IMAI, CAL. PRISON HEALTHCARE RECEIVERSHIP, ANALYSIS OF YEAR 2009 INMATE DEATH REVIEWS—CALIFORNIA PRISON HEALTH CARE SYSTEM 10 (2010), available at [http://www.cphcs.ca.gov/docs/resources/OTRES\\_DeathReviewAnalysisYear2009\\_20100907.pdf](http://www.cphcs.ca.gov/docs/resources/OTRES_DeathReviewAnalysisYear2009_20100907.pdf). Additionally, "non-preventable" inmate deaths "are largely the result of demographic features of the incarcerated population—tobacco, alcohol and drug addiction are reflected in the high incidence of lung and liver cancer, end stage liver disease caused by chronic hepatitis C infection, and suicide caused by endemic depression and hopelessness," which are all

As the number of persons incarcerated has grown in the past decades, the sheer number of persons affected by potentially unconstitutional conditions has grown as well, now comprising a substantial portion of the U.S. adult population.<sup>47</sup>

### A. Incarceration and the Intersectionality of Vulnerable Populations

Racial and sexual minorities, as well as persons with mental disabilities, are disproportionately represented in prison populations because of systemic bias both in the criminal justice system (including, for example, overcriminalization, selective enforcement, selective prosecution, and disparate incarceration) and in the country at large.<sup>48</sup> People associated with more than one marginalized group are especially at risk of incarceration.<sup>49</sup> These individuals experience multidimensional bias as a result of the intersection of their marginalized identities.<sup>50</sup> For example, a transgender<sup>51</sup> identified person of color with mental illness may experience heightened discrimination, both within the criminal justice system, and in society at large, based on the unique intersection of the different aspects of

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treatable conditions. *Id.* at 8; see also Amy Petré Hill, *Death Through Administrative Indifference: The Prison Litigation Reform Act Allows Women to Die in California's Substandard Prison Health Care System*, 13 HASTINGS WOMEN'S L.J. 223, 227 (2002) (arguing that the PLRA allows corrections departments to sentence non-violent offenders to death by keeping claims for medical care "tied up in red tape until [the offenders] die").

47. For example, "[l]ocal jails admitted 11.6 million persons during the 12-month period ending midyear 2012." TODD D. MINTON, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2012 - STATISTICAL TABLES 4 (2013), available at <http://www.bjs.gov/content/pub/pdf/jim12st.pdf>. The U.S. adult population in 2013 was roughly 242 million. *State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last updated July 8, 2014) (data derived by multiplying the population in 2013, 316 million, by the percentage of the population that was over 18 years of age, 76.7). Therefore, assuming negligible change in the adult population between midyear 2011 and 2013, roughly 4.7 percent of the U.S. adult population passed through a jail during the twelve month period ending midyear 2012.

48. See generally ALEXANDER, *supra* note 2. See also Mauer, *supra* note 2.

49. See, e.g., DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 13 (2011) ("The most marginalized trans populations have the least protection from violence, experience more beatings and rapes, are imprisoned at extremely high rates, and are more likely to be disappeared and killed.").

50. See, e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) (discussing how the intersectionality of marginalized identities can radically affect the lived experience of those persons with multiple axes of oppression).

51. Transgender women were assigned male at birth but possess a female gender identity. Transgender men were assigned female at birth but possess a male gender identity.

her marginalized identities, leading to her incarceration.<sup>52</sup> She may then be subject to additional discrimination and violence while incarcerated, and less able to seek redress.<sup>53</sup> One judge discussed this phenomenon in a Sixth Circuit dissent:

[T]he demographic composition of this country's prison population makes it probable that civil rights claims are filed most often by members of groups deemed by society to be "minorities." I would expect, for example, that a statistically disproportionate number of allegations of constitutional violations in our country's prisons are filed by African American males who, although constituting only six percent of the general population, account for almost half of the two million persons incarcerated in American jails and prisons. . . . Similarly, it does not strain credulity to suppose that the vast majority of recorded acts of brutality, excessive force, retaliation, and deliberate indifference in our prisons are not committed against the powerful or "accepted" segments of society, but rather against racial and ethnic minorities, adherents of unpopular or misunderstood religions, and individuals of "unaccepted" sexual orientations.<sup>54</sup>

Since there are a large number of vulnerable minorities in prison, and since they experience increased bias and discrimination while in prison, it is especially important to maintain access to the courts for these individuals.

### 1. Racial Minorities and Incarceration<sup>55</sup>

Scholars have argued that the expansion of the prison industrial complex has targeted people of color for incarceration.<sup>56</sup> Empirical studies show that the rise in total prison expansion since the 1970s has been accompanied by dispro-

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52. SPADE, *supra* note 508, at 11 (For persons dealing with transgender status, as well as a mixture of poverty, racism, and immigration status issues, "[m]ost had no hope of finding legal employment because of the bias and violences [sic] they faced, and therefore turned to a combination of public benefits and criminalized work—often in the sex trade—in order to survive. This meant constant exposure to the criminal punishment system, where they were inevitably locked into gender-segregated facilities that placed them according to birth gender and exposed them to further violence.").

53. This is especially true for immigrants seeking legal status. *See id.*

54. *Walker v. Bain*, 257 F.3d 660, 675 (6th Cir. 2001) (Daughtrey, J., dissenting).

55. Some of the statistics that follow regarding incarceration and race are focused on men. In 2008, women made up less than 7 percent of persons incarcerated in state or federal prisons (not including county jails or local lockups, which also skew heavily male). E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP'T OF JUSTICE, PRISONERS IN 2012 - ADVANCED COUNTS 2 tbl.1 (2013), available at <http://www.bjs.gov/content/pub/pdf/p12ac.pdf>. Because men make up such a large percentage of the total carceral population (93 percent), it is somewhat reasonable to treat general statistics about incarcerated adults as if they reflect the male experience, and vice versa.

56. *E.g.*, ALEXANDER, *supra* note 2, at 4.

portionately high incarceration of people of color that cannot be explained by disparate criminality.<sup>57</sup>

Fifty-eight percent of all adult inmates in 2008 were African American or Hispanic,<sup>58</sup> even though African Americans and Hispanics made up only around 25 percent of the United States population.<sup>59</sup> Overall, “1 in every 15 African American men and 1 in every 36 Hispanic men are incarcerated in comparison to 1 in every 106 White men,”<sup>60</sup> despite the fact that crime rates don’t support such disparate outcomes.<sup>61</sup> Over his lifetime, the likelihood of a Black man being imprisoned, not including any jail time,<sup>62</sup> is 28 percent, versus 16 percent for Hispanic men and only 4 percent for White men.<sup>63</sup>

State-by-state comparisons of incarceration rates may provide further evidence of the targeting of racial minorities by the criminal justice system.<sup>64</sup> States with higher African American populations also incarcerate a larger percentage of their overall population. For example, Louisiana has the highest incarceration rate in the United States at 893 per 100,000 residents,<sup>65</sup> and the second-highest population of African Americans at 32.8 percent.<sup>66</sup> Mississippi has the second-highest rate of incarceration at 717 per 100,000 residents,<sup>67</sup> with 37.6 percent of its population consisting of African Americans, the highest percentage of any U.S. state.<sup>68</sup> Conversely, Maine has the lowest state incarceration rate at 145 per 100,000 residents,<sup>69</sup> and a very small population of African Americans at 1.6 percent.<sup>70</sup> Minnesota has the second-lowest state

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57. Mauer, *supra* note 2.

58. *Criminal Justice Fact Sheet*, *supra* note 3.

59. *Id.*

60. Kerby, *supra* note 3.

61. See, e.g., *Crime in the United States 2011*, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-43> (last visited Nov. 24, 2013) (stating that nearly 70 percent of adult arrestees in 2011 were White and that Whites were arrested more often for violent crimes in 2011 than individuals of all other races combined, comprising nearly 60 percent of those arrests).

62. Jails typically hold persons awaiting trial and lower level offenders with sentences less than one year; prisons typically hold persons sentenced to more than one year.

63. Press Release, U.S. Dep’t of Justice, *If 1991 Incarceration Rates Continue, One in Twenty U.S. Residents Could Be Imprisoned During Their Lifetimes* (Mar. 6, 1997), *available at* <http://www.bjs.gov/content/pub/press/LLGSFP.PR>.

64. There is no evidence that the correlation noted below indicates causation.

65. CARSON & GOLINELLI, *supra* note 55, at 8.

66. U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, *THE BLACK POPULATION: 2010*, at 8 tbl.5 (2011), *available at* <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

67. CARSON & GOLINELLI, *supra* note 55, at 8.

68. U.S. CENSUS BUREAU, *supra* note 66.

69. CARSON & GOLINELLI, *supra* note 55, at 8.

70. U.S. CENSUS BUREAU, *supra* note 66.

incarceration rate of 184 per 100,000 residents,<sup>71</sup> and a very small population of African Americans at 6.2 percent.<sup>72</sup>

## 2. Sexual Minorities and Incarceration

LGBT people are incarcerated at a rate two to three times that of the general population.<sup>73</sup> This high rate is due in large part to the discrimination faced by members of the LGBT community at all levels of the criminal justice system.<sup>74</sup> Once incarcerated, they are also at extreme risk for sexualized violence.<sup>75</sup> In one 2007 study funded by the California Department of Corrections and Rehabilitation and conducted at six California men's prisons, 67 percent of inmates who identified as LGBTQ reported having been sexually assaulted by another inmate while incarcerated, a rate fifteen times higher than the general inmate population.<sup>76</sup>

Most prisons do not have specialized housing units for vulnerable LGBT prisoners or take LGBT status into account when making housing assignments.<sup>77</sup> For example, the former Governor of California vetoed a bill that would have instructed prison officials to consider a prisoner's LGBT status in housing assignments to reduce the risk of sexual assaults.<sup>78</sup> Transgender prisoners may be

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71. CARSON & GOLINELLI, *supra* note 55, at 8.

72. U.S. CENSUS BUREAU, *supra* note 66.

73. See HUNT & MOODIE-MILLS, *supra* note 5, at 1.

74. *E.g.*, JOEY L. MOGUL ET AL., QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 78 (2011) (explaining that sentencing patterns are stricter for homosexual offenders than for heterosexual offenders). For example, one case involved a (female to male) transgender man who was prosecuted for sexual assault on the theory that consensual sex acts were automatically involuntary because the complainants did not know of the defendant's trans background. *Id.* at 77. The judge at sentencing stated (as a justification for the punishment of incarceration): "What this case is about is deceit," suggesting that the transperson "pretended" to be a man and so deserved to be locked up. *Id.*

75. See JUST DETENTION INT'L, LGBTQ DETAINEES CHIEF TARGETS FOR SEXUAL ASSAULT IN DETENTION 1 (2009), available at [http://www.justdetention.org/en/factsheets/JD\\_Fact\\_Sheet\\_LGBTQ\\_vD.pdf](http://www.justdetention.org/en/factsheets/JD_Fact_Sheet_LGBTQ_vD.pdf) (last visited Dec. 2, 2013).

76. *Id.*

77. This may change as more prisons institute Prison Rape Elimination Act (PREA) standards in order to avoid a potential 5 percent reduction in federal prison funds. See 42 U.S.C. § 15607(e)(2) (2012). For an example of a facility that segregates gay and transgender prisoners, see Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 19–54 (2011) (discussing the Los Angeles County Men's Central Jail which has a separate, and safer, unit for gay men and transgender women).

78. 2009 Legislation, CAL. LEGIS. LESBIAN, GAY, BISEXUAL & TRANSGENDER CAUCUS (Oct. 19, 2009), <http://lgbtcaucus.legislature.ca.gov/2009-legislation> ("AB 382 (Ammiano) - Require the California Department of Corrections and Rehabilitation (CDCR) to consider sexual orientation and gender identity when classifying inmates in order to prevent sexual violence. Status: Passed the California Legislature. Vetoed by the Governor (10/11/2009).").

at the highest risk of sexual violence and assault among all inmates, with one study showing that 59 percent of transgender women housed in men's prisons experience sexual abuse compared to 4 percent of nontransgender inmates.<sup>79</sup> Transgender inmates are almost always assigned housing based upon their genitalia, or assigned sex at birth, rather than their gender identity and gender presentation,<sup>80</sup> despite it being a Department of Justice "best practice" not to do so.<sup>81</sup> Since most transgender persons either cannot afford or do not desire gender confirmation surgery, the vast majority of transgender prisoners are placed according to their birth sexual assignment.<sup>82</sup> As a result, transgender women are almost always housed in men's prison facilities where they are at extreme risk for sexual abuse and rape.<sup>83</sup> Transgender men are also at heightened risk of sexual violence.<sup>84</sup>

### 3. Persons With Mental Disabilities and Incarceration

Because of harsh criminalization policies and discriminatory application of drug laws,<sup>85</sup> the majority of incarcerated persons suffer from some type of mental

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79. Dolovich, *supra* note 75, at 2 n.4 (citing VALERIE JENNESS, *THE VICTIMIZATION OF TRANSGENDER INMATES: AN EMPIRICAL EXAMINATION OF A VULNERABLE POPULATION IN PRISON* 14 (2008)).

80. California, for example, houses all pre-operative and non-operative transgender women in men's prisons. Author conversation with Prison Law Office staff, July 2013. However, a few jurisdictions have changed policies to match gender identity with housing. *See, e.g.*, Katie McDonough, *Texas County Adopts Sweeping New Policy to Protect Transgender Rights in Prison*, SALON (Nov. 18, 2013), [http://www.salon.com/2013/11/18/texas\\_county\\_adopts\\_sweeping\\_new\\_policy\\_to\\_protect\\_transgender\\_rights\\_in\\_prison](http://www.salon.com/2013/11/18/texas_county_adopts_sweeping_new_policy_to_protect_transgender_rights_in_prison) (discussing the first jail in Texas to adopt the policy).

81. The Department of Justice's recent report recommends that prisons "[s]egregate and, subject to staffing limitations, provide enhanced security for transgendered inmates, but with the same programming and privileges of general population inmates." STEVEN T. MCFARLAND & CARROLL ANN ELLIS, U.S. DEP'T OF JUSTICE, *REPORT ON RAPE IN FEDERAL AND STATE PRISON IN THE U.S.* 37 (2008), available at [http://www.ojp.usdoj.gov/reviewpanel/pdfs/prea\\_finalreport\\_080924.pdf](http://www.ojp.usdoj.gov/reviewpanel/pdfs/prea_finalreport_080924.pdf).

82. *See, e.g.*, Sydney Tarzwell, Comment, *The Gender Lines Are Marked With Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 193 (2006) (describing the Arkansas Department of Corrections' policy of housing transgender and transsexual females in male prisons).

83. *See* Eumi K. Lee, *An Overview of Special Populations in California Prisons*, 7 HASTINGS RACE & POVERTY L.J. 223, 227–28 (2010) ("The vulnerability of the transgender population to sexual assault and rape in prison is caused in large part by the prison system's classification of transgender individuals and the repercussions of that classification on their housing placements.")

84. *See, e.g.*, SPADE, *supra* note 48, at 7–8 (discussing Jim, a 25-year-old transgender man with an intersex condition). Jim was placed into a men's jail but denied access to his hormone therapy, causing him to menstruate. *Id. at 8*. When Jim was strip searched while menstruating, his condition was outed to staff and other inmates, and Jim faced threats of rape. *Id.*

85. Lurigio, *supra* note 6, at 71S.

illness, including very serious mental illnesses.<sup>86</sup> Inmates with a history of mental illness and emotional disorders can be targeted for sexual abuse.<sup>87</sup>

According to the DOJ, around 56 percent of state prisoners, 45 percent of federal prisoners, and 64 percent of jail inmates have mental health problems.<sup>88</sup> About 24 percent of state prisoners, 21 percent of jail inmates, and 14 percent of federal prisoners have received treatment for a mental health problem within the last twelve months.<sup>89</sup> Additionally, 24 percent of jail inmates, 15 percent of state prisoners, and 10 percent of federal prisoners have at least one symptom of a psychotic disorder.<sup>90</sup>

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Because there are so many minority inmates in U.S. prisons, the potential for discrimination and abuse is high. While the civil rights of all inmates deserve enforcement, the vulnerability of marginalized populations emphasizes the need for adequate redress.

## B. Inmates' Limited Options for Redress

We have an obligation to provide the basic necessities of life to those whom we have chosen to strip of their freedom through incarceration.<sup>91</sup> Inmates have

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86. BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, U.S. DEPT OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (2006), *available at* <http://www.bjs.gov/content/pub/pdf/mhppji.pdf>.

87. DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), *available at* <http://www.bjs.gov/content/pub/pdf/mhppji.pdf>. NAT'L PRISON RAPE ELIMINATION COMM'N, REPORT 7, app. B at 217 (2009) (claiming that among the criteria known to increase the vulnerability of male inmates are "mental or physical disability"); *see also*, e.g., STOP PRISONER RAPE, PREA UPDATE: UNIQUE OPPORTUNITY TO STIMULATE REFORM 6 (2008), *available at* [http://www.justdetention.org/pdf/PREA\\_Update\\_June\\_2008.pdf](http://www.justdetention.org/pdf/PREA_Update_June_2008.pdf) ("[M]arginalized and special needs populations are at heightened risk [of sexual abuse in prison]. Among women, typical survivors of sexual abuse [in prison] are non-violent, young, and mentally ill inmates. Among men, non-violent, young inmates, and gay and transgender prisoners have the highest rates of victimization."); CAL. PENAL CODE § 2636(a)(4) (West 2014) (requiring prisons to consider mental illness when making housing decisions in order to prevent sexual violence).

88. JAMES & GLAZE, *supra* note 87.

89. *Id.* This could include a medical diagnosis, use of prescription mental health medication, overnight hospitalization for mental illness, or professional therapy. *Id.*

90. *Id.* at 2.

91. *See* Dolovich, *supra* note 7, at 921–22 (introducing the concept of the state's "carceral burden"). Viewed as a whole, the state's obligation to its incarcerated offenders may be understood as that of ensuring the minimum conditions for maintaining prisoners' physical and psychological integrity and well-being—those basic necessities of human life, including protection from assault, without which human beings cannot function and that people in



no options when it comes to their safety or health care. Inmates have no choice about where or with whom they sleep, what or when they eat, what to wear or how often it gets washed, how often or when they bathe, or the conditions of their showers. They cannot shop at another store if the food provided is insufficient to meet rudimentary nutritional needs. Inmates cannot switch prisons if they are not being allowed to worship. They cannot force the prison to protect them from violent fellow inmates or guards, nor can they lock their cell doors against those individuals who would harm them. Inmates also cannot access any mental or physical health care unless a prison allows it: They cannot simply find another doctor when a prison doctor is committing malpractice. Therefore the state, by taking away these basic freedoms from inmates, has committed itself to providing minimal care.<sup>92</sup>

### C. Inmates' Access to the Courts

The rise of the “carceral state”<sup>93</sup> coincides temporally with the decline in legal protections for prisoners.<sup>94</sup> In the event that the state fails to meet an inmate’s basic needs, incarceration also removes “various avenues for pursuing legal claims that are potentially available to the non-prisoner; the prison inmate is isolated from possible sources of free legal assistance, severely limited in his capacity to gain sufficient assets to hire a lawyer, and unable to travel freely and thereby take advantage of other possible resources (including libraries and personal fact-gathering).”<sup>95</sup> In *Bounds v. Smith*, the Supreme Court recognized that prisoner complaints “are the first line of defense against constitutional violations.”<sup>96</sup> In light of this, prisoner access to the courts is essential to both the smooth function-

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prison need just by virtue of being human. . . . I refer collectively to this set of minimum requirements as ‘basic human needs.’

*Id.* at 921.

[T]he state’s obligation to meet the basic human needs of its prisoners stems from a very particular source: the state’s own decision to incarcerate those it has convicted of crimes.

By virtue of this decision, the state acquires distinct duties toward members of this group that it may not owe to other people, however deserving those others might be.

*Id.* “When the state opts to incarcerate convicted offenders as punishment, it is committing itself to providing for prisoners’ basic human needs in an ongoing way as long as they are in custody. This is the state’s carceral burden.” *Id.* at 921–22 (emphasis omitted).

92. *Id.* at 921.

93. Referring to the steep rise in the rate of incarceration over the past several decades.

94. Michael B. Mushlin & Naomi Roslyn Galtz, *Getting Real About Race and Prisoner Rights*, 36 *FORDHAM URB. L.J.* 27, 27 (2009). Additionally, these two trends “cannot be considered in isolation from one another.” *Id.*

95. 3 *WAYNE R. LAFAYE ET AL.*, *CRIMINAL PROCEDURE* § 11.2(f) (2014).

96. *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

ing of prisons and the health and welfare of inmates.<sup>97</sup> At the very least, the high rate of sexual assault in prison, about 59 times the nonincarcerated rate,<sup>98</sup> illustrates why inmates, denied other redress, must have access to the courts.

An inmate can go through the prison administration to try to effect a change in conditions, but often the existing power structures have a vested interest in not making prison conditions better.<sup>99</sup> And because an inmate cannot merely move out if the landlord refuses to fix the pipes or deal with the roach issue, litigation is, in many jurisdictions, the only “reform tool available” to regulate systems of incarceration.<sup>100</sup> “The only universal accountability mechanism is the inmate lawsuit seeking damages or some kind of remedial action for injury inflicted by official misconduct.”<sup>101</sup> An inmate’s ability to contest substandard conditions, such as unaddressed rat infestations, lack of bedding or even a bed,

97. *See id.* (holding “that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law”).

98. Compare Anthony C. Thompson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 119, 124 (2009) (“[E]xperts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison. Many inmates have suffered repeated assaults. Under this estimate, nearly 200,000 inmates now incarcerated have been or will be the victims of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000.” (quoting Prison Rape Elimination Act, 42 U.S.C. § 15601(2) (Supp. IV 2005))), with JENNIFER TRUMAN & MICHAEL PLANTY, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE CRIMINAL VICTIMIZATION, 2011 at 2 tbl.1 (2012). The rate of rape/sexual assault in the U.S. in 2010 was approximately .105 percent (268,570 rapes/sexual assaults in a 12-year-old and older population of 255,961,940). *Id.* While the result is comparing lifetime sexual assault in prison (13 percent) vs. one year of sexual assault in the general population (.105 percent), it is illustrative to note that the prison rape rate is 123 times the general population rate, while the average length of incarceration is only 3 years according to the United States Bureau of Justice Statistics. *Criminal Sentencing Statistics*, U.S. BUREAU JUST. STAT. (August 2003), [http://www.policyalmanac.org/crime/archive/criminal\\_sentencing\\_statistics.shtml](http://www.policyalmanac.org/crime/archive/criminal_sentencing_statistics.shtml) (not including life or death sentences). This makes the annual rate of rape in carceral facilities around 41 times higher than in the non-incarcerated population (if we assume the sexual assault rate is linear).

99. For example, many politicians run on a “tough on crime” platform, and any reforms aimed at making prison conditions better are seen as undermining that image. *See, e.g.*, Steve Merti, *Ombudsman Warns Tories’ Tough-On-Crime Policies Creating Prison Powder Keg*, YAHOO NEWS (Nov. 25, 2013), <http://news.yahoo.com/blogs/dailybrew/ombudsman-warns-tories-tough-crime-policies-creating-prison-200313894.html> (describing the political response to overpopulation in Canadian prisons). Additionally, “approximately 6% of state prisoners, 16% of federal prisoners, and . . . nearly half of all immigrants detained by the federal government” are now incarcerated in private prisons. ACLU, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION 5 (2011), available at <https://www.aclu.org/prisoners-rights/banking-bondage-private-prisons-and-mass-incarceration>. Privately run prisons have profit as their primary motivator, and reducing the quality and quantity of inmate food, inmate medication, and inmate security has a positive effect on the bottom line for prison investors. *See id.* at 23.

100. Schlanger, *Political Economy*, *supra* note 21, at 1.

101. Piehl & Schlanger, *supra* note 11, at 80.

inedible or non-nutritious food, and lack of protection from abusive inmates or guards, is enabled by civil rights litigation.

## II. PRO SE RIGHTS AND INMATES' RIGHT TO "MEANINGFUL ACCESS"

### A. Inmates' Right to Counsel

Every American has a right to access the court to seek redress from wrongs committed against her, for which there may be a legal remedy. But the law is complicated, and attorneys are expensive. What is an indigent prisoner, as 95 percent of inmates are, to do?<sup>102</sup> For many prisoners the bare right to file a legal claim will not be sufficient to protect their rights.<sup>103</sup>

For indigent defendants in criminal cases, there is a very limited constitutional right to counsel.<sup>104</sup> Criminal defendants are constitutionally required to have court-appointed counsel *only* during trial and for a first direct appeal,<sup>105</sup> and only for cases in which they face substantial terms of imprisonment. Some jurisdictions provide appointed representation throughout the direct appeals process, and some provide counsel for all criminal appeals, including collateral attacks on a conviction.<sup>106</sup>

There is, however, no constitutional right to counsel for any civil claims—for either plaintiffs or defendants—unless a person's physical liberty is at stake.<sup>107</sup> When an indigent inmate wants to pursue a civil claim challenging her conditions of confinement, she must represent herself *pro se* except in the rare circumstance when a court appoints counsel at its discretion.<sup>108</sup> But federal courts have

102. See Sharone Levy, *Balancing Physical Abuse by the System Against Abuse of the System: Defining "Imminent Danger" Within the Prison Litigation Reform Act of 1995*, 86 IOWA L. REV. 361, 371 (2000) ("Because inmates generally lack sufficient wealth and may find it difficult to pay the total filing fee within thirty days as normally required, approximately ninety-five percent of prisoner-initiated suits are filed *in forma pauperis*.").

103. See *Lewis v. Casey*, 518 U.S. 343, 354 (1996) stating that inmates have no right to assistance in discovering grievances or litigating effectively once a case has been filed.

104. See *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (defining that right).

105. 18 U.S.C. § 3006A(c) (2012).

106. See, e.g., *History*, CAL. APP. PROJECT, [http://www.lacap.com/About\\_Cap/about\\_cap.asp#history](http://www.lacap.com/About_Cap/about_cap.asp#history) (last visited June 24, 2014) (providing and paying for qualified appellate attorneys for criminal conviction appeals in the State of California).

107. *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18, 25 (1981).

108. *Wilborn v. Escalderon*, 789 F.2d 1328, 1330–1331 (9th Cir. 1986). For example, the Central District of California appoints counsel only if the case has survived dismissal and summary judgment, unless the inmate is proven to have very debilitating mental or language-related challenges. See *Pro Bono Civil Rights Panel*, CENTRAL DISTRICT OF CALIFORNIA, <http://www.cacd.uscourts.gov/attorneys/pro-bono> (last visited June 24, 2014). Therefore, most inmates, in

no authority to require attorneys to represent indigent inmates so the attorney must do so voluntarily,<sup>109</sup> and the courts have no funds to pay the appointed attorney.<sup>110</sup> It is therefore difficult to find attorneys willing to represent inmates free of charge even when a judge is willing to appoint one.<sup>111</sup> As such, a large majority of inmates filing legal claims are left with no choice but to do so pro se; this has a significant impact on their ability to effectively seek relief.

Once an indigent person has been incarcerated, she is almost certain to remain indigent throughout the course of her incarceration because inmate wages, for those who have paid jobs, are very low.<sup>112</sup> Additionally, without a reasonable income, prisoners who were not indigent when they were convicted can become so while incarcerated because of new incarceration fees.<sup>113</sup> What money an inmate earns is often eaten up by said fees and inflated commissary costs for essential items like shampoo and toothpaste.<sup>114</sup> That helps to explain why, in the federal court system in 2000, 94 percent of prisoner petitions, versus only 10.5 percent of nonprisoner petitions, were filed pro se.<sup>115</sup>

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order to get appointed counsel, must not only plead effectively, but must also somehow conduct effective discovery against guards or other inmates, while in a carceral facility.

109. *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 298 (1989).

110. U.S. COURTS, PRISONER SELF-HELP PACKET 13 (2003), available at <http://www.id.uscourts.gov/forms-dc/PrisonerCR03.pdf>.

111. *Id.*

112. See Schlanger, *Inmate Litigation*, *supra* note 24, at 1646 n.301 (citing CAMILLE GRAHAM CAMP & GEORGE M. CAMP, CRIMINAL JUSTICE INST., THE CORRECTIONS YEARBOOK 2000: ADULT CORRECTIONS 111 (2000) (stating that for those who have paid employment in prison, “daily inmate wages vary from lows of under a dollar to highs of a few dollars per day worked”)).

113. See, Mary Beth Lane & Josh Jarman, *Poor Inmates Leave Jails Short on Pay-to-Stay Fees*, COLUMBUS DISPATCH, June 27, 2013, <http://www.dispatch.com/content/stories/local/2013/06/27/poor-inmates-leave-jails-short-on-pay-to-stay-fees.html>; *Dallas Jail Will Take Fees for Inmate Health Services Out of Commissary Accounts*, GRITS FOR BREAKFAST (Feb. 22, 2012), <http://gritsforbreakfast.blogspot.com/2012/02/dallas-jail-may-take-fee-for-inmate.html>.

114. See, e.g., *Prisoners Pay More: The Commissary Boondoggle*, PRISON CULTURE (July 18, 2011), <http://www.usprisonculture.com/blog/2011/07/18/prisoners-pay-more-the-commissary-boondoggle>. For example, in Illinois state prisons, inmates without jobs usually receive \$9.60 from the state each month, which can be eaten up by other fees such as healthcare co-pays. *Id.* Inmates can use whatever money is left to purchase items that are not provided by the prison, such as travel size amounts of deodorant (\$2–4), toothpaste (\$2–4), shampoo (\$1–3), laundry detergent (\$4–5), lotion (\$2–4), over the counter medications, writing materials to keep in touch with loved ones, legal copies (\$.05/page), and clothing beyond the two pairs of underwear, two t-shirts, one shirt and one pair of pants provided by the prison each year (shoes are not provided at all, nor are cold-weather boots). *Id.*

115. U.S. COURTS, *supra* note 20.

## B. Inmates' Right of "Meaningful Access" to the Courts: *Bounds* and *Casey*

Given the important role of the courts in enforcing inmates' constitutional rights, it should come as no surprise that the Supreme Court, in the landmark case *Bounds v. Smith*,<sup>116</sup> established that the Constitution guarantees inmates meaningful access to the courts. The Court addressed the question of "whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts."<sup>117</sup> Answering this question in the affirmative, the *Bounds* Court found that "it is now established beyond doubt that prisoners have a constitutional right of access to the courts."<sup>118</sup>

In reaching its decision, the Court wanted to ensure the continued vitality of "original actions seeking . . . [the] vindication of fundamental civil rights," which "frequently rais[e] heretofore unlitigated issues."<sup>119</sup> The Court emphasized that "civil rights actions are of 'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights. . . . [and] the prisoner petitions here are the first line of defense against constitutional violations."<sup>120</sup> Additionally, the Court noted that there is a great need for new legal research and advice to make a meaningful initial presentation to a trial court in civil rights cases.<sup>121</sup> Therefore, the *Bounds* court explicitly held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."<sup>122</sup>

Nearly two decades later, however, the Supreme Court in *Lewis v. Casey*<sup>123</sup> retreated from *Bounds*'s expansive interpretation of inmates' right to have access to the courts.<sup>124</sup> In *Casey*, a group of inmates filed a class action claim challenging the adequacy of the Arizona state prison library system.<sup>125</sup>

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116. 430 U.S. 817, 824 (1977). The right of access identified in *Bounds v. Smith* extends to federal as well as state prisoners. *Phillips v. Bureau of Prisons*, 591 F.2d 966, 974 (D.C. Cir. 1979).

117. *Bounds*, 430 U.S. at 825.

118. *Id.* at 821.

119. *Id.* at 827.

120. *Id.* at 827–28.

121. *Id.* at 828.

122. *Id.* at 828.

123. 518 U.S. 343 (1996).

124. *Id.* at 350–52 (declaring actual injury a constitutional prerequisite to finding a violation of inmates' constitutional rights).

125. *Id.* at 346.

Although language in *Bounds* suggested that inmates have an independent right to access a prison law library,<sup>126</sup> *Casey* “reinterpreted the right of access to the courts” guaranteed in *Bounds*.<sup>127</sup> Justice Scalia, writing for the majority, held that *Bounds* went too far.<sup>128</sup> *Casey* interpreted the right to access the courts to mean that inmates have no “freestanding right to law libraries or legal assistance,” but only “a reasonably adequate opportunity to present claimed violations of fundamental rights to the courts.”<sup>129</sup> Instead, the right of access to the court guarantees only the right to have some “minimal” form of assistance so as to be able to present any “nonfrivolous legal claim” to the court.<sup>130</sup> After *Casey*, the right of meaningful access is simply a right to file the initial papers with the court,<sup>131</sup> which may be satisfied by giving inmates “court-provided forms,” which do not “attempt any legal analysis” but only state relevant facts.<sup>132</sup>

In an attempt to clarify its standard, the majority in *Casey* explicitly stated that the right to access does not include providing inmates with the ability “to discover grievances, and to litigate effectively once in court.”<sup>133</sup>

Although the *Casey* standard may seem harsh, that case merely lays out the minimum level of assistance the current Court believes the Constitution requires prisons to provide. In other words, *Casey* establishes a constitutional floor below which inmate legal assistance programs may not fall. States are, however, free to implement initiatives that provide a greater degree of assistance to inmates seeking to file legal claims: The *Casey* court explicitly stated that “we encourage local experimentation in various methods of assuring access to the courts.”<sup>134</sup> Given the substantial practical<sup>135</sup> and legal<sup>136</sup> barriers that limit inmates’ ability to seek redress in the courts, states should provide more legal assistance to inmates in order to ensure that *Bounds*’s promise of meaningful access is fulfilled.

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126. *Id.* at 350–51.

127. *Id.* at 350.

128. *Id.* at 354 (“It must be acknowledged that several statements in *Bounds* went beyond the right of access recognized in the earlier cases on which it relied . . . [but] [t]hese elaborations upon the right of access to the courts have no antecedent in our pre-*Bounds* cases, and we now disclaim them.”).

129. *Id.* at 351 (internal quotations omitted).

130. *Id.* at 352–53.

131. See 3 RIGHTS OF PRISONERS § 12:5 (4th ed. 2014).

132. *Casey*, 518 U.S. at 352.

133. *Id.* at 354 (emphasis omitted).

134. *Id.* at 352 (internal quotations omitted).

135. See *supra* Part II.A.

136. See *infra* Part III.

### III. LEGAL BARRIERS TO INMATE RELIEF

The majority of prisoner pro se constitutional claims are filed in federal courts.<sup>137</sup> Fewer inmates file in state courts,<sup>138</sup> which may be more heavily deferential to prison officials than federal courts.<sup>139</sup> Most prisoner lawsuits are individual claims seeking damages and perhaps some injunctive relief for the individual.<sup>140</sup> Group claims, more often for injunctive relief than for damages, have in the past been an effective means of changing unconstitutional prison conditions more widely.<sup>141</sup>

#### A. Prison Litigation Reform Act

##### 1. PLRA Requirements

Congress has passed legislation that limits inmate access to the courts. In 1996, in response to concerns about the overburdening of federal courts by inmate litigation,<sup>142</sup> Congress passed the PLRA.<sup>143</sup> The PLRA is designed to keep prisoner<sup>144</sup> grievances in prisons and out of courts, on the theory that prison officials should have the primary responsibility for prison regulation rather than federal judges.<sup>145</sup> The provisions of the PLRA limit inmate civil actions in federal courts that either raise challenges to conditions of confinement, or to actions by government officials that affect the lives of persons confined in prison.<sup>146</sup> The

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137. Schlanger, *Political Economy*, *supra* note 21, at 4.

138. See Schlanger, *Inmate Litigation*, *supra* note 24, at 1576 (noting that inmates file only 1/3 the number of state court claims as federal court claims).

139. See *Casey*, 518 U.S. at 361; see also Kim Shayo Buchanan, Comment, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751, 763 (2005) (“[U]ncritical judicial deference . . . abandons prisoners’ well-being almost entirely to the discretion of guards and wardens . . .”).

140. Schlanger, *Political Economy*, *supra* note 21, at 3.

141. *Id.*

142. Schlanger, *Inmate Litigation*, *supra* note 24, at 1576, 1625.

143. 42 U.S.C. § 1997e (2012).

144. For the purposes of the PLRA, a prisoner is defined as “any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.” 42 U.S.C. § 1997e(h) (2006).

145. Exhaustion is the primary mechanism through which this is accomplished. See 42 U.S.C. § 1997e(a) (2012) (“No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”).

146. 18 U.S.C. § 3626(g)(2) (2012).

PLRA does not affect habeas corpus actions or appeals from criminal convictions.<sup>147</sup>

There is evidence that the PLRA has substantially reduced the burden imposed on courts, prisons, and jails by prisoner litigation, by reducing inmate civil litigation by more than half.<sup>148</sup> But the PLRA has also simultaneously created major obstacles to holding prisons accountable.<sup>149</sup>

There are three major routes Congress used to limit inmate civil claims through the PLRA: “restrictions on the powers of the federal courts; restrictions on the relief available in prisoner cases; and restrictions on the ability of [individual] prisoner litigants to get into court.”<sup>150</sup> I focus here on the PLRA’s restrictions on inmates’ ability to file suit and on the relief available through litigation. These provisions of the PLRA (a) require the exhaustion of all available administrative remedies,<sup>151</sup> (b) limit monetary damages for mental and emotional injuries,<sup>152</sup> (c) impose filing fee requirements<sup>153</sup> and limit filings of repeated in forma pauperis complaints for prisoners with a history of filing dismissed claims (three-strikes rule),<sup>154</sup> (d) allow for judicial review of claims prior to docketing the case,<sup>155</sup> and (e) impose strict limits on attorneys’ fees.<sup>156</sup>

#### a. Administrative Exhaustion

The PLRA provides that no action may be brought by a prisoner with respect to prison conditions under 42 U.S.C.A. § 1983 (or any other federal law) until the inmate has exhausted all available administrative remedies.<sup>157</sup> Exhaustion is required for all prisoner suits seeking redress for prison circumstances or occurrences, regardless of whether they involve general circumstances of incarceration or particular episodes with inmates or staff, or whether they allege an Eighth Amendment violation based on the use of excessive force or some other

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147. Ivy A. Finkenstadt, *Representing Prisoner Clients: Prison Litigation Reform Act*, 44-DEC. MD. B.J. 58, 60 (2011).

148. JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980–2000, at 1 (2002) [hereinafter PRISONER PETITIONS].

149. Statement of Margo Schlanger, *supra* note 23, at 1.

150. Elizabeth Alexander, *Prison Litigation Reform Act Raises the Bar*, 16 CRIM. JUST. 10, 11 (2002).

151. 42 U.S.C. § 1997e(a) (2012).

152. 42 U.S.C. § 1997e(e) (2012).

153. 28 U.S.C. § 1995(b), (f)(2) (2012).

154. 28 U.S.C. § 1915(g) (2012).

155. 42 U.S.C. § 1997e(c)(1) (2012).

156. 42 U.S.C. § 1997e(d) (2012); *see also* Finkenstadt, *supra* note 146, at 60.

157. 42 U.S.C. § 1997e(a) (2012).



constitutional violation.<sup>158</sup> The PLRA's exhaustion provisions also require a prisoner to exhaust a facility's grievance process no matter how legitimate the reasons for failing to follow grievance procedures might be, even if the inmate is illiterate, sick, injured, mentally ill, or otherwise incapacitated.<sup>159</sup> The PLRA requires "proper [administrative] exhaustion," meaning that a prisoner must comply with all time limits, appeal levels, and other procedural requirements.<sup>160</sup> If at any point an administrative remedy is denied for a procedural reason, such as filing after an arbitrary time limit has expired, or the inmate's claim is not exhausted for any other reason, the inmate's case—no matter how meritorious—must be dismissed.<sup>161</sup> The ostensible purpose of the PLRA's exhaustion requirement is twofold: (1) "to reduce the quantity and improve the quality of prisoner suits"<sup>162</sup> and (2) to afford corrections officials the time and opportunity to address complaints internally before allowing the initiation of a federal case.<sup>163</sup> Unfortunately, the exhaustion requirement has had the effect of obstructing court oversight of conditions of confinement.<sup>164</sup> Administrative remedies are often very difficult to access.<sup>165</sup> The exhaustion requirement incentivizes prison and jail officials to conjure up ever higher and more complex procedural hurdles in order to foreclose subsequent constitutional litigation.<sup>166</sup> Deadlines for filing a complaint are often very short, such as two to five days, and the number of administrative appeals required can be very large.<sup>167</sup> "The requisite forms may be repeatedly unavailable, or the prisoner may fear retaliation for use of the grievance system," which often involves the "officer whose conduct is the subject of their complaint."<sup>168</sup> Minor technical errors filling out any forms also bar meritorious claims.<sup>169</sup>

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158. *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

159. *Why Must the PLRA Be Reformed?*, SAVE COALITION, <http://www.savecoalition.org/plra.html> (last visited Sept. 24, 2014).

160. *Woodford v. Ngo*, 548 U.S. 81, 90–91, 93 (2006).

161. *Porter*, 534 U.S. at 524–25; *see also* Finkenstadt, *supra* note 146, at 61.

162. *Porter*, 534 U.S. at 524.

163. *Johnson v. Killian*, 680 F.3d 234, 238 (2d Cir. 2012) (quoting *Amador v. Andrews*, 655 F.3d 89, 96 (2d Cir. 2011)). If a prisoner claims there was no available administrative remedy, she "bears the burden of establishing that an administrative remedy was unavailable." *Patel v. Moron*, 897 F. Supp. 2d 389, 398 (E.D.N.C. 2012). However, defendants, rather than plaintiffs, "have the burden of proving that the prisoner did not exhaust available administrative remedies completely and accurately." Finkenstadt, *supra* note 146, at 61; *see also* *Jones v. Bock*, 549 U.S. 199, 211–12 (2007).

164. Statement of Margo Schlanger, *supra* note 23, at 2.

165. *Id.* at 6.

166. *Id.* at 2.

167. *Id.* at 6.

168. *Id.*

169. *Id.* at 7.

The Court recently relented slightly from the most rigorous application of the exhaustion doctrine by holding that an inmate's compliance with the PLRA's exhaustion requirement as to some, but not all, claims does not warrant per se dismissal of the entire action, but only the claims left unexhausted.<sup>170</sup> Additionally, the Court held that the plaintiff's failure to name all defendants in a complaint was also not cause for per se dismissal.<sup>171</sup> Nevertheless, the bar to achieve exhaustion is still very high.

### b. Physical Injury Requirement

The PLRA prohibits prisoners from seeking money damages for a mental or emotional injury without a prior showing of physical injury or the commission of a sexual act.<sup>172</sup> Courts have held that a physical injury must be more than de minimis.<sup>173</sup> Generally speaking, if a non-prisoner would have gone to a doctor or sought medical treatment, an injury may be considered more than de minimis.<sup>174</sup>

But courts frequently differ on what constitutes de minimis physical injury.<sup>175</sup> In one case, a judge ruled that bruises on an inmate's ear, bruises on the back of his head, and swelling on his abdomen from a guard's beating were insufficient physical injury under the PLRA.<sup>176</sup> Additionally, many constitutional

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170. *Jones v. Bock*, 549 U.S. 199, 223–24 (2007).

171. *Id.* at 217.

172. 42 U.S.C. §1997e(e) (2012). This section was amended in March 2013 to add “or the commission of a sexual act.” Commission of a sexual act includes only penetration of the genitalia by a penis, penetration of genitalia by hands or objects for the purpose of harassment or sexual gratification, etc., or oral contact with genitalia. 18 U.S.C.A. § 2246(2) (West 2014) (this section was amended in March 2013 to add sexual acts to the physical injury requirement). From 1996 until 2013, rape and sexual assault did not in and of themselves qualify as physical injury for the purposes of the PLRA. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (amending the PLRA's limitation on damages clause to allow an inmate to recover damages resulting from the commission of a sexual act).

173. *E.g.*, *Luong v. Hatt*, 979 F. Supp. 481, 486 (N.D. Tex. 1997).

174. *Id.*

175. *See Alexander*, *supra* note 149, at 14 (“[A]llegations of cuts and abrasions satisfy physical injury requirement.” (citing *Gomez v. Chandler*, 163 F.3d 921 (5th Cir. 1999))); *id.* (“[I]ntrusive body searches qualify as physical injury.” (citing *Liner v. Goord*, 196 F.3d 132 (2d Cir. 1999))); *id.* (“[C]onfinement in filthy cell where exposed to mentally ill patients not physical injury.” (citing *Harpers v. Showers*, 174 F.3d 716 (5th Cir. 1999))); *id.* (“[B]ruised ear does not qualify as physical injury.” (citing *Sigler v. Hightower*, 112 F.3d 191 (5th Cir. 1997))).

176. Statement of Margo Schlanger, *supra* note 23, at 5 & n.18 (“[C]oncluding that inmate confined for twelve hours in ‘strip cage’ in which he could not sit down did not suffer physical injury even though he testified that he had a ‘bad leg’ that swelled ‘like a grapefruit’ and that caused severe pain and cramps.” (citing *Jarriett v. Wilson*, 414 F.3d 634 (6th Cir. 2005))); *id.* (“[C]oncluding that alleged ‘pain, numbness in extremities, loss of mobility, lack of sleep, extreme tension in neck and back, extreme rash and discomfort’ did not satisfy PLRA physical injury requirement.” (citing *Myers v. Valdez*, No. 3-05-CV-1799-L, 2005 WL 3147869, at \*2 (N.D. Tex. Nov. 17, 2005)));

violations do not result in physical injuries, such as violations of the First Amendment right to freedom of religion; courts have denied such claims because they did not involve physical injuries.<sup>177</sup> The effect of this requirement is that inmates who suffer “mentally and emotionally traumatic experiences such as mental torture, harassment, coercion, and even some forms of sexual assaults” are denied monetary compensation for their injuries.<sup>178</sup>

Several district courts have found the physical injury requirement in 1997e(e) to be unconstitutional.<sup>179</sup> But the only circuit courts to speak on the matter have upheld the statute as constitutional.<sup>180</sup>

### c. Filing Fees for Indigent Inmates

Under federal law, indigent plaintiffs may request in forma pauperis status,<sup>181</sup> asking the court to waive filing fees based on their lack of available funds. But under the PLRA, prisoners do not receive the waiving benefit of pauper status. Inmates must instead pay full filing fees in installments.<sup>182</sup> The inmate must pay, at the time of filing and monthly thereafter until the filing fee is satisfied, 20 percent of the greater of (1) the amount of money in the prisoner's inmate account or (2) the average of funds in the inmate's account for the preceding six months.<sup>183</sup> This last provision ostensibly exists to prevent prisoners from draining their inmate accounts in order to qualify for lower court payments.<sup>184</sup> Nevertheless, it constitutes a considerable burden: No matter how poor an inmate is, or how essential the items she must buy from the commissary with her meager

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*id.* (“[S]ymptoms including ‘severe stomach aches, severe headaches, severe dehydration . . . and blurred vision,’ suffered by inmate confined in cell allegedly ‘smear[ed] with human waste and infested with flies’ did not constitute physical injury for PLRA purposes.” (citing *Mitchell v. Horn*, No. Civ.A.98-4742, 2005 WL 1060658, at \*1 (E.D. Pa. May 5, 2005))).

177. *Why Must the PLRA Be Reformed?*, *supra* note 158.

178. Finkenstadt, *supra* note 146, at 61.

179. *See, e.g.*, *Siggers-El v. Barlow*, 433 F. Supp. 2d 811, 816 (E.D. Mich. 2006) (“Application of § 1997e(e) to bar mental or emotional damages would effectively immunize officials from liability for severe constitutional violations, so long as no physical injury is established.”); *Percival v. Rowley*, No. 1:02-CV-363, 2005 WL 2572034, at \*2–3 (W.D. Mich. Oct. 12, 2005); *Mason v. Schriro*, 45 F. Supp. 2d 709, 715–720 (W.D. Mo. 1999).

180. *See, e.g.*, *Al-Amin v. Smith*, 637 F.3d 1192, 1198 (11th Cir. 2011) (stating that prisoner could not seek punitive damages relief absent physical injury); *Davis v. District of Columbia*, 158 F.3d 1342, 1347 (D.C. Cir. 1998); *Zehner v. Trigg*, 133 F.3d 459, 463 (7th Cir. 1997).

181. *E.g.*, FED. R. APP. P. 24.

182. Finkenstadt, *supra* note 146, at 63. For example, the Central District of California filing fee for any civil action, including inmate cases filed in forma pauperis, is \$400. *See Schedule of Fees*, U.S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, <https://www.cacd.uscourts.gov/court-procedures/filing-procedures/schedule-fees> (last visited June 20, 2014).

183. 28 U.S.C.A. § 1915 (b)(1) (West 2014).

184. Finkenstadt, *supra* note 146, at 63.

funds, monthly payments of 20 percent of her inmate account must be handed over until the court fees are paid in full.<sup>185</sup>

The PLRA imposes even heavier restrictions on inmates who file claims that are dismissed for any reason. “If a prisoner files three or more claims in federal court that are dismissed as ‘frivolous, malicious, or fail[ing] to state a claim upon which relief can be granted,’” the prisoner can never again file in forma pauperis.<sup>186</sup> The rule does not prohibit further filing of suit; rather, the prisoner must pay the full fee at the time of filing, no matter her lack of resources, unless she is “in imminent danger of physical injury.”<sup>187</sup> An appeal of a dismissed action is a separate strike, as is any actions filed before the PLRA took effect (that is, this aspect of the PLRA has retroactive applicability.)<sup>188</sup> The PLRA’s “three strikes” provision doesn’t just affect inmates who abuse the system by filing frivolous claims; it effectively bars access to the court for indigent prisoners who made mistakes in prior cases, usually due to their lack of access to counsel or legal training.<sup>189</sup>

All appellate level courts to address the constitutionality of this provision of the PLRA have found it to be permissible. In *Lewis v. Sullivan*,<sup>190</sup> the Seventh Circuit noted that plaintiffs have challenged the constitutionality of Section 1915(g) under “the due process right of access to the courts, the equal protection clause, the ex post facto clause, the first amendment right to petition for redress of grievances, and several others,” all to no avail.<sup>191</sup> The *Lewis* court identified seven other circuit courts that had previously addressed the statute and found it constitutional, before also upholding the statute.<sup>192</sup>

#### d. Initial Court Screening

Under the PLRA, a court can screen any complaint filed in forma pauperis, and any inmate claim, and dismiss it sua sponte if the court is satisfied that the action is “frivolous, malicious, fails to state a claim upon which relief can be granted,

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185. 28 U.S.C.A. § 1915(b)(2) (West 2014). If an inmate should be lucky enough to have a job, at the average wage of a few dollars a day, if she spends no money on food, toiletries, or any other essentials, she could pay filing fee in roughly six and a half months. See *Prisoners Pay More*, *supra* note 114.

186. Finkenstadt, *supra* note 146, at 63 (citing 28 U.S.C. § 1915(g)).

187. Alexander, *supra* note 149, at 12.

188. *Id.*

189. *Why Must the PLRA Be Reformed?*, *supra* note 158.

190. 279 F.3d 526 (7th Cir. 2002).

191. *Id.* at 528.

192. *Id.*

or seeks monetary damages from a defendant who is immune from such relief.”<sup>193</sup> “The courts are split on whether this provision removes the court’s power to dismiss with leave to amend to cure the deficiencies in the initial complaint.”<sup>194</sup> Often courts screen these complaints for dismissal prior to docketing and prior to serving the defendant(s).<sup>195</sup> These dismissals count against inmates for purposes of the “three strikes” rule.<sup>196</sup>

#### e. Limitations on Attorney’s Fees

The PLRA sets a very strict limit on the recovery of attorneys’ fees for representing inmates. Attorneys’ fees cannot be an hourly rate greater than 150 percent of the hourly rate established under the Criminal Justice Act for payment of court appointed costs.<sup>197</sup> Additionally, in damages cases, attorney’s fees cannot be greater than 150 percent of the plaintiff’s monetary recovery.<sup>198</sup>

These rules limit attorney compensation for successful constitutional claims. For example, in one Second Circuit case, an inmate filed a claim against prison staff for removing a large volume of paperwork regarding pending litigation from his cell.<sup>199</sup> The inmate won his First Amendment case, but was awarded only nominal damages of \$1.00 by a jury.<sup>200</sup> The court then awarded only \$1.40 in attorney’s fees, rather than the almost \$100,000 in costs incurred by the plaintiff’s attorneys.<sup>201</sup> The Second Circuit affirmed, stating, “all of our sister circuits [which] construed § 1997e(d)(2) similarly have concluded that it imposes a fee cap equal to 150 percent of a monetary judgment awarded to a prisoner-plaintiff.”<sup>202</sup> The Second Circuit acknowledged that “capping attorney’s fees for a \$1.00 monetary award at \$1.50 is the practical equivalent of no fee award at all,”<sup>203</sup> but went on to state that “that is not a sufficient reason to deny the statutory

193. 42 U.S.C. 1997e(c)(1) (2012).

194. Alexander, *supra* note 149, at 12.

195. Schlanger, *Inmate Litigation*, *supra* note 24, at 1629.

196. Alexander, *supra* note 149, at 12.

197. Finkenstadt, *supra* note 146, at 63 (citing 42 U.S.C. §1997e(d)). “Circuits are divided on whether the base rate should be the rate actually paid to court appointed defense attorneys in the jurisdiction or the rate established by the Judicial Conference under the act.” *Id.* Additionally, a portion of the plaintiff’s recovery (up to 25 percent) must be given to her attorney to satisfy part of the defendant’s obligation. *Id.* (citing 42 U.S.C. § 1997e(d)(2)).

198. 42 U.S.C. §1997e(d)(2) (2012); *see also* Alexander, *supra* note 149, at 15.

199. *Shepherd v. Goord*, 662 F.3d 603, 605 (2d Cir. 2011).

200. *Id.*

201. *Id.*

202. *Id.* at 608.

203. *Id.* at 609.

language its plain meaning, which permits no exception for minimal or nominal monetary judgments.”<sup>204</sup>

As the Sixth Circuit explained in *Walker v. Bain*:<sup>205</sup>

We are aware that § 1997e(d)(2) will have a strong chilling effect upon counsels' willingness to represent prisoners who have meritorious claims. We are also mindful that the “marginal or trivial” claims that result in a judgment for a prisoner . . . do in fact arise out of an actual, proven civil rights violation. We admit to being troubled by a federal statute that seeks to reduce the number of meritorious civil rights claims and protect the public fisc at the expense of denying a politically unpopular group their ability to vindicate actual . . . civil rights violations.<sup>206</sup>

Despite these concerns expressed by the courts, constitutional challenges to the fee cap under the Fifth Amendment have been rejected.<sup>207</sup> The irony of the attorney fee restriction is that it often makes it cost prohibitive for attorneys to represent prisoners, with the end result being a greater burden “on courts to process cases in which prisoners, who are not conversant with the law and court rules, must represent themselves.”<sup>208</sup>

## 2. The Purpose of the PLRA

From a political viewpoint, “[i]t is a common theme in law-and-order discourse to decry prisoner hyperlitigiousness; politicians often condemn jailhouse lawyers and frivolous prisoner lawsuits.”<sup>209</sup> Supporters of the PLRA went on

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204. *Id.*

205. 257 F.3d 660 (6th Cir. 2001).

206. *Id.* at 670.

207. 3 ALBA CONTE, ATTORNEY FEE AWARDS § 13:2 (3d ed. 2004); *see also* Walker, 257 F.3d at 669 (“§ 1997e(d)(2) is rationally related to serving the purposes of decreasing marginal prisoner lawsuits and protecting the public fisc.”); Boivin v. Black, 225 F.3d 36, 46 (1st Cir. 2000); Madrid v. Gomez, 190 F.3d 990, 996 (9th Cir.1999). But the First Circuit in *Boivin v. Black*, in dicta, indicated that the limitation of fees to 150 percent of the judgment would not apply to a case in which both damages and injunctive relief were awarded. *Boivin*, 225 F.3d at 41 n.4. As well, in *Johnson v. Daley*, the Seventh Circuit stated that “fees must be ‘proportionately related to the court ordered relief’ and, when monetary relief is awarded, the fees attributable to that relief cannot exceed 150% of the damages.” 339 F.3d 582, 583 (7th Cir. 2003). This seems to indicate that where injunctive or declaratory relief is awarded, some other formula may be used to calculate attorney’s fees, perhaps without a strict cap.

208. *Why Must the PLRA Be Reformed?*, *supra* note 158.

209. Schlanger, *Political Economy*, *supra* note 21, at 4.

record stating that the purpose of the act was to reduce the multitude of frivolous inmate claims while preserving meritorious inmate claims.<sup>210</sup>

From the federal courts' perspective, inmate lawsuits are numerous and can often be frivolous, and pose real management challenges both for the courts and for prisons.<sup>211</sup> Because pro se inmates' complaints are generally written by persons without legal training, a significant portion of whom are functionally illiterate in the English language,<sup>212</sup> the claims can be hard for law clerks to decipher and take significantly more time than attorney-composed claims.<sup>213</sup>

Additionally, over time the number of inmate claims has risen to take up a substantial portion of the federal docket. With the increase in the incarcerated population from the 1970s to the 1990s came a proportional increase in inmates' lawsuits.<sup>214</sup> While prison officials benefitted from (and were some-

210. See Schlanger, *Inmate Litigation*, *supra* note 24, at 1587 n.89, 1634 n.270 (citing 141 CONG. REC. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) ("The crushing burden of these frivolous suits makes it difficult for the courts to consider meritorious claims."); *see also* 141 CONG. REC. S19,114 (daily ed. Dec. 21, 1995) (statement of Sen. Kyl) ("If we achieve a 50-percent reduction in bogus Federal prisoner claims, we will free up judicial resources for claims with merit by both prisoners and nonprisoners."); 141 CONG. REC. S18,136 (daily ed. Dec. 7, 1995) (statement of Sen. Hatch); 141 CONG. REC. H1480 (daily ed. Feb. 9, 1995) (statement of Rep. Canady) ("These reasonable requirements will not impede meritorious claims by inmates but will greatly discourage claims that are without merit.")).
211. Statement of Margo Schlanger, *supra* note 23, at 2.
212. Around one-third of inmates perform at the very lowest levels of literacy; they may not be able to read a short bit of text to find a simple fact. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., LITERACY BEHIND PRISON WALLS 17 (1994), *available at* <http://nces.ed.gov/pubs94/94102.pdf>. Inmates are also almost 400 percent more likely than non-incarcerated persons to have a learning disability (11 percent as opposed to 3 percent). *Id.* at xxiii. And, "7 in 10 prisoners . . . are apt to experience difficulty in performing tasks that require them to integrate or synthesize information from complex or lengthy texts or to perform quantitative tasks that involve two or more sequential operations and that require the individual to set up the problem"—the very skills necessary to compose a coherent complaint. *Id.* at xviii. Demographic characteristics and educational attainment accounted for all the literacy rate differences between inmates and non-inmates. *Id.* at xix. Though "Literacy Behind Prison Walls" is nearly 20 years old, there is no reason to think that literacy rates have risen since then, with the subsequent surge in carceral populations resulting in overcrowding and reductions in prison programming, and the demographic consistency in inmate populations between 1991 and 2013 (overwhelmingly young, male and minority). *See id.* at 17 (describing the prison population).
213. "The presence of pro se litigants can cause the court to spend up to four times as much time on a case . . ." JOY MOSES, CTR. FOR AM. PROGRESS, GROUNDS FOR OBJECTION: CAUSES AND CONSEQUENCES OF AMERICA'S PRO SE CRISIS AND HOW TO SOLVE THE PROBLEM OF UNREPRESENTED LITIGANTS 8 (2011), *available at* <http://cdn.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/objection.pdf>; *see also* David Giacalone, *Winkelman: Scalia Frets Over Pro Se Burden on Courts*, SHLEP (Feb. 28, 2007, 11:34 AM), <http://blogs.law.harvard.edu/shlep/2007/02/28/winkelman-scalia-frets-over-pro-se-burden-on-courts> (stating that lawsuits brought *pro se* "make a lot more work for federal district judges" (quoting Justice Scalia)).
214. *See* PRISONER PETITIONS, *supra* note 147.

times happy to be the beneficiaries of) the side effects of this litigation, such as funding increases in the wake of court decrees mandating additional staffing and training,<sup>215</sup> courts began to feel overwhelmed by the docket. In 1995 alone, 41,679 inmate civil rights suits were filed in federal courts,<sup>216</sup> a steep rise from the 12,998 inmate civil rights cases filed in 1980.<sup>217</sup> These dramatic increases were partly responsible for the passage of the PLRA in 1996 in an effort to reduce the burden on the federal courts. The Supreme Court has itself stated that “the PLRA’s dominant concern [is] to promote administrative redress, filter out groundless claims, and foster better prepared litigation of claims aired in court.”<sup>218</sup>

Even after the PLRA’s passage, prisoner litigation continues to “account for an outsized share of filings” in federal district courts.<sup>219</sup> In 2005, nearly 10 percent of all civil cases filed in federal courts nationwide were prisoner complaints claiming civil rights violations,<sup>220</sup> whereas less than 1 percent of the total U.S. population was incarcerated on the last day of 2005.<sup>221</sup>

Justification for the PLRA hinged on federal courts’ experience of a deluge of prisoner complaints in the years leading up to 1995.<sup>222</sup> Considering inmate filings in the federal courts alone can be misleading, however. By aggregating both state and federal filings, it becomes clear that prisoners do not file civil cases at a higher rate than nonprisoners.<sup>223</sup> The increase in prisoner litigation after the 1970s was substantially tied to increases in incarceration, rather than an increase

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215. Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 563 (2006) (stating that consent decrees often bring political cover for large spending increases).

216. PRISONER PETITIONS, *supra* note 147.

217. *Id.* at 2 tbl.1.

218. *Porter v. Nussle*, 534 U.S. 516, 528 (2002).

219. *Woodford v. Ngo*, 548 U.S. 81, 94 n.4 (2006).

220. *Jones v. Bock*, 549 U.S. 199, 203 (2007).

221. See PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2005, at 1 (2006), available at <http://www.bjs.gov/content/pub/pdf/p05.pdf> (“Overall, the United States incarcerated 2,320,359 persons at yearend 2005.”); see also *Vintage 2005: National Tables*, U.S. CENSUS BUREAU, [https://www.census.gov/popest/data/historical/2000s/vintage\\_2005/index.html](https://www.census.gov/popest/data/historical/2000s/vintage_2005/index.html) (last visited Sept. 25, 2014) (click on “XLS” link after heading entitled “Annual Estimates of the Population for the United States and States, and for Puerto Rico: April 1, 2000 to July 1, 2005” to access data) (noting that the population estimate for the United States as of July 2005 was 296,410,404). The total incarcerated population on that day divided by the overall population of the U.S. is 0.7 percent. However, this statistic could be misleading in light of the churning of persons into and out of jails each day. See *supra* note 47 (stating that 11.6 million persons had been processed through local jails alone in the year ending mid-2012).

222. Schlanger, *Inmate Litigation*, *supra* note 24, at 1586–87.

223. *Id.* at 1578 (stating that, using data from before the passage of the PLRA, “the evidence is clear: once state and federal filings are combined, inmates and noninmates have comparable per capita civil litigation rates”).



in litigiousness per prisoner.<sup>224</sup> The continued disproportionate filing rates in federal courts reflect the fact that most inmates file their claims in federal rather than state courts, because the federal Constitution is, in most cases, the only meaningful source of protection. Nonprisoner claimants do not favor federal courts over state courts to the same degree.

But even if the concern about inmate litigiousness were grounded in fact, the PLRA has ameliorated the problem: The PLRA has drastically reduced the number of cases filed.<sup>225</sup> Inmates filed 26 federal cases per 1,000 inmates in (pre-PLRA) 1995; in 2000 it was 17 per 1,000 inmates;<sup>226</sup> in 2005, it was just 11 cases per 1,000 inmates, a decline of almost 60 percent post-PLRA.<sup>227</sup> The burden for prison administration has fallen even more sharply because of the PLRA's screening provisions, "which require courts to dispose of legally insufficient prisoner civil rights cases without even notifying the sued officials that they have been sued or receiving any response."<sup>228</sup>

### 3. PLRA's Negative Impact on Meritorious Claims

Although the PLRA was intended to reduce only frivolous filings,<sup>229</sup> the PLRA has undermined prisoners' ability to seek legitimate relief through the courts as well.<sup>230</sup> If the PLRA were functioning successfully, by reducing the quantity and improving the quality of prisoner suits as its supporters intended, then the huge decline in inmate claims would have been accompanied by a proportionate increase in plaintiffs' success rates in the remaining cases.<sup>231</sup> But the evidence shows that success rates have also declined.<sup>232</sup> Fewer inmates are reaching the courts, but even more cases are dismissed, and fewer inmates successfully settle their claims.<sup>233</sup> The PLRA is screening out constitutionally meritorious cases by instituting often-insurmountable obstacles.<sup>234</sup> This poses a serious problem because prisoners

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224. PRISONER PETITIONS, *supra* note 147, at 3; *see also* Schlanger, *Inmate Litigation*, *supra* note 24, at 1586–87 (“[A]fter 1981, annual increases in inmate federal civil rights filings were primarily associated, in nearly every state, with the growing incarcerated population, [and] it would be equally appropriate to talk about a ‘deluge’ of inmate requests for food.”).

225. Statement of Margo Schlanger, *supra* note 23, at 2.

226. PRISONER PETITIONS, *supra* note 147, at 1; Statement of Margo Schlanger, *supra* note 23, at 2.

227. Statement of Margo Schlanger, *supra* note 23, at 2.

228. *Id.*

229. *See infra* Part V(B)(2)(a) (Barriers to Relief).

230. *See* Schlanger, *Political Economy*, *supra* note 21, at 4.

231. Statement of Margo Schlanger, *supra* note 23, at 3.

232. *Id.*

233. *Id.*

234. *Id.*

often do file “serious cases: cases involving life-threatening deliberate indifference by authorities to prisoner health and safety; sexual assaults; religious discrimination; retaliation against those who exercise their free speech rights; and so on.”<sup>235</sup> The resulting harm affects not only prisoners but also the entire system of carceral constitutional accountability.<sup>236</sup>

## B. *Ashcroft v. Iqbal*

### 1. Heightened Pleading Standard

The Supreme Court case *Ashcroft v. Iqbal*<sup>237</sup> also presents inmate claimants with a considerable challenge. Even if inmates break through all the barriers erected by the PLRA, the heightened federal pleading standard laid out in *Iqbal* may lead the court to dismiss the inmates' claims. *Bell Atlantic v. Twombly*<sup>238</sup> and *Ashcroft v. Iqbal* altered years of American civil procedure and created a heightened federal pleading standard that is extremely difficult for inmate plaintiffs to meet. The new standard requires plaintiffs to allege specific facts that, if true, lead to a plausible conclusion that the defendant has violated the law.<sup>239</sup> This new standard overruled the previous, more plaintiff-friendly Rule 8 pleading standard articulated in *Conley v. Gibson*.<sup>240</sup>

Rule 8 of the Federal Rules of Civil Procedure (FRCP) requires that a pleading must contain simply “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>241</sup> The FRCP was adopted in 1938, and Rule 8 was intended to replace the common-law pleading system that required specific forms and words be used to state a claim.<sup>242</sup> Rule 8 instigated what is known as “notice pleading,” requiring a plaintiff to give only enough detail to put the defendant “on notice” that a claim was being pursued.<sup>243</sup> Notice pleading simply required plaintiffs to state facts that could conceivably result in a win for

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235. Statement of Margo Schlanger, *supra* note 23, at 2–3.

236. *Id.* at 3.

237. 556 U.S. 662 (2009).

238. 550 U.S. 544 (2007).

239. A challenge with the new pleading standard is that often the defendant is the only party in possession of the evidence of defendant's wrongdoing; without discovery, the plaintiff does not have access to the specific facts needed to satisfy the pleading standard. See Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 91 (2010).

240. 355 U.S. 41 (1957).

241. FED. R. CIV. P. 8.

242. Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 557 (2010).

243. *Id.* at 561.

the plaintiff.<sup>244</sup> Details were left for later in the course of litigation, after discovery allowed litigants to access information possessed only by the adversary but required for the plaintiff to prove her claim.

In *Twombly*, the Supreme Court ushered in a new era for evaluating whether a claim will be dismissed for failure to state a claim, instituting the “plausibility” standard.<sup>245</sup> In *Iqbal*, the Supreme Court expanded *Twombly* to all civil actions. The result was to recast the Rule 8 “plain statement” standard into a plausibility pleading standard.<sup>246</sup> To survive a motion to dismiss under Rule 12(b)(6), a complaint must now contain sufficient factual matter “to state a claim to relief that is plausible on its face.”<sup>247</sup> “[T]he Court described a formula that many courts now use to evaluate pleadings. First, courts identify and disregard statements that are not entitled to the assumption of truth: legal conclusions instead of factual allegations. If well-pled allegations remain, courts then determine whether the complaint states a claim to relief that is plausible on its face.”<sup>248</sup>

This pleading system requires judges to make decisions about the merits of a claim prior to discovery.<sup>249</sup> Where significant informational asymmetry exists between parties as in a civil rights claim<sup>250</sup>—that is, where the defendant has sole access to the factual evidence necessary to prove the plaintiff’s claim—a heightened pleading standard may cause the judge to dismiss a potentially meritorious claim.<sup>251</sup> This problem is amplified in carceral facilities, where the prison staff and administration may have sole access to most or all of the relevant evidence necessary to establish an inmate claim for relief, resulting in unnecessary dismissals of potentially meritorious inmate claims.

## 2. Why the Supreme Court Changed the Pleading Standard

The *Iqbal* majority may have been concerned that the low notice pleading standard created incentives for claimants to engage in abusive litigation tactics.

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244. See *Conley*, 355 U.S. at 47–48.

245. Alex Reinert, *The Impact of Ashcroft v. Iqbal on Pleading*, 43 URB. LAW. 559, 559 (2011).

246. Quintanilla, *supra* note 36, at 2.

247. *Ashcroft v. Iqbal*, 556 U.S. 662, 697 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

248. Quintanilla, *supra* note 36, at 16 (citations omitted).

249. *Id.*

250. Reinert, *Costs*, *supra* note 34, at 123. Information asymmetry in this context means cases where the plaintiff does not have access to the facts necessary to prove her claim, but needs discovery evidence from the defendant in order to do so. This is almost always the case in civil rights claims, where plaintiff is alleging intentional discrimination, but the facts she has for pleading are consistent with both legal and illegal behavior on the part of the defendant. See Malveaux, *supra* note 238, at 87.

251. See Malveaux, *supra* note 238, at 85–101 (discussing the reasons for the negative impact of *Iqbal* on civil rights cases).

The costs of discovery can be very high for defendants, and if the bar for pleading is low, the threat of impending discovery can force defendants to settle even if a plaintiff's case has no merit.<sup>252</sup> Heightened pleading rules can act as gatekeepers by allowing for dismissal of meritless claims before discovery, keeping these claims from taking up the courts' time and defendants' money.<sup>253</sup> Therefore, *Iqbal's* plausibility standard can function to "reduce crowded dockets, make discovery available only to worthy litigants, and generally improve the quality of litigation" in federal courts.<sup>254</sup> This framing assumes that notice pleading let in too many meritless cases, which a heightened pleading system will keep out.<sup>255</sup> While study has shown that dismissal rates have increased after the Court decided *Iqbal*, these rates alone cannot tell us how many meritorious versus nonmeritorious cases have been dismissed under the *Iqbal* standard.

### 3. *Iqbal's* Negative Impact on Pro Se and Inmate Claims

*Iqbal* concerned a claim by a detainee who alleged discrimination by government officials.<sup>256</sup> As a result, "federal courts have interpreted *Iqbal* as if the *Iqbal* Court required heightened pleading for claims of discrimination."<sup>257</sup>

*Iqbal* requires federal courts, when deciding whether a complaint is plausible, to draw on their "judicial experience and common sense." Courts apply this standard at the commencement of litigation, evaluating the plausibility of claims before discovery—before evidence has been gathered and presented. This highly subjective pleading standard applies to all claims, including claims of discrimination by members of stereotyped groups. In short, under *Iqbal*, federal courts must grapple at the inception of litigation with deciding whether members of stereotyped groups have pled plausible claims of discrimination, relying on their intuitions and common sense, rather than evidence.<sup>258</sup>

"[S]cience suggests that when judges deliberate without evidence, relying instead on their own 'common sense,' intuitions, stereotypes, and implicit associations will likely affect their judgment."<sup>259</sup> As a result, *Iqbal* has had a particularly heavy impact on claims brought by pro se claimants.

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252. Reinert, *Costs*, *supra* note 34, at 124–25.

253. *Id.* at 123–24.

254. *Id.* at 119.

255. *Id.* at 119–20.

256. *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009).

257. Quintanilla, *supra* note 36, at 6.

258. *Id.* at 2. This reliance on intuition is increased, and therefore especially worrisome, when judges are working under pressure. Malveaux, *supra* note 238, at 100.

259. Quintanilla, *supra* note 36, at 3; *see also* Malveaux, *supra* note 238, at 98–101 (discussing subjective biases of judges and how those biases interact with *Iqbal* to increase civil rights claim dismissals).

Judges are supposed to read pro se complaints liberally, holding pro se complaints to a less stringent standard than pleadings drafted by counsel.<sup>260</sup> Pro se claims should be “interpret[ed] charitably,”<sup>261</sup> held “to less stringent standards”<sup>262</sup> and “even after *Twombly*” should be dismissed “only in the most unsustainable of cases.”<sup>263</sup> “This is particularly so when the pro se plaintiff alleges that her civil rights have been violated.”<sup>264</sup>

The evidence shows that judges have not heeded these directives. Because pro se plaintiffs “tend to assert claims in a more broad, general fashion” than attorneys, after *Iqbal*, “courts tend to characterize many more of [pro se claimants’] allegations as legal conclusions,” rather than factual allegations; and legal conclusions can be ignored under *Iqbal*.<sup>265</sup> Moreover, courts may actually act totally contrary to the liberal pleading standard meant to be imposed on pro se claimants by taking the absence of counsel as a signal of the merits of the claim and subtly stereotyping poor people who cannot afford counsel.<sup>266</sup>

#### 4. The *Iqbal* Effect: Increased Dismissals of Constitutional Civil Rights Claims

No empirical research has been published specifically parsing out *Iqbal*’s effect on inmate civil rights claims. Looking to all pro se civil rights claims, though, can serve as an imperfect proxy for inmate civil rights claims, since the majority of pro se civil rights claims are filed by inmates.<sup>267</sup> Therefore, several studies on

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260. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

261. *Williams v. Anderson*, 959 F.2d 1411, 1417 & n.4 (7th Cir. 1992) (reading the complaint in light of the plaintiff’s history of mental health problems); *see also* *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (providing the pro se plaintiff with an opportunity to offer proof in support of his claim for relief despite the Court’s inability to “say with assurance” that the plaintiff had alleged sufficient facts to entitle him to relief).

262. *Haines*, 404 U.S. at 520.

263. *Boykin v. KeyCorp*, 521 F.3d 202, 216 (2d Cir. 2008).

264. *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 191 (2d Cir. 2008) (quoting *Boykin*, 521 at 216) (emphasis omitted).

265. *Quintanilla*, *supra* note 36, at 53; *see also* *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009) (“A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth.”).

266. *Quintanilla*, *supra* note 36, at 54.

267. Nationally, 66.6 percent of pro se claims were inmate petitions. *See Federal Caseload Trend: More Civil Cases Being Filed Without Lawyer’s Help*, ADMIN OFFICE OF THE U.S. COURTS (June 15, 2011), [http://www.uscourts.gov/News/NewsView/11-06-15/Federal\\_Caseload\\_Trend\\_More\\_Civil\\_Cases\\_Being\\_Filed\\_Without\\_Lawyer\\_s\\_Help.aspx](http://www.uscourts.gov/News/NewsView/11-06-15/Federal_Caseload_Trend_More_Civil_Cases_Being_Filed_Without_Lawyer_s_Help.aspx). Additionally, 94 to 96 percent of inmates file pro se. U.S. COURTS, *supra* note 20; *see generally* Moore, *supra* note 35, at 617 (“[M]ost prisoners file pro se.”).

post-*Iqbal* 12(b)(6) dismissal rates are illustrative of the difficulties inmates face in overcoming the heightened pleading standard.

One of the first empirical studies of the effects of *Iqbal* on 12(b)(6) dismissals was published in 2010 by Patricia Hatamyar; it found that constitutional civil rights claims were significantly more likely to be dismissed by district courts after *Iqbal* than under the earlier liberal pleading regime.<sup>268</sup> But this study explicitly excluded both inmate complaints and complaints filed with an application to proceed in forma pauperis,<sup>269</sup> which many inmates file, so the change in dismissal rates may have been different as regards the inmate population.

Hatamyar conducted another empirical study of dismissal rates post-*Iqbal* that she published in 2012.<sup>270</sup> This study considered all cases dismissed under Rule 12(b)(6), and deliberately excluded only those inmate cases dismissed sua sponte by the court under the PLRA prior to docketing.<sup>271</sup> The study showed that dismissals in general went up from 46 percent under notice pleading to 61 percent post-*Iqbal*.<sup>272</sup> The rate of dismissal without leave to amend for represented constitutional civil rights plaintiffs was 3.77 times higher under *Iqbal* than under notice pleading, whereas the rate of dismissal with leave to amend for represented constitutional civil rights plaintiffs was 14 times higher under *Iqbal*.<sup>273</sup> Additionally, even in a system where the PLRA allows judges to dismiss many inmate claims sua sponte before docketing, 12(b)(6) dismissals without leave to amend for pro se constitutional civil rights plaintiffs were 2.16 times higher than the rate for represented constitutional civil rights plaintiffs under *Iqbal*.<sup>274</sup> Thus *Iqbal* has likely had a substantial and deleterious effect on inmate dismissal rates under 12(b)(6).

## 5. Implicit Bias as an Explanation for the *Iqbal* Effect

Victor Quintanilla looked at post-*Iqbal* 12(b)(6) dismissals in federal workplace racial discrimination cases.<sup>275</sup> After reviewing prior research on the initial

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268. Hatamyar, *supra* note 241, at 556 (finding that these claims faced a 56 percent chance of dismissal under *Iqbal*, compared with a 46 percent chance of dismissal under notice pleading). “Moreover, in the largest category of cases in which 12(b)(6) motions were filed—constitutional civil rights cases—motions to dismiss were granted at a higher rate (53%) than in all cases combined (49%) . . .” *Id.*

269. *Id.* at 585.

270. Moore, *supra* note 35, at 603.

271. *Id.* at 616–17 & n.46.

272. *Id.* at 614.

273. *Id.* at 623.

274. *Id.*

275. Quintanilla, *supra* note 36, at 5.

impact of *Iqbal*, Quintanilla conducted three empirical studies.<sup>276</sup> In examining these claims, Quintanilla found that implicit bias and lay theories of discrimination appear to affect judicial decisionmaking at the pleading stage.<sup>277</sup>

The dismissal rate for Black<sup>278</sup> plaintiffs' claims of race discrimination increased from 20.5 percent under notice pleading to 54.6 percent post-*Iqbal*, a 2.66 times increase.<sup>279</sup> For Black pro se plaintiffs' claims, the dismissal rate increased from 32.0 percent under notice pleading to 67.3 percent under *Iqbal*, representing a 2.10 times increase.<sup>280</sup> But when the race of the judge was factored in, there was an interesting difference: White judges dismissed Black plaintiffs' claims of race discrimination at a higher rate (57.5 percent) than did Black judges (33.3 percent).<sup>281</sup> Thus, it appears that White and Black judges apply *Iqbal* differently to race discrimination claims.<sup>282</sup>

The vast majority of judges in the United States are well-educated Whites.<sup>283</sup> As of 2009, 13 percent of the federal judiciary were racial minorities and 85 percent were White,<sup>284</sup> whereas as of 2012, 33 percent of adult persons in the United States were racial minorities, and 67 percent were non-Hispanic White.<sup>285</sup> And at least in the context of racial discrimination claims, it is clear that the race of the judge can affect the outcome,<sup>286</sup> which highlights the prob-

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276. *Id.*

277. *Id.* The claims examined included pro se plaintiffs but, because Quintanilla examined workplace discrimination claims, these necessarily did not include inmate claims.

278. I use the term "Black" versus the term "African American", both because Quintanilla uses the first term, but also because not all Blacks are African American, and racial discrimination seems to affect all persons perceived to be Black.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. Jaclyn Belczyk, *Most U.S. Federal Court Judges Still White Men, but Demographics Changing: Report*, JURIST (Aug. 18, 2009), <http://jurist.org/paperchase/2009/08/federal-court-demographics-changing-to.php> 8 ("As of early August 2009, [85% of the federal judiciary was White:] 70 percent of federal judges were White men, 15 percent were White women, 10 percent were minority (African-American and Hispanic) males, and 3 percent were minority females."); see also Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1123 (2009) ("Minority judges represent approximately 10% of the bench at all state court levels . . ."). As of 2008, approximately 10 percent of all state and federal judges in the United States were racial minorities and 90 percent were White. Chew & Kelley, *supra*, at 1125.

284. Belczyk, *supra* note 283.

285. *Adult Population By Race*, KIDS COUNT DATA CENTER, <http://datacenter.kidscount.org/data/tables/6539-adult-population-by-race#detailed/1/any/false/38/12,68,69,67,70,71,66,2800/13517,13518> (last updated July 2014).

286. See generally Chew & Kelley, *supra* note 283, at 1117.

lematic racial demographics of the judiciary, with racial minorities potentially being underrepresented by as much as 60 percent.<sup>287</sup>

What factors led to this disparate treatment of race discrimination claims? One explanation is implicit bias.<sup>288</sup> While overt racism has seen a decline in the United States, “prejudice still persists.”<sup>289</sup>

[C]ontemporary bias is less conscious and more subtle than overt [bias], it is expressed in indirect, often unintentional ways. Rather than antipathy, many now show ambivalence and avoid members of stereotyped groups. Many majority group members exhibit anxiety, disgust, fear, and discomfort toward stigmatized individuals, resulting in decreased helping behavior and cooperation, passive harm, and neglect.<sup>290</sup>

A majority of well-educated Whites in the United States express aversive racism.<sup>291</sup> Averse racism is “bias among people who openly endorse nonprejudiced beliefs, but whose negative implicit attitudes toward Blacks are expressed in subtle, indirect, and rationalizable ways.”<sup>292</sup> These persons will not act in biased ways when choices are clear, but “when the correct choice is unclear and the basis for judgment is ambiguous,” they will express biased judgment.<sup>293</sup>

Many legal scholars acknowledge that judges are human, and that their ability to be purely objective in deciding a case may be only theoretical.<sup>294</sup> There is no reason to believe that judges are immune from the same implicit biases that affect

287. Or, to put it another way, assuming all else is equal, we could expect to see roughly 2.5 times the number of racial minorities on the federal bench as are currently present, based on the demographics of the country as a whole. This assertion is based on the data immediately above: 13 percent racial minority judges in a country with 33 percent racial minorities in the general adult population, since generally only adults could have the education to qualify for the federal judiciary.

288. Implicit biases are “stereotypical associations so subtle that people who hold them might not even be aware of them.” Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196 (2009).

289. *See id.* (“Researchers have found a marked decline in explicit bias over time, even as disparities in outcomes persist.”); *see also* Barbara J. Flagg, *“And Grace Will Lead Me Home”: The Case for Judicial Race Activism*, 4 ALA. C.R. & C.L. L. REV. 103, 103 (2013) (“Race inequality persists in the United States. We see it everywhere—in wealth, income, and health disparities; in unequal access to resources such as housing and education; in elevated rates of incarceration for nonwhites; in every dimension of life.”).

290. Quintanilla, *supra* note 36, at 18.

291. *Id.* at 19–20; *see also* Rachlinski et al., *supra* note 288, at 1199, (“Researchers have consistently found that white Americans express a strong “white preference” on the IAT.”) The IAT, or Implicit Association Test, is a tool for measuring the presence of implicit biases and stereotypes. *Id.* at 1198.

292. Quintanilla, *supra* note 36, at 19.

293. *Id.* at 20.

294. Chew & Kelley, *supra* note 283, at 1131.



everyone else in our society.<sup>295</sup> Indeed, there is evidence that “judges do not leave behind their implicit biases when they walk through the courthouse doors.”<sup>296</sup>

The following three studies cited by Chew and Kelley were conducted based on data available before *Iqbal* changed the pleading standard but speak clearly to the implicit bias faced by both Black civil rights plaintiffs and Black criminal defendants. In a study of race based discrimination claims, most of which are judicially decided at summary judgment,<sup>297</sup> White judges held for plaintiffs less than half as often as Black judges.<sup>298</sup> An empirical analysis of federal workplace racial harassment cases between 1981 and 2003 revealed that plaintiffs before Black judges were 3.3 times more likely to win than those before White judges.<sup>299</sup> Finally, in a study examining judicial sentencing for criminal convictions, the race of the judge did not influence the outcome, but the race of the defendant did.<sup>300</sup> Controlling for type of crime, judges as a group—both Black and White—imposed harsher sentences on Blacks than on White offenders.<sup>301</sup>

These seemingly inconsistent narratives may help to explain the failure of judges to comprehend inmate civil rights claims. In the context of civil racial harassment claims, “African American judges can personally identify with instances of discriminatory treatment. . . in a way that White judges” cannot.<sup>302</sup> In sentencing decisions, both Black and White judges’ harsh sentencing of Black defendants may stem from a common view of “African American offenders as more threatening and dangerous than their White counterparts.”<sup>303</sup> Thus judges seem to be allowing racial implicit biases to affect their decisionmaking.

When judges dismiss inmate claims before even contacting the defendant, it is extremely unlikely that they would have information about the inmate’s race (unless the inmate is filing a racial discrimination claim), as information about the race of the plaintiff is not required in order to file a complaint.<sup>304</sup> But research

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295. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1146 (2012).

296. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 150 (2010).

297. Chew & Kelley, *supra* note 283, at 1137.

298. *Id.* at 1134 (citing research conducted by Nancy Crowe).

299. *Id.* at 1156 (citing their own empirical research).

300. *Id.* at 1133 (citing research conducted by Cassia Spohn).

301. *Id.*

302. *Id.* at 1157.

303. *Id.* at 1133.

304. A review of several states’ inmate filing forms show no checkbox or blank to fill in the race of the inmate. See, e.g., PRISONER SELF-HELP PACKET, CIVIL RIGHTS COMPLAINTS: 42 U.S.C. § 1983, at 5–22 (2003), available at <http://www.id.uscourts.gov/forms-dc/PrisonerCR03.pdf> (last visited Nov. 24, 2013); U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, CIVIL RIGHTS COMPLAINT FORM, available at <http://www.flnd.uscourts.gov/forms/Pro%20Se/>

shows negative employment and life outcomes for persons with names considered Black by society.<sup>305</sup> Consequently, name bias against those inmates with such names or more Hispanic appearing names could be operating here. Additionally, implicit racial bias may be triggered as a matter of default since the court knows at least 58 percent of the inmate population is Black or Hispanic. This has been referred to as the “the racial composition of the presumptive plaintiff class,”<sup>306</sup> and it has influenced judicial decisionmaking in other contexts.<sup>307</sup>

In most inmate civil rights cases, given the statistical makeup of each population, a White judge will be hearing from a non-White convicted criminal. Empathy for the inmate/plaintiff, who is seen as “dangerous” because she is a convicted criminal defendant, may therefore be extremely low, even among judges of color. This may correlate with a judicial determination of no “plausibility” in an inmate civil rights complaint when there are few facts present, as at the 12(b)(6) dismissal stage. In other words, implicit bias against prisoners, who are overwhelmingly people of color, is influencing judicial decisionmaking.

Additionally, the average judge is almost certain to have never been incarcerated. Judges may be unable, based on their experiences, to understand what is plausible in the context of a prison civil rights claim. As a result, the judge is less likely to understand or sympathize with the plaintiff's plight and more likely to give prison officials and corrections officers the benefit of the doubt, the opposite of what is supposed to happen at the 12(b)(6) dismissal stage. A judge viewing such a case at the dismissal stage is also probably much more likely to find that the plaintiff's claim is implausible if the plaintiff has been able to allege only a few facts—but not the facts available to only the defendants, which would allow the judge to understand that the inmate has a meritorious claim.

If implicit bias works to disadvantage racial minorities because White judges cannot imagine the veracity of their claims, how much worse must it be even

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Complaint-bivens1331.pdf (last visited Nov. 24, 2013); U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, PRISONER CIVIL RIGHTS ACT COMPLAINT FORM (2013), available at [http://www.ncwd.uscourts.gov/sites/default/files/forms/PRISONER\\_CIVIL\\_RIGHTS\\_COMPLAINT\\_May2013.pdf](http://www.ncwd.uscourts.gov/sites/default/files/forms/PRISONER_CIVIL_RIGHTS_COMPLAINT_May2013.pdf) (last visited Nov. 24, 2013).

305. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2004) (showing market bias studies based on name, with names more strongly identified with African Americans correlating with worse employment outcomes, and controlling for extraneous factors); see also Saku Aura & Gregory D. Hess, *What's in a Name?* (Ctr. for Econ. Studies 2004).

306. Maureen Carroll, *Racialized Assumptions and Constitutional Harm: Claims of Injury Based on Public School Assignment*, 83 TEMP. L. REV. 903, 903 (2010) (discussing disparate doctrine governing student interests in school discipline transfers versus school segregation plans).

307. See *id.* (exploring the phenomenon in the educational context).

for White inmates, when judges are rarely persons who have been incarcerated?<sup>308</sup> Like White judges in race-based discrimination claims, judges of any race may be unable, based on their life experience, to understand an inmate civil rights claim as factually plausible.<sup>309</sup> Overinclusion of minority groups in the prison population may make it even more difficult for (overwhelmingly White) judges to overcome their implicit bias against both inmates and people of color.

The problem post-*Iqbal* is not that judges are required to draw on their common sense and experience to decide cases; judges are already required to do this in nearly every decision they make.<sup>310</sup> The problem is that *Iqbal* requires judges to draw almost solely on their common sense at the very inception of litigation, before any evidence has been unearthed and presented to them.<sup>311</sup> “This regime necessarily requires judges to act . . . based on intuitions and pre-suppositions . . . . [For] [w]ithout evidence to evaluate, preconceptions too strongly affect the result.”<sup>312</sup> Thus, *Iqbal* undermines liberality.

### C. Substantive Law and Deference to Prison Administrators

The Court’s interpretation of substantive law regarding inmates’ rights also has a substantial bearing on the likelihood that inmates’ claims will succeed.

The Court in *Turner v. Safely*<sup>313</sup> articulated a very deferential standard for evaluating inmates’ constitutional claims.<sup>314</sup> Regarding the scope of *Turner*, the Court stated in *Washington v. Harper* that “the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison

308. The moral character test required to pass most bar exams precludes those convicted of a crime from becoming an attorney. See, e.g., *Statement on Moral Character Requirement for Admission to Practice Law in California*, STATE BAR OF CAL., [http://admissions.calbar.ca.gov/MoralCharacter/State ment.aspx](http://admissions.calbar.ca.gov/MoralCharacter/State%20ment.aspx) (last accessed Sept. 25, 2014) (stating that those persons “convicted of violent felonies, felonies involving moral turpitude and crimes involving a breach of fiduciary duty are presumed not to be of good moral character in the absence of a pardon or a showing of overwhelming reform and rehabilitation”); *id.* (“[P]ast criminal activity not including violent felonies, felonies involving moral turpitude and crimes involving a breach of a fiduciary duty is not necessarily disqualifying if sufficient time has passed during which the applicant has demonstrated rehabilitation and respect for the law and the rights of others.”) Also, in the author’s opinion, the contemporary political climate (i.e. “tough on crime”) in the United States would likely preclude such an attorney being nominated or elected to judicial office.

309. See generally Malveaux, *supra* note 238, at 99–101 (concluding that “the new pleadings standard has made civil rights claims more vulnerable to dismissal”).

310. See Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274, 279 (1929) (arguing that judges generally made decisions on a “hunch”).

311. Quintanilla, *supra* note 36, at 57.

312. *Id.* at 57–58.

313. 482 U.S. 78 (1987).

314. *Id.* at 89 (noting that “when a prison regulation impinges on inmates’ constitutional rights the regulation is valid if it is reasonably related to legitimate penological interests”).

administration implicate constitutional rights.”<sup>315</sup> The majority in *Lewis v. Casey* succinctly stated this standard of review: “[A] prison regulation impinging on inmates’ constitutional rights, even fundamental rights which would otherwise receive heightened scrutiny, ‘is valid if it is reasonably related to legitimate penological interests.’”<sup>316</sup> This is a very low bar for prison administrators to meet, corresponding roughly to rational basis review. In rational basis review, the asserted state interest is generally not interrogated, nor is the relationship between the asserted interest and the challenged policy.<sup>317</sup> Often, the state simply needs to assert any conceivable interest in order to achieve victory.<sup>318</sup>

*Turner* has been applied to First Amendment rights, equal protection rights, and due process liberty interests.<sup>319</sup> Prisoners also often bring claims asserting substantive violations of the Due Process Clauses of the Fifth and Fourteenth Amendments. But “[d]ue process requirements . . . currently reach only a limited set of prison and jail actions: As commonly held views of criminal offenders have shifted, so that they are viewed as more and more wild and threatening, the re-characterization of harsh measures as ‘security’ rather than summary punishment has moved much of penal administration beyond the scope of constitutional over-sight.”<sup>320</sup>

The two exceptions where the deferential *Turner* standard is not applied include claims under the Eighth Amendment and claims alleging explicit racial segregation.<sup>321</sup> Therefore, inmates frequently turn to the Eighth Amendment when filing conditions of confinement claims. But despite the fact that *Turner* deference does not apply to claims under the Eighth Amendment, these claims rarely succeed because, substantively, the bar to violate the Eighth Amendment’s ban on ‘cruel and unusual punishments’ has been set quite high.<sup>322</sup> Moreover, “[m]edical care, for example, need not be good, or even non-negligent; the Constitution forbids only care so deficient as to constitute ‘deliberate indifference’ to

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315. 494 U.S. 210, 224 (1990).

316. 518 U.S. 343, 361 (1996) (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

317. *But see* *Romer v. Evans*, 517 U.S. 620, 631–35 (1996) (where the purpose behind an anti-gay state constitutional amendment was interrogated under rational basis review).

318. *E.g.*, *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993) (citation omitted) (internal quotations omitted) (“[T]hose attacking the rationality of the legislative classification have the burden to negate every conceivable basis which might support it.”).

319. James E. Robertson, *The Rehnquist Court and the “Turnerization” of Prisoner’s Rights*, 10 N.Y. CITY L. REV. 97, 105 (2006).

320. Schlanger, *Political Economy*, *supra* note 21.

321. *E.g.*, *Johnson v. California*, 543 U.S. 499, 509–13 (2005).

322. Schlanger, *Political Economy*, *supra* note 21.

the health of those incarcerated in jails and prisons.”<sup>323</sup> Additionally, the use of force standard is also very high, where to find a violation, the actions of the prison official must be found to be “malicious[] and sadistic[] for the purpose of causing harm,”<sup>324</sup> a mens rea standard higher than recklessness, knowledge or even intent, because the specific intent must be to cause the harm. And many prison conditions claims are not cognizable because the Court has ruled that a prisoner must identify a *total* deprivation of a single basic human need, such as food, warmth or exercise, rather than challenging the overall conditions that may make her confinement inhumane.<sup>325</sup>

#### IV. RESOURCES FOR PRO SE LITIGANTS, BUT NOT FOR INMATES

##### A. National Efforts: Representation for Indigent Parties in Civil Cases

###### 1. Civil *Gideon*: An Unrealized Dream

Two cases firmly established the right to counsel in criminal cases. Seventy-five years ago, the U.S. Supreme Court held in *Powell v. Alabama*<sup>326</sup> that an individual has a due process right to retain an attorney to represent her in court.<sup>327</sup> Thirty-one years later, the Supreme Court recognized the constitutional right to counsel in criminal cases, even when an individual could not afford an attorney to represent her, in the landmark decision *Gideon v. Wainwright*.<sup>328</sup>

Then, in 1981, the Supreme Court established a narrow right to counsel in civil cases in *Lassiter v. Dep't of Social Services of Durham County*.<sup>329</sup> In limited circumstances, poor or indigent parents in civil proceedings to terminate parental rights were entitled to appointed counsel to represent them.<sup>330</sup> But

323. *Id.*

324. *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986).

325. *See Wilson v. Seiter*, 501 U.S. 294, 304 (1991) (emphasis added).

326. 287 U.S. 45 (1932).

327. *Id.* at 68–69 (“The right to be heard [in legal proceedings] would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . [When counsel is] employed by and appearing for [a party], it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.”).

328. 372 U.S. 335, 344 (1963) (“[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.”).

329. 452 U.S. 18, 26–27 (1981) (“[A]n indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.”).

330. *See id.* (adopting “the standard found appropriate in *Gagnon v. Scarpelli* and leave[ing] the decision whether due process calls for the appointment of counsel for indigent parents in termination

because of *Lassiter's* restrictive interpretation of the constitutional right to counsel in parental termination cases, many advocates were dissuaded from seeking the adoption of a wholesale constitutional right to counsel in all civil cases, a.k.a. a civil *Gideon*.<sup>331</sup>

Justice Earl Johnson, a retired Associate Justice of the California Court of Appeal, is one of the few jurists who has supported civil *Gideon*.<sup>332</sup> Justice Johnson recognized that civil *Gideon* is necessary “to help the courts maintain the confidence of the society and to perform the task of insuring that we are a just society under a rule of law.”<sup>333</sup> The United States’ failure to guarantee counsel to poor people in civil cases singles out U.S. citizens as “nearly alone among the poor people of the western industrial world in not having this basic right of democratic citizenship.”<sup>334</sup> There is a huge disparity in the U.S. between the amount of legal services rendered to those with the means to pay for legal representation and those without. As an example, in the year 2000 the law firm Skadden, Arps, Slate, Meagher & Flom LLP—which represents around a hundred corporate clients—earned a billion dollars in revenue, while the U.S. federal government only spent 300 million dollars on legal services for forty million poor U.S. citizens.<sup>335</sup>

In 2006 the American Bar Association (ABA) led the charge for civil *Gideon* when it passed Resolution 112A, which “set forth the long history of the ABA’s unwavering and principled support for meaningful access to legal representation for low income individuals, as well as the history of the ABA’s policy positions favoring a right to counsel.”<sup>336</sup>

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as

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proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review”).

331. Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrialized Democracies*, 24 FORDHAM INT’L L.J. S83, S102 (2000).

332. Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World?*, 15 TEMP. POL. CIV. RTS. L. REV. 769, 769 n.5 (2006).

333. Johnson, *supra* note 332, at S83 (quoting Robert W. Sweet, *Civil “Gideon” and Justice in the Trial Court (The Rabbi’s Beard)*, 42 RECORD 915, 924 (1997)).

334. *Id.* at S92.

335. *Id.* at S83–84 & n.4.

336. ABA TOOLKIT, *supra* note 18, at 2.

those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.<sup>337</sup>

Other national organizations also support the implementation of civil *Gideon*.<sup>338</sup>

## 2. In the Absence of Civil *Gideon*, Legal Services Organizations Provide Some Legal Assistance to Indigent Persons

The Federal government funds some legal services for poor people. The Legal Services Corporation (LSC) is a private, nonprofit, national corporation established by the United States Congress “that promotes equal access to justice and provides grants for high-quality civil legal assistance to low-income Americans.”<sup>339</sup> “The LSC was created in 1974 with bipartisan congressional sponsorship and the support of the Nixon administration, and is funded through the congressional appropriations process.” The LSC does not guarantee a legal right to counsel but does provide funds to organizations that provide legal services to indigent clients.<sup>340</sup>

The LSC helps low-income people with cases involving family law, housing and foreclosure, consumer issues, income maintenance, military families, and disasters.<sup>341</sup> The LSC provides funds to legal aid programs in all fifty states, the District of Columbia, Guam, Micronesia, Puerto Rico and the Virgin Islands.<sup>342</sup> For 2013, the LSC had a budget of over \$340 million to provide civil legal aid.<sup>343</sup> But significant data shows this level of funding is insufficient to meet the legal needs of poor people in the United States.

LSC federal funding in 2013 was substantially lower than the LSC’s funding in 1981, the last year prior to a sharp funding cut.<sup>344</sup> In 2013 dollars, the LSC

337. Am. Bar Ass’n, ABA 2006 Resolution 112A (2006), *available at* [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_06A112A.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf).

338. *See, e.g.*, NAT’L COAL. FOR A CIVIL RIGHT TO COUNSEL, <http://www.civilrighttocounsel.org> (last visited Aug. 30, 2014).

339. *About LSC*, LEGAL SERVS. CORP., <http://www.lsc.gov/about/what-is-lsc> (last visited Mar. 31, 2014).

340. *Types of Grants*, LEGAL SERVS. CORP., <http://www.lsc.gov/about/types-grants> (last visited Sept. 25, 2014).

341. *About LSC*, *supra* note 339.

342. *Grantee Profiles*, LEGAL SERVS. CORP., <http://www.lsc.gov/local-programs/program-profiles> (last visited Mar. 31, 2014).

343. *LSC Funding*, LEGAL SERVS. CORP., <http://www.lsc.gov/congress/lsc-funding> (last visited Mar. 31, 2014).

344. Johnson, *supra* note 332, at S93.

would need federal funding of \$822 million to be even with 1981 funding.<sup>345</sup> By contrast, other industrialized democracies spend much more on legal services as a percentage of gross national product than the United States: France and Germany spend 2.5 times more than the United States, and England spends 17 times more than the United States to provide representation for poor people.<sup>346</sup> LSC organizations estimate that for every one indigent person who comes to them for help, they have to turn away at least one other who is equally deserving of assistance, and those numbers do not even account for the many people who are indigent and need legal support but do not know about or attempt to access LSC services.<sup>347</sup>

### 3. Inmates Are Left Out of Both Proposed Civil *Gideon* and National Indigent Resources for Civil Parties

Neither the ABA nor other legal services organizations seem to champion civil *Gideon* as applied to inmates. The ABA resolutions make no mention of inmate representation, and LSC recipients are explicitly prohibited from participation in civil litigation or administrative hearings on behalf of an incarcerated person (inmate/prisoner) in a federal, state or local prison, as plaintiff or defendant, challenging the conditions of incarceration.<sup>348</sup> These omissions/prohibitions are not likely to be an oversight: It is well known that inmates bring the vast majority of pro se civil rights claims.<sup>349</sup> It is more likely a reflection of the anti-inmate sentiment that pervades the United States.<sup>350</sup>

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345. In 1981, the Legal Services Corporation (LSC) had a budget of 321 million dollars. *Id.* Adjusted to 2013 levels, this would be 822 million dollars. *Inflation Calculator*, U.S. INFLATION CALCULATOR, <http://www.usinflationcalculator.com> (last visited Sept. 25, 2014).

346. Johnson, *supra* note 332, at S96.

347. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL NEEDS OF LOW-INCOME AMERICANS 6 (2009) ("Of those people who seek assistance from LSC-funded legal aid programs, one is turned away because of limited resources for every one helped.").

348. 45 C.F.R. § 1637.3 (2013) ("A recipient may not participate in any civil litigation on behalf of a person who is incarcerated in a Federal, State or local prison, whether as a plaintiff or as a defendant, nor may a recipient participate on behalf of such an incarcerated person in any administrative proceeding challenging the conditions of incarceration.").

349. See Moore, *supra* note 35, at 617.

350. See Lucia Mouat, *Prisoners Do Time—And Pick Up the Tab for Room and Board*, CHRISTIAN SCI. MONITOR, Aug. 13, 1996, <http://www.csmonitor.com/1996/0813/081396.us.us.9.html> (discussing growing anti-prisoner sentiment in the United States).



## B. State Efforts: Civil *Gideon* and Indigent Civil Representation in California

Many states have acted independently to establish limited statutory rights to counsel in family law matters, dependency and neglect proceedings, bypass of parental consent or notification for minor abortion proceedings, housing discrimination proceedings, mental health civil commitment proceedings, and alcohol intoxication commitment proceedings.<sup>351</sup> As of 2006, only three states provided a potential right to court-appointed counsel in all civil cases,<sup>352</sup> and only one state, Illinois, specifically enshrined in statute the right of a pro se civil rights plaintiff to seek court-appointed counsel.<sup>353</sup> All four of these statutes provide only that the court “may” appoint counsel, and some permit it only in “exceptional circumstances.”<sup>354</sup> Therefore, these statutes do not afford indigent parties a dependable right to representation.

There is also a dearth of representation for poor people in California, but California is leading the way among states in trying to establish civil *Gideon*. Civil *Gideon* would guarantee representation for poor persons involved in cases involving “basic human needs.”<sup>355</sup>

Several studies illustrate the problem with legal services for the poor. In the year 2000 in Los Angeles County—the United States’ most populous county—there were 10 million people, with almost 2 million of those so poor as to be eligible for civil legal services.<sup>356</sup> But out of the 40,000 lawyers in Los Ange-

351. Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, J. POVERTY L. & POLY, July–Aug. 2006, at 245, 252–70.

352. *Id.* at 252; *see also* IND. CODE § 34-10-1-2 (2008); MASS. GEN. LAWS ANN. ch. 211D, § 6(b)(iii) (West 2011); N.Y. C.P.L.R. 1101, 1102(a) (McKinney 2012).

353. 775 ILL. COMP. STAT. ANN. § 5/10-102(B) (West 2011).

354. *E.g.*, IND. CODE ANN. § 34-10-1-2(b)(2) (LexisNexis 2008).

355. Basic human needs are defined by the ABA as including “shelter, sustenance, safety, [and] health.” ABA TOOLKIT, *supra* note 18, at 13. Shelter means a person’s “access or ability to remain in a dwelling, and the habitability of that dwelling.” *Id.* Safety means a person’s “ability to obtain legal remedies affording protection from the threat of serious bodily injury or harm, including proceedings to obtain or enforce protection orders because of alleged actual or threatened violence, and other proceedings to address threats to physical well being.” *Id.* Health means a person’s “access to health care for treatment of significant health problems.” *Id.*

356. Johnson, *supra* note 332, at S99. To be eligible for LSC services, one must be living at or below 125 percent of the federal poverty level; in 2012 that meant an income of “no more than \$13,963 for an individual and \$28,813 for a family of four.” LEGAL SERVS. CORP., 2012 FACT BOOK 7 (2013), *available at* <http://www.lsc.gov/sites/lsc.gov/files/LSC/lscgov4/AnnualReports/Funding%282012FactBook%29.pdf>. In 2011, one in five Americans was eligible for services, up 21 percent from 2007. *Id.*

les County, there were less than one hundred government-funded legal services lawyers for the poor 2 million, and 39,900 for the wealthier 8 million.<sup>357</sup>

Some jurisdictions offer pro se clinics for persons representing themselves in civil matters, offering information to petitioners online and at the courthouse.<sup>358</sup> In 2009, California became “the first state in the country to implement a publicly-funded pilot program that provides appointment of counsel to very low-income persons in certain civil proceedings where basic human needs are at stake.”<sup>359</sup> The Sargent Shriver Civil Counsel Act (AB 509) provides selected legal services organizations with funding to provide indigent clients with representation for eviction defense, domestic violence proceedings, and child custody or guardianship cases.<sup>360</sup>

Additionally, in 2012 San Francisco became the first city in the United States to create a guaranteed right to civil counsel for all persons living within 200 percent of the federal poverty line and having a case touching on “a basic human need.”<sup>361</sup> Funding for that program was limited to one staff person coordinating client placement with pro bono attorneys, rather than funding for the attorneys themselves.<sup>362</sup> Persons wishing to access those services must appear at the courthouse and request help,<sup>363</sup> thus this is not a resource for those who are imprisoned.

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357. See *Johnson*, *supra* note 332, at S99. A 2004 study in California showed that more than 4.3 million court users were pro se. See ABA TOOLKIT, *supra* note 18, at 6. In family law cases, “67 percent of petitioners [were] self-represented at the time of filing and 80 percent [were] self-represented at disposition for dissolution cases.” *Id.* “In unlawful detainer cases, 34 percent of petitioners [were] self-represented at filing and 90 percent of defendants [were] self-represented.” *Id.* Another 2010 report by the Judicial Council of California showed that 80 percent of litigants in California’s family law courts and more than 90 percent of those in tenancy disputes were pro se. Editorial, *In Their Own Words: Civil Gideon: Becoming a Reality?*, HARV. C.R.-C.L. L. REV., <http://harvardcrcl.org/in-their-own-words-civil-gideon-becoming-a-reality> (last visited Mar. 31, 2014).
358. See, e.g., Representing Yourself In Federal Courts, UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, <http://court.cacd.uscourts.gov/cacd/ProSe.nsf/> (last visited Nov. 14, 2014).
359. Editorial, *supra* note 358.
360. *Id.*; see also CAL. GOV’T CODE §§ 68650–68651 (West 2014).
361. S.F., CAL., ADMIN. CODE art. 58, §§ 58.1–58.3 (2011), available at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/committees/materials/rls111189tdr.pdf>; see also Mike Rosen, *Testing Civil Gideon*, CALIFORNIA LAWYER (June 2012), available at <http://www.callawyer.com/clstory.cfm?eid=922767>.
362. Rosen, *supra* note 361. There is also an argument that by providing representation now, the city actually will save money in the future. “By not providing counsel, cities and states end up paying the costs down the road in extended foster care or more police enforcement or homeless shelters.” *Id.* (quoting John Pollock, Coordinator for the National Coalition for a Civil Right to Counsel).
363. See generally *id.* (“On the fifth floor of the superior court in San Francisco, you see people in huge lines at the self-help window. It’s pathetic our society can’t do better.” (quoting James J. Brosnahan, Morrison & Foerster partner)).

V. A SOLUTION ADDRESSING THE NEEDS OF INMATES AND THE  
COURTS: ATTORNEY REPRESENTATION FOR INMATE CIVIL RIGHTS  
LITIGANTS

The ABA recommends a right to counsel for indigent persons for any civil claims regarding “basic human needs,” including “shelter, sustenance, safety, [and] health.”<sup>364</sup> These four basic human needs are the basis of practically all inmate civil rights litigation. It is hard to see why the ABA’s concern about nonincarcerated indigent persons should not also apply to indigent incarcerated persons. After all, the punishment we mete out to convicted criminals, their “sentence,” is to have their liberty completely abridged, not to suffer from poor nutrition, sexual abuse or untreated disease.<sup>365</sup>

A. Prison Lawyers Would Benefit Both Inmates and Government

Inmates have an interest in bringing claims that survive dismissal, and represented inmates have better outcomes in their suits.<sup>366</sup> Ensuring that inmates have access to legal counsel would thus benefit inmates’ interests. Additionally, the state has multiple interests here: an interest in the correction of unconstitutional conditions, in saving money, and, as a corollary of its financial interest, in having an efficient court system. A program providing Prison Lawyers would give the courts an opportunity to ensure that these interests are promoted.

The counseled sliver of the docket is far more successful for its plaintiffs than the uncounseled portion. Among cases terminated in 2000 (post-PLRA but pre-*Iqbal*), counseled cases were three times as likely as pro se cases to have recorded settlements, two-thirds more likely to go to trial, and two-and-a-half times as likely to end in a plaintiff’s victory at trial.<sup>367</sup> One-quarter of inmate civil rights settlements and one-third of inmates’ trial victories occurred in the 4 percent of cases with counsel.<sup>368</sup>

While there are many organizations that provide some limited civil rights litigation assistance to inmates,<sup>369</sup> there is a huge gap in representation. “In nearly 96% of their federal civil rights cases, prisoners have no lawyer.”<sup>370</sup> There-

364. ABA TOOLKIT, *supra* note 18, at 13-15.

365. *See supra* Part I., A-B.

366. *See* Schlanger, *Political Economy*, *supra* note 21, at 5.

367. *Id.*

368. *Id.*

369. *See, e.g.*, CAL. PRISON FOCUS, <http://www.prisons.org> (last visited June 22, 2014); PRISON L. OFF., <http://www.prisonlaw.com> (last visited June 22, 2014).

370. Schlanger, *Political Economy*, *supra* note 21, at 5.

fore, inmates are in need of a program that would ensure reliable access to legal assistance.

I propose that an organization called Prison Lawyers be established in the Ninth Circuit as a pilot program to provide attorney assistance for inmates in all civil rights claims.<sup>371</sup> The Ninth Circuit would be responsible for funding this organization, since the cost savings from the schemes that follow would primarily accrue to the federal courts, where inmates file the vast majority of their claims.<sup>372</sup>

The Ninth Circuit already funds all Federal Public Defenders inside its jurisdiction through the Criminal Justice Act of 1964.<sup>373</sup> Prison Lawyers could be an extension of that system both logistically and administratively.<sup>374</sup> But, unlike Public Defenders offices that are often organized on a county or state level,<sup>375</sup> the Prison Lawyers program would be a circuit-wide system of attorneys. Prison Lawyers working with prisoners in individual prisons will be very vulnerable to pressure from, among other things, guards, administrators, local politicians, and the surrounding community and will need the backing of a strong organization committed to the ideals of supporting inmates' right to access the courts. Prison Lawyers would receive direction and support from others within the circuit-wide Prison Lawyers organization, rather than from prison administration or local public defenders offices.

The attorney/employees of Prison Lawyers would work directly with inmates in litigating inmate claims. Rather than contacting a "jailhouse lawyer"<sup>376</sup> or utilizing the prison law library, prisoners would instead discuss any unresolved grievance with a Prison Lawyer. Prison Lawyers would be on hand to advise inmates about the procedures for filing their administrative grievances, so that fewer meritorious claims would be dismissed for a procedural error at the grievance phase. If, after administrative exhaustion, the grievance remains unresolved, the

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371. If the Prison Lawyers program is successful, it could be replicated throughout the country. The circuit courts receive funding through Congress, budgeted for and administered through the Administrative Office of the United States Courts, and the program would therefore require Congressional budget approval. See *Administrative Office of the United States Courts*, UNITED STATES COURTS, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice.aspx> (last visited Nov. 14, 2014).

372. See Schlanger, *Inmate Litigation*, *supra* note 24, at 1573–74 & n.52 (estimating that only about 25 percent of inmate litigation is filed in state courts, with the rest filed in federal courts).

373. See 18 U.S.C. § 3006A (2012).

374. It is possible that congressional authorization would be required to fund such a program.

375. See *Indigent Defense Systems*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=tp&tid=28> (last visited June 21, 2014) (stating that 22 states have state organized public defender offices, while 27 states and the District of Columbia have county organized public defender offices).

376. Jailhouse lawyers are inmates that assist other inmates in filing claims.

Prison Lawyer would assist the inmate in filing a constitutional civil rights claim with the courts and would represent the inmate in any further proceedings.

### B. Constitutionality of the Prison Lawyers Program

Because an inmate is restrained by the state and cannot freely access a public library or bookstore in order to learn how to represent herself pro se, *Bounds* established inmates' right to access to a law library or some kind of legal assistance<sup>377</sup> for filing direct appeals or "civil rights actions," like actions under 42 U.S.C. §1983 to vindicate "basic civil rights."<sup>378</sup> The Court has stated that states have an affirmative obligation "to assure all prisoners meaningful access to the courts."<sup>379</sup> But economic factors may be considered when states are deciding which methods to use to provide "meaningful access."<sup>380</sup>

Any challenge to the legal assistance provided by the state would be analyzed under *Casey*. "*Bounds*," the *Casey* Court noted, "guarantees no particular methodology [of legal assistance] but rather the conferral of capability. . . . When any inmate, even an illiterate or non-English speaking inmate shows that an actionable claim . . . which he desired to bring has been lost or rejected, or . . . is currently being prevented, because this capability of filing suit has not been provided, he demonstrates that the state has failed to furnish [the legal assistance required by *Bounds*]."<sup>381</sup> In order to have standing to contest a state plan regarding inmate legal assistance, an inmate must prove she was injured in fact by the inadequacy of the law library or legal assistance, not just in theory: for instance, by claiming that the resources provided were deficient to the point that they hindered her efforts to pursue a legal claim.<sup>382</sup> So even were an inmate to challenge the restriction of her access to a law library or legal assistance, she would have to prove that it frustrated her claim in a very specific way (like a missed deadline for filing).<sup>383</sup> Additionally, she would have to prove that she was injured in the pursuit of a civil rights claim or direct appeal, not some other form of litigation.<sup>384</sup> Further, she would have to prove that the restriction of her access was not related to a legitimate penological goal, such as prison security.<sup>385</sup>

377. *Bounds v. Smith*, 430 U.S. 817, 830 (1977).

378. *Lewis v. Casey*, 518 U.S. 343, 354 (1996) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974)).

379. *Bounds*, 430 U.S. at 824.

380. *Id.* at 825.

381. *Casey*, 518 U.S. at 356.

382. *Id.* at 351.

383. *See id.*

384. *See id.* at 354 (internal quotation marks omitted) ("[W]e extended [the right to access the courts] only slightly, [from direct appeals and habeas petitions] to civil rights actions.").

385. *See id.* at 361.

### C. Legal Assistance Is Necessary for Inmates to Meaningfully Access the Courts

In *Bounds v. Smith*, the Court recognized that “it is often more important that a prisoner [than a nonprisoner] complaint set forth a nonfrivolous claim meeting all procedural prerequisites, since the court may pass on the complaint's sufficiency before allowing filing in forma pauperis and may dismiss the case if it is deemed frivolous.”<sup>386</sup> Given *Iqbal's* raising of the pleading standard from “short and plain statement” to “plausible on its face,” and the PLRA's limitations on inmate ability to bring claims, it could be argued that in order to provide “meaningful access,” inmates require attorneys.<sup>387</sup>

But the Court has said that “where the Court has held that an indigent defendant has no constitutional right to counsel, the ‘meaningful access’ requirement of *Bounds* will not require that counsel be provided to the inmate defendant in the same procedural setting.”<sup>388</sup> It seems that the Court would be reluctant to extend the right to counsel to inmates, having already explained that “meaningful access” does not mean “right to counsel” for inmate civil rights claims in *Casey*.<sup>389</sup> However, *Casey* was decided before *Iqbal* substantially and negatively affected 12(b)(6) dismissals, especially in the context of pro se civil rights cases, so it may be worth pursuing a claim that the Constitution now requires inmates to have legal representation in order to access the courts.<sup>390</sup>

### D. Comparing Different Schemes

Prisons regularly restrict the constitutional rights of inmates based on penological need.<sup>391</sup> And courts have held that prison libraries are not the only way to provide “meaningful access.”

Justice Marshall, in *Bounds v. Smith*, stressed that the Court was leaving the states with considerable flexibility in meeting their constitutional obligation. It demanded only that prison authorities provide “adequate libraries or adequate assistance from persons trained in law.” While libraries were “one constitutionally

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386. 430 U.S. 817, 826 (1977).

387. Interestingly, Justice Rehnquist makes the argument in his *Bounds* dissent, pre-PLRA and pre-*Iqbal*, that the logical extension of *Bounds* is the requirement that the state appoint counsel for inmates' habeas corpus claims, *Id.* at 841 (Rehnquist, J., dissenting), which may explain why the *Casey* Court took such pains to explicitly limit *Bounds*.

388. LAFAYETTE ET. AL., *supra* note 95.

389. *See Casey*, 518 U.S. at 354.

390. This idea may be of interest to an enterprising impact litigator.

391. *See Turner v. Safley*, 482 U.S. 78, 89 (1987).

acceptable method to assure meaningful access,” the state was not foreclosed from using “alternative means to achieve that goal.”<sup>392</sup>

Prison Lawyers would of course serve a court gatekeeping function, as do all attorneys when acting in the best interests of their clients.<sup>393</sup> Attorneys must conduct due diligence before filing claims in court, or face sanctions.<sup>394</sup> This is true for both for-profit and nonprofit attorneys. Prison Lawyers would have to assess the merits of an inmate claim and advise her on the best course of action. In the case of a completely frivolous claim, the Prison Lawyer would be obligated not to file a claim on behalf of her client, thus saving the court time and money.

### 1. Option One—Install Prison Lawyers and Eliminate Pro Se Filing for Inmates’ Civil Rights Claims

The first possibility would be to eliminate the ability of inmates to file civil rights claims pro se, and instead institute a system whereby inmates must have counsel to file claims. This would create an internal vetting system for meritorious claims (namely the attorney’s best judgment, functioning just as it does for nonincarcerated persons), and give the inmate professional assistance in crafting complaints. If an inmate is represented by a Prison Lawyer, the complaint will both be written in legalese that the courts have come to expect, which will smooth out the complaint process for the courts, and the court will have an important tool for gauging the merits of a claim, namely the attorney’s implicit endorsement of the nonfrivolity of the claim. All this would assist in unclogging the courts. The state could save money on law libraries, since it would no longer need to provide access to the many inmates seeking legal resources for civil rights claims, but rather only to the Prison Lawyers representing those seeking habeas review. The courts would save money by not processing inmate pro se civil rights claims.

There would be negative constitutional implications to such a scheme, but there is an argument that it would pass constitutional analysis. For example, in *Bourdon v. Loughren*, the Second Circuit held that where an attorney represented an inmate defendant, that representation satisfied his “right of access to the

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392. LAFAVE ET. AL., *supra* note 95.

393. See Giacalone, *supra* note 212 (“[L]awyers ‘protect the court from frivolous suits.’” (quoting Justice Scalia)).

394. See FED. R. CIV. P. 11.

courts.”<sup>395</sup> Additionally the court held that the defendant’s right of access therefore was not violated when defendant was denied access to the jail library.<sup>396</sup>

One benefit to providing Prison Lawyers to inmates is that it would actually provide meaningful access to *all* inmates with civil rights claims, not just those who either have enough money to hire private counsel, are lucky enough to find pro bono counsel, or have enough education that they can meaningfully avail themselves of a prison law library (if provided). A court might hold that meeting a constitutional requirement for all inmates balances out any restriction on inmates who might have preferred filing pro se.

One downside to this scheme is that the Prison Lawyer would effectively act as a gatekeeper for all inmate claims, which leaves prisoners vulnerable to the corruption or abuse of persons in this position. For that reason, other options may be more desirable.

## 2. Option Two—Install Prison Lawyers and Eliminate Prison Law Libraries

Another option would be, instead of instituting a ban on pro se filings, to simply eliminate law libraries from prisons, thereby incentivizing prisoners to work through the Prison Lawyers.<sup>397</sup> This would likely be found constitutional as it applies to inmates seeking to file civil rights claims for the reasons stated in the Subpart above. Additionally, some states already limit or eliminate law library access for represented inmates. For example, under current California law, prisoners with appointed counsel can still access the law libraries but are only entitled to half the time afforded unrepresented inmates with legal deadlines.<sup>398</sup>

States themselves have claimed that “inmates are ‘ill-equipped to use’ ‘the tools of the trade of the legal profession,’ making libraries useless in assuring

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395. *Bourdon v. Loughren*, 386 F.3d 88, 98 (2d Cir. 2004). The court did not find that consideration was necessary as to whether counsel’s representation fell below effective assistance. *Id.* at 90.

396. *Id.*

397. One problem with this scheme is that it would not address the need for legal research/assistance for inmate criminal habeas petitions.

398. See CAL. CODE REGS. tit. 15, § 3122(b)(2) (2014) (“An inmate who is represented by an attorney for a case shall not be eligible for PLU status for any established court deadline pertaining to that case. An inmate with attorney representation for the established court deadline shall be entitled to GLU status only.”); CAL. CODE REGS. tit. 15, § 3123(b) (“All inmates, regardless of their classification or housing status, shall be entitled to physical law library access that is sufficient to provide meaningful access to the courts. Inmates on PLU status may receive a minimum of 4 hours per calendar week of requested physical law library access, as resources are available, and shall be given higher priority to the law library resources. Inmates on GLU status may receive a minimum of 2 hours per calendar week of requested physical law library access, as resources are available.”).



meaningful access [to the courts].”<sup>399</sup> And the Court has stated that states are “free to choose another means [beyond law libraries] of assuring access [to the courts].”<sup>400</sup> This scheme would both eliminate law library costs in prisons and decrease court costs, and is likely to pass constitutional muster under *Lewis*.

Because inmates would not have any access to legal documents, this option also places all the power into the hands of the Prison Lawyer. Additionally, eliminating law libraries would be problematic for inmates seeking to file habeas petitions, raising constitutional implications for that population, unless all inmates seeking habeas in a particular jurisdiction were granted assistance of outside counsel.<sup>401</sup>

### 3. Option Three—Just Install Prison Lawyers

A third option would be to leave both the right to file pro se and the prison law libraries in place, and simply add the Prison Lawyers system. Inmates who cannot get a Prison Lawyer to represent their claim will still be able to file pro se but will likely face an even steeper dismissal rate under this system, as the court may be even more likely to presume that claim nonmeritorious if a Prison Lawyer did not vet it.<sup>402</sup> This scheme would also save the courts money on processing inmate pro se claims, though not as much as the first two schemes.<sup>403</sup> It would, however, be the most desirable scheme because it leaves prisoners able to file pro se if a Prison Lawyer is not willing to take an inmate’s case not through lack of merit, but because of other reasons such as incompetence or corruption.

There are many unknown variables, but one estimate is that sixty-eight attorneys are sufficient to provide representation for all incarcerated people in the Ninth Circuit.<sup>404</sup> The staffing cost to the Ninth Circuit for the sixty-eight re-

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399. *E.g.*, *Bounds v. Smith*, 430 U.S. 817, 826 (1977).

400. *Id.* at 827.

401. *See, e.g.*, CAL. APP. PROJECT, *supra* note 106.

402. Judges will likely presume that attorneys will not risk sanction under the Federal Rules of Civil Procedure, Rule 11, for filing nonmeritorious claims. Conversely, if Prison Lawyers are available to all inmates, judges may presume the absence of representation for an inmate is a marker that the claim has no merit.

403. Additionally, it would address the concern that some inmates need a library to do legal research for state or federal habeas corpus claims.

404. For example, in the Ninth Circuit in 2010, there were 10,298 pro se inmate claims filed, versus 656 non-pro se inmate claims. U.S. COURTS, *supra* note 20. As a caseload comparator, the ABA suggests that public defenders should carry no more than 150 felony, 400 misdemeanor, or 25 appellate cases in a year. ABA, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS 9 n.30 (2009) (citations omitted). Therefore, a conservative estimate of the number of Prison Lawyers required for the Ninth Circuit, based on optimal felony caseloads for public defenders, would be roughly 1 lawyer per 150 claims, or 68 Prison Lawyers.

quired attorneys, including benefits, would be about \$5.6 million per year.<sup>405</sup> But if, as estimated, the 10,298 annual Ninth Circuit pro se inmate claims take up four times as much in court resources as non-pro se claims, then the savings to the Ninth Circuit could be substantial even with the added cost of the Prison Lawyers system.<sup>406</sup> And the primary purpose of the courts, to ensure justice for all people, would be better served.<sup>407</sup>

### E. Objections to the Prison Lawyers Program

One possible objection to the Prison Lawyers program is economic. The Prison Lawyers Program may actually increase the costs to the federal judiciary in the short-term, because more inmates' claims would not be initially dismissed and thus would require court resources to adjudicate. But in the long term, there could be a significant cost savings due to the fact that enforcement of constitutional conditions in carceral facilities would lead to fewer conditions of confinement claims being filed in the first place. The long-term cost savings could also be realized both by society, with a decrease in former inmates harmed by unconstitutional conditions, and by the court and prison system, with decreased recidivism meaning lower criminal adjudication and confinement costs.<sup>408</sup>

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405. In 2010, the median salary for a starting public defender was \$47,500 depending on location, \$60,280 for those with five years experience, and \$76,160 for those with eleven to fifteen years of experience. *New Findings on Salaries for Public Interest Attorneys*, NAT'L ASS'N FOR LEGAL CAREER PROFS. (2010), <http://www.nalp.org/sept2010pubintsal>. Benefits generally cost around an additional 30 percent on top of the salary. *Employer Costs for Employee Compensation for the Regions*, BUREAU LABOR STAT. (Dec. 2013), <http://www.bls.gov/ro7/ro7ecec.htm>. The \$5.3 million estimate assumes (1) that civil rights claims are as difficult as felony cases, an assumption worth further investigation, so that each Prison Lawyer ideally will have 150 cases; (2) that the average Prison Lawyer will have five years experience, and (3) that Prison Lawyers should be paid on scale with public defenders.

406. For example, if each pro se inmate claim took four hours to dispose of rather than the one hour a non-pro se inmate claim takes, then the Ninth Circuit could save over 40,000 hours of court time. The base salary for a first year law clerk in the Central District is roughly \$65,000, plus benefits at 30 percent, or, \$40.62/hr based on a forty-hour workweek and a fifty-two-week year. Under these assumptions, pro se cases cost the Ninth Circuit \$1.625 million. The actual number is likely quite a bit higher, as it seems unreasonable to assume that a non-pro se case takes only an hour to dispose of. If a non-pro se case takes two hours, then a pro se case takes eight hours, and this scheme saves the Circuit \$3.25 million. A more reasonable estimate may be that a non-pro se case takes eight hours, meaning that a prose case takes thirty-two hours, so this scheme saves the Circuit \$13 million. A full cost-benefit analysis at the dismissal stage would require data on the average cost of each pro se inmate case versus each non-pro se inmate case.

407. Additionally, there were 48,581 pro se inmate claims in 2010 nationwide, which would require only 324 Prison Lawyers. See U.S. COURTS, *supra* note 20. The Prison Lawyer scheme could easily be nationalized if successful in the Ninth Circuit.

408. See generally M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach*, 9 AM. L. & ECON. REV. 1, 1 (2007), available at

Another objection to the Prison Lawyers program is moral. While many nonincarcerated civil parties who cannot afford counsel end up losing significant legal rights, such as the ability to keep housing or custody of their children, why should the state pay for inmate representation? After all, inmates have been adjudicatively found to have committed acts that have harmed society, whereas nonincarcerated persons are presumptively innocent.<sup>409</sup> But the lack of representation for unincarcerated persons in the United States should not blind us to the needs of incarcerated persons, when the only way for incarcerated persons to assert their rights to basic human needs is through the courts. The question should not be which of these rights should be vindicated, but instead, how to overcome the political apathy that allows so many indigent persons to lose access to basic human needs through lack of representation.

### CONCLUSION

It is a sad truth about the U.S. justice system that there is a double standard dividing the rich and the poor. The outcome of one's civil or criminal case should not depend upon one's ability to pay an attorney, but it often does.

I advocate that the Prison Lawyers system be implemented in the Ninth Circuit. While all three systems proposed above would likely be found constitutional, I argue that the third option is the best choice. Installing Prison Lawyers, but leaving both the right to file pro se and inmate access to prison libraries intact, would efficiently promote multiple ends. Inmates would have support moving through the prison grievance system, so more meritorious claims would meet the PLRA exhaustion requirements. Inmates would have real access to the courts through the Prison Lawyer; therefore, more meritorious claims would reach the courts. And more inmates with meritorious claims would achieve relief either through trial or settlement. In the case of a corrupt or ineffective Prison Lawyer, an inmate could still represent herself pro se, but the system would still save the courts money in light of the decrease in the amount of time it takes judicial clerks to process a represented claimant versus a pro se claimant and the gatekeeping and signaling functions Prison Lawyers would serve. The courts and society would also eventually save time and money in light of the enforce-

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<http://aler.oxfordjournals.org/content/9/1/1.short> (“[O]ur estimates suggest that harsher prison conditions lead to more post-release crime.”).

409. In this Author's opinion, the issue of legal services for indigent, nonincarcerated persons is clearly one that needs addressing. LSC should be better funded, at least to pre-1981 levels, if not to the level of funding Great Britain provides.

ment of constitutional conditions of incarceration and the subsequent reduction in inmate claims.