

# THE INAPPLICABILITY OF THE PRISON LITIGATION REFORM ACT TO PRISONER CLAIMS OF EXCESSIVE FORCE

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*The Prison Litigation Reform Act (PLRA), enacted in 1996, creates numerous procedural requirements for prisoners who file civil claims challenging their conditions of confinement. Despite the severe burdens created by the PLRA and the questionable constitutionality of the filing provisions, many courts and commentators have applauded the PLRA. Not surprisingly, few challenges to the PLRA have met with success. In this Note, Ann Mathews argues that, at a minimum, the PLRA should be interpreted narrowly to exempt prisoners' claims of excessive force from the statute's requirements. As Mathews demonstrates, excessive force claims constitute a discrete and particularly serious category of prisoner claims that traditionally has been treated with heightened sensitivity by federal courts, including the Supreme Court. Mathews further argues that Congress, in drafting the PLRA, also recognized that increased deference is appropriate for prisoners' claims of excessive force. Mathews concludes that excluding such claims from the PLRA not only comports with judicial precedent, statutory language, and congressional intent, but also represents appropriate public policy.*

"While society in the United States gives the example of the most extended liberty, the prisons of the same country offer the spectacle of the most complete despotism."<sup>1</sup>

In 1994, the FBI began investigating allegations of ongoing and horrific abuse of prisoners by correctional officers at Corcoran State Prison, a maximum security facility in California.<sup>2</sup> Guards turned informants recounted instances in which correctional officers staged gladiator fights between rival inmates and greeted newly arriving prisoners with intimidation rites that included poking prisoners in the eyes, pulling on inmates' testicles, and ramming prisoners into windows and walls.<sup>3</sup> Guards also forced inmates to stand without shoes on scorching asphalt, only to blame the resulting wounds on games of barefoot handball.<sup>4</sup> As of mid-1996, seven inmates at Corcoran had

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<sup>1</sup> Gustave de Beaumont & Alexis de Tocqueville, *On the Penitentiary System in the United States and Its Application in France* 79 (Francis Lieber trans., Southern Illinois University Press 1964) (1833).

<sup>2</sup> Mark Arax, *Tales of Brutality Behind Bars*, L.A. Times, Aug. 21, 1996, at A1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

been shot and killed by guards, and more than fifty inmates had been wounded.<sup>5</sup> Though the prison recorded more killings of inmates than any other prison in the United States, internal investigations and shooting review boards appointed by the California Department of Corrections regularly found the officers innocent of wrongdoing.<sup>6</sup>

By 1996, reports of abuse against prisoners, such as those at Corcoran, were neither infrequent nor geographically limited. Rather, according to numerous news stories,<sup>7</sup> civil and human rights organizations,<sup>8</sup> and academics,<sup>9</sup> such abuse was widespread in jails and prisons across the United States. Many instances of systemic abuse were revealed only after individual prisoners, or prisoners joined as a class, filed suit against their abusers and the system at large.<sup>10</sup>

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<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> See, e.g., Carla Crowder, A Window Opens on Prisoner Abuse, Denver Rocky Mountain News, Feb. 11, 2001, at 5A, LEXIS, News Group File (describing allegations of routine brutality against inmates, including setting fire to inmates' cells and placing urine and feces in inmates' food, at Colorado prison); Emelyn Cruz Lat, Sex-Slave Suit Forces Reforms at Prisons, S.F. Examiner, Mar. 3, 1998, at A1 (detailing civil-rights lawsuit in which female prisoners alleged that they were assaulted sexually, beaten, and sold as sex slaves at federal penitentiary in Dublin, California); Matthew Purdy, Prison's Violent Culture Enveloping Its Guards, N.Y. Times, Dec. 19, 1995, at A1 (discussing repeated instances of officer brutality against inmates at Clinton Correctional Facility in New York and recounting one inmate's tale of being held down by his head and repeatedly kicked and punched, causing bruised ribs and separated shoulder).

<sup>8</sup> In its 1998 report, Rights for All, Amnesty International documented numerous accounts of abuse against prisoners throughout the 1990s. Amnesty Int'l USA, United States of America, Rights for All 55-73 (1998). The report described the July 1996 beatings of fourteen inmates at Hays State Prison in Georgia, the fatal beating of a Texas prisoner in 1994, the handcuffing of more than 600 prisoners at Arizona State Prison for ninety-six hours outdoors in August 1995, and the two-week shackling of a prisoner at the Halawa Correctional Facility, Hawaii, which resulted in more than twenty open sores and ulcers. Id. at 60-62, 66. In 1996, the acting director of the ACLU's National Prison Project noted similar abuses in other areas. See Elizabeth Alexander, Letter to Editor, Prison Suits Address Horrifying Conditions, Wall St. J., July 12, 1996, at A13 (describing instances of routine assault against inmates by prison guards in Washington, D.C., California, and Idaho).

<sup>9</sup> Christian Parenti, Lockdown America: Police and Prisons in the Age of Crisis 190-93, 207-10 (1999) (describing routine prison violence); Matthew Silberman, A World of Violence: Corrections in America 19-23 (1995) (describing correctional officer code of conduct which condones violence against prisoners); Mark S. Hamm et al., The Myth of Humane Imprisonment: A Critical Analysis of Severe Discipline in U.S. Maximum Security Prisons, 1945-1990, in Prison Violence in America 167, 167-95 (Michael C. Braswell et al. eds., 2d ed. 1994) (describing brutal disciplinary practices in maximum-security prisons).

<sup>10</sup> See, e.g., Purdy, supra note 7 (noting that public attention was drawn to systemic use of excessive force only after repeated suits were filed by injured prisoners); see also Nasim v. Warden, Md. House of Corr., 64 F.3d 951, 961 (4th Cir. 1995) (Motz, J., dissenting) (noting that "prisoners have filed *pro se* complaints that succeeded in obtaining relief to ameliorate sub-standard prison conditions . . . and to stem prisoner assaults and abuse"); cf. Harry A. Blackmun, Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?, 60 N.Y.U. L. Rev. 1, 21 (1985) ("I suspect that improvements in prison conditions of recent years are traceable in large part, and perhaps

By the spring of 1996, however, certain less severe prisoner claims were attracting attention in the popular press and among politicians. The public began reading about inmates who alleged that their constitutional rights were violated because they were deprived of shampoo and deodorant,<sup>11</sup> were denied a second serving of ice cream,<sup>12</sup> or were denied, as males, permission to wear women's lingerie.<sup>13</sup> Riding on the publicity of such frivolous claims, Congress enacted sweeping procedural changes aimed at curbing prisoner lawsuits.<sup>14</sup> On April 26, 1996, the passage of the Prison Litigation Reform Act of 1995 (PLRA)<sup>15</sup> sharply curtailed the ability of prisoners to file civil-rights claims in federal court.

The PLRA's broad scope takes little account of the extreme differences between a prisoner's claim of excessive force<sup>16</sup> and a pris-

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primarily, to actions under § 1983 challenging those conditions."); Note, Resolving Prisoners' Grievances Out of Court: 42 U.S.C. § 1997e, 104 Harv. L. Rev. 1309, 1309 (1991) [hereinafter Resolving Prisoners' Grievances] (noting that some prisoner civil-rights claims resulted in important improvements in prison conditions).

<sup>11</sup> *Scher v. Purkett*, 758 F. Supp. 1316, 1317 (E.D. Mo. 1991), *aff'd*, 62 F.3d 1421 (8th Cir. 1995) (dismissing as frivolous prisoner's claim that deprivation of shampoo and deodorant while in punitive segregation constituted cruel and unusual punishment).

<sup>12</sup> *Lyell v. Schachle*, No. 1-95-0035, 1996 WL 391557, at \*1-2 (M.D. Tenn. Feb. 28, 1996) (dismissing inmate's claim that denial of second serving of ice cream at dinner constituted violation of constitutional rights).

<sup>13</sup> *Jones v. Warden of Stateville Corr. Ctr.*, 918 F. Supp. 1142, 1146 (N.D. Ill. 1995) (finding that neither Equal Protection Clause nor First Amendment accords prisoners right of access to women's clothing); see also *infra* note 39 (discussing media characterizations of prisoner lawsuits).

<sup>14</sup> "Our proposals will return sanity and State control to our prison systems. To begin with, we would institute several measures to reduce frivolous inmate litigation." 142 Cong. Rec. S3703 (daily ed. Apr. 19, 1996) (statement of Sen. Abraham).

<sup>15</sup> Prison Litigation Reform Act (PLRA) of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified in scattered sections of 18, 28, & 42 U.S.C.). Though the Act's official title is "The Prison Litigation Reform Act of 1995," it was not enacted until April 26, 1996. When citing to the PLRA, courts and academics use both the 1995 and 1996 dates. This Note will use the official title.

<sup>16</sup> This Note uses "excessive force" to describe claims that specifically allege use of force by prison officers against inmates. This Note does not suggest that many nonexcessive force claims brought under the Eighth Amendment's prohibition on cruel and unusual punishment do not involve inhumane treatment on the part of prison officials toward inmates. Failure to provide adequate medical treatment, failure to provide minimally decent living conditions, and failure to protect against inmate-on-inmate violence all reflect extreme indifference towards prisoners' constitutional rights. Though beyond the scope of this Note, such claims are no less deserving of attention. This Note singles out excessive force claims for several reasons. Such claims are, in many ways, the most obvious violation of prisoners' constitutionally protected rights and, as such, have been accorded particular deference by federal courts, including the Supreme Court. See, e.g., *Hudson v. McMillian*, 503 U.S. 1, 4 (1992) (holding that use of excessive force against prisoner may violate Eighth Amendment even in absence of serious physical injury). Furthermore, excessive force claims present a uniquely viable category of claims for exemption from the PLRA for the reasons stated in this Note.

oner's claim of a defective haircut.<sup>17</sup> Applying the PLRA requirements to prisoner claims of excessive force imposes a one-size-fits-all "remedy" to the perceived problem of rampant, frivolous lawsuits by prisoners. Uniformly applying PLRA requirements ignores the seriousness of excessive force claims as well as the federal courts' historic treatment of such claims.<sup>18</sup> Accordingly, this Note argues that the PLRA should be construed narrowly to exempt excessive force claims from its requirements. Earlier this term, the Supreme Court addressed the issue in part when it decided *Porter v. Nussle*,<sup>19</sup> a case involving the applicability of the PLRA's exhaustion requirements to prisoners' claims of excessive force. This Note argues that the Court's failure to interpret the PLRA's exhaustion requirements narrowly to exempt excessive force claims from the mandatory exhaustion requirements constitutes an unnecessary and inappropriate retreat from longstanding federal judicial recognition and protection of prisoners' rights.

Part I of this Note briefly traces the history of prisoners' rights, the rise of prisoner litigation, and early attempts by Congress and the federal courts to reduce the number of prisoner petitions filed in federal court. Part II summarizes the statutory provisions of the PLRA and presents data suggesting that the assumption that motivated the PLRA—that frivolous prisoner suits flood federal court dockets—is wrong. Part III argues that while the PLRA as a whole has withstood constitutional scrutiny, arguments still exist, even in light of the decision in *Porter v. Nussle*, with which to challenge the applicability of the PLRA to prisoner claims of excessive force. This Note concludes that such an interpretation not only comports with judicial precedent, statutory language, and congressional intent, but also represents appropriate public policy.

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<sup>17</sup> See 141 Cong. Rec. 26,548 (1995) (statement of Sen. Dole) (referring to prisoner's claim of defective haircut as example of frivolous inmate litigation).

<sup>18</sup> See *infra* Parts III.A & B.

<sup>19</sup> *Porter v. Nussle*, 122 S. Ct. 983 (2002), 2002 WL 261683, overruling *sub nom. Nussle v. Willette*, 224 F.3d 95 (2d Cir. 2000). While *Nussle* alters the judicial backdrop against which this Note was written originally, this Note maintains, for the reasons set forth herein, that the PLRA may still, and should, be interpreted narrowly so as to exempt excessive force claims from its requirements. For a more detailed discussion of *Nussle* and the question presented to the Supreme Court, see *infra* notes 146, 162, and accompanying text.

## I

## PRISONERS' RIGHTS AND PRISONER LITIGATION

A. *Judicial Recognition of Prisoners' Rights*

At the middle of the twentieth century, many prisons were "cramped, vermin-infested century-old fortresses."<sup>20</sup> Prison farms, particularly those in the South, generated stories of atrocious working conditions and brutality.<sup>21</sup> Investigations into Georgia prison camps in the early 1940s revealed instances of prisoners "being beaten with rubber hoses and ax handles, [and] of being crowded into steaming 'sweatboxes' as punishment for misbehavior."<sup>22</sup> Some prisoners resorted to breaking their own legs and cutting their tendons to avoid punishing labor.<sup>23</sup> In Alabama, as many as six inmates at a time would be confined to a "doghouse"—a cramped room without lights, water, beds, or toilets—where they would be kept without exercise for several weeks.<sup>24</sup>

Until the mid-twentieth century, prisoners generally were considered to be "slaves of the state,"<sup>25</sup> with no access to the courts as a means of challenging substandard conditions of confinement or institutional abuse. In the 1960s, however, the Supreme Court abandoned its traditional "hands-off" policy towards prisons by recognizing prisoners' constitutional rights, as well as the right of prisoners to bring suit under 42 U.S.C. § 1983.<sup>26</sup> In short, "judges could no longer ignore

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<sup>20</sup> Parenti, *supra* note 9, at 164.

<sup>21</sup> See generally Larry W. Yackle, *Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System* 11-13 (1989) (describing deplorable conditions in prison farms across Alabama); Georgia Prisons: State Abolishes Old Abuses, *Life*, Nov. 1, 1943, at 93 [hereinafter *Georgia Prisons*] (describing brutal living conditions in Georgia prison farms). In Arkansas, for instance, inmates reportedly were lashed with a five-foot long leather strap, whipped for minor infractions until bloodied and bruised, and electrically shocked on sensitive parts of the body. *Hutto v. Finney*, 437 U.S. 678, 682 nn.4-5 (1978).

<sup>22</sup> *Georgia Prisons*, *supra* note 21, at 93.

<sup>23</sup> *Id.*

<sup>24</sup> Yackle, *supra* note 21, at 12-13.

<sup>25</sup> *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871) ("The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead. . . . They are the *slaves of the State* undergoing punishment for heinous crimes committed against the laws of the land." (emphasis added)); see also Jim Thomas, *Prisoner Litigation: The Paradox of the Jailhouse Lawyer* 83-84 (1988) (discussing nineteenth- and early twentieth-century "hands-off" policy, as exemplified by Virginia court in *Ruffin*); Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 *Or. L. Rev.* 1229, 1238 (1998) (referring to pre-1960s era in which "prisoners were considered to be slaves of the state").

<sup>26</sup> 42 U.S.C. § 1983 (1994). In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Supreme Court essentially recognized a federal analogue to § 1983. 403 U.S. 388, 390-91 (1971). Under *Bivens*, a plaintiff must allege facts showing that defendants acted under color of federal law to deprive a plaintiff of a constitutional

the appalling condition of penal institutions in some states.”<sup>27</sup> In fact, from the 1960s until at least the early 1990s, the federal courts were seen as “the principal agents of change in the nation’s prisons and jails.”<sup>28</sup> During this period, the Supreme Court explicitly recognized the prisoners’ ability to seek redress for violations of their constitutional rights, including lack of due process in disciplinary proceedings,<sup>29</sup> receipt of inadequate medical treatment,<sup>30</sup> lack of access to courts,<sup>31</sup> excessive force by correctional officers,<sup>32</sup> and indifference to inmate-on-inmate violence.<sup>33</sup> As courts expressed an increasing interest in prisoners’ rights, they also demonstrated their willingness to issue court orders mandating that jails and prisons live up to standards set and supervised by the courts.<sup>34</sup> By 1995, prisons in forty-one states, as well as the District of Columbia, Puerto Rico, and the Virgin Islands, had at one time been under comprehensive federal court orders.<sup>35</sup>

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right. *Id.* at 395-97. For a more thorough history of the prisoners’ rights movement, see generally Thomas, *supra* note 25, at 81-92; Wayne N. Welsh, *Counties in Court: Jail Overcrowding and Court-Ordered Reform 10-13* (1995) (discussing prisoners’ rights movement and inmate litigation as means of jail reform); Herman, *supra* note 25, at 1233-45 (1998) (discussing prisoners’ rights movement).

<sup>27</sup> Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. Ill. U. L.J. 417, 424 (1993).

<sup>28</sup> Malcolm M. Feeley & Roger A. Hanson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the Literature*, in *Courts, Corrections, and the Constitution: The Impact of Judicial Intervention on Prisons and Jails* 12, 12 (John J. DiIulio Jr. ed., 1990).

<sup>29</sup> *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974) (recognizing prisoners’ right to due process in prison disciplinary proceedings).

<sup>30</sup> *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976) (holding that deliberate indifference to prisoner’s serious illness or injury states cause of action under § 1983).

<sup>31</sup> *Bounds v. Smith*, 430 U.S. 817, 817-18 (1977) (affirming right of prisoners to access courts by requiring that prisons assist inmates in preparation and filing of legal papers either by providing prisoners with law libraries or legal assistance).

<sup>32</sup> *Hudson v. McMillian*, 503 U.S. 1, 4 (1992) (holding that use of excessive force against prisoner may violate Eighth Amendment even in absence of serious injury).

<sup>33</sup> *Farmer v. Brennan*, 511 U.S. 825, 828-29 (1994) (reaffirming that prison officials’ deliberate indifference to substantial risk of serious harm to inmate violates Eighth Amendment).

<sup>34</sup> For example, in one early consent decree case, a federal district court in Arkansas equated confinement in the Arkansas penitentiary system with “banishment from civilized society to a dark and evil world completely alien to the free world.” *Holt v. Sarver*, 309 F. Supp. 362, 381 (E.D. Ark. 1970); see also *Feliciano v. Barcelo*, 497 F. Supp. 14, 20-27 (D.P.R. 1979) (issuing comprehensive order regarding prison conditions and describing prisons where food was destroyed by rats and worms, urinals were flushed into sinks, and floors were covered with raw sewage).

<sup>35</sup> Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State* 13 (1998). The entire correctional systems of at least ten states were also under federal court orders. *Id.*

### B. *Early Measures to Limit Prisoner Suits*

As federal courts opened to prisoner claims, the number of state prisoner petitions filed in federal courts increased from a mere 218 cases filed in 1966 to 26,824 in 1992.<sup>36</sup> In 1996, 41,215 civil-rights petitions were filed in U.S. district courts by federal and state inmates.<sup>37</sup> At the same time, however, criminals, and thus prisoners, were increasingly becoming the focus of political disfavor.<sup>38</sup> It became common for the popular press to characterize inmates as flooding federal courthouses with frivolous claims designed to harass their keepers or simply to pass the time.<sup>39</sup> More and more commentators—

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<sup>36</sup> Roger A. Hanson & Henry W.K. Daley, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation 2* (U.S. Dep't of Justice, Fed. Justice Statistics Program, NCJ-151652, 1995).

<sup>37</sup> John Scalia, *Prisoner Petitions in the Federal Courts, 1980-96*, at 4 (U.S. Dep't of Justice, Fed. Justice Statistics Program, NCJ-164615, 1997). The increase of prisoner litigation may not be attributable solely to the increased willingness of federal courts to hear such claims. Rather, "the rise of litigation was shaped by broader social factors as well." Jim Thomas, *The "Reality" of Prisoner Litigation: Repackaging the Data*, 15 *New Eng. J. on Crim. & Civ. Confinement* 27, 30 (1989). "Politicized prisoners, increased access to law, decreased public tolerance of discretionary abuse, definitions of inhumane treatment, expansion of rights for all citizens, decreased administrative control over prison staff, and an increasing body of supportive case law all contributed to the expansion of prison law." *Id.* at 32.

<sup>38</sup> See Parenti, *supra* note 9, at 167-69 (discussing war on crime and accompanying legislation); Timothy J. Flanagan, *Reform or Punish: Americans' Views of the Correctional System*, in *Americans View Crime and Justice* 75, 91-92 (Timothy J. Flanagan & Dennis R. Longmire eds., 1996) (noting rise in tough-on-crime and tough-on-prisoners sentiment in mid-1990s).

<sup>39</sup> Many commentators place at least partial blame on the popular press for its often-exaggerated characterization of prisoner civil-rights litigation.

"Cop killer Leroy Williams sued for \$4 million, claiming soapy milk endangered his life. . . . Rapist Joseph Gonzalez sued for \$25,000, claiming lost sleep, headaches and chest pains caused by a defective haircut. . . . Robber Roy Clendinen, citing melted ice cream, claimed \$1 million in damages." . . . A layperson reading such a newspaper article might get the impression that the cases summarized in such lists represent the great majority of prisoner civil-rights cases filed in the courts of the United States. Making such an assumption, however, would be a mistake.

Henry F. Fradella, *In Search of Meritorious Claims: A Study of the Processing of Prisoner Civil Rights Cases in a Federal District Court*, 21 *Just. Sys. J.* 23, 23-24 (1999) (quoting Patrice O'Shaughnessy, *Con-Job Suits: New Move to Curb Wacky Prisoner Claims*, N.Y. Daily News, Apr. 7, 1996, at A1).

A typical story appeared in the *New York Times*, in which a reporter described a lawsuit brought by an inmate after he allegedly received creamy, not chunky, peanut butter. Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, N.Y. Times, Mar. 21, 1994, at A1. The suit, and Ms. Dunn's characterization of it, was to become the most often-cited instance of frivolous prisoner litigation during debates over the PLRA. See *infra* note 127 (discussing peanut butter case); see generally Thomas, *supra* note 37, at 40 (noting circular reporting techniques of media, who rely on correctional officers for information that officers obtained through media reports on frivolous filing by prisoners).

inside and outside the judiciary—suggested curbing prisoner litigation.<sup>40</sup>

In 1980, Congress already had taken measures to reduce the number of civil-rights petitions filed by prisoners in federal courts. The Civil Rights of Institutionalized Persons Act (CRIPA)<sup>41</sup> sought to reduce prisoner suits by permitting federal district courts to compel prisoners in participating states to exhaust state prison grievance procedures before filing § 1983 claims.<sup>42</sup> But the exhaustion requirements were deemed by many to be a failure, with few states electing to participate in CRIPA.<sup>43</sup>

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<sup>40</sup> Concern regarding the rising number of prisoner lawsuits echoed throughout Congress, the courts, and the Executive Branch. As early as 1980, a Senate report indicated concern that “[t]he almost 10,000 prisoner suits brought to court in 1978 are swamping our judges. Many of these complaints are pro se and often poorly drafted in terms of presenting the problem in a legal context.” S. Rep. No. 96-416, at 34 (1980), reprinted in 1980 U.S.C.C.A.N. 787, 816. Even by the early 1970s, Chief Justice Burger was advocating reforming the ways in which federal courts handled prisoner suits. See Warren E. Burger, Report on the Federal Judicial Branch—1973, 59 A.B.A. J. 1125, 1128 (1973) (suggesting that “we use some common sense and devise procedures that give prompt attention to valid complaints”). Judge Wilkinson of the Fourth Circuit reflected the sentiment shared by many federal judges in the pre-PLRA years: “[O]ur contemporary legal system invites prisoners to sue. Any rational prisoner will bring more rather than fewer suits, regardless of the legal merit of the claims.” *Nasim v. Warden, Md. House of Corr.*, 64 F.3d 951, 957 (4th Cir. 1995) (Wilkinson, J., concurring). Judge Wilkinson continued: “It is Congress that must undertake the basic reforms that are necessary. . . . State bodies should be the ones to hear complaints about state prison management. The experiment in federal oversight has outlived its usefulness.” *Id.* at 959; see also *Gabel v. Lynaugh*, 835 F.2d 124, 125 n.1 (5th Cir. 1988) (claiming that “[a] high percentage [of prisoner claims] are meritless, and many are transparently frivolous”). Even the White House, through Vice President Dan Quayle’s Council on Competitiveness, formed a special working group to consider “civil justice reform.” Chaired by Solicitor General Kenneth Starr, the group’s agenda included ways to “Reduce Frivolous and Protracted Prisoner Litigation.” Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 *Duke L.J.* 1, 19-20 (1997).

<sup>41</sup> Pub. L. No. 96-247, § 7, 94 Stat. 349, 352 (1980) (codified at 42 U.S.C. § 1997 (1994)).

<sup>42</sup> The enactment of an exhaustion requirement for prisoners’ § 1983 claims represented a drastic departure from the usual rule that exhaustion is not required for such claims. See *Patsy v. Bd. of Regents*, 457 U.S. 496, 510 (1982) (“Section 1997e[, the Civil Rights of Institutionalized Persons Act (CRIPA),] carves out a narrow exception to the general no-exhaustion rule to govern certain prisoner claims, and establishes a procedure to ensure that the administrative remedies are adequate and effective.”); see also *Hudson v. McMillian*, 503 U.S. 1, 15 (1992) (Blackmun, J., concurring in judgment) (“By statute, prisoners—alone among all other § 1983 claimants—are required to exhaust administrative remedies.”).

<sup>43</sup> See *Hanson & Daley*, *supra* note 36, at 40 (noting that most prisons and jails did not seek certification as required and were not encouraged to do so by Attorney General or federal courts); James C. Turk, *The Nation’s First Application of the Exhaustion Requirement of 42 U.S.C. § 1997(e): “The Virginia Experience,”* 7 *Am. J. Trial Advoc.* 1, 18 (1983) (noting that while § 1997e “presents a viable mechanism for unburdening the federal courts of trivial and non-serious prisoner litigation,” it is unlikely to aid significantly in



Some federal courts did, however, exercise judicial discretion to eliminate meritless prisoner claims. For example, some courts took seriously the discretion afforded them by the pre-PLRA federal in forma pauperis (IFP) statute<sup>44</sup> to dismiss an action as "frivolous" if the court found that the action lacked an arguable basis in either law or fact.<sup>45</sup> Depending on court resources, some districts relied heavily on pro se law clerks<sup>46</sup> and magistrate judges to make initial determinations of whether an IFP complaint should be dismissed under the then-existing IFP provisions.<sup>47</sup> Some courts also dismissed claims where a plaintiff had engaged already in a number of identical or nearly identical suits in which the issues had been determined.<sup>48</sup> Ad-

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reducing federal caseload until state grievance procedures are "construed or amended to allow the awarding of monetary damages for violations of constitutional rights involving other than property deprivations"); *Resolving Prisoners' Grievances*, supra note 10, at 1318-22 (noting that many states elected not to participate for variety of reasons, including feelings of federal intrusion in state prison systems and sluggishness on part of Department of Justice in certifying statutorily required grievance procedures); see also Eisenberg, supra note 27, at 436 (noting that there is no indication that CRIPA's exhaustion provisions had any significant impact on reducing overall number of prisoner complaints).

<sup>44</sup> 28 U.S.C. § 1915(d) (1994) ("The court . . . may dismiss the case . . . if satisfied that the action is frivolous or malicious."). The in forma pauperis (IFP) provision generally permits indigent plaintiffs to have the initial court filing fee waived. § 1915(a).

<sup>45</sup> "[T]o provide free access to the courts without overwhelming the efficient administration of justice with meritless cases, the system relies primarily on the judgment of the district courts to permit suits that are arguably meritorious and to exclude suits that have no arguable basis in law or fact." *Nasim v. Warden, Md. House of Corr.*, 64 F.3d 951, 954 (4th Cir. 1995); see also Hanson & Daley, supra note 36, at 42 (noting that sua sponte dismissal authority was used frequently in Southern District of New York). The Supreme Court partially reined in the sua sponte dismissal discretion in *Neitzke v. Williams*, 490 U.S. 319 (1989), in which a unanimous Court warned against conflating the standards of frivolousness and failure to state a claim. The Court specifically held that a complaint filed in forma pauperis is not automatically frivolous so as to warrant sua sponte dismissal under § 1915(d) simply because the complaint fails to state a claim. *Id.* at 331. In fact, the Court noted that "[c]lose questions of federal law, including claims filed pursuant to 42 U.S.C. § 1983, have on a number of occasions arisen on motions to dismiss for failure to state a claim, and have been substantial enough to warrant this Court's granting review, under its certiorari jurisdiction, to resolve them." *Id.* at 328. Notably, the PLRA includes failure to state a claim as grounds for sua sponte dismissal. 28 U.S.C. § 1915(e)(2)(B)(ii) (Supp. V 2000); 42 U.S.C. § 1997e(c)(1) (Supp. V 2000).

<sup>46</sup> Pro se law clerks are generally full-time, permanent court personnel who are responsible for screening court documents submitted by pro se parties, including prisoners' civil-rights complaints and habeas corpus petitions. See, e.g., Fed. Judicial Ctr., Resource Guide for Managing Prisoner Civil Rights Litigation 27 (1996) (describing role of pro se clerks).

<sup>47</sup> *Id.* (describing use of magistrate judges, chambers clerks, and pro se clerks to review IFP complaints); Hanson & Daley, supra note 36, at 41-42 (describing efficient use of pro se clerks and magistrate judges in Middle District of Alabama and Southern District of New York); see also Burger, supra note 40, at 1128 (suggesting that prisoner civil-rights cases should be referred to magistrate judges for preliminary consideration).

<sup>48</sup> See, e.g., *Daye v. Bounds*, 509 F.2d 66, 69 (4th Cir. 1975) (dismissing prisoner's claims after finding his allegations merely continuation of series of meritless claims); cf. *In re Tyler*, 677 F. Supp. 1410, 1413-14 (D. Neb. 1987) (reprimanding prisoner-plaintiff who

ditionally, some courts permitted dismissal of complaints under the former IFP provision where it was indisputable that the defendant was immune from suit<sup>49</sup> or where the claim alleged the violation of a right that did not exist.<sup>50</sup> At least one appellate court approved evidentiary hearings by magistrate judges as a means of scrutinizing the merits of prisoners' claims.<sup>51</sup> Other courts even experimented with requiring prisoners to prepay a percentage of the filing fee in order to proceed IFP.<sup>52</sup>

Over the years, however, such measures did not receive universal praise from judges and academics. For instance, many of those who have advocated for increasing the use of prison grievance procedures as a means of alleviating the burden on federal courts specifically have noted that exhaustion should not be required and that monetary damages should be made available through grievance procedures.<sup>53</sup> Other commentators argued that existing IFP requirements should not be

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repeatedly filed meritless claims and used abusive language in filings by limiting number of cases plaintiff could file IFP), *aff'd*, 839 F.2d 1290 (8th Cir. 1988).

<sup>49</sup> See, e.g., *Crisafi v. Holland*, 655 F.2d 1305, 1308 (D.C. Cir. 1981) ("[Prisoner's] complaint is properly dismissed as frivolous prior to service of process if it is clear from the face of the pleading that the named defendant is absolutely immune from suit on the claims asserted."); see also *Yellen v. Cooper*, 828 F.2d 1471, 1475-76 (10th Cir. 1987) (recognizing court's authority to dismiss complaint *sua sponte* under 28 U.S.C. § 1915(d) on basis of absolute immunity of defendant).

<sup>50</sup> See, e.g., *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989) (noting judges' authority to dismiss "claims of infringement of a legal interest which clearly does not exist" such as respondent's claim that his transfer to less desirable cell house violated Due Process Clause).

<sup>51</sup> See *Spears v. McCotter*, 766 F.2d 179, 181 (5th Cir. 1985) (establishing courtroom hearing as substitute for motion for more definite statement in prisoner *pro se* cases to determine whether claims were frivolous), overruled on other grounds by *Neitzke*, 490 U.S. at 324.

<sup>52</sup> See *Thomas*, *supra* note 25, at 159-60 (discussing prepayment requirements in Central District of Illinois and data showing little effect on filing rates); see also *Roller v. Gunn*, 107 F.3d 227, 232 (4th Cir. 1997) (discussing approval of pre-PLRA local court rule requiring partial filing fees in prisoner IFP lawsuits and noting that nine other circuits upheld similar requirements). In fact, local court rules such as those discussed in *Roller* served as the model for the PLRA's amended IFP provisions. See 141 Cong. Rec. 38,276 (1995) (statement of Sen. Kyl) (acknowledging that many PLRA provisions were based on reforms enacted in Arizona).

<sup>53</sup> Fed. Courts Study Comm., Judicial Conference of the U.S. Fed. Courts, Report of the Federal Courts Study Committee 49-50 (1990) (recommending exhaustion of state institutional remedies but stressing that such remedies must be "*fair and effective administrative remedies*"); William Bennett Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610, 641-57 (1979) (recommending internal prison administrative remedies but not requiring exhaustion); Resolving Prisoners' Grievances, *supra* note 10, at 1323 (arguing that grievance system must provide adequate safeguards so that prisoners are not afraid to use it).

made more stringent.<sup>54</sup> Still others suggested that the most effective way to curb the filing of nonmeritorious claims by prisoners would be to provide legal counsel to prisoners alleging civil-rights violations, thereby permitting lawyers to weed out frivolous claims.<sup>55</sup> Thus, federal courts employed a variety of discretionary approaches to deal with the workload generated by prisoners' civil-rights claims, with no general consensus reached as to the most appropriate method of handling such suits.

## II

### THE PRISON LITIGATION REFORM ACT OF 1995<sup>56</sup>

In 1996, Congress effectively overrode such judicial discretion by enacting the PLRA, a set of formal procedural requirements aimed at curbing prisoner litigation.<sup>57</sup> Though the PLRA purportedly prevents

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<sup>54</sup> Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 Iowa L. Rev. 871, 902 (1983) (suggesting that more stringent requirements for IFP status are not solution to reducing federal caseload); Turner, *supra* note 53, at 646-47 (arguing against adopting more stringent IFP provisions because impact on potentially meritorious cases would be too great).

<sup>55</sup> See Lynn S. Branham, *Limiting the Burdens of Pro Se Inmate Litigation: A Technical-Assistance Manual for Courts, Correctional Officers, and Attorneys General* 39 (1997) (suggesting that litigation costs "might be reduced through a carefully crafted legal-assistance program" which would help weed out nonmeritorious cases and litigate meritorious ones more effectively); Eisenberg, *supra* note 27, at 446-66 (advocating for prisoner's right to counsel in civil-rights cases); Turner, *supra* note 53, at 647-53 (suggesting that counsel be appointed in those cases not dismissed); Jim Thomas, *Inmate Litigation—Using the Courts or Abusing Them?*, *Corrections Today*, July 1988, at 124, 126 (suggesting that more well-trained law clerks should be provided to prisoners).

<sup>56</sup> The PLRA was offered originally by Senators Dole, Kyl, and Hatch in 1995 as a freestanding bill, but it failed to yield enough votes. See Prison Litigation Reform Act of 1995, S. 866, 104th Cong. (1995). A version of the original freestanding bill was incorporated into H.R. 2076, an act "[m]aking appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies," which was vetoed by President Clinton on December 19, 1995. See H.R. 2076, 104th Cong. (1995); Text of the President's Veto Message for H.R. 2076, U.S. Newswire, Dec. 19, 1995, LEXIS, News Group File. Senator Hatch reintroduced the PLRA in Congress's next term, but this time it appeared as a rider to an omnibus appropriations bill that President Clinton signed into law on April 26, 1996. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, tit.VIII, 110 Stat. 1321 (codified in scattered sections of 18, 28, & 42 U.S.C.). Professors Tushnet and Yackle suggest that signing the legislation made political sense to President Clinton for at least two reasons. First, as a "new Democrat" President Clinton endorsed many of the get-tough-on-crime policies embodied in the PLRA. Tushnet & Yackle, *supra* note 40, at 21-22. Second, the appropriations bill that contained the PLRA represented President Clinton's "political victory" over the Republican Congress that he had accused of shutting down the government in its earlier budget war. *Id.*

<sup>57</sup> See *supra* note 14 and accompanying text.

only frivolous claims from being heard by federal courts,<sup>58</sup> the Act actually creates serious obstacles to all prisoner claims, including non-frivolous claims of excessive force.<sup>59</sup> In addition, by foreclosing the ability of certain prisoners to file suits in forma pauperis,<sup>60</sup> the PLRA's "three-strikes" provision effectively bars certain claims from being heard altogether.<sup>61</sup>

In order to understand more fully the scope and mechanics of the PLRA and how it affects prisoners' claims of excessive force, Part II.A provides an overview of the statute and its filing provisions. Part II.B explores the underlying rationale behind these provisions in an effort to demonstrate the PLRA's weak underpinnings.

### A. Overview

The PLRA actually is comprised of two separate provisions, each with a decidedly different emphasis and purpose. First, the PLRA contains the STOP provisions,<sup>62</sup> which limit the circumstances under which courts may enter injunctions against unconstitutional prison

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<sup>58</sup> See 141 Cong. Rec. 35,797 (1995) (statement of Sen. Hatch) (explaining that Congress did "not want to prevent inmates from raising legitimate claims" and claiming that "this legislation will not prevent those claims from being raised").

<sup>59</sup> For example, many courts hold that the PLRA requires prisoners to exhaust internal grievance procedures before filing in federal court, a particularly burdensome requirement for prisoners claiming excessive force. See *infra* notes 102-04, 145.

<sup>60</sup> The "three-strikes" provision permits a federal court to bar a prisoner from filing in forma pauperis if the prisoner has had three suits previously dismissed as frivolous. 28 U.S.C. § 1915(g) (Supp. V 2000). For a more detailed discussion of the three-strikes provision, see *infra* notes 138-41 and accompanying text.

<sup>61</sup> For instance, in 1998, Reginald McFadden, an inmate at a correctional facility in New York, filed a complaint alleging physical abuse during his pretrial detention. *McFadden v. Parpan*, 16 F. Supp. 2d 246, 246 (E.D.N.Y. 1998). Without even inquiring into the merits of Mr. McFadden's excessive force claim, the district court dismissed the claim *sua sponte* under the PLRA's "three-strikes" provision, foreclosing Mr. McFadden's ability to file claims in forma pauperis. *Id.* at 247.

Many prisoners, such as Mr. McFadden, are indigent and lack the wage-earning capacity while in prison to pay even minimal filing fees. See Jody L. Sturtz, Comment, *A Prisoner's Privilege to File In Forma Pauperis Proceedings: May It Be Numerically Restricted?*, 1995 Detroit C.L. Mich. St. U. L. Rev. 1349, 1351 (noting that "[s]ince a vast majority of inmates are indigent, the constitutional right to access would be meaningless without the In Forma Pauperis Statute"). Not surprisingly, many prisoners file IFP. See *Roller v. Gunn*, 107 F.3d 227, 230 (4th Cir. 1997) (noting that IFP filings accounted for almost half of circuit's 1995 caseload and prisoners represented seventy-five percent of those filings). Thus, the PLRA's IFP provisions now "force prisoners to choose between the amenities they can purchase from their institutional accounts, which typically hold only small amounts of money, and the benefits they receive from filing lawsuits." Tushnet & Yackle, *supra* note 40, at 65.

<sup>62</sup> The provisions are so named because they were originally part of the Stop Turning Out Prisoners Act, S. 400, 104th Cong. (1995).

conditions such as overcrowding,<sup>63</sup> and which ostensibly were intended to “get the federal courts out of the business of running jails.”<sup>64</sup> Second, the PLRA contains provisions that establish new procedural requirements for prisoners’ civil suits<sup>65</sup> designed “to curtail abusive prisoner tort, civil rights, and conditions litigation.”<sup>66</sup>

The six primary prisoner filing provisions<sup>67</sup> are as follows: First, indigent prisoners, unlike other indigent litigants, now must pay filing fees in civil actions and appeals in installments based on a statutory formula.<sup>68</sup> Second, a court may dismiss a prisoner’s claim *sua sponte* if the court determines that the allegations of poverty are untrue, if the action is frivolous, malicious, or fails to state a claim, or if the plaintiff seeks monetary relief from a defendant who is immune to suit.<sup>69</sup> Third, prisoners who have had three actions or appeals dismissed as frivolous, malicious, or failing to state a claim for relief may not proceed IFP unless they are in imminent danger of serious physical injury.<sup>70</sup> Fourth, prisoners must exhaust administrative remedies before bringing actions “with respect to prison conditions.”<sup>71</sup> Fifth, the PLRA provides generally that no federal civil action may be brought by a prisoner “for mental or emotional injury suffered while

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<sup>63</sup> 18 U.S.C. § 3626(a)-(g) (Supp. V 2000). The STOP provisions of the PLRA have been the subject of both praise and condemnation from commentators. Compare Criminal Oversight, Wall St. J., June 10, 1996, at A18 (referring to federal judiciary’s involvement in state prisons as “tyranny over the penal system” and hailing PLRA as “a real victory” over “criminals’ rights”), with Ricardo Solano Jr., Note, Is Congress Handcuffing Our Courts?, 28 Seton Hall L. Rev. 282, 309-10 (1997) (arguing that STOP provisions will affect prison reform adversely and threaten independence of federal judiciary). The STOP provisions have fared well in federal courts, with the Supreme Court recently upholding the automatic stay provisions of the PLRA and concluding that the provision does not violate separation-of-powers principles. *Miller v. French*, 530 U.S. 327, 350 (2000). A full examination of the STOP provisions is not within the scope of this Note, however, as the provisions do not significantly impact the ability of individual prisoner-plaintiffs to bring civil suits alleging violations of individual constitutional rights. Rather, the STOP provisions focus on large-scale suits involving federal judicial oversight of day-to-day prison operation and management.

<sup>64</sup> *Benjamin v. Jacobson*, 172 F.3d 144, 182 (2d Cir. 1999) (Calabresi, J., concurring).

<sup>65</sup> 28 U.S.C. § 1915(a)-(h) (Supp. V 2000); 42 U.S.C. §§ 1997a-1997h (Supp. V 2000).

<sup>66</sup> *Mitchell v. Farcass*, 112 F.3d 1483, 1488 (11th Cir. 1997).

<sup>67</sup> This Note shall refer to these provisions generally as the “prisoner filing provisions.”

<sup>68</sup> 28 U.S.C. § 1915(b)(1) (Supp. V 2000) (“in forma pauperis provisions”). This provision essentially adopts the tactics taken by some district courts, see *supra* note 52 and accompanying text, in the pre-PLRA days and makes their usage mandatory, not discretionary.

<sup>69</sup> 28 U.S.C. § 1915(e)(2) (Supp. V 2000); 42 U.S.C. § 1997e(c)(1) (Supp. V 2000) (“*sua sponte*” provision).

<sup>70</sup> 28 U.S.C. § 1915(g) (Supp. V 2000) (“three-strikes” provision).

<sup>71</sup> 42 U.S.C. § 1997e(a) (Supp. V 2000) (“exhaustion requirement”).

in custody without a prior showing of physical injury.”<sup>72</sup> Sixth, the PLRA provides limitations on attorneys’ fees.<sup>73</sup>

### B. Critique of the PLRA’s Fundamental Rationale

Proponents of the PLRA, both in and out of Congress, appeared to accept without question the notion that frivolous prisoner lawsuits were flooding the federal courts and steering the courts toward a workload crisis.<sup>74</sup> Indeed, for years advocates of prison litigation reform have argued that prisoner petitions drown the courts with their sheer numbers,<sup>75</sup> that the vast majority of these claims lack merit,<sup>76</sup> that many prisoners repeatedly file frivolous claims,<sup>77</sup> and that prisoner cases take the attention of federal judges away from more deserving litigants.<sup>78</sup>

Closer examination of prisoner filings in federal court, however, reveals significant weaknesses in these assumptions. While the total number of prisoner lawsuits did increase from 1980 to 1996, if one accounts for the increase in the national prisoner population during that time,<sup>79</sup> one sees that the rate at which inmates filed petitions actually *declined* by approximately seventeen percent during the same pe-

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<sup>72</sup> Id. § 1997e(e) (“physical-injury requirement”).

<sup>73</sup> Id. § 1997e(d) (“attorney fee caps”).

<sup>74</sup> Senator Hatch, a proponent of the PLRA, remarked that the civil-justice system was “overburdened by frivolous prisoner lawsuits.” 141 Cong. Rec. 35,797 (1995) (statement of Sen. Hatch); see also *infra* notes 125-27 and accompanying text (discussing PLRA advocates’ characterization of frivolous inmate litigation).

<sup>75</sup> Professor Eisenberg notes that certain basic assumptions are often made about prisoner suits: that the number of lawsuits has risen dramatically and threatens to disrupt the entire federal court system, and that the majority of these cases lack merit. See Eisenberg, *supra* note 27, at 435; see also 141 Cong. Rec. 14,572 (1995) (statement of Sen. Kyl) (stating that prisoner civil-rights claims “clog[] the courts and drain[] precious judicial resources”).

<sup>76</sup> “Many prisoners are interested in using the courts to achieve ends other than the adjudication of meritorious claims. Prisoners use the judicial system to harass prison and judicial officials by pursuing cases to the full limits of the law.” Lori Carver Praed, Note, Reducing the Federal Docket: An Exclusive Administrative Remedy for Prisoners Bringing Tort Claims Under the Federal Tort Claim Act, 24 Ind. L. Rev. 439, 445 (1991); see also *Scher v. Purkett*, 758 F. Supp. 1316, 1317 (E.D. Mo. 1991) (noting “just how vexed it [the district court] has become with malcontent inmates who fill their idle time, and the Court’s precious time, by filing § 1983 complaints about the petty deprivations inherent in prison life”), *aff’d*, 62 F.3d 1421 (8th Cir. 1995).

<sup>77</sup> See, e.g., *Roller v. Gunn*, 107 F.3d 227, 230 (4th Cir. 1997) (compiling cases in which individual prisoners had filed ten, seventy-three, and six hundred lawsuits, respectively).

<sup>78</sup> See *Hanson & Daley*, *supra* note 36, at 3 (noting that popular image of prisoner litigation includes notion that prisoners file “for entertainment value” and that prisoner cases crowd out other litigation on federal court dockets); Praed, *supra* note 76, at 447 (suggesting that other litigants suffer when prisoner claims “saturate the docket”).

<sup>79</sup> Between 1980 and 1996, the number of persons incarcerated in state and federal prisons in the United States increased an average of 8.2% annually—from roughly 320,000 incarcerated during 1980 to 1.13 million in 1996. *Scalia*, *supra* note 37, at 5.

riod.<sup>80</sup> Moreover, focusing on the raw number of petitions filed ignores another reality: The number of civilian lawsuits also increased steadily during this period.<sup>81</sup> Data also shows significant variation among the states and among different prison facilities in the number of prisoner suits filed. Some have suggested that filings are highest in areas with larger prison populations and in those with the poorest prison conditions.<sup>82</sup>

As to the presumption that most prisoner claims lack merit, the data is, at best, inconclusive.<sup>83</sup> First, no consensus exists as to what constitutes merit. In other words, "the view that prisoners' suits lack merit depends on who defines merit."<sup>84</sup> Though dismissal rates do not necessarily provide an entirely accurate means of gauging merit or frivolity,<sup>85</sup> these numbers do shed some light on the federal courts' treat-

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<sup>80</sup> *Id.*; see also Thomas, *supra* note 37, at 39 ("[A]lthough there are currently more prisoners, they are filing proportionately fewer suits.").

<sup>81</sup> "[A]ll litigation has gradually increased in the past twenty years, not only that of prisoners." Thomas, *supra* note 37, at 36. For instance, civil-rights-related cases (excluding prisoner claims) increased from nine percent of all federal civil cases in 1990 to seventeen percent in 1998. Marika F.X. Litras, *Civil Rights Complaints in U.S. District Courts, 1990-98*, at 1 (Dep't of Justice, Bureau of Justice Statistics Special Report NCJ-173427, 2000); cf. Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982) ("One reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties.").

<sup>82</sup> See Branham, *supra* note 55, at 23 (noting that extent to which state prisoners file civil-rights claims varies greatly from state to state and prison to prison); Turner, *supra* note 53, at 613-16 (explaining that prisoner § 1983 cases are highest in districts with major prison facilities and suggesting that high filings in certain states may reflect poor prison conditions). A disproportionate share of state prisoners' civil-rights suits are filed by prisoners confined in maximum-security prisons. See Branham, *supra* note 55, at 23; Turner, *supra* note 53, at 621. No consensus exists as to why this is so. Some commentators suggest that the high filing rate of prisoners confined in maximum-security facilities reflects poor conditions of confinement in those facilities. See, e.g., Human Rights Watch, *Red Onion State Prison: Super-Maximum Security Confinement in Virginia*, Human Rights Violations in the United States, May 1999, at 2 (noting that "[p]rison staff use force unnecessarily, excessively, and dangerously" in supermax facility). Others suggest that prisoners in such facilities simply may be more "disgruntled" about their situation and thus take to the courts. See Branham, *supra* note 55, at 23-27.

<sup>83</sup> As one commentator has written:

Although there is much statistical reporting regarding the filing of prisoner civil-rights cases, there is little systematic data examining the processing of prisoner civil-rights cases in the federal courts of the United States. . . . There is, therefore, little data upon which we may rely to determine the validity of the popular portrayal of Section 1983 inmate litigation.

Fradella, *supra* note 39, at 26.

<sup>84</sup> Thomas, *supra* note 37, at 40; see also Eisenberg, *supra* note 27, at 437 (noting that while many commentators routinely suggest that majority of prisoner cases are frivolous, little agreement exists as to what "frivolous" is).

<sup>85</sup> Some courts may dismiss cases for reasons other than frivolousness when, in fact, the claims could have been classified as frivolous. Branham, *supra* note 55, at 40-41. On the other hand, a high dismissal rate simply may reflect a court's "dismissive attitude towards

ment of prisoner cases. A 1992 study by the National Center for State Courts found that only nineteen percent of prisoner civil-rights claims were dismissed by district courts as frivolous.<sup>86</sup> In a study of prisoner cases filed in 1994 in the United States District Court for the District of Arizona, approximately seventy percent of the cases were deemed nonfrivolous by pre-PLRA IFP standards.<sup>87</sup>

Recent studies also suggest that the stereotype about “frequent filers”—inmates who single-handedly flood the halls of justice—is simply inaccurate.<sup>88</sup> As to prisoners raising an infinite number of claims within a single suit, the Arizona study showed that 68.5% of prisoners raised only one claim, 22% raised two claims, and only 1% raised five claims or more.<sup>89</sup> Likewise, some researchers contend that prisoner suits do not substantially curtail the federal courts’ ability to address nonprisoner litigation. Given that “[c]ase-processing times have remained fairly constant over the years” even as the number of prisoner suits has increased, it does not follow that inmate litigation is causing a delay in processing nonprisoner lawsuits.<sup>90</sup>

### III

#### REMOVING EXCESSIVE FORCE CLAIMS FROM THE PLRA

Despite such weaknesses in the PLRA’s underlying rationale, many groups and commentators received the legislation enthusiastically.<sup>91</sup> And while the PLRA has been challenged in court, such ef-

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prisoners’ complaints.” *Id.* at 30; see also Thomas, *supra* note 37, at 49 (“[W]e cannot judge the frivolousness of prisoner claims simply by counting the number of suits dismissed, because ‘dismissal’ may, in fact, obscure the fact that the prisoner has come away with something that would not have been given if not for the suit.”).

<sup>86</sup> Hanson & Daley, *supra* note 36, at 20. Notably, the single greatest basis for dismissal (accounting for thirty-eight percent of dismissals) was prisoner-plaintiffs’ failure to comply with court rules. *Id.*

<sup>87</sup> Fradella, *supra* note 39, at 39.

<sup>88</sup> “[M]ost prisoners are ‘one-shot players’ in that they file but a single suit.” Thomas, *supra* note 37, at 45; see also Branham, *supra* note 55, at 28 (noting that only small number of repeat litigants file disproportionate share of suits).

<sup>89</sup> Fradella, *supra* note 39, at 30-31.

<sup>90</sup> Branham, *supra* note 55, at 35. “The burden is relatively light because such a large proportion of the cases are screened out and summarily dismissed before they get under way, because court appearances and trials are rare, and because prisoner cases are not particularly complex as compared to other types of federal litigation.” Turner, *supra* note 53, at 637. Nearly seventy-five percent of prisoner suits are dismissed in favor of defendants, most often as a result of a prisoner’s failure to comply with court rules; half of all suits filed by prisoners in federal court are resolved in six months or less. Hanson & Daley, *supra* note 36, at 18-23 (discussing manner and timing of disposition of prisoner suits).

<sup>91</sup> See, e.g., Kristin L. Burns, Note, Return to Hard Time: The Prison Litigation Reform Act of 1995, 31 Ga. L. Rev. 879, 925 (1997) (“In sum, Congress based the PLRA upon laudable goals. . . .”); Eugene J. Kuzinski, Note, The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of



forts have met only with limited success: Most courts broadly endorse the Act's constitutionality.<sup>92</sup> Thus far, however, all attacks have been

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1995, 29 Rutgers L.J. 361, 398 (1998) ("Congress has finally taken a bold legislative move to remedy the flaws of the present system. The Prison Litigation Reform Act is clearly more than a political ploy. . . . [It] makes very radical, but also very necessary, changes."); see also Implementation of Prisoners Rights Legislation: Hearing Before the Senate Judiciary Committee, 104th Cong. (1996) (statement of Sarah Vandenbraak, Former Lead Counsel for Philadelphia District Attorney), 1996 WL 556529 ("The recently enacted Prison Litigation Reform Act has provided much needed relief by giving judges the tools to weed out nonsense litigation so that they can use their limited resources to address the legitimate cases.").

Many academic writers, as well as civil-rights organizations, however, strongly opposed the legislation. For academic criticism of the PLRA, see, e.g., Herman, *supra* note 25, at 1290-92 (arguing generally against constitutionality of PLRA); Jason E. Pepe, Challenging Congress's Latest Attempt to Confine Prisoners' Constitutional Rights: Equal Protection and the Prison Litigation Reform Act, 23 Hamline L. Rev. 58 (1999) (arguing against constitutionality of physical-injury requirement); Tushnet & Yackle, *supra* note 40, at 66-67 (suggesting that three-strikes provision may violate equal protection); Joshua D. Franklin, Comment, Three Strikes and You're Out of Constitutional Rights? The Prison Litigation Reform Act's "Three Strikes" Provision and Its Effect on Indigents, 71 U. Colo. L. Rev. 191 (2000) (arguing that three-strikes provision of PLRA is unconstitutional); Karen M. Klotz, Comment, The Price of Civil Rights: The Prison Litigation Reform Act's Attorney's Fee-Cap Provision as a Violation of Equal Protection of the Laws, 73 Temp. L. Rev. 759 (2000) (arguing against constitutionality of attorney fee-cap provisions of PLRA); Stacey Heather O'Bryan, Note, Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners, 83 Va. L. Rev. 1189 (1997) (arguing that physical-injury requirement may impose impermissible obstacles on vindication of prisoners' constitutional rights); Julie M. Riewe, Note, The Least Among Us: Unconstitutional Changes in Prisoner Litigation Under the Prison Litigation Reform Act of 1995, 47 Duke L.J. 117 (1997) (arguing against constitutionality of IFP provisions and physical-injury requirements); Simone Schonenberger, Note, Access Denied: The Prison Litigation Reform Act, 86 Ky. L.J. 457 (1997-1998) (arguing against constitutionality of three-strikes provision). For commentary by the American Civil Liberties Union on the PLRA, see Prisoners' Rights, ACLU Position Paper (ACLU, New York, N.Y.), Fall 1999, at 1, <http://www.aclu.org/library/PrisonerRights.pdf> (noting that PLRA "attempts to slam the courthouse door on society's most vulnerable members" and that ACLU is leading nationwide challenge to PLRA).

<sup>92</sup> See, e.g., *Nicholas v. Tucker*, 114 F.3d 17, 21 (2d Cir. 1997) (upholding constitutionality of IFP provisions); *Mitchell v. Farcass*, 112 F.3d 1483, 1490 (11th Cir. 1997) (same); *Hampton v. Hobbs*, 106 F.3d 1281, 1287 (6th Cir. 1997) (same); see also *Hadix v. Johnson*, 230 F.3d 840, 847 (6th Cir. 2000) (upholding constitutionality of attorney fee provisions); *Rodriguez v. Cook*, 169 F.3d 1176, 1178-82 (9th Cir. 1999) (upholding constitutionality of three-strikes provision); *Christiansen v. Clarke*, 147 F.3d 655, 657-58 (8th Cir. 1998) (upholding constitutionality of sua sponte dismissal provisions). A few district courts have struck down various provisions of the PLRA on equal-protection grounds. See, e.g., *Ayers v. Norris*, 43 F. Supp. 2d 1039, 1051 (E.D. Ark. 1999) (holding three-strikes provisions unconstitutional as violation of Equal Protection Clause), abrogated by *Higgins v. Carpenter*, 258 F.3d 797, 798 (8th Cir. 2001); *Lyon v. Vande Krol*, 940 F. Supp. 1433, 1439 (S.D. Iowa 1996) (same); see also *Johnson v. Daley*, 117 F. Supp. 2d 889, 893 (W.D. Wis. 2000) (holding attorney fee cap provisions unconstitutional as violation of Equal Protection Clause); *Walker v. Bain*, 65 F. Supp. 2d 591, 596 (E.D. Mich. 1999) (same), *aff'd* in part, *rev'd* in part, and vacated in part, 257 F.3d 660, 670 (6th Cir. 2001) (holding that attorney fee provisions survive rational-basis review). One appellate judge expressed res-

made to specific provisions of the PLRA, such as the physical-injury requirement and the IFP filing limitations.<sup>93</sup> Arguments still exist to challenge the applicability of the PLRA to prisoner excessive force claims. Excessive force claims constitute a unique class of prisoner claims,<sup>94</sup> and the PLRA should be interpreted narrowly to exempt such claims from the statute's prisoner filing provisions.

Part III.A suggests that prisoner claims of excessive force constitute a discrete and particularly serious category of prisoners' civil-rights claims. Part III.B demonstrates that courts, including the Supreme Court, traditionally have treated such claims with heightened sensitivity. Part III.C then argues that Congress, in drafting the PLRA, also recognized that increased deference is appropriate for prisoners' claims of excessive force. Considering the judicial backdrop against which Congress legislated, the language and structure of the statute, and Congress's intent as reflected in the statute's legislative history, the PLRA may be interpreted to exclude prisoners' claims of excessive force from its stringent filing requirements. Finally, Part III.D suggests that strong policy concerns warrant such an interpretation.

### A. *Unique Category of Prisoner Claims*

Excessive force claims differ from other prisoner claims in ways that warrant distinct treatment under the PLRA. As a preliminary matter, claims of guard brutality represent a discrete and narrow group of claims asserted by prisoners.<sup>95</sup> By definition, excessive force claims involve more fundamentally willful and brutal behavior by prison officials than other prisoner claims<sup>96</sup> and require at least de

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ervations about the constitutionality of the PLRA's sua sponte dismissal provisions. *Mitchell*, 112 F.3d at 1490-93 (Lay, J., concurring).

<sup>93</sup> See *supra* note 92 for examples of such challenges.

<sup>94</sup> See *supra* note 16 (discussing rationale for singling out excessive force claims for exemption from PLRA).

<sup>95</sup> See *Turner*, *supra* note 53, at 623 (indicating that claims of guard brutality ranged from 7.5% to 10.4% of all prisoner suits). In the District Court of Arizona study, 3.1% of prisoner petitions alleged use of force. *Fradella*, *supra* note 39, at 34; cf. *Hanson & Daley*, *supra* note 36, at 17 (determining that twenty-one percent of prisoner petitions alleged violations of their "physical security").

<sup>96</sup> The mens rea requirement for excessive force claims reflects the required intentionality behind the alleged acts. See *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (holding that standard for determining whether prison officials used excessive force is "whether force was applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically to cause harm"). This standard is in direct contrast to the deliberate-indifference standard applied when prisoners allege inadequate medical treatment, failure to protect from other prisoners, and inadequate prison conditions. See *Farmer v. Brennan*, 511 U.S. 825, 834-36 (1994) (discussing deliberate-indifference standard and equating standard to one of recklessness). Just this Term, the Supreme Court specifically noted the distinction

minimis physical injury and suffering on the part of the prisoner.<sup>97</sup> An example is the recent claim by a Texas inmate who suffered a dislocated shoulder and loss of vision after a prison guard handcuffed him, repeatedly punched him in the face, and "jumped up and down on his left arm until he heard a loud pop."<sup>98</sup> Similarly, a New York prisoner alleged that correctional officers handcuffed him so tightly that it cut off his circulation, used a baton to strike him on the head and spear him in the back, kicked him while he was on the floor, and squeezed his throat until he was unable to breathe.<sup>99</sup>

In addition, excessive force claims cannot always be resolved internally and thus require the involvement of courts. Internal investigations into prisoner claims of excessive force frequently result in

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made in *Hudson* and *Farmer* with regard to the mens rea requirement for claims of excessive force. See *Porter v. Nussle*, 122 S. Ct. 983 (2002), 2002 WL 261683 ("We do not question those decisions and attendant distinctions . . .").

<sup>97</sup> *Hudson*, 503 U.S. at 9-10 ("[N]ot . . . every malevolent touch by a prison guard gives rise to a federal cause of action."). Thus, for example, a bruised ear has been considered de minimis and thus beyond the scope of an Eighth Amendment violation. See *Siglar v. Hightower*, 112 F.3d 191 (5th Cir. 1997) (upholding dismissal of prisoner's complaint alleging bruised ear as result of excessive force).

Some courts have permitted prisoners to bring claims in which medical evidence failed to demonstrate more than de minimis injuries if the action alleged constituted more than de minimis force. In *Brooks v. Kyler*, 204 F.3d 102 (3d Cir. 2000), the court found a prisoner's complaint that correctional officers repeatedly punched him in the head, stomped on his neck and back, slammed him into a wall, and choked him presented facts sufficient to survive a motion for summary judgment even if alleged injuries were minor. *Id.* at 107-08. Such an interpretation comports with *Hudson's* recognition that while not "every malevolent touch by a prison guard gives rise to a federal cause of action," "diabolic or inhuman" punishment will not be tolerated under the Eighth Amendment simply because it inflicts "less than some arbitrary quantity of injury." *Hudson*, 503 U.S. at 9. Justice Blackmun specifically recognized that some use of force might well rise to the level of a constitutional violation yet leave no signs of significant injury. *Id.* at 13-14 (Blackmun, J., concurring in judgment) (noting availability of techniques "ingeniously designed to cause pain but without a telltale 'significant injury'").

<sup>98</sup> *Sikes v. Gaytan*, 218 F.3d 491, 492 (5th Cir. 2000).

<sup>99</sup> *Blissett v. Coughlin*, 66 F.3d 531, 533-34 (2d Cir. 1995). Unfortunately, such claims are not rare. In Louisiana, a prisoner, who had filed suit before the enactment of the PLRA, recently prevailed in an excessive force case in which the prisoner accused guards at Louisiana State Penitentiary at Angola of beating him so brutally that he was hospitalized for forty-nine days with two broken ankles. See Brett Barrouquere, Inmate Wins Damages for Beating, Advocate (Baton Rouge, La.), Jan. 24, 2001, at 1-B, LEXIS, News Group File. Inmates at Nassau County Jail in New York reported being chained to railings in a jail elevator and beaten repeatedly as the car ascended and descended. Charlie LeDuff, 14-Month Federal Study Denounces Cruel Conditions at the Nassau County Jail, N.Y. Times, Sept. 16, 2000, at B5. Such abuse was uncovered after an inmate was bludgeoned to death in 1999 by correctional officers. *Id.*

Not surprisingly, such behavior exposes correctional officers not only to civil liability but also to criminal sanctions. Prison officials may be charged and prosecuted under state or federal criminal laws, or under 18 U.S.C. § 242. See, e.g., Karen Abbott, Ex-Prison Guards Sentenced to 2 Years for Beating Prisoner, Denver Rocky Mountain News, Jan. 14, 2001, at 11A, LEXIS, News Group File.

officers being cleared of brutality, even when the facts suggest otherwise.<sup>100</sup> Furthermore, for a variety of reasons, including commitment to a group identity and fear of reprisal for testifying against the group, few officers are willing to testify against fellow officers in internal proceedings.<sup>101</sup> Also, prisoners themselves may feel more threatened bringing excessive force claims in an internal proceeding, behind prison walls, than they would before a court of law.<sup>102</sup> The fear of retaliation is particularly strong with excessive force claims, as institutional bias is quite high and guards face potential criminal liability.<sup>103</sup>

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<sup>100</sup> See Kelsey Kauffman, *Prison Officers and Their World* 129 (1988) (noting routine denial by prison officials of officer brutality at Massachusetts prison). Charges of officer brutality against prisoners at Walpole State Prison in Massachusetts were alleged frequently during the 1970s. *Id.* Though the charges were brought not only by the prisoners themselves (inmates' family and friends, the prison chaplain, outside observers, and state legislators also made charges), they were denied consistently by prison officials and the Department of Correction. *Id.* While investigations finally were conducted after three state legislators claimed to have received over nine hundred reports of abuse, the state investigation found only three instances of use of force by officers, which warranted disciplinary but not criminal action. *Id.* Yet, according to Walpole officers interviewed later, "physical force beyond the need for restraint or self-defense was used on a regular basis throughout the 1970s as a means of maintaining control and deterring assaults on officers." *Id.* Likewise, internal investigations at Corcoran State Prison in California cleared officers of any wrongdoing despite well-corroborated accounts of officer violence against inmates. See Arax, *supra* note 2 (discussing warden ignoring instances of excessive force); see also Carla Crowder, *Prison Union Reported Abuse in '95*, *Denver Rocky Mountain News*, Jan. 3, 2001, at 5A, LEXIS, News Group File (quoting union official as saying "local management knows this is happening and is condoning these assaults . . . [and] in some cases supervisors are even ordering the assaults"); Purdy, *supra* note 7 (discussing minimal disciplinary action taken in response to prison officers' use of excessive force and reluctance of staff to report incidents).

<sup>101</sup> See Kauffman, *supra* note 100, at 95-99 (describing prison officer code that prohibits testifying against fellow officers). Kauffman, a former prison officer, recounts how she attended a court hearing regarding allegations of guard brutality in which prison officers perjured themselves one after the other. *Id.* at 96. Upon learning that Kauffman was herself a former officer, the guards freely admitted their perjury, despite receiving no assurance of anonymity. *Id.*; see also Mark Arax, *Ex-Guard Tells of Brutality, Code of Silence at Corcoran*, *L.A. Times*, July 6, 1998, at A1 (describing officer's silence in face of other officers' abuse of inmates). The former guard described the mentality of working in the maximum-security facility: "That's the socialization. I didn't care if someone got raped or if someone got killed by staff. It was just another day's work." *Id.*

<sup>102</sup> Prisoners legitimately fear reprisals even when they bring their claims to court. See, e.g., *Ruiz v. Estelle*, 550 F.2d 238, 239 (5th Cir. 1977) (noting that inmates were subjected "to threats, intimidation, coercion, punishment, and discrimination" after filing lawsuits).

<sup>103</sup> See Brief of Amici Curiae ACLU et al. at 16, *Booth v. Churner*, 121 S. Ct. 1819 (2001) (No. 99-1964), <http://supreme.lp.findlaw.com/supreme-court/briefs/99-1964/99-1964.mer.ami.aclu.pdf> [hereinafter ACLU Brief] (noting inmates' fear of retaliation when accusing prison officers of using excessive force); cf. Paul Pinkham, *Witness in Valdes Death Seeks Move*, *Florida Times-Union*, Jan. 31, 2001, at A1, LEXIS, News Group File (describing Florida inmate's allegations that prison guards threatened him for talking to FBI about fatal beating of inmate); Purdy, *supra* note 7 (relating instance in which officer threatened inmate with further beatings if he told truth about injuries). As discussed *supra*

Even if prisoners do risk bringing grievances, too often internal grievance procedures are inadequate for victims of excessive force.<sup>104</sup> Finally, the principles underlying use of internal grievance procedures—providing prison officials with notice and opportunity to change their practices—“are not served when a practice is aimed at one specific inmate,” as is the case with excessive force cases, “rather than the prison population as a whole,”<sup>105</sup> as in cases challenging conditions of confinement.

### *B. Judicial Treatment of Excessive Force Claims*

Given the severity of official behavior alleged in prisoners' excessive force claims, it is not surprising that federal courts show heightened sensitivity to such claims and “are likely to take considerable time to review issues that concern the alleged use of excessive force with very close scrutiny.”<sup>106</sup> Judges tend to acknowledge the legitimacy of prisoner claims of violence, particularly those involving prisoners confined in maximum security prisons, by granting them more favorable review than other types of prisoner claims.<sup>107</sup> Likewise, even though prisoners rarely prevail in their cases,<sup>108</sup> a recent study shows that a substantial percentage of cases in which prisoners do prevail involve claims of excessive force by correctional officers.<sup>109</sup> Such outcomes “indicate that some lawsuits warrant attention, that federal

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in notes 99-101, institutional bias is particularly strong in cases involving alleged use of force by prison officers, who may be subject to civil, as well as criminal, sanctions.

<sup>104</sup> In many instances, the realities of prison life prevent inmates, particularly those alleging excessive force, from meeting the short deadlines of grievance procedures. For example, inmates often are moved to segregated units where it is difficult to receive forms and assistance, or inmates are hospitalized or too incapacitated by their injuries to meet filing deadlines. See ACLU Brief, *supra* note 103, at 15-16.

<sup>105</sup> *Lawrence v. Goord*, 238 F.3d 182, 186 (2d Cir. 2001) (holding that exhaustion of administrative remedies is not required where inmate alleges “particularized instances of retaliation”).

<sup>106</sup> Hanson & Daley, *supra* note 36, at 31-32.

<sup>107</sup> See, e.g., Thomas, *supra* note 37, at 42 & n.43 (noting study in which judges allowed pro se indigent prisoner claims of violence to proceed about seventy-five percent of time, as compared to sixty percent for other types of prisoner claims).

<sup>108</sup> See Branham, *supra* note 55, at 42 (noting that “prisoners rarely win”); Hanson & Daley, *supra* note 36, at 36 (stating that ninety-four percent of prisoners win nothing from civil-rights claims).

<sup>109</sup> In a study of twenty settlements—in which the terms of the settlement were identified publicly—and four trial verdicts, forty-five percent of the cases involved “excessive force by correctional officers; failure to protect inmates from threats, harassment, and violence by other inmates; improper body cavity searches; and assaults and harassment from arresting officers.” Hanson & Daley, *supra* note 36, at 36; cf. Purdy, *supra* note 7 (explaining that in six years, inmates at Clinton Correctional Facility in New York won seven claims of excessive force by correctional officers and settled ten brutality claims with state).

courts recognize this fact, and that they devote their resources accordingly.”<sup>110</sup>

Indeed, in *Hudson v. McMillian*,<sup>111</sup> decided just three years before the PLRA was first proposed, the Supreme Court specifically adopted a more lenient injury standard for prisoners’ claims of excessive force than for all other prisoner civil-rights claims.<sup>112</sup> In fact, the Court distinguished excessive force claims from all other prisoner claims brought under the Eighth Amendment,<sup>113</sup> recognizing a prisoner’s right to be free from bodily harm at the hands of prison guards as the most stringently protected constitutional right of a prisoner: “When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency *always are violated*.”<sup>114</sup>

### C. Congressional Treatment of Excessive Force Claims

The language of certain PLRA filing provisions and the PLRA’s legislative history suggest that Congress did not intend for the PLRA filing provisions to apply to prisoners’ claims of excessive force.<sup>115</sup> This interpretation of the PLRA is further warranted by the doctrine

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<sup>110</sup> Hanson & Daley, *supra* note 36, at 37.

<sup>111</sup> 503 U.S. 1 (1992). Justice O’Connor wrote the opinion of the Court, which was joined by Chief Justice Rehnquist and Justices White, Kennedy, and Souter. Justice Stevens concurred in part and concurred in the judgment, and Justice Blackmun concurred only in the judgment. Justice Thomas wrote a dissenting opinion, in which Justice Scalia joined. *Id.* at 3.

<sup>112</sup> In *Hudson*, the Supreme Court drew a distinction between prisoner claims of excessive force and condition-of-confinement claims, requiring a less rigorous showing of injury for the former. See *id.* at 7-10 (declining to apply significant-injury standard applied in inadequate-medical-care and prison-conditions cases to excessive force cases).

<sup>113</sup> “To deny . . . the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the concepts of dignity, civilized standards, humanity, and decency that animate the Eighth Amendment.” *Hudson*, 503 U.S. at 11 (internal quotations omitted).

<sup>114</sup> *Id.* at 9 (emphasis added). Some might argue that the Supreme Court’s recent decision in *Porter v. Nussle*, in which the Court held that the PLRA exhaustion requirement “applies to all inmate suits about prison life . . . whether they allege excessive force or some other wrong,” signals a retreat from the Court’s distinction between excessive force and other claims. *Porter v. Nussle*, 122 S. Ct. 983, 992 (2002), 2002 WL 261683, overruling *sub nom. Nussle v. Willette*, 224 F.3d 95 (2d Cir. 2000). However, while the Court refused to recognize such a distinction for purposes of exhaustion, the Court affirmed the continued vitality of cases, such as *Hudson*, in which “the Court did indeed distinguish excessive force claims from . . . [other] claims.” *Id.* at 990.

<sup>115</sup> Congress, too, is presumed to have legislated against the judicial backdrop of *Hudson v. McMillian*. See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978) (“Congress will be presumed to have legislated against the background of our traditional legal concepts.”). While *Nussle* arguably creates new precedent regarding the Court’s treatment of excessive force claims vis-à-vis other prisoner claims, Congress drafted and enacted the PLRA six years prior to the *Nussle* decision, against a backdrop of judicial precedent that consistently recognized such distinctions.

of avoidance of constitutional questions,<sup>116</sup> since application of the PLRA to prisoner claims of excessive force would raise grave constitutional concerns.<sup>117</sup>

In analyzing whether the PLRA should be interpreted to include prisoners' claims of excessive force, the context and structure of the statute as a whole must be considered.<sup>118</sup> While as a general rule one

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<sup>116</sup> Generally, where a statute is susceptible to two constructions, one of which gives rise to serious constitutional questions and the other of which avoids such questions, the former construction is adopted. According to the *Ashwander* doctrine,

"When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

*Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)); see also *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 500 (1979) (recognizing that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available").

<sup>117</sup> The Fifth Amendment's Due Process Clause requires that federal legislation meet the same equal-protection standards applicable to the states as set forth in the Fourteenth Amendment. *Mathews v. De Castro*, 429 U.S. 181, 182 n.1 (1976). Under equal-protection analysis, classifications implicating a suspect class or burdening a fundamental right are subject to strict scrutiny. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Classifications that burden neither a suspect class nor a fundamental right will be upheld so long as they "bear[ ] a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). For purposes of this argument, strict scrutiny need not even be sought. According to *Cleburne*, a law's relationship to an asserted goal may not be "so attenuated as to render the distinction [between different groups] arbitrary or irrational." *Cleburne*, 473 U.S. at 446. Nor will an objective inspired by animus—"a bare . . . desire to harm a politically unpopular group"—constitute a legitimate interest. *Id.* at 447 (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

When one closely examines the underlying rationales behind the various PLRA provisions and applies them to prisoners' claims of excessive force, the result is a law "born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 634. That is, application of the PLRA to such claims blatantly suppresses important constitutional claims filed by prisoners at a time when the general public and courts welcome such claims by non-prisoners. The 1990s marked a decade of public outcry against the use of excessive force in the civilian community. See generally John V. Jacobi, *Prosecuting Police Misconduct*, 2000 *Wis. L. Rev.* 789, 792-803 (discussing police violence in 1990s); Sa'id Wekili & Hyacinth E. Leus, *Police Brutality: Problems of Excessive Force Litigation*, 25 *Pac. L.J.* 171, 175-88 (1994) (discussing high-profile trials of police officers in New York and California). If the PLRA is interpreted to apply to prisoners' claims alleging the very same kind of abuse, the double standard seems clear. Viewed accordingly, the PLRA is precisely the sort of law condemned by the Supreme Court in *Romer*: "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Romer*, 517 U.S. at 633.

<sup>118</sup> See, e.g., *Bailey v. United States*, 516 U.S. 137, 145 (1995) ("The meaning of statutory language, plain or not, depends on context." (internal quotations omitted)); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (noting that in assessing plain meaning Court also must look to "language and design of the statute as a whole").

must look to the language of a statute to determine its meaning,<sup>119</sup> where ambiguity exists within the text of the statute, one may inquire further into the statute's legislative history to determine congressional intent.<sup>120</sup> Such textual ambiguity exists within the PLRA, as evidenced by lower federal courts' struggles to determine whether certain filing provisions, most notably the exhaustion requirements, apply to prisoners' claims of excessive force.<sup>121</sup> That federal judges disagree as to the scope of the PLRA filing provisions suggests that it is necessary to inquire beyond the plain text of the statute to ascertain congressional intent.

This Section begins with a discussion of the PLRA's legislative history in order to provide a basis with which to discern Congress's intent in passing the PLRA. It then argues that several of the PLRA filing provisions suggest that Congress intended to exempt excessive force claims from certain filing requirements. Finally, this Section

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<sup>119</sup> "When we find the terms of a statute unambiguous, judicial inquiry is complete, except 'in rare and exceptional circumstances.'" *Rubin v. United States*, 449 U.S. 424, 430 (1981) (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 187 n.33 (1978)); see also *Hill*, 437 U.S. at 184 n.29. ("When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning.").

<sup>120</sup> "Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear." *Blum v. Stenson*, 465 U.S. 886, 896 (1984); see also *Flora v. United States*, 362 U.S. 145, 151 (1960) (noting that "frequently the legislative history of a statute is the most fruitful source of instruction as to the proper interpretation"); *United States v. Pub. Utils. Comm'n of Cal.*, 345 U.S. 295, 315 (1953) ("Where the words are ambiguous, the judiciary may properly use the legislative history to reach a conclusion."). While courts have relied increasingly on legislative history as a tool for statutory interpretation in recent years, some judges, most notably Justice Scalia, express disdain for the use of such material. See George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 *Duke L.J.* 39 (discussing widespread usage of legislative history as tool for statutory interpretation); Arthur Stock, *Note, Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 *Duke L.J.* 160, 161 (describing Justice Scalia's "disdain for the use of legislative history"). Justice Scalia makes no effort to hide this disdain, claiming that use of legislative history is a "waste of research time and ink" and "a false and disruptive lesson in the law." *Conroy v. Aniskoff*, 507 U.S. 511, 518-19 (1993) (Scalia, J., concurring in the judgment); see also *United States v. Taylor*, 487 U.S. 326, 344 (1988) (Scalia, J., concurring in part) (finding "no justification for resort to the legislative history").

<sup>121</sup> For a discussion of the debate over the scope of exhaustion requirements, see *infra* notes 144-62 and accompanying text. Courts also differ in their interpretation of the extent to which the "imminent-danger" exception to the three-strikes provision covers prisoners' claims of excessive force. See *infra* notes 138-41 and accompanying text. Additionally, some courts recognize a judicial exception to the physical-injury requirement for certain constitutional claims that otherwise would seem to fall within the language of the provision. See *infra* note 136. Finally, despite seemingly clear language in certain provisions applying the PLRA to "all civil actions" filed by petitioners, courts have held that the PLRA does not apply to prisoners' habeas corpus petitions. See *infra* notes 166-67 and accompanying text.



suggests that sound arguments also exist to support exempting excessive force claims from the remaining PLRA filing provisions.

### 1. *Legislative History*

Some commentators describe the process "leading to the passage of the PLRA . . . [as] characterized by haste and lack of any real debate."<sup>122</sup> In fact, the PLRA legislation was not subject to committee markup, and the committee did not furnish a report detailing the PLRA's likely effects.<sup>123</sup> Thus, floor debates provide the only evidence of how Congress perceived the prisoner litigation "problem" and how Congress intended the PLRA to remedy that "problem."<sup>124</sup>

Proponents of the PLRA noted in statements made on the Senate floor that the "civil justice system [is] overburdened by frivolous prisoner lawsuits"<sup>125</sup> that "clog[ ] the courts and drain[ ] precious judicial resources."<sup>126</sup> Senators supporting the PLRA bemoaned the federal courts' involvement in such prisoner claims as "insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead

<sup>122</sup> Herman, *supra* note 25, at 1277; see also *Benjamin v. Jacobson*, 935 F. Supp. 332, 340 (S.D.N.Y. 1996) ("[I]t is worth noting that some believe that this legislation which has a far-reaching effect on prison conditions and prisoners' rights deserved to have been the subject of significant debate. It was not."), *aff'd in part, rev'd in part*, 172 F.3d 144, 182 (2d Cir. 1999).

<sup>123</sup> [T]he effort to enact this proposal as part of an omnibus appropriations bill is inappropriate. Although a version of the PLRA was introduced as a free-standing bill and referred to the Judiciary Committee, it was never the subject of a committee mark-up, and there is no Judiciary Committee report explaining the proposal. The PLRA was the subject of a single hearing in the Judiciary Committee, hardly the type of thorough review that a measure of this scope deserves.

142 Cong. Rec. 5193 (1996) (statement of Sen. Kennedy).

<sup>124</sup> "Frequently, . . . issues not addressed by committee reports are discussed during the floor debate, and here the *views of Members closely associated with the legislation through either sponsorship or committee review can be helpful.*" Costello, *supra* note 120, at 50 (emphasis added). Thus, it is worth noting that Senators Hatch, Kyl, Dole, Abraham, and Reid were at various times sponsors of different drafts of the PLRA. See, e.g., 141 Cong. Rec. 27,042 (1995) (statement of Sen. Hatch) (listing sponsors of PLRA amendment as Senators Dole, Reid, Kyl, Abraham, Gramm, Specter, Hutchinson, Thurmond, Santorum, and Grassley); 141 Cong. Rec. 14,570 (1995) (statement of Sen. Dole) (introducing S. 866, "a bill to reform prison litigation" on behalf of himself and Senators Kyl and Hatch). But see *Garcia v. United States*, 469 U.S. 70, 76 n.3 (1984) ("[T]o select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions." (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951) (Jackson, J., concurring))).

<sup>125</sup> 141 Cong. Rec. 35,797 (1995) (statement of Sen. Hatch).

<sup>126</sup> *Id.* at 14,572 (statement of Sen. Kyl).

of the creamy variety.”<sup>127</sup> Clearly, assaults and batteries—such as the continuous shocking of an inmate with a 50,000 volt stun gun<sup>128</sup> or the lethal beating of a prisoner<sup>129</sup>—were “far removed from what the sponsors said was on their minds.”<sup>130</sup> In fact, a close reading of the floor debates on the PLRA reveals that of all of the examples of allegedly frivolous lawsuits filed by prisoners, not a single one involved a prisoner alleging excessive use of force.<sup>131</sup> Rather, the cases cited appeared either frivolous on their face or simply failed to state a cogni-

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<sup>127</sup> Id. at 27,042 (statement of Sen. Dole). In fact, proponents of the PLRA cited the chunky versus creamy peanut butter case no less than five times during the floor debates over the PLRA. Despite its prominence in the PLRA floor debates, the peanut butter case may have been incorrectly stated and, in fact, not nearly as “frivolous” as many claimed it to be. See Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 Brook. L. Rev. 519, 521 (1996) (explaining that prisoner actually was suing for peanut butter he had never received but for which he had paid). “The ‘chunky peanut butter’ case has become the favorite canard of those who wish to ridicule prisoner litigation. Many journalists have reported it, using the inaccurate description of the case . . . [which] was repeatedly cited during congressional consideration of proposals to limit prisoner litigation.” Id. at 522.

In fact, several of the poster cases for frivolous claims look less than frivolous upon closer examination. In his review of cases listed in the “top ten frivolous prisoner lawsuits,” a list promulgated by the National Association of Attorneys General and quoted from during congressional debates on the PLRA, Judge Newman states that “the lists included some accounts that were at best highly misleading and, sometimes, simply false.” Id. at 520.

<sup>128</sup> Craig Timberg, *Documents Show Use of Force at Va. Prison*, Wash. Post, July 31, 2001, at B1 (describing incident at Wallens Ridge super-maximum-security prison in Virginia in which guards repeatedly shocked diabetic prisoner who died five days after incident).

<sup>129</sup> Guy H. Lawrence, *Problems in Nueces County Jail*, Corpus Christi Caller-Times, July 29, 2001, at A1, LEXIS, News Group File (recounting instance in which prisoner died after being beaten and put in restraining chair).

<sup>130</sup> Booth v. Churner, 206 F.3d 289, 302 (3d Cir. 2000) (Noonan, J., concurring and dissenting), *aff’d* on other grounds by 121 S. Ct. 1819 (2001).

<sup>131</sup> Senator Reid provided a typical laundry list of allegedly frivolous claims, including the famed peanut butter case, a claim that limiting receipt of stamps violated an inmate’s religious belief in writing letters, a claim that a prison’s delivery of mail interfered with the prisoner’s usual sleeping pattern, and a claim that a prisoner was forced to wear size five tennis shoes when his actual foot size was four and three-quarters. 141 Cong. Rec. 27,043 (1995) (statement of Sen. Reid). Judges have relied on such examples to argue against the PLRA exhaustion requirement’s applicability to excessive force claims. See, e.g., *Booth*, 206 F.3d at 301-02 (Noonan, J., concurring and dissenting) (pointing to illustrations of frivolous claims in *Congressional Record* and arguing that such claims do not equate to claims of excessive force). But see *Beeson v. Fishkill Corr. Facility*, 28 F. Supp. 2d 884, 892 (S.D.N.Y. 1998) (“There is no reason to believe in the abstract—and no evidence that Congress actually believed—that prisoners’ allegations of assault are, on the whole, more meritorious than any other category of prisoner litigation.”).

zable claim<sup>132</sup>—pleading flaws typically not shared by allegations of excessive force.<sup>133</sup>

Thus, a narrow reading of the PLRA appears to comport with congressional intent.<sup>134</sup> Congress sought to tailor the inmate filing requirements to weed out nonmeritorious claims while preserving legitimate ones. Congress did “not want to prevent inmates from raising legitimate claims,” and supporters of the PLRA believed that it would not “prevent those claims from being raised.”<sup>135</sup>

## 2. *Implied Exemptions*

Several PLRA filing provisions implicitly provide such exemptions for excessive force claims. The physical-injury requirement, the three-strikes provision, and the exhaustion requirement all contain language suggesting that Congress did not intend for such provisions to apply to prisoner claims of excessive force.

First, § 1997e(e) states: “No Federal civil action may be brought by a prisoner . . . for mental or emotional injury suffered while in custody without a prior showing of *physical injury*.”<sup>136</sup> The inclusion

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<sup>132</sup> However, even claims that initially might appear meritless may, upon closer examination, allege valid causes of action. See *supra* notes 45 & 127.

<sup>133</sup> Of course, not every claim alleging excessive force is inherently nonfrivolous. A prisoner might allege a *de minimis* injury, e.g., “a guard stepped on my toe,” and then claim excessive force. But such claims quickly would fail for failure to state a claim. See *supra* note 97 (discussing level of injury required to state cause of action of excessive force). Likewise, a prisoner simply could make up a claim, but internal disincentives reduce the likelihood of such claims, see *supra* notes 102-04 and accompanying text, and early evidentiary hearings can be used to eliminate such whole-cloth fabrications; see *supra* note 51 and accompanying text (discussing use of evidentiary hearings to ascertain merit of prisoners’ § 1983 claims).

<sup>134</sup> A narrow reading of the PLRA draws further support from Justice Breyer’s dissenting opinion in *Miller v. French*, 530 U.S. 327 (2000), a recent decision in which the Supreme Court interpreted the scope of the automatic-stay provisions included within the STOP sections of the PLRA. The majority, though looking beyond the plain text of the STOP provisions and considering the context of the statute as a whole, determined that any state motion to terminate a court’s prospective relief operates as an automatic stay of an injunction against unconstitutional prison conditions, despite the federal courts’ traditional equitable powers to “stay the stay.” *Id.* at 335-41. Justice Breyer, dissenting and finding the stay discretionary, argued for “a more flexible interpretation of the statute” in order to “keep in mind the extreme circumstances that at least some prison litigation originally sought to correct.” *Id.* at 355. Justice Breyer concluded that “Congress has simultaneously expressed its intent to maintain relief that is narrowly drawn and necessary to end unconstitutional practices.” *Id.* at 361.

<sup>135</sup> 141 Cong. Rec. 35,797 (1995) (statement of Sen. Hatch).

<sup>136</sup> 42 U.S.C. § 1997e(e) (Supp. V 2000) (emphasis added). This section has been held to apply only to claims for mental or emotional injury, not to claims involving other types of injury. *Robinson v. Page*, 170 F.3d 747, 748 (7th Cir. 1999). “It would be a serious mistake to interpret section 1997e(e) to require a showing of physical injury in all prisoner civil rights suits. The domain of the statute is limited to suits in which mental or emotional injury is claimed.” *Id.* Some courts have gone further, creating a “judicial exception” to

of a physical-injury requirement signals Congress's concern with claims involving actual physical injury. Given that prisoners must allege more than de minimis injuries to state a claim for excessive force,<sup>137</sup> § 1997e(e) will be satisfied by default every time a prisoner includes a claim for mental or emotional injury resulting from use of excessive force.

Second, § 1915(g) states:

In no event shall a prisoner bring a civil action . . . if the prisoner has, on 3 or more prior occasions . . . brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim . . . unless the prisoner is under imminent danger of serious physical injury.<sup>138</sup>

Thus, a prisoner with three or more prior claims dismissed on the statutorily enumerated grounds still may proceed in forma pauperis in federal court if the prisoner faces imminent danger of serious physical injury.

Many courts hold that the danger is to be assessed at the time of the filing of the complaint rather than at the time of the alleged incident.<sup>139</sup> Several courts, however, have interpreted the imminent-danger exception to cover instances in which prisoners allege either ongoing abuse or fear of retaliation.<sup>140</sup> Therefore, because many prisoners face retaliation when alleging excessive use of force by prison officers, many plaintiffs in excessive force cases might fall under the imminent-danger exception.<sup>141</sup>

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§ 1997e(e) by placing certain constitutional claims beyond the reach of the physical-injury requirement, even when only emotional injuries are alleged. See *Pepe*, supra note 91, at 64 (explaining that some courts have concluded that Congress never meant to preclude review of constitutional claims that otherwise would be barred by physical-injury requirement).

<sup>137</sup> See supra note 97 and accompanying text (discussing injury requirement for excessive force claims).

<sup>138</sup> 28 U.S.C. § 1915(g) (Supp. V 2000) (emphasis added).

<sup>139</sup> See *Abdul-Akbar v. McKelvie*, No. 98-7307, 2001 WL 76277, at \*1 (3d Cir. Jan. 29, 2001) (holding that danger should be assessed at time of filing complaint), overruling *Gibbs v. Roman*, 116 F.3d 83, 86-87 (3d Cir. 1997); *Medberry v. Butler*, 185 F.3d 189, 193 (11th Cir. 1999) (same); *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir. 1998) (same); *Baños v. O'Guin*, 144 F.3d 883, 884-85 (5th Cir. 1998) (same).

<sup>140</sup> Cf. *Abdul-Akbar*, 2001 WL 76277, at \*8 (concluding that § 1915(g) permits "prisoners who remain in danger of future grievous harm" to file immediately); *Choyce v. Dominguez*, 160 F.3d 1068 (5th Cir. 1998) (remanding for reconsideration of imminent-danger determination where prisoner alleged incident complained of "was only one episode in an ongoing pattern of threats and violence" in retaliation for prior litigation); *Ashley*, 147 F.3d at 717 (holding that prisoner who alleged that he was placed in continuing proximity to inmates who wished to harm him met imminent-danger exception).

<sup>141</sup> See supra notes 102-03 and accompanying text (discussing inmate fear of reprisal). At least one author has suggested that Congress should extend the three-strikes exception to cover indigent prisoners who are under imminent danger of physical injury at any point in time relating to their suit. See *Sharone Levy*, Note, *Balancing Physical Abuse by the*

That Congress created an imminent-danger exception to the three-strikes provision again demonstrates its sensitivity to claims involving physical injury, and thus, excessive force, by prison officials. Without such an exemption, a prisoner alleging abuse by correctional officers would be barred permanently from proceeding IFP if that prisoner had filed three or more previously dismissed claims. Given that virtually all prisoners proceed IFP,<sup>142</sup> such a procedural rule could effectively bar serious claims of institutional abuse—an outcome at odds with the intent of PLRA supporters to permit meritorious claims to be heard by federal courts.<sup>143</sup>

Third, § 1997e(a) states: “No action shall be brought *with respect to prison conditions* . . . until such administrative remedies as are available are exhausted.”<sup>144</sup> Until recently, the federal courts of appeal were split as to whether excessive force claims are claims “with respect to prison conditions.”<sup>145</sup> The Supreme Court recently answered that question in the affirmative when it decided *Porter v. Nussle*<sup>146</sup> and concluded that excessive force claims do fall within the PLRA’s exhaustion requirements.<sup>147</sup>

While *Nussle* curtails the ability of litigants to challenge the application of the exhaustion requirement to claims of excessive force,

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System Against Abuse of the System: Defining “Imminent Danger” Within the Prison Litigation Reform Act of 1995, 86 Iowa L. Rev. 361 (2000) (examining three-strikes provision and recommending extending imminent-danger exception to allow all inmates under imminent danger to file in forma pauperis). Such an extension “would act to safeguard the penal process, allowing meritorious suits to be brought in a more expedient manner.” *Id.* at 391.

<sup>142</sup> See Schonenberger, *supra* note 91, at 461 (“Since a vast majority of inmates are indigent, the constitutional right to access would be meaningless without the in forma pauperis statute.”).

<sup>143</sup> See *supra* note 135 and accompanying text (noting that Congress did not intend to prevent inmates from bringing legitimate claims); see also *supra* notes 60-61 and accompanying text (describing how three-strikes provision barred prisoner’s excessive force claim from being heard by federal court).

<sup>144</sup> 42 U.S.C. § 1997e(a) (Supp. V 2000) (emphasis added).

<sup>145</sup> Compare *Booth v. Churner*, 206 F.3d 289, 293-98 (3d Cir. 2000) (finding that excessive force claims are claims “with respect to prison conditions” and thus require exhaustion), *aff’d* on other grounds by 121 S. Ct. 1819 (2001), *Higginbottom v. Carter*, 223 F.3d 1259, 1261 (11th Cir. 2000) (same), *Freeman v. Francis*, 196 F.3d 641, 642-44 (6th Cir. 1999) (same), with *Lawrence v. Goord*, 238 F.3d 182, 185-86 (2d Cir. 2001) (finding that excessive force claims are not claims “with respect to prison conditions” and thus do not require exhaustion); *Nussle v. Willette*, 224 F.3d 95, 99-106 (2d Cir. 2000) (same), *Carter v. Kiernan*, No. 98 Civ. 2664, 1999 WL 14014, at \*2-5 (S.D.N.Y. Jan. 14, 1999) (same), *Johnson v. O’Malley*, No. 96 C 6598, 1998 WL 292421, at \*3 (N.D. Ill. May 19, 1998) (same).

<sup>146</sup> *Porter v. Nussle*, 122 S. Ct. 983 (2002), 2002 WL 261683, overruling *sub nom.* *Nussle v. Willette*, 224 F.3d 95 (2d Cir. 2000).

<sup>147</sup> *Id.* at 992 (holding that “the PLRA’s exhaustion requirement applies to all inmate suits about prisoner life,” including claims of excessive force).

there are persuasive reasons to find that the PLRA exhaustion requirement should not be read to apply to such claims, thus suggesting that the Court erred in its decision. The pre-PLRA version of § 1997e(a) applied to all § 1983 claims filed by prisoners.<sup>148</sup> Thus, as one district court has noted, the limitation in the PLRA to suits “brought with respect to prison conditions” indicates that Congress “intended to limit the exhaustion requirements of § 1997e(a) to ‘a subset of all possible actions.’”<sup>149</sup> The question then is whether that subset includes excessive force claims. And, as the Court of Appeals for the Second Circuit has noted, the term “prison conditions” is “scarcely free of ambiguity,” as it “provides no definition of what constitutes a claim ‘brought with respect to prison conditions’” nor does the definitional provision of § 1997 define the phrase.<sup>150</sup>

While “prison conditions” is defined in the STOP provisions,<sup>151</sup> that definition, by its own terms, applies only to that section.<sup>152</sup> Some courts have applied the definition to excessive force cases,<sup>153</sup> but such a reading ignores the explicit language of the STOP provisions regard-

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<sup>148</sup> 42 U.S.C. § 1997e(a) (1994) (“[T]he court shall, if the court believes that such requirement would be appropriate and in the interests of justice . . . require exhaustion of such plain, speedy, and effective remedies as are available.”). While the former exhaustion requirement explicitly covered all prisoner civil-rights claims, the exhaustion requirement was not mandatory on courts. In the pre-PLRA version, effectiveness of remedies was also a precondition to exhaustion, a requirement omitted in the PLRA. *Id.*

<sup>149</sup> *Carter*, 1999 WL 14014, at \*4 (quoting *Baskerville v. Goord*, 97 Civ. 6413, 1998 WL 778396, at 3 (S.D.N.Y. Nov. 5, 1998)); see also *White v. Fauver*, 19 F. Supp. 2d 305, 314 (D.N.J. 1998) (asserting that “Congress must have meant to reduce the scope of § 1997e(a), otherwise the limiting language would not have a real and substantial effect” (internal quotation marks omitted)). In *Porter v. Nussle*, the Supreme Court implicitly recognized the plausibility of such an interpretation of the new exhaustion language, though the Court found it “at least equally plausible . . . that Congress inserted ‘prison conditions’ into the exhaustion provision simply to make it clear that preincarceration claims fall outside § 1997e(a).” *Nussle*, 122 S. Ct. 983, 991 (2002).

<sup>150</sup> *Nussle*, 224 F.3d at 101.

<sup>151</sup> 18 U.S.C. § 3626(g)(2) (Supp. V 2000). Section 3626(g)(2), the definitional section of the STOP provisions, defines “prison conditions” as follows:

[T]he term ‘civil action with respect to prison conditions’ means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.

<sup>152</sup> 18 U.S.C. § 3626(g) (Supp. V 2000) (limiting scope of definitions to definitions used in § 3626).

<sup>153</sup> See e.g., *Booth v. Churner*, 206 F.3d 289, 294 (3d Cir. 2000) (borrowing § 3626(g) definition on basis that substantial relation between two provisions of PLRA presents “a classic case for application of the normal rule of statutory construction . . . that the identical terms used in the two sections should be read as conveying the same meaning”); *Beeson v. Fishkill Corr. Facility*, 28 F. Supp. 2d 884, 891 (S.D.N.Y. 1998) (importing § 3626 definition of “prison conditions” and finding that it covers prisoner claims of excessive force).

ing the definition's application,<sup>154</sup> and assumes incorrectly that it covers excessive force claims.<sup>155</sup>

To fall under the STOP provision's definition of prison conditions, excessive force claims would have to either relate to a "condition of confinement" or to the "effects of actions by government officials on the lives of persons confined in prison."<sup>156</sup> The first reading seems implausible. As one judge has argued persuasively, "A punch on the jaw is not 'conditions.' A punch in the jaw in prison is not 'prison conditions'. . . . The statutory phrase 'conditions of confinement' does not encompass specific batteries."<sup>157</sup>

Likewise, a straightforward reading of "the effects of actions by government officials" would not necessarily cover an intentional beating, as "such awkward language would not, ordinarily, be used to describe such incidents."<sup>158</sup> Furthermore, the "distinct statutory purposes" of the filing provisions indicate that the "government officials" phrase in the STOP provisions would not necessarily apply to guards who use excessive force.<sup>159</sup> The filing provisions deal with

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<sup>154</sup> See *Carter v. Kiernan*, No. 98 Civ. 2664, 1999 WL 14014, at \*3 (S.D.N.Y. Jan. 14, 1999) ("Congress has not indicated that any definition of prison conditions in § 3626(g)(2) should be used in any other section such as § 1997e(a).").

<sup>155</sup> "The text of § 3626(g)(2), however, is no less ambiguous than the text of § 1997e(a) itself—indeed, judges have reached opposite conclusions on whether § 1997e(a) encompasses excessive force and assault claims notwithstanding their common reliance on 18 U.S.C. § 3626(g)(2) for guidance." *Nussle*, 224 F.3d at 102.

<sup>156</sup> 18 U.S.C. § 3626(g)(2).

<sup>157</sup> *Booth*, 206 F.3d at 301 (Noonan, J., concurring and dissenting). Judge Noonan also argued that the conditions to which the definition refers are those illustrated in the floor debates on the PLRA: "how warm the food is, how bright the lights are, whether there are electrical outlets in each cell, whether the prisoners' hair is cut by licensed barbers." *Id.* (quoting 142 Cong. Rec. S10,576 (daily ed. Sept. 16, 1996) (statement of Sen. Abraham)); cf. *Nussle*, 224 F.3d at 101 (noting that "plain meaning of 'prison conditions' in § 1997e(a) does not obviously encompass particular instances of excessive force or assault"); *Carter*, 1999 WL 14014, at \*3 ("The plain meaning of [prison conditions] . . . refer[s] to the conditions of prison life—such as the provision of food, shelter, and medical care in prison. It would be strange to interpret a lawsuit about an alleged intentional beating of a prisoner as an 'action . . . with respect to prison conditions.'"); *Johnson v. O'Malley*, No. 96 C 6598, 1998 WL 292421, at \*3 (N.D. Ill. May 19, 1998) (finding that excessive force claim is not "an action with respect to prison conditions").

<sup>158</sup> *Nussle*, 224 F.3d at 102. Or, as Judge Noonan, dissenting in part in *Booth*, aptly put it: "A guard hits you on the mouth. Would you report the blow by saying, 'A government official has taken an action having an effect on my life?' No speaker of English would use such a circumlocution. Why should we attribute such circuitousness to Congress?" *Booth*, 206 F.3d at 302.

<sup>159</sup> *Nussle*, 224 F.3d at 103-04 (interpreting exhaustion provisions in light of statutory purposes of PLRA). However, in *Beeson v. Fishkill Correctional Facility*, the district court explicitly stated that "one would not be justified in drawing a meaningful distinction between the purposes of § 1997e(a) and § 3626." 28 F. Supp. 2d 884, 891 (S.D.N.Y. 1998); cf. *Booth*, 206 F.3d at 294 (noting that 18 U.S.C. § 3626 and 42 U.S.C. § 1997e(a) are directed "towards similar ends").

weeding out frivolous suits administratively before they get to the federal courts. By contrast, the STOP provisions aim to prevent “courts from micromanaging prison systems . . . [and] usurping the authority given to prison administrators to decide matters of routine prison administration.”<sup>160</sup> Viewed this way, the term “government officials” refers to officials with administrative or policymaking responsibility in prisons rather than prison employees with day-to-day contact with prisoners.<sup>161</sup>

Interpreting the phrase “prison conditions” in § 1997e(a) to exclude excessive force claims despite the definitions in the STOP provisions comports well with the Supreme Court’s disaggregation of Eighth Amendment claims into those alleging excessive force and those alleging conditions of confinement.<sup>162</sup> Thus, reading the ambiguous language of § 1997e(a) in light of the structure, purpose, and leg-

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<sup>160</sup> *Nussle*, 224 F.3d at 104 (quoting *Baskerville v. Goord*, No. 97 Civ. 6413, 1998 WL 778396, at \*4 (S.D.N.Y. Nov. 5, 1998)).

<sup>161</sup> See *id.* Prisoners alleging excessive force may, and often do, sue high-level supervisory prison officials in addition to individual guards involved in an incident. The basis of the claim, however, involves the abuse by the correctional officers—not an official with the state or federal department of corrections.

<sup>162</sup> See *supra* notes 111-14 and accompanying text (discussing Supreme Court treatment of excessive force claims). The Court of Appeals for the Second Circuit, as well as several district courts, finds this analysis persuasive. See *Nussle*, 224 F.3d at 106 (discussing Supreme Court Eighth Amendment jurisprudence); *Carter*, 1999 WL 14014, at \*4 (“The Supreme Court’s distinction between claims based on prison conditions and claims based on excessive force indicates that interpreting the phrase ‘with respect to prison conditions’ to encompass excessive force claims would slight the legal principles that operate in this area of the law.”). Not all courts, however, are persuaded that the Supreme Court has made such obvious distinctions between excessive force and prison condition claims. See, e.g., *Booth*, 206 F.3d at 297 (contending that there is no evidence other than Supreme Court’s use of similar language in *Farmer* and *Hudson* that “prison conditions” has well-settled meaning); *Beeson*, 28 F. Supp. 2d at 890-91 (failing to be persuaded by distinctions Supreme Court may have made in *Farmer* and *Hudson*).

In fact, the Supreme Court itself, while recognizing the distinctions made in *Farmer* and *Hudson*, recently refused to find those distinctions applicable to the PLRA exhaustion requirement. See *Porter v. Nussle*, 122 S. Ct. 983, 990-92 (2002), 2002 WL 261683. Unfortunately, however, the Court failed to explain fully why the distinctions made in *Farmer* and *Hudson*, cases focused primarily on proof requirements, were inapplicable to the exhaustion requirement. Rather, the Court simply stated that it had “no reason to believe that Congress meant to release the evidentiary distinctions drawn in *Hudson* and *Farmer* from their moorings and extend their application to . . . § 1997e(a).” *Id.* at 990. To do so, reasoned the Court, “would be highly anomalous” given the PLRA’s elimination of judicial discretion regarding exhaustion and the elimination of the requirement that administrative remedies be efficient and effective. *Id.* However, such an interpretation completely overlooks the unique nature of prisoners’ excessive force claims, see *supra* notes 95-105, and the particularized need of prisoners filing such claims to have their grievances heard in courts and not by internal review boards. Rather, the Court elevated the interests of prison administrators above those of prisoner safety: “Do prison authorities have an interest in receiving prompt notice of, and opportunity to take action against, guard brutality that is somehow less compelling than their interest in receiving notice and an opportunity



islative history of the PLRA reveals that, despite the Supreme Court's recent decision in *Porter v. Nussle*, the exhaustion requirement should not apply to particular instances of excessive force.

### 3. *Remaining PLRA Provisions*

Unlike the PLRA's physical-injury, three-strikes, and exhaustion requirements, which by their language suggest a limitation on their applicability to excessive force claims, the PLRA's IFP, sua sponte dismissal, and attorney-cap provisions apply broadly to all civil actions or appeals of civil actions filed by prisoners.<sup>163</sup> But despite the broad language used in these provisions, they may be interpreted so as not to apply to excessive force claims.<sup>164</sup>

Several courts hold that the PLRA's "physical-injury" requirement does not apply to certain constitutional claims (such as those alleging violations of the First Amendment), despite the contradictory statutory language.<sup>165</sup> Similarly, courts already exempt habeas corpus petitions and appeals from denials of such petitions from the PLRA requirements,<sup>166</sup> despite the fact that habeas petitions are, strictly

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to stop other types of staff wrongdoing?" *Id.* at 992. This Note, for the reasons suggested herein, would answer that question in the affirmative.

<sup>163</sup> See, e.g., 28 U.S.C. § 1915(a)(2) (Supp. V 2000) ("A prisoner seeking to bring a civil action or appeal a judgment in a civil action . . ."); § 1915(g) (Supp. V 2000) ("In no event shall a prisoner bring a civil action or appeal a judgment in a civil action . . ."); 42 U.S.C. § 1997e(d) (Supp. V 2000) ("In any action brought by a prisoner . . ."). While litigants bringing excessive force claims have challenged the constitutionality of these provisions, it does not appear that any litigant has argued specifically that the provisions do not apply to prisoners' claims of excessive force. See, e.g., *Foulk v. Charrier*, 262 F.3d 687, 703-04 (8th Cir. 2001) (applying attorney-fee-cap provision to prisoner's claim of excessive force and finding that fee-cap provision does not violate Equal Protection Clause).

<sup>164</sup> See *supra* notes 116-17, 134-35 and accompanying text (suggesting rationale for flexible interpretation of PLRA).

<sup>165</sup> The physical-injury requirement provides that "[n]o Federal civil action may be brought by a prisoner . . . for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e) (Supp. V 2000). As one district court has recognized, "some highly significant constitutional claims, such as those addressing the inmate's rights under the Establishment Clause, may not strictly comply with the requirements of 42 U.S.C. § 1997e(e)." *Warburton v. Underwood*, 2 F. Supp. 2d 306, 315 (W.D.N.Y. 1998). The court nonetheless found that the claim "deserve[d] to be heard . . . despite the fact that the only injury plaintiff could experience as a result of a constitutional violation under the Establishment Clause would be mental or emotional." *Id.*; see also *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998) (finding that "§ 1997e(e) does not apply to First Amendment rights regardless of the form of relief sought").

<sup>166</sup> See, e.g., *Anderson v. Singletary*, 111 F.3d 801, 806 (11th Cir. 1997) (holding that PLRA filing-fee-payment requirements do not apply to habeas corpus petitions or to appeals from denials of such petitions); *Santana v. United States*, 98 F.3d 752, 756 (3d Cir. 1996) (same). "At first blush, the plain meaning of the PLRA appears to require petitioners for habeas relief to fulfill its filing fee obligations," *Santana*, 98 F.3d at 754, but lower federal courts have concluded "that Congress promulgated the PLRA to curb prisoner

speaking, "civil actions."<sup>167</sup> Thus, where appropriate, courts have deviated from the language of the PLRA to bar its applicability to certain kinds of prisoner claims. So it is not implausible to argue that while the language of certain PLRA provisions appears to apply to prisoner claims of excessive force, Congress did not intend the PLRA to require prisoners claiming abuse at the hands of guards to overcome the PLRA's procedural obstacles.<sup>168</sup>

That at least a few lower courts have questioned the constitutionality of the *sua sponte* dismissal and attorney-cap provisions puts them on even shakier ground.<sup>169</sup> To exempt excessive force claims from the rigid filing provisions would impose only the risk of an occasional frivolous claim, which is "a comparatively small price to pay (in terms of the statute's entire set of purposes) to avoid the serious constitutional problems that accompany . . . [a] more rigid interpretation."<sup>170</sup>

#### D. Exemption Warranted

For those observers who predicted that the PLRA would lead to little change in prisoner filing practices and thus be of little practical concern,<sup>171</sup> available data suggests otherwise. The number of prisoner petitions filed in federal court has dropped sharply in the five years since the passage of the PLRA.<sup>172</sup> Unfortunately, however, "there is

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tort, civil rights and conditions litigation, not the filing of habeas corpus petitions." *Anderson*, 111 F.3d at 805.

<sup>167</sup> See, e.g., *Martin v. United States*, 96 F.3d 853, 855 (7th Cir. 1996) (noting that habeas corpus proceedings "are technically civil proceedings and so come within the literal scope of" PLRA); see also *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 14 (1992) (O'Connor, J., dissenting) ("[O]ver the writ's long history, . . . one thing has remained constant: Habeas corpus is . . . an original civil action in a federal court.").

<sup>168</sup> Cf. *Booth v. Churner*, 206 F.3d 289, 302 (3d Cir. 2000) (Noonan, J., concurring and dissenting) (arguing that to read § 1997e(a) to require exhaustion for excessive force claims would be "to deny a remedy that a conscientious Congress continues to provide").

<sup>169</sup> See *Mitchell v. Farcass*, 112 F.3d 1483, 1491-92 (11th Cir. 1997) (Lay, J., concurring) (questioning constitutionality of *sua sponte* dismissal provision); see also *Johnson v. Daley*, No. 98-C-0518-C, 2000 WL 1521605, at \*13 (W.D. Wis. Oct. 6, 2000) (holding that attorney fee cap violates Equal Protection Clause); *Walker v. Bain*, 65 F. Supp. 591 (E.D. Mich. 1999) (same), vacated, 257 F.3d 660, 670 (6th Cir. 2001). Admittedly, however, no federal appellate court has yet held these provisions unconstitutional. See *supra* note 92 and accompanying text.

<sup>170</sup> *Miller v. French*, 530 U.S. 327, 361 (2000) (Breyer, J., dissenting) (discussing STOP provisions).

<sup>171</sup> See, e.g., Tushnet & Yackle, *supra* note 40, at 85-86 (suggesting that because PLRA is largely symbolic statute, it is unlikely to have widespread systematic effects).

<sup>172</sup> The number of civil-rights petitions filed by state and federal inmates declined from 41,215 in 1996 to 26,462 in 1998, a decline attributed to the PLRA's filing restrictions. Litras, *supra* note 81, at 5. In 1998, the number of petitions filed by state prisoners dropped eighteen percent from the previous year. See Admin. Office of the U.S. Courts, Federal Justice Caseload Statistics 10 (1998). In 1999, state prisoner petitions involving civil-rights and prison conditions decreased ten percent. See Admin. Office of the U.S.

no way to tell whether the unfiled cases would have been frivolous, or whether it is only the indigent who are being prevented or deterred from filing cases, whether frivolous or not.”<sup>173</sup>

With prisoners generally in public disfavor, the popular press deterred and prevented from reporting behind prison walls,<sup>174</sup> and limited federal resources expended on ferreting out official prison abuse,<sup>175</sup> courts remain the strongest, and perhaps only, means of addressing and remedying prisoner claims of excessive force. Courts should not ignore the powerful and historic role that they have played in safeguarding prisoners’ constitutional rights.<sup>176</sup> Nor should courts ignore the inherent value served by prisoner litigation—the vindication of constitutional rights, the deterrence of official misconduct, and the promotion of government accountability.<sup>177</sup> When prison officials, “who are supposed to maintain order, amplify the terrors of incarceration by brutalizing [inmates] . . . justice demands swift and certain punishment.”<sup>178</sup> Concerns with the size of the federal docket simply

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Courts, Federal Justice Caseload Statistics 12 (1999); see also Michael Shaw, *Lawsuits Filed by Prisoners in E. St. Louis Are Declining, Federal Reform, Filing Fee Have Curbed the Number of Civil Lawsuits Filed*, St. Louis Post-Dispatch, Jan. 29, 2001, at 1, LEXIS, News Group File (reporting that prisoner petitions in federal district court in East St. Louis dropped significantly in wake of PLRA and quoting court attorney as saying that PLRA has “definitely had a deterrent effect”).

<sup>173</sup> See Herman, *supra* note 25, at 1292.

<sup>174</sup> See, e.g., Jonathan Brunt, *Behind Closed Doors: Covering America’s Prisons*, Quill, Sept. 1, 2000, LEXIS, News Group File (detailing difficulty journalists face in reporting behind prison walls); Human Rights Watch, *supra* note 82, at 3 (noting Red Onion State Prison’s “notorious reluctance to give the press access to the facility”).

<sup>175</sup> See Herman, *supra* note 25, at 1270 (discussing reduction in Department of Justice budget for prison condition litigation during Reagan Administration); cf. *Resolving Prisoners’ Grievances*, *supra* note 10, at 1320-22 (describing Department of Justice’s seeming unwillingness to expend efforts to certify prison grievance procedures under CRIPA).

<sup>176</sup> See *supra* Part I.A (discussing federal courts’ historic role in protecting rights of prisoners and reforming penal systems across United States). This Note maintains that the Court’s recent decision in *Porter v. Nussle*, 122 S. Ct. 983 (2002), 2002 WL 261683, marks an unfortunate retreat from the Court’s historic role as protector of prisoners’ rights.

<sup>177</sup> Branham, *supra* note 55, at 44-46 (noting that inmate litigation vindicates constitutional rights, promotes “Government Accountability,” encourages “Respect for the Law,” and serves as “Safety Valve”); Dean J. Champion, *Jail Inmate Litigation in the 1990s*, in *American Jails: Public Policy Issues* 197, 214-15 (Joel A. Thompson & G. Larry Mays eds., 1991) (suggesting that inmate litigation, regardless of how it is viewed by courts, serves purpose in that it exerts prison officials to act more responsibly). Courts similarly appreciate the valuable role played by the judiciary in deterring official misconduct. See *Mitchell v. Farcass*, 112 F.3d 1483, 1493 (11th Cir. 1997) (Lay, J., concurring) (“[L]imited overview by the courts serves as a deterrent to prison authorities who might otherwise abuse their power . . .”); *Cain v. Darby Borough*, 7 F.3d 377, 381 (3d Cir. 1993) (en banc) (discussing merits of § 1983 cases as deterrent against official misconduct in nonprisoner excessive force case).

<sup>178</sup> Editorial, *Guarding Human Rights*, Denver Post, Nov. 6, 2000, at B10, LEXIS, News Group File; see also Crowder, *supra* note 100 (quoting prison guard union official as saying

cannot justify burdening prisoner claims of excessive force and delaying such remediation.<sup>179</sup>

While the preferable solution would be to amend the PLRA to explicitly exempt excessive force claims from its provisions, the likelihood of Congress enacting such legislation is slim, given the inherent difficulty of amending statutes<sup>180</sup> and the general political unpopularity of prisoners.<sup>181</sup> Thus, to protect prisoner claims of excessive force from undue procedural hurdles designed only to curb trivial, frivolous prisoner litigation, the PLRA should be construed narrowly to exempt excessive force claims from its provisions. Such claims should, at a minimum, be returned to their pre-PLRA status.<sup>182</sup> The pre-PLRA requirements—*sua sponte* dismissal and the discretionary use of exhaustion requirements and evidentiary hearings—provide adequate safeguards to ensure that claims alleging excessive force are nonfrivolous,<sup>183</sup> as does the requirement that prisoners allege more than de minimis physical injury.<sup>184</sup>

While some prison litigation opponents might argue that prisoners simply would allege excessive force in every claim if excessive force claims were exempt from the requirements of the PLRA, real-

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that “[t]he things we are seeing and experiencing here . . . violate the heart of our nation and its Constitution”).

<sup>179</sup> As Justice Harlan noted in *Bivens*:

Judicial resources . . . are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

*Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Harlan, J., concurring in judgment). Justice Blackmun voiced similar sentiments: “If increased state autonomy and reduced federal caseloads can be purchased only with the coin of more constitutional violations and fewer constitutional remedies, the price is high and is one I am not prepared to pay.” Blackmun, *supra* note 10, at 28.

<sup>180</sup> See, e.g., James J. Brudney, Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response, 93 Mich. L. Rev. 1, 21-26 (1994) (discussing inherent difficulties in moving legislation through Congress).

<sup>181</sup> See *supra* note 38.

<sup>182</sup> Congress also should take affirmative steps to prevent federal district courts from imposing local rules on IFP filing fee provisions (as some courts did before passage of the PLRA) with respect to indigent inmates bringing claims of excessive force.

<sup>183</sup> In response to concerns that the Supreme Court’s decision in *Hudson v. McMillian* would “open the floodgates for filings by prison inmates,” Justice Blackmun specifically noted the then-available remedies for screening prisoner litigation—discretionary exhaustion requirements, early determination of qualified immunity, and dismissal of frivolous or malicious complaints—and found them “adequate to control any docket-management problems that might result from meritless prisoner claims.” 503 U.S. 1, 15-16 (1992) (Blackmun, J., concurring in judgment).

<sup>184</sup> See *supra* note 97 and accompanying text.

world experience suggests otherwise.<sup>185</sup> And, while some courts have suggested that exempting excessive force claims from PLRA requirements would “generate additional work for the district courts because the distinction between cases . . . will often be difficult to identify . . . . [This would] thwart Congress’s purpose in enacting the PLRA,”<sup>186</sup> such arguments ignore the fact that some courts, and the PLRA itself, already exempt, with no apparent difficulty, various types of claims from the statute.<sup>187</sup> Courts already engage in a close reading of prisoner complaints to determine whether the complaint alleges only emotional injuries, in which case the complaint must allege a prior physical injury, or whether the complaint alleges multiple types of injuries, in which certain claims may stand and others may be dismissed.<sup>188</sup> As one court noted in discussing the time courts would need to devote to making an imminent-danger determination under § 1915(g), the additional time required is “a byproduct of the PLRA most likely not contemplated by Congress, but which must nonetheless be handled by the courts.”<sup>189</sup> Furthermore, studies of prisoner petitions routinely break down claims into specific categories, demonstrating the relative ease with which courts may be able to discern distinct claims being alleged.<sup>190</sup> Finally, any argument about the diffi-

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<sup>185</sup> See *supra* notes 102-03 and accompanying text (discussing disincentives for prisoners to bring excessive force claims).

<sup>186</sup> *Beeson v. Fishkill Corr. Facility*, 28 F. Supp. 2d 884, 892 (S.D.N.Y. 1998) (citations omitted); see also *Porter v. Nussle*, 122 S. Ct. 991 (2002), 2002 WL 261683 (claiming that distinguishing between types of prisoner claims “would generate additional work for the district courts because the distinction . . . will often be difficult to identify” (citation omitted)).

<sup>187</sup> See *supra* notes 136, 145, 166-67 and accompanying text. In *Booth v. Churner*, Judge Noonan, though arguing that exhaustion was not required for excessive force claims, would have dismissed the inmate’s claims that did require exhaustion. 206 F.3d 289, 302-03 (3d Cir. 2000) (Noonan, J., concurring and dissenting). “[T]hat [Booth] put these matters into his complaint does not mean that he forfeits the claims whose treatment was not required to begin administratively.” *Id.*

<sup>188</sup> “If the suit contains separate claims, neither involving physical injury, and in one the prisoner claims damages for mental or emotional suffering and in the other damages for some other type of injury, the first claim is barred by the statute but the second is unaffected.” *Robinson v. Page*, 170 F.3d 747, 749 (7th Cir. 1999).

<sup>189</sup> *Gibbs v. Cross*, 160 F.3d 962, 967 n.8 (3d Cir. 1998) (finding that inmate’s allegation of exposure to dust constituted “serious physical injury” under exception to three-strikes provision).

<sup>190</sup> In his study of two hundred cases filed in the District of Arizona, Fradella broke down prisoner claims by amendment violation. For example, 26.6% raised Fourteenth Amendment violations, 17.6% raised Sixth Amendment violations, and into further sub-categories, for example, percentage of claims regarding conditions of confinement, failure to protect, inadequate medical care, and use of force. Fradella, *supra* note 39, at 32-34. The 1992 National Center for State Courts study performed similar breakdowns, e.g., 17% of prisoner petitions alleged inadequate medical treatment, 13% alleged due-process violations, and 7% alleged denial of access to courts. Hanson & Daley, *supra* note 36, at 17.

culty of disaggregating multiple claims is significantly weakened by the fact that the vast majority of prisoner petitions allege a single claim.<sup>191</sup>

### CONCLUSION

Prisons are not designed to be pleasant places.<sup>192</sup> But nor is a prison meant to be “a dark and evil world”<sup>193</sup> where keepers abuse those under their care. Unfortunately, such abuse continues to occur with alarming frequency.

In the six years since the passage of the PLRA, use of excessive force against prisoners has continued unabated. In the spring of 1999, guards at Red Onion State Prison in Virginia fired rubber pellets from 12-gauge shotguns on three separate incidents, hitting seven inmates, one of whom was hospitalized to remove pellets embedded in his face.<sup>194</sup> In June 2000, the family of an inmate who had been held at a jail in Houston, Texas, filed suit alleging that a jail guard had beaten the inmate severely, causing him to be paralyzed for nearly a year before his death.<sup>195</sup> In July 2000, a female inmate at a New Hampshire jail told of being stripped, handcuffed, kicked, and pepper sprayed by guards in her cell.<sup>196</sup>

Such claims are neither trivial nor frivolous, and should not bear the procedural burdens Congress sought to impose on meritless prisoner claims. To fully protect the right of prisoners to assert claims of excessive force, the PLRA must be interpreted to exempt such claims from its procedural requirements. In deciding *Porter v. Nussle* earlier this Term, the Supreme Court had the opportunity to take such an affirmative step by finding the PLRA exhaustion requirements inapplicable to prisoner claims of excessive force. Unfortunately, the Court rejected such an interpretation of the PLRA and, in so doing, ignored persuasive constitutional, statutory, and policy justifications for a narrow reading of the PLRA.<sup>197</sup> Until Congress or the Court

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<sup>191</sup> See *supra* note 89 and accompanying text (revealing that 68.5% of prisoner petitions allege single claim).

<sup>192</sup> Cf. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (noting that “the Constitution does not mandate comfortable prisons” (internal quotation omitted)).

<sup>193</sup> *Holt v. Sarver*, 309 F. Supp. 362, 381 (E.D. Ark. 1970) (describing Arkansas penitentiary system).

<sup>194</sup> Frank Green, 7 Fighting Inmates Fired On, *Richmond Times Dispatch*, Apr. 7, 1999, at B1.

<sup>195</sup> AP Newswires, Lawsuit Alleges Abuse by Harris County Jail Guard, June 17, 2000, LEXIS, APWires File.

<sup>196</sup> Katharine Webster, Witnesses: Woman Prisoner Repeatedly Stripped, Beaten by Officers, AP Newswire, July 8, 2000, LEXIS, APWires File.

<sup>197</sup> *Porter v. Nussle*, 122 S. Ct. 983, 992 (2002), 2002 WL 261683 (holding “that the PLRA’s exhaustion requirement applies to all inmate suits about prison life . . . whether

revisits *Nussle*, prisoners filing excessive force claims will labor under an unnecessary and unduly burdensome exhaustion requirement.

If the risk of exempting excessive force claims from the PLRA is that a few meritless claims make their way onto the federal docket, that risk is one Congress, the Court, and society should be prepared to accept. To do otherwise is to discourage prisoners with valid excessive force claims from vindicating their rights and outing their abusers. To do otherwise is to invite a return to an era in which a prisoner is no more than “the slave of the state”<sup>198</sup>—a morally and legally reprehensible notion for twenty-first-century America.

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they allege excessive force or some other wrong”), overruling sub nom., *Nussle v. Willette*, 224 F.3d 95 (2d Cir. 2000).

<sup>198</sup> *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871).