Articles

The PLRA's Carceral Litigation Penalty

Alexander Afnán*

ABSTRACT

Almost thirty years ago, Congress enacted the Prison Litigation Reform Act (PLRA) to curb a perceived surge of frivolous lawsuits filed by incarcerated individuals. The PLRA imposed significant barriers on incarcerated litigants, among the most critical and least studied of which was the mandatory filing fee. While non-incarcerated individuals can have the court filing fee waived or reduced, Congress explicitly adopted the filing fee, which is now $350 in district court and $605 for an appeal, as a carceral penalty to disincentivize civil rights litigation in prisons. Congress asserted that this penalty would only reduce frivolous litigation, not meritorious claims. Yet, over nearly three decades, the jurisprudence around the carceral litigation penalty has evolved in ways that increasingly hinder indigent incarcerated individuals from making important civil rights claims in ways far beyond what even Congress likely imagined.

* Teaching fellow and supervising attorney at the Georgetown University Law Center Civil Rights Clinic. Sincere thanks to Nicole Rheault, Aderson Francois, Zina Makar, Daniel Harawa, Deborah Epstein, and Pegah Nabili for their valuable comments on prior drafts of this article. Thanks also to Sela Carrington for her research assistance. And thanks to Alexis S. Bloodsworth, Kenneth M. Bernstein, Luz M. Payán, and the other members of the Penn State Law Review for their careful editing of this article. All errors and omissions are mine alone.

This Article highlights the financial reality of the prison environment—a deprived ecosystem where subtle changes can have outsized and unanticipated consequences. For example, most incarcerated individuals earn a wage between $0.13 and $0.52 per hour (if they are paid at all), are taxed on much of their wages for "room and board," and have to pay for many of the basic necessities at the prison commissary. As a result, penalizing indigent incarcerated individuals for initiating a lawsuit forces them to make a unique economic sacrifice—a sacrifice worth thousands of hours of prison labor and which prohibits many people from bringing important civil rights lawsuits, leaves them and their families less able to afford their basic necessities, and removes a critical accountability mechanism for prison conditions.

By analyzing the fundamental errors leading to the adoption and validation of the PLRA's mandatory filing fee requirement, and by characterizing it as a carceral penalty prohibiting access to important civil rights litigation in prisons, this Article seeks to paint the broader picture of how a facially neutral prison law can have devastating consequences when imposed on an economic ecosystem designed to punish people beyond their official sentence.

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I. INTRODUCTION

Ms. Davis is incarcerated in a prison facility for women. Six months ago, she was assaulted by a correctional officer. After weeks of submitting and appealing futile grievances, Ms. Davis concluded that the only way to protect herself would be to file a lawsuit. Ms. Davis assumed the court would let her proceed for free, like they do for people outside prison, if it knew she would not be able to afford the filing cost. However, when Ms. Davis filed the lawsuit, the judge told her that because she is incarcerated, she has to pay the full district court filing fee of $350—worth more than a year of her salary. The judge even suggested that her alarm when hearing the cost of the lawsuit was an indication that her claims were likely frivolous and not "worth the price."

What the judge didn't know is just how costly the price is to Ms. Davis. Working in the prison kitchen, Ms. Davis earns the average non-industry minimum wage for incarcerated workers: $0.13/hour.[1] Outside prison, she would not be liable for federal or state taxes for her yearly income, yet the prison deducts 60% of her wages each month, claiming most of it for "room and board." What's left in her account is barely enough for her. Even though Ms. Davis's prison must provide basic

1. For hypotheticals and calculations, this Article assumes $0.13 as the national average minimum wage for incarcerated people. *See infra* app. 1, note 338 and accompanying text; *see also* ACLU & U. CHIC. L. SCHOOL GLOBAL HUM. RIGHTS CLINIC, CAPTIVE LABOR: EXPLOITATION OF INCARCERATED WORKERS 101 tbl. C (2022) [hereinafter CAPTIVE LABOR], https://perma.cc/4C83-DLZ9.

necessities for her, they often fall far below this minimum standard, leaving Ms. Davis responsible to pay for the difference.

As Ms. Davis ponders how she will afford the basic filing fee, the calculation presented to her is one of the many sacrifices a person outside prison would not have to make. Ms. Davis lives far from her husband and children, whom she hasn't embraced in many months. The only way to hear their voices is over the phone, but Ms. Davis's prison charges nearly thirteen hours of her labor per 15-minute phone call and three hours per electronic message. In recent months, Ms. Davis's prison began outsourcing food to a private vendor that only offers two cold meals a day. Ms. Davis now often goes to bed hungry, as she cannot always afford to eat from the prison commissary. Ms. Davis is also not always provided menstrual pads. Those months, she has to pay two weeks of her wages to afford a $6 box of tampons[2] and often improvises by folding toilet paper or reusing old pads when she cannot afford the cost. One of her correctional officers knows this and suggests he can get her the pads she needs, but only in exchange for certain "favors." Now, having been assaulted by that officer, Ms. Davis does not know whether she can afford to forego the critical purchases she would need to sacrifice to seek judicial protection.

Ms. Davis is a hypothetical individual—an amalgamation of many stories. Yet her hardship is a reality for many of the people living in jails and prisons across the United States. Since the passage of the Prison Litigation Reform Act (PLRA) in 1996, incarcerated individuals looking to bring a civil rights lawsuit now need to overcome numerous financial, procedural, and substantive barriers that do not apply to non-incarcerated individuals. As a result, not only are their stories and harms suppressed, but they lose one of the few accountability mechanisms regulating their conditions of confinement.

This Article analyzes the history, development, and implications of one of the PLRA's most important, yet least studied, provisions: the mandatory filing fee. Over the last thirty years, a wealth of scholarship has analyzed and critiqued a range of the implications of the PLRA, such as the exhaustion requirement, the "three strikes" rule, and the physical injury requirement. The mandatory filing fee, by contrast, has received minimal attention. And yet, the legislative record shows that when legislators did discuss the terms of the PLRA, they focused almost exclusively on the imposition of this mandatory fee.

The solution Congress openly proposed was to create a financial burden designed to disincentivize incarcerated individuals from bringing

2. The cost of a box of tampons ranges between states, with some such as Texas charging between $6 to $15. *See infra* app. 1, tbl. 4 & note 351.

civil rights lawsuits. Although Congress framed it as making incarcerated individuals "pay the same kind of filing fees and costs that a citizen who has not committed any violation of law has to pay,"[3] the disincentive they created applies exclusively to incarcerated individuals; indigent litigants outside of prison can have the filing fee reduced or waived entirely. Thus, a more complete assessment of this financial burden should treat it less like an administrative fee and more as a penalty designed to stifle prison litigation.

Proponents of the PLRA insisted that Congress designed the financial burden only to deter *frivolous* litigation, and that meritorious claims "will not be shut out from court for lack of sufficient money."[4] Yet, in the three decades since, as courts have wrangled with the gaps, ambiguities, and inconsistencies within the text of the PLRA, they have consistently created more prohibitive interpretations of the prison litigation penalty by hallucinating a legislative history that did not exist. In the process, courts have repeated the same mistaken presuppositions Congress made that a financial barrier to litigation is harmless because prisons provide the basic necessities to incarcerated individuals.

It is important to clarify that these barriers are not wholly unique to the PLRA. American institutions have long used money to shape access to fundamental rights. Before 1965, Jim Crow laws predicated voter registration on a person's ability to pay the poll tax, leaving many Black and poor white citizens unable to vote.[5] Similarly, bail has evolved from a measure of mitigating flight risk to a system that guarantees pre-trial detention for hundreds of thousands of people who are still legally innocent but cannot afford the bail amount. Some states condition re-enfranchisement and citizenship rights on a person having paid all outstanding legal financial obligations, including the fees arising from their detention.[6] More recently, government proposals have taken little pains to hide the directness of the relationship between financial means and fundamental rights by using money to bypass immigration processes ordinarily required to secure residence in the United States,[7] or to

3. 141 CONG. REC. 27044 (1995) (statement of Sen. Jon Kyl).

4. 141 CONG. REC. 14573 (1995) (statement of Sen. Jon Kyl).

5. *See* Farrell Evans, *How Jim Crow-Era Laws Suppressed the African American Vote for Generations*, HISTORY.COM (May 13, 2021), https://perma.cc/F72W-E8MV.

6. For example, in 2019, Florida passed SB 7066, which conditioned re-enfranchisement for people with felony convictions on "full payment of fines or fees ordered by the court as a part of the sentence," which can cost up to $50 per day of detention. FLA. STAT. § 98.0751(2)(a)(5)(b) (2019); *see* FLA. STAT. § 951.033 (2024).

7. The Trump golden visa program allows wealthy individuals to purchase a "gold card" that grants them certain undefined "privileges" in the United States, including the right to residency without needing to meet the typical requirements for a permanent

penalize individuals seeking immigration, temporary protected status, or asylum.[8] These collectively forge different classes of rights depending on a person's financial means.

What is significant about the PLRA's carceral litigation penalty, which Congress, the courts, and legal academia have not paid adequate attention to, is the distinctive financial deprivation and exploitation that incarcerated individuals face, all of which the prison institution explicitly controls. Incarcerated individuals do not have labor mobility or ready substitutes for their basic purchases. It is not possible to move from state to state or job to job to increase earning potential. As soon as someone sets foot inside a prison, the prison labor market subjects them to either not being paid at all or being paid cents on the hour, with large percentages of that income taxed towards their prison's costs. Similarly, incarcerated individuals must rely on the prison commissary to buy essential goods, such as food, hygiene, and menstrual health products. These expenses are often far from discretionary; despite the expectation that prisons provide all of a person's basic needs, the reality is that they often fail to offer even the bare minimum, leaving incarcerated individuals with little choice but to make up for the difference out of their own pocket.

It is in this context that the cost of the carceral litigation penalty should be examined. By forcing individuals earning $0.13 an hour to pay a $350 filing fee—the equivalent of charging a $19,520 filing fee to someone earning the federal minimum wage of $7.25 an hour—the carceral litigation penalty ensures any civil rights lawsuit challenging prison conditions is paid at a significant and often prohibitive cost.

In Part II, this Article examines the irregular legislative history of the PLRA, which Congress passed with minimal debate and scrutiny on the premise of deterring frivolous litigation. This Article identifies the assumptions and tropes about prison life introduced by Congress and detail what is characterized as Congress's twofold promise: to not only deter frivolous litigation but to preserve and enhance the outcome of meritorious litigation.

In Part III, this Article analyzes how courts have applied and developed the vague and sometimes inconsistent nature of the PLRA's text concerning the carceral litigation penalty over the last three decades. In the absence of any critical congressional debate or reasoning, this

residence card. *See* Tovia Smith, *Trump's $5 Million Gold Card Offers the Rich a Fast Lane to Residency*, NPR (June 2, 2025, at 05:01 ET), https://perma.cc/6P64-WFYU.

8. The "One Big Beautiful Bill Act" significantly increased the cost of various immigration and asylum filing applications and appeals, some of which were previously free. *See Comparison Chart of the Immigration-Related Fee Changes Brought by H.R.1 The So-Called One Big Beautiful Bill Act*, NAT'L IMMIGR. PROJ., https://perma.cc/7ETD-KPYY (last updated Sep. 16, 2025).

Article traces two prominent trends that have emerged. On the one hand, when courts have paid attention to the financial hardships in prison and the implications of the carceral litigation penalty, they have followed less punitive interpretations that better protect meritorious litigation. By contrast, when courts have focused solely on Congress's deterrent intent and made similar assumptions about prisons providing the basic necessities to incarcerated individuals, they have devised more hostile and impractical rules, some of which are likely beyond what Congress ever intended.

In Part IV, this Article aims to bridge major parts of the gap between assumption and reality by examining the deprived financial ecosystem that continues to punish incarcerated individuals. Highlighting the relationship between poverty and incarceration and the exploitative labor and commissary practices common in prisons throughout the country, this Article demonstrates how incarcerated individuals are dependent on their scant commissary income to afford the basic necessities they are constitutionally owed but, in reality, often denied. As a result, for individuals earning the average minimum prison wage, a 15-minute phone call could cost more than a full day's worth of prison labor, and an essential box of menstrual pads could be worth two weeks' income.

In Part V, this Article reviews the overlooked consequences of the PLRA's carceral litigation penalty. By imposing a penalty designed to target the most financially vulnerable people in prison, the carceral litigation penalty erodes the ability for individuals with meritorious lawsuits to access the courts, forces them to choose between financing a lawsuit and affording their basic necessities, and removes one of the key accountability measures protecting them from harmful conditions of confinement.

Finally, in Part VI, this Article proposes and evaluates the strength of two approaches to remedy or mitigate harm arising from the carceral litigation penalty: to legislate or amend the PLRA entirely, and to follow judicial interpretations that pay close attention to evidence and reality rather than conjecture and theory.

II. THE ORIGIN OF THE PLRA'S CARCERAL LITIGATION PENALTY

A. The Monster Loose in the Courts

American law has long held that a person should not be financially barred from accessing the courts for lack of means. This tradition traces back to English common law as early as 1495, when Henry VII passed a statute "to admit such persons as are poor to sue *in Forma Pauperis*"

without paying the court fees.[9] Throughout the post-Revolutionary period, some of the newly independent states adopted similar statutes waiving court fee requirements for indigent plaintiffs.[10] In 1892, the federal government guaranteed this right to all Americans through the *in forma pauperis* statute, which allows a citizen to commence a lawsuit "without prepayment of fees or security" following a showing of indigency.[11]

In the years preceding the PLRA, the Civil Rights of Institutionalized Persons Act (CRIPA)[12] governed litigation brought by incarcerated individuals, which Congress enacted in 1980 to "authorize actions for redress in cases involving deprivations of rights of institutionalized persons."[13] CRIPA allowed incarcerated litigants to file civil rights lawsuits in federal court and, following the provisions of the *in forma pauperis* statute, granted them the ability to pay none of or part of the court filing fee.[14]

Although Congress passed CRIPA without great controversy, it was not long until the Act was treated as the culprit of a new phenomenon: the rise in prison litigation overburdening the federal courts. Following the passage of CRIPA, the number of federal suits incarcerated individuals in federal and state institutions filed surged from 12,395 in 1980 to 40,569 in 1995—an increase of 227%.[15] During this time, the number of judges serving in federal courts remained unchanged and federal courts around the country became increasingly overwhelmed with the rising federal docket. As one author described it, the rising caseload had become "a monster [] loose in the federal courts."[16]

Commentators credited the nationwide proliferation of federal litigation to a number of factors. Writing in 1982, Chief Justice Warren

9. Suing In Forma Pauperis Act 1495, 11 Hen. 7, c. 12 (Eng.). The 1495 statute additionally provided indigent plaintiffs with free legal counsel—something American law would not do for another 500 years. *See id.*

10. *See* Lee Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VALPARAISO L. REV. 21, 29–30 (1968), https://perma.cc/8AKS-9RSX.

11. Act of July 20, 1892, ch. 209, 27 Stat. 292 (codified as amended at 28 U.S.C. 1915(a)). In 1959, Congress expanded the *in forma pauperis* statute from covering only "citizens" to covering "persons." Pub.L. No. 86-320, 73 Stat. 590 (1959).

12. *See* Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified as amended at 42 U.S.C. §§ 1997–1997j).

13. *Id.* § 1.

14. *See* 28 U.S.C. § 1915(a).

15. U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends, 1980–2000*, at 3 (2002) [hereinafter *Prisoner Petition Statistics*], https://perma.cc/89XW-RSZX. In 1980, 23,230 federal lawsuits were filed by individuals incarcerated in federal and state institutions. This increased to a high of 68,235 in 1996. *See id.* at 1.

16. Robert S. Want, *The Caseload Monster in the Federal Courts*, 69 A.B.A. J. 612, 615 (1983).

Burger attributed the issue to the intensifying litigiousness of American society: "Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal 'entitlements.'"[17] Other commentators observed the vast expansion in private federal rights during that same time period,[18] the rising prominence of litigation as a tool for enforcing federal statutes,[19] the Supreme Court's widening of Section 1983 actions,[20] Congress's elimination of the amount-in-controversy requirement for federal question jurisdiction in 1980,[21] the proliferation of federal fee-shifting statutes and enhanced damages statutes,[22] and litigants' preference for federal judges due to the perceived failure of state courts to protect federal constitutional rights.[23]

Around the same time, another phenomenon was taking place. Beginning in the 1960s, courts began to establish new rights for

17. Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982).

18. *See* Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 647 (2013). Notable statutes enacted during this time period covered civil rights (like the Civil Rights Acts of 1964 and 1968), environmental rights (the Clean Air Act, 1963) and Clean Water Act, 1972), and consumer protection (the Consumer Credit Protection Act, 1968, and the Consumer Product Safety Act, 1970).

19. *See* Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1547 (2014). The late 1960s and late 1990s saw "an unmistakable explosion of private lawsuits to enforce federal statutes," which increased by over 1000% from 1967 to 1999. *Id.* According to Burbank and Farhang, the rise in private rights was a legislative choice during an era "when divided party control of the legislative and executive branches became the norm and relations between Congress and the President became more antagonistic." *Id.* at 1549. While institutions historically held the duty of enforcing rights, the political distrust resulted in primarily-Democratic Congresses expanding private rights of enforcement as "a form of insurance against the [Republican] President's failure to use the bureaucracy to carry out Congress's will." *Id.*

20. In 1980, the Supreme Court extended the interpretation of Section 1983 actions beyond civil rights law to include violations of all federal laws. *See* Maine v. Thiboutot, 448 U.S. 1, 4 (1980). The dissent in *Maine* highlighted how this expansion may well result in increased "new filings in our already overburdened courts." *Id.* at 23 (Powell, J., dissenting).

21. *See* Federal Question Jurisdictional Amendments Act of 1980, Pub. L. 96-486, § 2(a), 94 Stat. 2357, 2369 (codified at 28 U.S.C. § 1331); *see also* Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2124 (2019).

22. *See* Burbank, Farhang & Kritzer, *supra* note 18, at 647. In enacting the Civil Rights Attorney's Fees Awards Act of 1976, Congress explicitly intended to use fee-shifting statutes as a way of incentivizing private actions to achieve effective enforcement of civil rights and environmental laws, which it believed "depends largely on the efforts of private citizens." H.R. REP. NO. 94-1558 (1976); *see also* Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 263 (1975). For a more comprehensive overview of the rule of fee shifting in incentivizing public interest litigation, see generally Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 L. & CONTEMP. PROBS. 233 (1984).

23. *See* Zambrano, *supra* note 21, at 2146–47; Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1111 (1977).

incarcerated individuals. These included the right to sue the federal government under the Federal Tort Claims Act;[24] the right to limited procedural due process protections during disciplinary hearings;[25] the right to adequate law libraries or legal assistance, and the right to humane conditions of confinement, including food, clothing, shelter, medical care, and protection from serious bodily harm.[26] Even though these rights remained more limited than the constitutional protections given to people outside prison,[27] they nevertheless created a new platform from which individuals could challenge many of the appalling prison conditions that had been almost completely unregulated until then.[28] Federal courts, emboldened with the power to remedy such violations,[29] soon became receptive forums for prison lawsuits challenging a range of prison conditions, including prison overcrowding, rampant physical violence and sexual assault, inadequate medical facilities, and unsafe living conditions.[30] By 1995, federal courts had varying degrees of supervision over nine of ten Federal facilities and one

24. *See* United States v. Muniz, 374 U.S. 150, 150 (1963).

25. *See* Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

26. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 103 (1976); Farmer v. Brennan, 511 U.S. 825, 832 (1994).

27. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 349 (1981) ("The United States Constitution does not mandate comfortable prisons, and prisons, which house persons convicted of serious crimes, cannot be free of discomfort."); Hudson v. Palmer, 468 U.S. 517, 536 (1984) (holding the Fourth Amendment protection against unreasonable searches does not apply to people in prison); Turner v. Safley, 482 U.S. 85, 89 (1990) (allowing a prison regulation to impinge on the constitutional rights of an incarcerated person if the regulation is "reasonably related to legitimate penological interests").

28. *See* William C. Collins, *Bumps in the Road to the Courthouse: The Supreme Court and the Prison Litigation Reform Act*, 24 PACE L. REV. 651, 651–52 (2004):

> Prisons and jails were often filthy, dilapidated, poorly run hellholes. Inmates might be given guns and told to supervise other inmates. A 1,000 inmate Arkansas prison ran with eight (count 'em, eight) guards who were not convicts. Only two worked at night. Professionalism among wardens and guards was spotty at best and probably defined differently than today. Training may have consisted of little more than instructions not to let the guys in the striped suits out the door. Force as a control tool (read "beatings") was commonplace, a recognized control tool. Inmates not only worked in prison medical systems, they might perform minor surgery and other medical tasks.

Id. (footnotes omitted); Catherine G. Patsos, *The Constitutionality and Implications of the Prison Litigation Reform Act*, 42 N.Y.L. SCH. L. REV. 205, 212–14 (describing lawsuits challenging prison conditions in the 1970s).

29. In *Swann v. Charlotte-Mecklenburg Board of Education*, the Supreme Court granted lower courts a broad equitable power allowing them to remedy past wrongs in the form of school desegregation. *See* 402 U.S. 1, 15 (1971). Courts have since extended this holding to construct court orders and consent decrees redressing unconstitutional prison conditions. *See* Thomas Julian Butler, *The Prison Litigation Reform Act: A Separation of Powers Dilemma*, 50 ALA. L. REV. 585, 588 (1999).

30. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1571 & n.48 (2003) [hereinafter Schlanger, *Inmate Litigation*].

of four State facilities through a court order or consent decree.[31] These court orders required prisons to limit their population, to address specific conditions, or both.[32]

Despite the many nuanced factors leading to an overcrowded federal docket, including an increase in civil rights lawsuits coming from prisons, there was a far easier scapegoat to pin the blame on. The problem, lobbied for by the National Association of Attorneys General (NAAG) and eventually promoted by members of Congress, was that too many incarcerated individuals were filing *frivolous* lawsuits.[33]

On the surface, this theory seemed plausible. By 1995, federal suits brought by incarcerated individuals constituted nearly a fifth of an already-bloated federal civil docket.[34] Because the relationship between incarcerated people and the state is inherently adversarial, "the frequently observed neighborly avoidance of litigation in the interest of an ongoing amicable relationship seems inapplicable."[35] As the Supreme Court highlighted:

> For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are

31. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Census of State and Federal Correctional Facilities, 1995*, at 12 [hereinafter *1995 Census*], https://perma.cc/67P9-RCY4. In 1995, 113 of the 125 Federal correctional facilities and 321 of the 1,375 State correctional facilities were under court order or consent decree. *See id.* These court order took on a wide variety of different forms. *See* Margo Schlanger, *Civil Rights Injunctions Over Time*, 81 N.Y.U. L. REV. 550, 575–76 (2006):

> They can apply to a wing of a facility (a death row, for example), to an entire facility, to a group of facilities within a jurisdiction, or to all the jurisdiction's facilities. A single order can govern many areas of prison life and policy, one very crucial area of prison policy (say, medical care), or something more minor in its importance (say, telephone service). An order regulating the imposition of discipline or jail menus can affect every inmate in a facility very deeply; an order setting a minimum frequency for the opportunity to shower might similarly affect every inmate, but more shallowly. An order requiring some exemption from general policy to adherents of a minority religion may be of vital importance to just a few inmates in a facility.

Id. (footnotes omitted).

32. *See 1995 Census*, *supra* note 31, at 12. The specific conditions in prison most frequently targeted by court orders were, by number of correctional facilities: crowding (213), medical facilities (139), library services (129), staffing (118), recreation (100), education (96), visiting and mail procedural (88), food service and nutrition (83), fire hazards (78), disciplinary policies (78), administrative segregation (76), inmate classification (76), grievance policies (74), religious policies (74), and counselling programs (69). *See id.*

33. *See* Dennis C. Vacco et al., Letter to the Editor, *Free the Courts from Frivolous Prisoner Suits*, N.Y. TIMES, Mar. 3, 1995, at A26 (letter from Attorneys General of New York, Nevada, Indiana, and Washington).

34. *See* Schlanger, *Inmate Litigation*, *supra* note 30, at 1558.

35. *Id.* (footnotes omitted).

> boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State.[36]

Yet, despite the plausibility of this theory, the Department of Justice's Bureau of Statistics observed that the *rate* of prison litigation remained the same. Analyzing trends in prison litigation, the Bureau of Statistics reported, "[b]etween 1980 and 1995, the rate at which State inmates filed civil rights petitions was stable, averaging 40 petitions per 1,000 inmates."[37] Instead, the Bureau of Statistics explained that the rise in prison litigation "was primarily attributable to the increase in the State prison population," which tripled from 305,458 in 1980 to 1,025,624 in 1995.[38] In other words, it was mass incarceration—rather than an unexplained increase in the frivolity of prison lawsuits—that was driving the rise of prison litigation. As one author observed, "it would be equally appropriate to talk about a 'deluge' of inmate requests for food."[39]

Despite the widespread evidence of inhumane prison conditions scattered throughout the federal docket, as evidenced by the consent decrees and court orders, along with the well-documented rise of mass incarceration, the myth that too many incarcerated individuals were filing frivolous lawsuits prevailed. The NAAG circulated lists of "top-10" frivolous lawsuits via newspapers and legislators, citing what they characterized as representations of typical prison litigation.[40] Such lists included descriptions of a suit against a Missouri prison for not having a salad bar, or a suit in Nevada claiming a constitutional violation when the plaintiff received chunky peanut butter (instead of smooth) from the prison canteen.[41]

These depictions, while ripe for ridicule, misrepresented the factual basis for many of these lawsuits. The salad bar suit, for example, denounced numerous deficiencies in the standard of confinement, which included overcrowding, lack of sufficient food, and food contamination, and in which the salad bar was a brief reference to the nutrition offered at the prison guard canteen and other state prisons.[42] Similarly, the offense the plaintiff complained about in the chunky peanut butter suit revolved around the prison administration improperly debiting the limited funds within the plaintiff's account for a commissary purchase he never

36. Presier v. Rodriguez, 411 U.S. 475, 492 (1973).

37. *Prisoner Petition Statistics*, *supra* note 15, at 3.

38. *Id.*; *see also id.* 4 tbl. 3.

39. Schlanger, *Inmate Litigation*, *supra* note 30, at 1587.

40. *See, e.g.*, Vacco et al., *supra* note 33, at A26.

41. *See* Nicole Winbeinger & Hannah Beckler, *The Myth of Frivolous Prisoner Lawsuits*, BUS. INSIDER (Dec. 20, 2024, at 09:21 ET), https://perma.cc/EPA5-CKLA.

42. *See* John O. Newman, *Foreword: Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 521 (1996).

received.[43] These "top-10" lists were also not representative of most prison lawsuits at the time, which involved civil rights claims against physical assaults, inadequate medical care, due process violations relating to disciplinary sanctions, and claims relating to the conditions of confinement.[44]

Nevertheless, the NAAG's lobbying successfully synonymized prison litigation with petty grievances at the taxpayer's expense. As this chorus of outrage reached its crescendo, there became an increasing consensus that something must be done to restrain the "monster" emerging from prisons.

B. The PLRA and Congress's Deterrent Intent

For a bill that dramatically changed the constitutional rights of millions of Americans overnight and modified the generally trans-substantive Federal Rules of Civil Procedure, the PLRA received minimal analysis or debate.[45] The PLRA was born, killed, and born again over the span of fifteen months, often packaged and repackaged through other bills that received the brunt of congressional scrutiny, and ultimately slipped into law as a rider to an omnibus appropriations bill following a budgetary crisis and two government shutdowns.[46]

The first intimations of the PLRA emerged in the Republican Party's 1994 Agenda,[47] although it was not until January 1995 that early versions of the PLRA were found within sections of other, larger

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43. *See id.*:

> He had ordered two jars of peanut butter; one sent by the canteen was the wrong kind, and a guard had quite willingly taken back the wrong product and assured the prisoner that the item he had ordered and paid for would be sent the next day. Unfortunately, the authorities transferred the prisoner that night to another prison, and his prison account remained charged $2.50 for the item that he had ordered but had never received.

Id.

44. *See* Schlanger, *Inmate Litigation*, *supra* note 30, at 1571 & n.48.

45. *See id.* at 1561–62. The PLRA created alterations for numerous federal civil rules, including Rule 4 (issuance of a summons); Rule 53 (special masters), and Rule 55 (default judgments)—more than any other piece of legislation. *See id.* at 1562; *see also* 28 U.S.C. § 1915(d) (allowing *in forma* pauperis litigants to have their summons and complaints served by officers of the court); 18 U.S.C. § 3626(f) (limiting the power of special masters); 42 U.S.C. § 1997e(g)(1) (limiting default judgments: "[n]o relief shall be granted to the plaintiff unless a reply has been filed").

46. *See* Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It*, 86 CORN. L. REV. 483, 537 (2001).

47. The 1994 Contract with America included the reform proposal, the Taking Back Our Streets Act, which required federal courts to dismiss any "frivolous or malicious" prison lawsuits. *See* Edward J. Rymsza, *The Contract with America: The Crystallization of the Gop's Racial Agenda*, 1 CUNY L. REV. 481, 499 (1996), https://perma.cc/G72H-56L8.

proposed bills. At the time, the concern around "frivolous" prison litigation was an afterthought to the battle Congress was beginning to wage against district courts over what it perceived as the "judicial micromanagement"[48] of prisons through consent decrees and court-mandated population caps.[49] Within each of these bills, the section that would later become the PLRA's mandatory filing fee requirement received minimal attention and explicitly allowed courts to "require full *or partial* payment of filing fees *according to the prisoner's ability to pay*."[50]

On May 25, 1995, Majority Leader Senator Bob Dole and Senator Jon Kyl proudly introduced the fully-formed PLRA, aimed at "deter[ring] frivolous inmate lawsuits," which included the final version of the carceral litigation penalty.[51] Both Senators spent most of their time repeating tropes about frivolous prison litigation.[52] "Prisons should be prisons, not law firms," Dole exclaimed.[53] "[P]risoners will now 'litigate at the drop of a hat,' (quoting Justice Rehnquist) simply because they have little to lose and everything to gain."[54] Again, quoting Justice Rehnquist, Kyl argued that incarcerated individuals file lawsuits only "as a means of gaining a 'short sabbatical in the nearest Federal courthouse.'"[55]

The patchwork legislative record of the PLRA comprises a one-hour hearing in the Senate on September 27, 1995, in which the PLRA received almost no mention,[56] and a handful of fragmented statements by

48. 141 CONG. REC. 26549 (1995) (statement of Sen. Jon Kyl).

49. *See* H.R. REP. NO. 104-21, at 5–6 (1995); Civil Justice Fairness Act, S. 672, 104th Cong. tit. V (1995); Local Law Enforcement Act, S. 816, 104th Cong. § 102 (1995).

50. H.R. REP. NO. 104-21 § 204(b) (emphasis added); S. 672 § 501(b); S. 816 § 102(d)(2).

51. 141 CONG. REC. 14572 (1995) (statement of Sen. Jon Kyl); *see also id.* at 14570–75. Senator Orrin Hatch reintroduced the same version of the PLRA on September 27, 1995. *See id.* at 26552–53.

52. *See id.* at 14572 (statements of Sen. Bob Dole and Sen. Jon Kyl).

53. *Id.* at 14571 (statement of Sen. Bob Dole).

54. *Id*. at 14570 (statement of Sen. Bob Dole) (quoting Cleavinger v. Saxner, 474 U.S. 193, 210 (1985) (Rehnquist, J., dissenting)).

55. *Id.* at 14572 (statement of Sen. Jon Kyl) (quoting Cruz v. Beta, 405 U.S. 319, 327 (1972) (Rehnquist, J., dissenting)).

56. The Senate Committee on the Judiciary also held a hearing on July 27, 1995, intending to discuss the PLRA and reforms to prison litigation*;* however, the Committee devoted almost the entirety of the hearing to the Stop Turning Out Prisoners Act that restricted court-mandated population caps and consent decrees. *See generally Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing on S. 3, S. 38, S. 400, S. 866, S. 930, and H.R. 667 Before the Comm. On Judiciary*, 104th Cong. (1995), https://perma.cc/F8HU-FGBP.

Senators and Representatives in May, September, and December 1995.[57] Together, these statements reiterated concerns about widespread frivolous prison litigation (characterizing it as "an endless flood,"[58] a "veritable torrent,"[59] and an "alarming explosion"[60]).[61] Despite their spirited concerns, the PLRA's proponents offered no analysis that demonstrated a widespread phenomenon of frivolous prison litigation, and instead devoted considerable time recycling anecdotes provided by the NAAG of allegedly frivolous lawsuits, such as the infamous "chunky peanut butter" case,[62] that were now plaguing the federal courts.[63]

For all the far-reaching implications of the procedural and legal barriers the PLRA would impose,[64] the most consistent solution to

57. For a more comprehensive review of the PLRA's legislative record, see Branham, *supra* note 46, at 487–89, n.12.

58. *Prison Reform: Enhancing the Effectiveness of Incarceration*, *Hearing Before the Committee on the Judiciary*, 104th Cong. 5 (1995) (statement of Sen. Spencer Abraham); 141 CONG. REC. 26553 (1995) (statement of Sen. Orrin Hatch).

59. 141 CONG. REC. 26448 (1995) (statement of Sen. Spencer Abraham).

60. *Id.* at 26546 (statement of Sen. Bob Dole).

61. For a thorough analysis of the rhetoric devices employed by Senators Dole, Kyl, Hatch, and Abraham during the passage of the PLRA, see generally Terri LeClercq, *Rhetorical Evil and the Prison Litigation Reform Act*, 15 LEGAL COMM. & RHETORIC: JALWD 47 (2018).

62. Senators referred to chunky peanut butter nine times throughout the limited legislative history of the PLRA. *See* 141 CONG. REC. 14570 (1995) (statement of Sen. Bob Dole); *id.* at 14573 (statement of Sen. Jon Kyl); *id.* at 26546 (statement of Sen. Dole); *id.* at 26551 (statement of Sen. Kyl); *id.* at 27041 (statement of Sen. Dole); *id.* at 27042 (statement of Sen. Harry Reid) (mentioning chunky peanut butter three times); *id.* at 27044 (statement of Sen. Kyl).

63. *See id.* at 14574–75 (statement of Sen. Jon Kyl); *id.* at 27042–43 (statement of Sen. Harry Reid). Senator Reid even introduced a bizarre article onto the congressional record that he had previously written for a Las Vegas Newspaper, satirically advertising going to prison as an optimal way of litigating petty grievances. *See id.* (statement of Sen. Reid):

> Life can be tough. Mom brought home creamy peanut butter when you asked for extra chunky? You didn't get that fancy weight machine you wanted for Christmas? Don't like the type of music they play at the stereo system at work? Well, heck. Why not file a lawsuit? Oh, I know what you're thinking: "I can't afford a lawyer." Suppose though, I told you about a plan that provides you with an up-to-date library and a legal assistant to help you in your suit. This plan not only provides legal research, it also give you, absolutely free, three square meals a day. And friends, if you get tired of legal research, you can watch cable TV in the rec room or lift weights in a nice modern gym. "OK, OK," you're saying. What's the catch? How much do I have to pay to sign up for this program?" Well, folks, that's the best part. This assistance plan is absolutely free. All you have to do to qualify is commit a crime, get caught, and go to the pen.

Id.

64. Other notable hurdles imposed by the PLRA are: judicial screening, the exhaustion requirement, the "three strikes" rule, the physical injury requirement, the limit on attorneys' fees, and the limitation on injunctive relief. *See* 28 U.S.C. § 1915(g); 42 U.S.C. §§ 1997e(a), 1997e(c)–1997e(e)

frivolous prison litigation identified by Congress was through the imposition of a financial barrier. Dole explained that incarcerated litigants are likely to be much poorer than other litigants, meaning courts often waive their filing fee.[65] Instead, by making the court filing fee mandatory for incarcerated individuals, including (and especially) those experiencing indigency, the PLRA's carceral litigation penalty would limit prison litigation by making incarcerated people "less inclined to file a lawsuit in the first place."[66] Kyl added that the litigation penalty would "force prisoners to think twice about the case" because they "will have to make the same decision that law-abiding Americans must make: Is the lawsuit worth the price?"[67]

The PLRA's supporters argued that the carceral penalty was especially important because incarcerated people have access to certain basic necessities under the Constitution.[68] "Unlike other prospective litigants who seek poor person status," Kyl argued, "prisoners have all the necessities of life supplied, including the materials required to bring their lawsuits."[69]

A handful of legislators expressed concern that the PLRA's overbreadth would burden meritorious lawsuits equally. Then-Senator Joe Biden highlighted the problems with prison conditions and warned that, "some of these lawsuits have merit . . . . [I]n an effort to curb frivolous prisoner lawsuits, the [PLRA] places too many road-blocks to meritorious prison lawsuits."[70] Representative John Conyers Jr. stressed that the PLRA "would prevent the Federal courts from remedying egregious abuses suffered by prisoners," including rape, sadistic beatings, and failure to provide adequate medical care, because the PLRA "appl[ies] to all prisoner initiated lawsuits, not merely frivolous lawsuits."[71] Senator Paul Simon similarly urged, "In seeking to curtail frivolous lawsuits, we cannot deprive individuals of their basic civil rights. We must find the proper balance."[72]

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65. 141 CONG. REC. 14571 (1995) (statement of Sen. Bob Dole).

66. *Id.* (statement of Sen. Bob Dole); *see also id.* at 26546 (statement of Sen. Dole).

67. *Id.* at 14572 (statement of Sen. Jon Kyl); *see also id.* at 27044 (statement of Sen. Kyl).

68. *See, e.g.*, Bounds v. Smith, 430 U.S. 817, 828 (1977) (giving incarcerated people the right to "adequate law libraries or adequate assistance from persons trained in the law"); Estelle v. Gamble, 429 U.S. 97, 103 (1976) (giving incarcerated people the right to adequate medical care); Brown v. Plata, 563 U.S. 493, 502, 510–11 (2011) (holding that incarcerated people have the right to basic necessities, such as food and necessary medical care).

69. 141 CONG. REC. 14572 (1995) (statement of Sen. Jon Kyl); *see also id.* at 14573 (statement of Sen. Kyl).

70. *Id.* at 27043 (statement of Sen. Joseph Biden, Jr.).

71. *Id.* at 35624 (statement of Rep. John Conyers, Jr.).

72. 142 CONG. REC. 5194 (1996) (statement of Sen. Paul Simon).

Nevertheless, the advocates of the PLRA remained convinced that the carceral litigation penalty had all the balance it needed. Kyl argued that it is "small enough not to deter a prisoner with a meritorious claim, yet large enough to deter frivolous claims and multiple filings" and "prisoners with meritorious claims will not be shut out from court for lack of sufficient money to pay even the partial fee."[73] The PLRA's proponents went even further, promising that the carceral litigation penalty would in fact *benefit* meritorious claims by freeing up judicial resources that would have otherwise been spent reviewing frivolous claims.[74]

In the end, the PLRA became law without ever having been considered as a standalone bill. President Clinton signed the PLRA into law in April 1996 as a rider to Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act, which Congress only pushed through following a budgetary crisis and two government shutdowns.[75]

A review of the legislative history of the PLRA, taken as a whole, reveals not only Congress's explicit intent of using the carceral penalty to deter frivolous prison litigation, but a more subtle implied promise of preserving or even enhancing the ability for incarcerated plaintiffs to bring meritorious lawsuits. As Part IV of this Article will demonstrate, such statements were a mere sophism: naïve at best and rhetorically deceptive at worst.

C. 28 U.S.C. § 1915(b): The PLRA's Carceral Litigation Penalty

Before the PLRA, courts would typically review the *in forma pauperis* claims of each plaintiff on a case-by-case basis and had great discretion to address how much of the filing fee each individual plaintiff should pay. The PLRA's carceral litigation penalty removed this discretion for incarcerated plaintiffs by making the filing fee mandatory,

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73. 141 CONG. REC. 14572 (1995) (statement of Sen. Jon Kyl).

74. *See id.* at 38276 (statement of Sen. Jon Kyl).

75. *See* Pub. L. 104-134, § 801, 110 Stat 1321, 1321–66 (1996). Professor Lynn S. Branham's discussion is informative on this. *See* Branham, *supra* note 46, at 537–38:

> [The omnibus appropriations bill that passed the PLRA] was the byproduct Congress's failure in 1995 to enact eight of the thirteen annual appropriations bills funding federal agencies. This failure was largely attributable to the inclusion of riders in those bills concerning such controversial issues as abortion, environmental regulation, and prisoner litigation. Congress's failure to enact these appropriations bills led to a budgetary crisis and two government shutdowns, for a week in November of 1995 and twenty-one days during December and January. Congress then used stopgap measures—"mini" continuing resolutions—to fund the government until the omnibus appropriations bill was finally enacted in April of 1996. Buried in the fine print of that bill was the PLRA.

Id.

regardless of their financial circumstances. For all other non-incarcerated plaintiffs, courts could continue to waive the filing fee following a showing of indigency.[76]

The PLRA introduced a prescribed statutory formula that allowed indigent incarcerated individuals filing under *in forma pauperis* status to stagger monthly payments of the remaining fee. First, an incarcerated individual qualifying for *in forma pauperis* status must pay an initial partial filing fee determined as the greater of 20% of the litigant's monthly deposits or 20% of the average balance to the account for the preceding six months.[77] The litigant must then pay monthly installments worth 20% of the income into their prison account, when the balance in the account exceeds $10, until the fee has been paid in full.[78]

The PLRA complemented the carceral litigation penalty with § 1915(b)(4), known as the "safety valve provision,"[79] which emphasizes that "[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee."[80]

At a cursory glance, the carceral penalty and the safety valve provision consolidated Congress's twofold promise. By creating a uniform cost for filing a lawsuit, Congress ensured that the cost of an obviously frivolous claim would outweigh any benefit. At the same time, by creating a payment schedule deducting only 20% of a litigant's income after the money in their account exceeded $10, the PLRA, in theory, created a flexible payment schedule to ensure that poverty should not deny anyone the ability to redress meaningful harms in court.

Yet, as Part III of this Article will reveal, when the two aims have appeared to be in conflict, the PLRA's ambiguous and, at times, conflicting provisions left a number of key questions unanswered. In the absence of clear guidance, the punitive nature of the carceral litigation penalty often prevails, and courts have routinely prioritized interpreting the PLRA in a manner that emphasizes its prohibitive intent, regardless of the potential merit of the lawsuit.

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76. *See* 28 U.S.C. § 1915(a).

77. *See id.* § 1915(b)(1).

78. *See id.* § 1915(b)(2).

79. *See, e.g.*, Bruce v. Samuels, 577 U.S. 82, 86 (2016); Taylor v. Delatoore, 281 F.3d 844, 850–51 (9th Cir. 2002).

80. 28 U.S.C. § 1915(b)(4).

III. JUDICIAL EXPANSION OF THE CARCERAL LITIGATION PENALTY

A. Constitutional Challenges to the Carceral Litigation Penalty

Having been passed into law without any meaningful scrutiny, the carceral litigation penalty's first real challenge came at the judicial level. Almost immediately after the passage of the PLRA, numerous circuits heard arguments challenging the carceral litigation penalty over claims that it violated an incarcerated person's First Amendment[81] and Due Process[82] rights to access the courts.[83]

The circuit courts' response was unanimous: the PLRA's carceral penalty was a valid exercise of Congress's Article III power to set limits on federal jurisdiction and access to federal courts.[84] In upholding Congress's power to enact the PLRA, courts began their process—one that would unfold over the next three decades—of peering through the limited pages of the PLRA's legislative history and validating Congress's deterrent intent while paying little attention to the financial reality within prisons or Congress's implied promise of protecting meritorious suits.

The D.C. Circuit's analysis in *Tucker v. Branker* was illustrative of how courts treated these initial challenges.[85] There, the plaintiff, Cornelius Tucker, sought to sue one of his corrections officers; the district court dismissed his suit sua sponte.[86] Tucker had no funds in his

81. *See* Cal. Motor Transp. Co. v. Trucking Unltd., 404 U.S. 508, 513 (1972) (upholding the right of court access as "part of the right of petition protected by the First Amendment").

82. *See* Wolff v. McDonnell, 418 U.S. 539, 579 (1974) ("The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.").

83. Some plaintiffs brought additional constitutional challenges to the PLRA's filing fee requirement under the Equal Protection clause of the Fourteenth Amendment, arguing that it disproportionately deprived the rights of incarcerated and indigent persons. These Circuit courts promptly dismissed such constitutional arguments: neither incarcerated nor indigent persons were considered "suspect classes" for Fourteenth Amendment purposes, meaning the statute need only be rationally related to the "legitimate governmental interest" of deterring frivolous prison litigation. *See* Nicholas v. Tucker, 114 F.3d 17, 20–21 (2d Cir. 1997); Roller v. Gunn, 107 F.3d 227, 233–34 (4th Cir. 1997), *cert. denied*, 522 U.S. 874 (1997); Hampton v. Hobbs, 106 F.3d 1281, 1286–1287 (6th Cir. 1997); Taylor v. Delatoore, 281 F.3d 844, 849–50 (9th Cir. 2002); Mitchell v. Farcass, 112 F.3d 1483, 1487–89 (11th Cir. 1997); Tucker v. Branker, 142 F.3d 1294, 1299–1301 (D.C. Cir. 1998).

84. *See, e.g.*, *Nicholas*, 114 F.3d at 20–21; *Roller*, 107 F.3d at 230–34; Norton v. Dimazana, 122 F.3d 286, 289–91 (5th Cir. 1997); *Hampton*, 106 F.3d at 1284–88; Lucien v. DeTella, 141 F.3d 773, 775–76 (7th Cir. 1998); *Taylor*, 281 F.3d at 848–49; Shabazz v. Parsons, 127 F.3d 1246, 1248–49 (10th Cir. 1997); *Mitchell*, 112 F.3d at 1487–89; *Tucker*, 142 F.3d at 1297–99.

85. *See* 142 F.3d 1294, 1297–1301 (1998).

86. *See id.* at 1297.

account at the time of his complaint and the court allowed him to file without paying the requisite fee.[87] However, shortly before Tucker filed his appeal, Congress enacted the PLRA, meaning Tucker now had to pay the $105 filing fee for his appeal through installments of $4 from the $20 he received each month.[88] Tucker argued that these monthly payments, even in installments of $4 per month, "forc[ed] him to choose between filing a lawsuit and being able to buy the necessities of life."[89]

The D.C. Circuit dismissed Tucker's claims and emphasized that Tucker's detention facility had a constitutional responsibility to provide him with "adequate food, clothing, shelter, and medical care."[90] In addition, the court noted that the fees would leave Tucker with $16 per month, from which he could make "discretionary purchases."[91] The court either ignored Tucker's claims that he lacked the funds needed to pay necessary purchases like "toiletries, stamps, and hygiene items" or treated these as merely among Tucker's other discretionary purchases.[92] It made no attempt to assess how much Tucker had to pay each month for these items, the degree to which they were necessary, or whether Tucker's income was sufficient to cover these expenses while paying the $4 monthly installments. Instead, the D.C. Circuit summarily concluded that the carceral penalty "requires [Tucker] to make the same kind of economic choice that any other would-be civil plaintiff must make."[93]

Many courts reviewing similar challenges to the carceral penalty believed that, far from imposing an unconstitutional burden on indigent prison litigants, the PLRA was especially considerate of the penalty's financial burden. Some courts found easy comfort in the safety valve's token guarantee, without investigating the penalty's practical consequences.[94] Others noted that the monthly installments of 20% of a person's income were "mild" and were only deducted after a plaintiff's account exceeded $10, which left them with sufficient money for their necessary monthly purchases.[95]

87. *See id.*
88. *See id.* at 1298.
89. *Id.*
90. *Id.* (quoting Farmer v. Brennan*,* 511 U.S. 825, 832 (1994)).
91. *Id.*
92. *Id.*
93. *Id.*; *see also* Roller v. Gunn, 107 F.3d 227, 233 (4th Cir. 1997); Taylor v. Delatoore, 281 F.3d 844, 849 (9th Cir. 2002) ("Because prisoners are in the custody of the state and accordingly have the 'essentials of life' provided by the government, an indigent prisoner would not ordinarily be required to make the choice between his lawsuit and the necessities of life in the same manner that a non-prisoner would.").
94. *See* 28 U.S.C. § 1915(b)(4); *see also* Nicholas v. Tucker, 114 F.3d 17, 21 (2d Cir. 1997); Norton v. Dimazana, 122 F.3d 286, 289–91 (5th Cir. 1997).
95. Hampton v. Hobbs, 106 F.3d 1281, 1284 (6th Cir. 1997).

Some courts even equated a plaintiff's willingness to pay the court fees with their perception of the merit of their claims. In *Lucien v. DeTella*, for example, the Seventh Circuit commented that if the plaintiff thought $18 was excessive as the initial partial fee, it "implie[d] that he did not think much of his chances of success."[96] This point, in particular, echoed the rhetoric passed around the Senate floor that the PLRA's financial burden would make incarcerated plaintiffs ask: "Is the lawsuit worth the price?"[97] Both Congress and the courts thereby spelled out their implicit calculation that if an indigent individual decides that the cost of the carceral litigation penalty is too burdensome, it must be because the claims would have lacked merit.

B. Judicial Expansion of the Carceral Litigation Penalty

The judiciary did not stop by merely affirming the PLRA's carceral litigation penalty. Over the next two and a half decades, the ambiguity, gaps, and at times inconsistencies in the PLRA's unscrutinized text left many key questions unanswered. Without textual guidance, courts continue to consolidate Congress's punitive intent of deterring prison litigation through an unfolding jurisprudence that has, for the most part, augmented the carceral litigation penalty to new heights even Congress likely could not have foreseen.

1. Strict Enforcement of the Penalty

Almost all circuits have resolved that nonpayment of the filing fee should result in dismissal of the claim and that the merits of the claim are irrelevant to this sanction. Even then, courts strictly enforce the carceral litigation, meaning a plaintiff must still pay even if the court immediately dismisses their claims without considering them due to a technical error or if the plaintiff voluntarily withdraws their complaint or appeal before committing significant judicial resources.

For example, in *Miller v. Lincoln County*, the litigant, Gerald Lee Miller, entered his appeal on the 31st day after the entry of judgment dismissing his claims (one day after the thirty-day deadline).[98] The Eighth Circuit not only summarily dismissed Miller's appeal due to his untimely filing, but insisted that he was nevertheless liable to pay the appellate fee in full, even though the court would not consider his

96. Lucien v. DeTella, 141 F.3d 773, 774 (7th Cir. 1998); *see also Roller*, 107 F.3d at 233 ("If a prisoner determines that his funds are better spent on other items rather than filing a civil rights suit, 'he has demonstrated an implied evaluation of that suit' that the courts should be entitled to honor.").

97. 141 CONG. REC. 14572 (1995).

98. *See* 171 F.3d 595, 595 (8th Cir. 1999).

appeal.[99] Similarly, in *Copley v. Henderson*, the magistrate judge granted *in forma pauperis* status to the plaintiff, Winfield Copley, and explicitly advised Copley that he could avoid the collection of his filing fee if he dismissed the case with prejudice.[100] After Copley moved to dismiss his case, the district court nevertheless insisted that Copley must pay the court filing fee, despite acting in reliance on the magistrate judge's advice. Ignoring the inequity of the court reneging on the magistrate's assurances, the court declared: "prisoners should understand that from the moment we allow them to proceed *in forma pauperis*, they owe the United States of America the full filing fee."[101]

Miller and Copley's misfortunes are no abnormality; most circuits addressing the issue demand the full carceral litigation penalty for the claim or appeal, regardless of the outcome or whether the court will even consider them.[102] But the reasoning courts have provided is unconvincing. The Seventh Circuit claimed that waiving the penalty for claims that courts immediately dismiss would "produce the paradox that frivolous appellants would get a decision on the merits without charge while appellants who had colorable but losing cases would get (the same) decision on the merits only after paying."[103] Yet this only applies to cases that the court dismisses due to obvious frivolity. It does not justify insisting on payment of the penalty for cases that courts dismiss on jurisdictional grounds, when the court may have spent minimal resources and may even have denied the plaintiff's claim or appeal despite the plaintiff having strong claims.

2. Multiple Penalties

What happens to an indigent plaintiff who has multiple fees from the carceral litigation penalty? This may arise when a plaintiff is filing more than one lawsuit, or when a plaintiff files a single lawsuit through one or more stages of appeal. The text of the PLRA unambiguously states that they must pay the full amount of the carceral penalty through monthly installments worth "20% of the preceding month's income."[104]

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99. *See id.* ("[D]ismissal of the appeal does not release Miller from the obligation to pay the appellate fee in full.").

100. *See* 980 F. Supp. 322, 322–23 (D. Neb. 1997).

101. *Id.* at 323.

102. *See* Leonard v. Lacy, 88 F.3d 181, 187–88 (2d Cir. 1996); Porter v. Dep't of the Treasury, 564 F.3d 176, 179 (3d Cir. 2009); Williams v. Roberts, No. 96-31058, 1997 U.S. App. LEXIS 18834, at *4, *7 (5th Cir. July 23, 1997) (dismissed on jurisdictional grounds); Martin v. United States, 96 F.3d 853, 856 (7th Cir. 1996); Thurman v. Gramley, 97 F.3d 185, 187 (7th Cir. 1996) (dismissed on jurisdictional grounds); *In re* Tyler, 110 F.3d 528, 529–30 (8th Cir.1997).

103. *Martin*, 96 F.3d at 856.

104. 28 U.S.C. § 1915(b)(2); *see* 28 U.S.C. § 1915(b)(1)–(2).

But, as the Seventh Circuit observed, "[t]he statute does not tell us whether the 20 percent-of-income payment is *per case* or *per prisoner*."[105]

Until 2016, the PLRA's silence on the question led to a circuit split. The Second, Third, and Fourth Circuits sided with a "sequential" or "per-plaintiff" approach that capped the monthly payment at 20% of the plaintiff's income.[106] The Fifth, Seventh, Eighth, Tenth, and D.C. Circuits opted for a "simultaneous" or "per-case" approach requiring cumulative payments deducting as much as 100% of a person's monthly income.[107] Interestingly, both sides found justification in the text and structure of the PLRA and its purpose in deterring frivolous lawsuits.[108]

For courts adopting the sequential approach, one of the principal inquiries concerned whether asking a plaintiff to pay more than 20% of their monthly income towards the carceral litigation penalty would pose an undue financial burden or prevent them from filing meritorious claims. The Fourth Circuit found that making plaintiffs pay cumulative payments "crosses the line from deterrence to punishment," which is particularly problematic because there is no "valid penological or rehabilitative purpose in creating a risk that inmates would have to surrender the necessities of daily subsistence."[109] The Second Circuit similarly noted its concern that a carceral litigation penalty amounting to more than 20% of a person's income posed "a serious constitutional

105. Newlin v. Helman, 123 F.3d 429, 436 (7th Cir. 1997) (emphasis added).

106. *See* Whitfield v. Scully, 241 F.3d 264, 276 (2d Cir. 2001); Siluk v Merwin, 783 F.3d 421, 427 (3d Cir. 2015); Torres v. O'Quinn, 612 F.3d 237, 246–48 (4th Cir. 2010); *see also* Lafauci v. Cunningham, 139 F. Supp. 2d 144, 147 (D. Mass. 2001).

107. *See* Atchison v. Collins, 288 F.3d 177, 180 (5th Cir. 2002); *Newlin*, 123 F.3d at 436 (7th Cir. 1997); Lefkowitz v. Citi-Equity Grp., 146 F.3d 609, 612 (8th Cir. 1998); Hendon v. Ramsey, 478 F. Supp. 2d 1214, 1219 (S.D. Cal. 2007) (within the Ninth Circuit); Christensen v. Big Horn Cnty. Bd. of Cnty. Comm'rs, 374 Fed. Appx. 821, 833 (10th Cir. 2010); Pinson v. Samuels, 761 F.3d 1, 8 (D.C. Cir. 2014); *see also* Goodrich v. Tyree, No. 08-CV-13664, 2010 U.S. Dist. LEXIS 62032, at *4–5 (E.D. Mich. June 23, 2010); Stine v. Fed. Bureau of Prisons, No. 1:13-cv-1883-AWI, 2015 U.S. Dist. LEXIS 90667, at *18–20 (S.D. Cal. 2007).

108. *See Merwin*, 783 F.3d at 432 (noting that the PLRA's "three strikes" rule more powerfully satisfies its goal of preventing plaintiffs from filing repeatedly frivolous lawsuits, leaving the filing fee requirement as a "moderate measure" that does not consider the merits of the plaintiff's claim); *see also Torres*, 612 F.3d at 245 (interpreting the "plain text" of the statute and finding that "§ 1915(b)(1)'s specific reference to the 'payment of *any* court fees' suggests that the twenty percent exaction applies to all court fees, in total"). *But see Pinson*, 761 F.3d at 8–9 (finding that the plain text of § 1915(b)(1) "calls for assessment of the initial partial filing fee *each time* a prisoner 'brings a civil action or files an appeal,'" which then "acts as the 'triggering condition' for the monthly installments required by [§ 1915(b)(2)]"); *Atchison*, 288 F.3d at 180–81 (5th Cir. 2002); *Torres*, 612 F.3d at 256 (4th Cir. 2010) (Niemeyer, J., dissenting).

109. *Torres*, 612 F.3d at 247.

quandary as to whether an unreasonable burden had been placed on the prisoner's right of meaningful access to the courts."[110]

Conversely, the majority courts ignored the issue and gave broad deference to Congress's intention of deterring frivolous prison litigation.[111] Only two courts meaningfully grappled with the possibility that simultaneous penalties amounting to up to 100% of a person's monthly income could deter plaintiffs from filing meritorious claims. The Seventh Circuit in *Newlin v. Helman* explicitly dismissed this possibility as moot by cynically speculating that individuals bringing multiple suits are "likely to have three strikes and to owe all future filing fees in full, in advance."[112] In *Hendon v. Ramsey*, the court instead mirrored the arguments made by Kyl and the D.C. Circuit in *Tucker* that incarcerated persons "have the 'essentials of life' provided by the government."[113] As a result, even an incarcerated individual paying 100% of their monthly income would "not be 'required to make choices between his lawsuit and the necessities of life.'"[114]

The circuit split and divided priorities presented a unique opportunity for the Supreme Court to weigh in on Congress's twofold promises. That moment arrived in *Bruce v. Samuels* in 2016.[115] As the petitioners argued, while the simultaneous approach to the carceral litigation penalty would serve as a deterrent, there would be "an accompanying suffocation of any impetus to file the meritorious claims."[116] The petitioners emphasized this point by detailing the gulf between the cost of the carceral litigation penalty for an appeal ($350 per case and $505 per appeal at the time) and the meager wages the vast majority of incarcerated plaintiffs earn.[117]

Rather than acknowledge whether simultaneous penalties would unduly burden meritorious claims, the Supreme Court similarly dismissed the issue and, turning to Congress's deterrent intent, concluded that "[t]he per-case approach more vigorously serves the statutory

110. *Whitfield*, 241 F.3d at 277.

111. *See Atchison*, 288 F.3d at 180; *Pinson*, 761 F.3d at 8–10. *See generally Lefkowitz*, 146 F.3d 609; Christensen v. Big Horn Cnty. Bd. of Cnty. Comm'rs, 374 Fed. Appx. 821 (10th Cir. 2010).

112. 123 F.3d 429, 436 (7th Cir. 1997).

113. 478 F. Supp. 2d 1214, 1220 (S.D. Cal. 2007).

114. *Id.* (quoting Taylor v. Delatoore, 281 F.3d 844, 849 (2002)); *see also Atchison*, 288 F.3d at 181 ("Given that prisoners are not forced to choose between the necessities of life and filing a lawsuit, it is unlikely that there are serious constitutional questions in play here.").

115. *See* Bruce v. Samuels, 577 U.S. 82, 90 (2016).

116. Brief for Petitioner at 67, Bruce v. Samuels, 577 U.S. 82 (2016) (No. 14-844), 2015 WL 4776433, at *40.

117. *See id.* at 62–63.

objective of containing prisoner litigation,"[118] meaning an incarcerated person could owe up to 100% of their monthly income on the carceral litigation penalty. In doing so, the Court dismissed the petitioner's arguments and the reality of hardship they demonstrated. The Court perfunctorily concluded that "the safety-valve provision ensures against denial of access to federal courts"[119] and reasoned that not only are prisons "constitutionally bound to provide inmates with adequate food, clothing, shelter, and medical care," but that the Federal Bureau of Prisons "goes beyond those requirements" by offering personal hygiene products and free postage.[120] As Section IV.B.2 will show, even if one could describe personal hygiene products or means of communication as exceeding a person's "basic necessities," the Supreme Court failed to investigate the reality that most incarcerated individuals affected by this decision do not have their basic needs met and instead must regularly rely on their limited accounts for basic sustenance.

3. Multiple Plaintiffs

Many people in prison are subject to the same conditions of confinement and similar treatment. What happens to the carceral litigation penalty when there are multiple incarcerated plaintiffs in one case? Do they each have to pay an individual penalty (per plaintiff), or do they independently pay a pro-rated penalty (per claim)?

Again, the text of the PLRA is silent; as one court declared, "[n]othing in the PLRA speaks with sufficient clarity" on the matter.[121] On the one hand, the text of the PLRA is written from the perspective of a single litigant and requires them to "pay the full amount of a filing fee"[122] without addressing the possibility of multiple plaintiffs. On the other hand, the PLRA also precludes courts from collecting more money for each action than the statute permits.[123] Therefore, if three plaintiffs file a joint lawsuit, the court would receive three times the statutory cap for filing fees associated with one civil action.

118. *Bruce*, 577 U.S. at 90. Justice Ginsburg's opinion highlights that the language from § 1915(b)(1) calls for the assessment of "*an* initial partial filing fee" each time a plaintiff brings "*a* civil action or files *an* appeal," which means that the initial partial filing fee requirement provision is written from the perspective of a single case. *Id.* (emphasis added). Because this language triggers § 1915(b)(2)'s monthly payment requirement, and nothing else in the Statute suggests a change of perspective, the Supreme Court held that a per-case approach was more faithful to the PLRA. *See id.*

119. *Id.*

120. *Id.* at 89 (citing Farmer v. Brennan, 511 U.S. 825 (1994)).

121. Hagan v. Rogers, 570 F.3d 146, 156 (3d Cir. 2009).

122. 28 U.S.C. § 1915(b)(1).

123. *See* 28 U.S.C. § 1915(b)(3).

A small number of courts have allowed multiple plaintiffs to pro-rate the filing fee, although with little elaboration to explain the decision.[124] Nevertheless, the majority approach is that each plaintiff granted *in forma pauperis* status is responsible for paying the full carceral litigation penalty for their case.[125] Again, courts draw their reasoning not only from the text of the PLRA but from Congress's prohibitive intent behind the penalty.[126] The pro-rated approach, according to the Seventh Circuit, would "undermine the system of financial incentives created by the PLRA" as plaintiffs "doubtless prefer joint litigation if many prisoners then share the cost of one filing fee."[127]

The Eleventh Circuit went a step further. Emphasizing that the carceral litigation penalty would "force prisoners to think twice" about filing their case,[128] the Eleventh Circuit held that the statutory fee cap set by § 1915(b)(3) the PLRA *repeals* Rule 20 of the Federal Rules of Civil Procedure allowing joinder of parties.[129] District courts following the Eleventh Circuit similarly found that the PLRA prohibits Rule 24 intervenor plaintiffs.[130] Rather than allowing multiple plaintiffs to share the filing fee, and without any evidence from the legislative history to support its interpretation, these courts have opted to hold that the better interpretation of the PLRA—a law designed to reduce the docket for an overworked federal judiciary—is for each plaintiff to file *an independent* lawsuit challenging the same cause of action.

4. Paying the Penalty After Release

Most courts agree that once a person is released from prison, litigation relating to their experience in prison is not subject to the PLRA.[131] The same applies to individuals released on parole.[132]

124. *See, e.g.*, *In re* Prison Litig. Reform Act, 105 F.3d 1131, 1138 (6th Cir. 1997); Alcala v. Woodford, No. C 02–0072, 2002 WL 1034080, at *1 (N.C. Cal. May 21, 2002).

125. *See* Hagan v. Rogers, 570 F.3d 146, 155–156 (3d Cir. 2009); Boriboune v. Berge, 391 F.3d 852, 855–56 (7th Cir. 2004); Hubbard v. Haley, 262 F.3d 1194, 1197–98 (11th Cir. 2001); Pinson v. Fed. Bureau of Prisons, No. 24-CV-1312, 2024 WL 2133831, at *7 n.4 (S.D.N.Y. Apr. 15, 2024); Obst v. Neb. Dep't of Corr., No. 4:15CV3054, 2015 WL 3627271, at *1 (D. Neb. June 10, 2015); Cole v. Houston, No. 4:06cv3314, 2007 WL 1309821 (D. Neb. Mar. 30, 2007); Pinson v. Frisk, No. 13–cv–05502, 2015 WL 738253, at *6 (N.D. Cal. Feb 20, 2015); Treglia v. Kernan, No. C 12–2522, 2013 WL 1502157, at *1 (N.D. Cal. Apr. 11, 2013).

126. *See Treglia*, 2013 WL 1502157, at *3.

127. *Boriboune*, 391 F.3d at 854.

128. Hubbard v. Haley, 262 F.3d 1194, 1198 (11th Cir. 2001) (quoting 141 CONG. REC. S7526 (daily ed. May 25, 1995) (statement of Sen. Jon Kyl)).

129. *See id.*; *see also Treglia*, 2013 WL 1502157, at *3; Caputo v. Belmar Mun. & Cnty, No. 08–1975, 2008 WL 1995149, at *6–8 (D.N.J. May 2, 2008).

130. *See* Daker v. Wetherington, 469 F. Supp. 2d 1231, 1234–36 (N.D. Ga. 2007).

131. *See, e.g.*, Ahmed v. Dragovich, 297 F.3d 201, 210 (3d Cir. 2002); Cofield v. Bowser, 247 F. App'x 413, 414 (4th Cir. 2007) (per curiam) (unpublished); Nerness v.

However, what Congress failed to anticipate is the financial obligations of a prison litigant who brings a complaint while incarcerated and is released *pendente lite* (during the litigation). Do they prepay the entire carceral litigation penalty at once upon their release? Is their obligation to pay the fee waived altogether now that they are no longer incarcerated? Or should courts pro-rate the penalty only according to the time they were incarcerated?

A purely textual reading of the carceral litigation penalty raises numerous questions, not the least because § 1915(b)(2) mandates a payment scheme deducting "20 percent of the preceding month's income credited to *the prisoner's account*."[133] Such an account ceases to exist the moment a person is no longer incarcerated. Yet, § 1915(b)(1) unambiguously states that the plaintiff must pay "the *full amount*" of the penalty.[134] Thus, as at least one circuit noted, "a literal reading of all provisions of the PLRA, as applied to released prisoners, is not possible."[135]

Courts have, unsurprisingly, reached different conclusions. The Second, Fourth, and Sixth Circuits found that a plaintiff released from prison should have their post-release obligations determined "like any non-prisoner, solely by whether he qualifies for [*in forma pauperis*] status."[136] In doing so, these courts paid special attention to the onerous result of a newly released plaintiff who would otherwise have to pay the entirety of their remaining penalty in one lump sum. Surely, Congress did not intend to achieve a result in which the newly released plaintiff is not only "shoulder[ing] a more difficult financial burden than the average

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Johnson, 401 F.3d 874, 876 (8th Cir. 2005) (per curiam); Talamantes v. Leyva, 575 F.3d 1021, 1023–1024 (9th Cir. 2009); Norton v. City of Marietta, 432 F.3d 1145, 1150 (10th Cir. 2005) (per curiam); Lesesne v. Doe, 712 F.3d 584, 586, 588 (D.C. Cir. 2013).

132. *See, e.g.*, Greig v. Goord, 169 F.3d 165, 167 (2d Cir. 1999) (per curiam) (noting that a parolee is not "incarcerated or detained"); *see also* 42 U.S.C. § 1997e(h) (defining a "prisoner" as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program").

133. 28 U.S.C. § 1915(b)(2) (emphasis added).

134. 28 U.S.C. § 1915(b)(1) (emphasis added).

135. McGann v. Comm'r, SSA, 96 F.3d 28, 30 (2d Cir. 1996).

136. *Id.*; *see also* DeBlasio v. Gilmore, 315 F.3d 396, 399 (4th Cir. 2003) ("[A] released prisoner may proceed in forma pauperis upon satisfying the poverty provisions applicable to non-prisoners."); *In re* Prison Litig. Reform Act, 105 F.3d 1131, 1139 (6th Cir. 1997); McGore v. Wrigglesworth, 114 F.3d 601, 612–13 (6th Cir. 1997); Perez v. Bryant, 2020 U.S. Dist. LEXIS 97073, No. 20-CV-0079, *1 (S.D.N.Y. June 2, 2020); Page v. Kirby, 314 F. Supp. 2d 619, 621 (N.D. W. Va. 2004). District courts in Colorado before *Brown* also applied this holding. *See, e.g.*, Duran v. Crandell, No. 10-cv-02490-PAB, 2012 WL 2065540, *1–3 (D. Colo. June 8. 2012) (ordering the plaintiff to file for *in forma pauperis* status to have their fee waived or pay the full filing fee); Burns v. Buford, No. 10-cv-2691, 2012 U.S. Dist. LEXIS 66160, at *4 (D. Colo. May 11, 2012).

indigent plaintiff in order to continue his lawsuit," but also a greater burden than if they had remained incarcerated.[137] The Second and Fourth Circuits also considered Congress's prohibitive intent behind the penalty, but found it insufficient to justify imposing an unfair financial burden.[138] The Third and Fifth Circuits, however, used Congress's deterrent intent to remove the distinction between what a plaintiff owes pre-release and post-release.[139] In *Gay v. Texas Department of Corrections State Jail Division*, the Fifth Circuit explicitly rejected the position that the carceral litigation penalty only extends so long as the plaintiff is incarcerated.[140] Based on its "desire to put some teeth into the PLRA's front-end deterrent," the Fifth Circuit found the plaintiff's release "irrelevant" and insisted on continued payment of the filing fee after release.[141] In other words, the carceral litigation penalty applies even to plaintiffs released from incarceration.

The emphasis on Congress's deterrent intent reached more extreme results in a minority of opinions. Judge Miner's dissent in *McGann* argued that the plaintiff should pay the full carceral litigation penalty upfront, presuming that Congress was simply not concerned with appeals from newly-released prison plaintiffs when it created the PLRA.[142] Judge Miner added, without reference, that Congress was surely aware that "prisoners are much less likely to pursue frivolous litigation after their release from confinement."[143] Since then, a small minority of district courts have mirrored Judge Miner's dissent and adopted holdings requiring a newly released plaintiff to pay the full balance from their filing fee upfront, with no assessment of their financial ability.[144] These decisions, while not the majority, are yet another example of courts prioritizing the PLRA's prohibitive intent to interpret the carceral litigation penalty in ways that impose greater burdens than Congress likely ever foresaw.

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137. *DeBlasio*, 315 F.3d at 399.

138. *See id.* ("While preventing frivolous lawsuits is a legitimate reason for requiring prisoners to overcome additional financial hurdles when filing suits, the same rationale does not dictate that recently-released prisoners become instantly liable for the remaining filing fee balance simply because they have been released.").

139. *See* Siluk v Merwin, 783 F.3d 421, 433 & n.71 (3d Cir. 2015); Gay v. Tex. Dep't of Corr. State Jail Div., 117 F.3d 240, 242 & n.3 (5th Cir. 1997); *see also* Kilgore v. Kendrick, No. 5:17-cv-144-MTT, 2017 U.S. Dist. LEXIS 214413, at *2 (M.D. Ga. Oct. 17, 2017) (unpublished).

140. *See* 117 F.3d 240, 242 & n.3 (5th Cir. 1997).

141. *Id.* at 242.

142. *See* McGann v. Comm'r, SSA, 96 F.3d 28, 31 (2d Cir. 1996) (Miner, J., dissenting).

143. *Id.*

144. *See, e.g.*, McColm v. California, No. 1:14-cv-00580, 2015 U.S. Dist. LEXIS 23564, *3 (E.D. Cal. Feb. 26, 2015); Murphy v. Maricopa Cnty. Sheriff's Off., No. CV-05-2553, 2005 U.S. Dist. LEXIS 34828, *3–4 (D. Ariz. July 29, 2014).

IV. THE FINANCIAL HARDSHIPS OF A DEPRIVED ECOSYSTEM

As of 2025, approximately two million people are incarcerated in the United States. This includes approximately 1.3 million in federal or state prisons, 562,000 in local jails, 48,000 in immigration detention centers, and 28,000 in youth detention facilities.[145] This figure is but a snapshot of the roughly 5.6 million people that churn in and out of correctional facilities each year.[146] Each of these individuals are subject to the PLRA's carceral litigation penalty.

As Part IV shows, the PLRA rests on a foundation of congressional misrepresentation and judicial deference that fails to account for the economic realities within prisons. As a result, the PLRA's carceral litigation penalty punishes the poorest within prisons, regardless of whether they are challenging valid and concerning constitutional violations.

A. The Well-Trodden Road from Poverty to Incarceration

The vast majority of individuals who end up behind bars come from economically disadvantaged backgrounds, in which limited access to quality education, stable employment, housing, and healthcare creates conditions that increase their vulnerability to the criminal justice system.[147] As a result, a disproportionate number of people who experience poverty are imprisoned at some point in their lives.[148]

145. *See* Wendy Sawyer & Pete Wagener, *Mass Incarceration: The Whole Pie 2025*, PRISON POL'Y INITIATIVE (Mar. 11, 2025), https://perma.cc/9S3T-U3VM.

146. *See id.*

147. Economic exclusion is one of the greatest indicators of criminal activity or criminalization. As economic opportunity worsens, people are more likely to turn to commit property crimes (such as burglary, larceny, and auto-theft) or drug-related activity to sustain a living. *See* Steven Raphael, *Identifying the Effect of Unemployment on Crime*, 44 J.L. & ECON. 259, 276 (2001); Keith R. Ihlanfeldt, *Neighborhood Drug Crime and Young Males' Job Accessibility*, 89 REV. ECON. & STAT. 151, 163 (2007), https://perma.cc/BW63-N5QK. Economic exclusion also operates at the community level, where impoverished communities are subject to over-policing that inherently increases the likelihood of its residents being subject to aggressive stop-and-search tactics, arrests, and citations. *See* Douglas A. Smith, *The Neighborhood Context of Police Behavior*, 8 CRIME & JUST. 313, 329 (1986), https://perma.cc/6M3F-3LHQ.

148. *See* Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, BROOKINGS INST., Mar. 2018, at 2 (families earning less than about $14,000 "are 20 times more likely to be in prison on a given day in their early 30s than children born in top-decile families"). The median annual income before incarceration for individuals aged 27–42 is $19,185, which is 41% less than the average income of non-incarcerated individuals of a similar age. *See* Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), https://perma.cc/U9P8-HQUH.

The interplay between poverty and incarceration is also mutually reinforcing.[149] In some instances, individuals sucked into the criminal justice system become trapped in a never-ending cycle of economic opportunity costs or financial penalties relating to bail, court fees, and fines, resulting in further jail time and more severe financial penalties for those unable to pay.[150] Prior imprisonment also sets off a host of collateral consequences harming economic opportunity for the individual and their families once they leave prison, such as limiting future employment opportunities and income,[151] impairing academic performance,[152] causing adverse mental and physical health effects,[153] and dissolving social networks.[154]

The issue, then, is that subjecting incarcerated individuals to a financial deterrent no doubt affects them at a higher rate than non-incarcerated individuals. As Congress noted, a significant number of incarcerated individuals filed *in forma pauperis* because of their

149. *See* TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 49–68 (2007); Robert J. Sampson & Charles Loeffler, *Punishment's Place: The Local Concentration of Mass Incarceration*, 139 DAEDALUS 20, 24–25 (2010), https://perma.cc/GC8L-VGFM.

150. *See* Lisa Foster, *The Price of Justice: Fines, Fees and the Criminalization of The Price of Justice: Fines, Fees and the Criminalization of Poverty in the United States Poverty in the United States*, 11 U. MIA. RACE & SOC. JUST. L. REV. 1, 15–23 (2020), https://perma.cc/9DYT-ZNRZ. These costs, which have risen dramatically over the years, have increasingly become an alternative State revenue stream to fund the rising costs associated with mass incarceration. *See id.* at 8–10.

151. Incarceration not only reduces the opportunities for work available upon release, decreases earnings, and shortens average job tenure, and narrows the kinds of jobs available. *See* Sandra S. Smith & Nora C. R. Broege, *Searching for Work with a Criminal Record*, 67 SOC. PROBS. 208, 208–09 (2020), https://perma.cc/AY9W-ADPP; Bruce Western, *Mass Incarceration and Economic Inequality*, 74 SOC. RSCH. 509, 524–28 (2007), https://perma.cc/V32R-CWUZ.

152. *See* Rebecca J. Shlafer, Tyler Reedy & Laurel Davis, *School-Based Outcomes Among Youth with Incarcerated Parents: Differences by School Setting*, 87 J. SCH. HEALTH 687, 693–94 (2018), https://perma.cc/X2C5-3XDK; Kristin Turney & Anna R. Haskins, *Falling Behind? Children's Early Grade Retention After Paternal Incarceration*, 87 SOC. & EDUC. 241, 253–54 (2014), https://perma.cc/EAX7-L8BH.

153. *See* Christine H. Lindquist & Charles A. Lindquist, *Gender Differences in Distress: Mental Health Consequences of Environmental Stress Among Jail Inmates*, 15 BEHAV. SCIS. & L. 503, 515–22 (1998), https://perma.cc/9PFT-JQCJ; Amrita Goomany & Tommy Dickinson, *The Influence of Prison Climate on the Mental Health of Adult Prisoners: A Literature Review*, 22 J. PSYCH. MENTAL HEALTH NURSING 413, 415–20 (2015), https://perma.cc/L7V5-XZ8F.

154. *See* Jessica Reichert, *Concentrations of Incarceration: Consequences of Communities with High Prison Admissions and Returns*, ILL. CRIM. JUST. INFO. AUTH., Dec. 18, 2019, at 5, https://perma.cc/2XBX-SZGC; Todd R. Clear, Dina R. Rose & Judith A. Ryder, *Incarceration and the Community: The Problem of Removing and Returning Offenders*, 47 CRIME & DELINQUENCY 335, 341–42 (2001), https://perma.cc/3575-KSBE.

poverty.[155] This was therefore a vulnerability the carceral litigation penalty intended to exploit.

B. Exacerbating Financial Hardship Inside Prison Walls

For most individuals arriving at the prison gates, their financial fortunes only worsen throughout their confinement. The state or the handful of contractors they approve have full control of the economic environment of the prison: how much a person makes, how much they are taxed, what they need to spend money on, and how much each purchase costs. When Congress imposed a carceral litigation penalty so that incarcerated individuals "make the same decision law-abiding Americans must make,"[156] it did not account for the factors that would make this equivalency impossible. Critically, an informed analysis of the carceral litigation penalty must acknowledge how the labor market exploits incarcerated individuals by severely restricting or entirely eliminating any source of labor income, taxing them at disproportionately high rates, and then subjecting them to an economy that forces them to pay for many of their basic necessities.

1. Labor Exploitation

Many incarcerated people rely on prison labor as their primary, and often sole, source of income. However, prisons exploit incarcerated laborers by offering either nominal compensation or no remuneration at all—a policy that relies on the judicial presumption that incarcerated workers "have no enforceable right to be paid for their work under the Constitution."[157]

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155. *See* 141 CONG. REC. 14571 (1995) (statement of Sen. Bob Dole) ("As indigents, prisoners are generally not required to pay the fees that normally accompany the filing of a lawsuit."); 141 CONG. REC. 26546 (1995) (statement of Sen. Dole) ("[M]ost of these prisoner lawsuits were filed free of charge. No court costs. No filing fees.").

156. 141 CONG. REC. 14572 (1995) (statement of Sen. Jon Kyl).

157. Serra v. Lappin, 600 F.3d 1191, 1195 (9th Cir. 2010). Courts use two principal reasons to justify denying minimum wage protections for individuals with criminal convictions. First, the Punishment Clause of the Thirteenth Amendment explicitly permits involuntary servitude (which implies unpaid labor) as a form of punishment for individuals who have been "duly convicted" of a crime. U.S. CONST. amend. XIII, § 1 (emphasis added). Second, appellate courts have also determined that the Fair Labor Standards Act (FLSA) (29 U.S.C.A. §§ 201–19 (West))—a statute designed to safeguard fundamental labor rights through provisions such as a minimum wage—does not extend to individuals incarcerated and employed by correctional institutions; even though prisoners are not included in the FLSA's list of exempt workers, courts have unanimously held that they do not qualify as "employees" under the Act; *see also* Matthew J. Lang, *The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should be Extended to Prisoner Workers*, 5 U. PA. J. LAB. & EMP. L. 191, 193–96 (2002); *cf.* Powell v. U.S. Cartridge Co., 339 U.S. 497, 517 (1950) (interpreting the FLSA's list

A national study in 2022 found that incarcerated people earned an average minimum hourly wage of $0.13 and an average maximum hourly wage of $0.52 for non-industry jobs (custodial, maintenance, grounds keeping, or food service jobs), which make up the vast majority of jobs in prisons.[158] And a 2017 national study, focusing instead on the average daily wages, found that incarcerated workers earned between a minimum daily wage of $0.86 and a maximum daily wage of $3.45 for non-industry prison jobs.[159] Notably, this is lower than the average daily wage in 2001, showing a decline between 2001 and 2017.[160] Only 6% of incarcerated people work for state-owned businesses that offer relatively better wages, ranging between $0.33 and $1.41 per hour.[161]

Some states are considerably worse than others. On the more fortunate end, incarcerated workers employed by state-owned businesses may earn between $0.70–$2.70 per hour in Washington.[162] At the lower end, however, an incarcerated worker employed in a non-industry maintenance job may earn as little as $0.05 per hour in Kansas.[163] The states with the highest incarcerated populations trend towards being the lowest paying employers. California pays its approximately 199,000 incarcerated workers between $0.08 to $0.37 per hour for non-industry jobs and $0.35 to $1 per hour for state-owned jobs.[164]

Many would consider such a pittance fortunate. Alabama, Arkansas, Florida, Georgia, Mississippi, North Carolina, and Texas all pay no compensation for the vast majority of work assignments.[165] In Texas, for example, which has the highest prison population in the United States, only *80* incarcerated workers received a wage through Texas's Prison Industry Enhancement Certification Program ("PIECP")—less than

of exemptions to hold that "specificity in stating exemptions strengthens the implication that employees not thus exempted . . . remain within the Act").

158. *See* CAPTIVE LABOR, *supra* note 1, at 101 tbl. C.

159. Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), https://perma.cc/DNA5-9TFU. For a more in-depth analysis of each state's pay scale and wage policies, see *State and Federal Prison Wage Policies and Sourcing Information*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), https://perma.cc/7DL8-H9DF.

160. *See* Sawyer, *supra* note 159. In 2001, the minimum daily wage was $0.93 and the maximum daily wage was $4.73 for non-industry prison jobs. *See id.*

161. *See id.*

162. *See* CAPTIVE LABOR, *supra* note 1, at 101 tbl. C, 103.

163. *See id.* at 101.

164. *See id.* at 101 tbl. C; *California Profile*, PRISON POL'Y INITIATIVE, https://perma.cc/DE4T-ZNH8 (last visited Jan. 6, 2026). California has not raised its prison wages in over forty years. *See* John L. Orr, *In 40 Years, Not a Single Raise for California Prisoners*, PRISON JOURNALISM PROJ. (June 6, 2023), https://perma.cc/F8BT-E9BW.

165. *See id.* at 10, 97–101 tbl. B.

0.001% of its nearly 219,000 incarcerated workers.[166] The remaining workers received nothing.[167] Similarly, Florida and Georgia, which incarcerate the third and fourth most people in the United States (approximately 157,000 and 95,000, respectively),[168] pay nothing to the vast majority of workers.[169] Even states that have abolished involuntary servitude in their state constitutions continue to deprive their incarcerated populations of the right to compensation for their labor. In Alabama, for example, unpaid labor persists despite a 2022 constitutional amendment banning slavery and involuntary servitude in prisons.[170]

Federal initiatives designed to improve the wages of incarcerated workers have had a limited effect. Congress designed the PIECP to place incarcerated individuals into "realistic work environments" that pay them "prevailing wages" and give them meaningful skills to help with employment upon release.[171] Over 45 different state and federal prison industry programs participate in the PIECP.[172] However, many employers benefitting from the PIECP either reduce the incarcerated employees' wages to the state minimum wage, even when the prevailing wage for that job is above minimum wage, or they implement "training" loopholes that keep workers at lower pay levels for years, often rotating them to new roles that restart the training process.[173]

Low wages are not the only issue. For many incarcerated workers, the state taxes as much as 80% of these wages. In many states, most of these garnishments finance costs related to the individual's confinement, such as "room and board"[174] (also known as "pay to stay"[175]). Table one depicts the wages that the state taxed as part of the PIECP program in

166. *See id.* As of 2025, approximately 219,000 people were incarcerated in Texas carceral institutions. *Texas Profile*, PRISON POL'Y INITIATIVE, https://perma.cc/BY9T-YDTQ (last visited Oct. 14, 2025).

167. *See* CAPTIVE LABOR, *supra* note 1, at 102 tbl. C.

168. *See Florida Profile*, PRISON POL'Y INITIATIVE, https://perma.cc/LZR6-ZQNQ (last visited Oct. 14, 2025); *Georgia Profile*, PRISON POL'Y INITIATIVE, https://perma.cc/E3PK-JCR9 (last visited Oct. 14, 2025).

169. *See* CAPTIVE LABOR, *supra* note 1, at 102 tbl. C.

170. *See id.*; *see also* Council v. Ivey, 771 F. Supp. 3d 1208, 1221–23 (M.D. Ala. 2025) (alleging the Alabama Department of Corrections coerces incarcerated individuals into poorly paid or unpaid labor through punitive regulations and physical abuse); *Incarcerated Workers Fighting to Abolish Involuntary Servitude in Alabama's Prisons*, CTR. FOR CONST. RTS. (Apr. 30, 2024), https://perma.cc/2D27-TB4U.

171. *See Prison Industry Enhancement Certification Program (PIECP), Overview*, BUREAU JUST. ASSISTANCE (Mar. 14, 2023), https://perma.cc/J662-PJT3.

172. *See id*.

173. *See* Bob Sloan, *The Prison Industries Enhancement Certification Program: Why Everyone Should be Concerned*, PRISON LEGAL NEWS (Mar. 15, 2010), https://perma.cc/EDF3-VXSH.

174. *See* CAPTIVE LABOR, *supra* note 1, at 58–60; Sawyer, *supra* note 159.

175. *See* Lauren-Brooke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, BRENNAN CTR. FOR JUST., May 21, 2015, at 3, https://perma.cc/A9TC-SLHE.

2024, which on average deducted 57.8% from the salaries of incarcerated workers employed by the PIECP. Of that, 23% of an incarcerated worker's income went towards room and board, 12.1% went towards victim programs, and 10.1% went towards family support.

Table 1: Gross Wages, Deductions, and Net Wages from the PIECP in 2024

	Gross Wages	Deductions: Victim Program	Deductions: Family Support	Deductions: Room and Board	Deductions: Taxes	Total Deductions	Net Wages
Quarter 1[176]	$9,806,565	$1,152,359	$241,807	$2,248,285	$940,320	$5,582,772	$4,223,793
Quarter 2[177]	$11,407,868	$1,406,820	$253,066	$3,847,453	$1,076,502	$6,583,842	$4,824,086
Quarter 3[178]	$11,416,989	$1,331,811	$220,281	$3,857,578	$1,089,679	$6,499,349	$4,917,640
Quarter 4[179]	$11,787,019	$1,468,128	$3,783,234	$269,343	$1,236,984	$6,757,688	$5,029,331
Total	$44,418,441	$5,359,118	$4,498,388	$10,222,659	$4,343,485	$25,423,651	$18,994,850
Percent of Total		12.1%	10.1%	23.0%	9.8%	57.2%	42.8%

The PIECP is by no means an outlier. In Minnesota, for example, the state deducted 77% of wages earned by incarcerated workers in 2021, about two-thirds of which went to "cost of confinement."[180] Other states, like Florida, also use wage deductions to renovate and expand carceral facilities.[181]

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176 *See* NAT'L CORRECTIONAL INDUSTRIES ASS'N (NCIA), PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM QUARTERLY REPORT: STATISTICS FOR THE QUARTER ENDING MARCH 31, 2024.

177 *See* NCIA, PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM QUARTERLY REPORT: STATISTICS FOR THE QUARTER ENDING JUNE 30, 2024.

178 *See* NCIA, PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM QUARTERLY REPORT: STATISTICS FOR THE QUARTER ENDING SEPTEMBER 30, 2024, https://perma.cc/XMZ9-FNEV (last visited Jan. 7, 2026).

179 *See* NCIA, PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM QUARTERLY REPORT: STATISTICS FOR THE QUARTER ENDING DECEMBER 31, 2024, https://perma.cc/2KA3-EB42 (last visited Jan. 7, 2026).

180. Filiberto Nolasco Gomez, *An Update on Prison Labor in Minnesota*, WORKDAY MAG. (Jan. 5, 2022), https://perma.cc/FFT6-4JKN.

181. *See* FLA. STAT. § 946.522(1) (2003):

> [M]oneys deposited by the corporation authorized under this part to manage and operate correctional work programs. The appropriated funds shall be used by the corporation for purposes of construction or renovation of its facilities or for the expansion or establishment of correctional work programs . . . or for prison industries enhancement (PIE) programs.

2. Commissary Exploitation for Basic Necessities

Congress justified the carceral litigation penalty on the basis that incarcerated individuals "have all the necessities of life supplied."[182] Courts have since defended and expanded the penalty under the same assumptions: that prisons uphold their constitutional mandate to provide individuals with "adequate food, clothing, shelter, and medical care," that prison purchases are only "discretionary," and that a penalty on litigation will not force a litigant "to choose between filing a lawsuit and being able to buy the necessities of life."[183] The reality could not be more different.

Far from being "discretionary," the prison system compels incarcerated individuals to participate in a financially exploitative prison economy to access fundamental necessities, such as outside communication, food, hygiene, and medical care.[184] This "captive market" is intensified by prison systems prohibiting family members from providing care packages with these necessities, requiring them instead to supply goods to their loved ones through the prison commissary or outside vendors at inflated prices.[185]

The increasing privatization of prisons has also intensified the exploitative pricing practices of essential prison goods.[186] Prison systems receiving "kickbacks" from these private vendors have little motivation to regulate commissary prices. For instance, Florida's Department of Corrections receives a 35.6% commission on all marked-up commissary items sold by the for-profit Keefe Group, while Kentucky receives a 16% commission from Union Supply Group.[187] With a monopoly on the prison market and minimal oversight on pricing practices, state and private vendors inflate the prices of the goods they offer, sometimes at several times the price at which it would be sold outside prison.[188]

Id.

182. 141 CONG. REC. 14572 (1995) (statement of Sen. Jon Kyl).

183. *See, e.g.*, Bruce v. Samuels, 577 U.S. 82, 89; Tucker v. Branker, 142 F.3d 1294, 1298; *see also supra* Part III.

184. *See* Schlanger, *Inmate Litigation*, *supra* note 30, at 1646.

185. *See* Taylor Elizabeth Eldridge, *The Big Business of Prisoner Care Packages*, MARSHALL PROJ. (Dec. 21, 2017), https://perma.cc/X8SA-NCLF.

186. *See* CAPTIVE LABOR, *supra* note 1, at 72.

187. *See* Elizabeth Weill-Greenberg & Ethan Corey, *Locked In, Priced Out: How Prison Commissary Price-Gouging Preys on the Incarcerated*, APPEAL (Apr. 17, 2024), https://perma.cc/C2RH-VEPM.

188. Private prisons vendors have seen their profits soar even as the quality of the goods and services they provide has markedly declined. *See* Alexandra Arriaga, *Why Inflation Price Hikes Are Even Worse Behind Bars*, MARSHALL PROJ. (May 2, 2023, at 06:00 ET). In 2022, Aramark reported its highest income ever at $16 billion in revenue, a 35% increase from 2021. *See id.*; *see also* Aramark Reports Fourth Quarter and Full Year Fiscal 2022 Results 1–2, 4, https://perma.cc/M3FR-RTS2. Three of the major care package vendors serving correctional facilities—Access Securepak, Aramark's iCare, and

The cost of the carceral litigation penalty ought to be assessed within this context. The penalty might be more justified if it came out of non-essential, discretionary expenditure. But when it is competing with extreme income scarcity and high costs for basic sustenance, the likely harm will not only disincentivize meritorious litigation but will force harmful economic sacrifices.

A 2022 report found that 70% of incarcerated workers surveyed "were not able to afford basic necessities with their prison wages."[189] According to a 2018 study analyzing commissary sales reports in Illinois, Massachusetts, and Washington, incarcerated individuals spent an average of $947 each year on commissary expenses—far more than what they earned in prison.[190] Of that amount, the vast majority of annual commissary purchases went toward food ($709) and hygiene products ($89).[191] Most incarcerated individuals cannot finance these exorbitant commissary costs through their prison income alone, meaning they must rely on the support of their families, who are often already living in conditions of poverty and burdened by the loss of an important source of income.[192]

Although these financial burdens existed at the time Congress enacted the PLRA in 1996, they have only increased over the last three decades. Incarcerated individuals are increasingly unable to afford the costs of sustaining their basic necessities, let alone the additional costs associated with filing a civil rights lawsuit. In 2022, a study of 26 state commissaries revealed price increases across the entire prison system that, in many cases, exceeded the cost of inflation.[193] For example, while the cost of groceries rose by 8.4% between 2021 and 2022, the cost of food in Pennsylvania prisons rose by 26%.[194] The price of Ramen—a typical go-to meal for many incarcerated people due to its lower cost—

Union Supply Direct—incorporate incarcerated labor into their business models. *See* Eldridge, *supra* note 185. For a more thorough analysis into the increasing privatization of prisons, the role of the private prison lobby, and its effect on incarcerated individuals, see generally ACLU, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION (2011), https://perma.cc/47MR-VP7R.

189. *See* CAPTIVE LABOR, *supra* note 1, at 72.

190. *See* Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, PRISON POL'Y INITIATIVE (2018), https://perma.cc/2DTP-Y2EH [hereinafter Raher, *A Deeper Look at Prison Commissaries*].

191. *Id.*

192. *See id.*; Tommasso Bardelli et al., *The High Cost of Cheap Prisons*, L. & POL. ECON. PROJ. (Apr. 12, 2023), https://perma.cc/P24G-W8G8.

193. *See* Alexandra Arriaga, *Why Inflation Price Hikes Are Even Worse Behind Bars*, MARSHALL PROJ. (May 2, 2023, 06:00 ET), https://perma.cc/559Z-85DU.

194. *See id.*; *The Steep Hike in Prison Commissary Prices Outpaced Inflation*, PA. PRISON SOC'Y (Dec. 15, 2022), https://perma.cc/JN64-2JW9.

increased by 68% in Illinois.[195] And peanut butter became between 25% and 35% more expensive across state prisons.[196]

Although not exhaustive, five categories of prison expenses warrant a deeper investigation to showcase how the failure of prisons to supply incarcerated individuals with their basic needs make many of these commissary costs essential. These categories are: (a) outside communication, (b) food, (c) menstrual hygiene products, (d) other hygiene products, and (e) healthcare.

To investigate the commissary costs associated with these categories of basic needs, this Article compares commissary costs from five different prison commissary systems, captured in Appendix 1.[197] This Article also calculates the "real labor cost" for each commissary item using the average minimum wage for the relevant state to determine the number of hours of labor required to afford these necessities. These labor costs, while steep, do not even include the garnishments that are deducted from prison wages; it would be entirely plausible to double these labor costs to accurately review a person's purchasing capacity in prison.

The following commissary systems were selected because they represent a broad range of systems: private and state vendors; state and federal prisons; states offering a minimum wage and states offering no minimum wage; prisons detaining men and women; maximum- and minimum-security level prisons; and prisons in states with and without reform measures. They also capture commissary systems from the four states with the highest populations of incarcerated individuals, which together incarcerate over 670,000 people.[198] The following commissary systems were selected:

The Texas Department of Criminal Justice ("Texas DCJ"): Texas's prison commissaries are state-run and standardized across most prisons.[199]

195. *See* Arriaga, *supra* note 188.

196. *See id.*

197. Because commissary lists would differ based on the state, vendor, and locality of each prison, it would require a thorough comparison of every commissary provider to provide a more precise average of the cost of living in prisons. While ideal, that is beyond the scope of this paper.

198. *See Texas Profile*, *supra* note 166 (Texas currently incarcerates 219,000 people); *Florida Profile*, *supra* note 168 (Florida currently incarcerates 157,000 people); *California Profile*, *supra* note 164; *Georgia Profile*, *supra* note 168 (Georgia currently incarcerates 95,000 people).

199. *See* Texas Department of Criminal Justice, *Commissary Price List* [hereinafter *Texas Commissary List*], https://perma.cc/32Q4-EUUG (last visited Oct. 7, 2025, 23:20 ET).

The Florida Department of Corrections ("Florida DOC"): Florida operates almost all of its prison commissaries through a single private vendor, Keefe Group.[200]

The California Department of Corrections and Rehabilitation, Central California Women's Facility ("CCWF"): CCWF is a state-run facility in California—a state that has already implemented reform efforts, including regulatory caps on commissary mark-ups—and CCWF hosts over 2,250 women at all security levels.[201]

The Federal Bureau of Prisons, United States Penitentiary in Atlanta ("Atlanta BOP"): Atlanta BOP is a federally-run prison in Georgia—a state that allows prisons to pay incarcerated workers nothing—and Atlanta BOP hosts over 1,800 incarcerated men at all security levels.[202]

The Wisconsin Department of Corrections ("Wisconsin DOC"): Wisconsin operates almost all of its prison commissaries through a private vendor, Union Supply Group.[203]

a. Outside Communication

Incarcerated individuals typically have a small number of options for communicating with people outside of prison, including family and legal counsel: letters, in-person visitation, telephone and video calls, and more recently, a limited electronic messaging service. In some instances, the prisons altogether prohibit in-person family visits, leaving families and incarcerated individuals with no option but to speak with their loved

200. *See* Florida Department of Corrections, *Female Canteen Menu* (May 16, 2025) [hereinafter *Florida Commissary List*], https://perma.cc/VZ9B-P724; *see also* Weill-Greenberg & Corey, *supra* note 187 (explaining that the Keefe Group also operates as the primary or only commissary vendor in 15 other states: Arizona, Delaware, Idaho, Illinois, Kansas, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, Rhode Island, Vermont, Virginia, and Wyoming).

201. *See* Central California Women's Facility Commissary List, *CCWF GP Price List* (Jan. 2024) [hereinafter *CCWF (CA) Commissary List*], https://perma.cc/8MXP-X8BM, at 13.

202. *See* Federal Bureau of Prisons, *U.S.P Atlanta Commissary* (Jan. 2022) [hereinafter *Atlanta BOP (GA) Commissary List*], https://perma.cc/44KZ-PWKG.

203. *See* Ethan Corey, *Wisconsin Commissary List*, APPEAL (Feb. 27, 2024), https://perma.cc/LSV8-M5S3 [hereinafter *Wisconsin Commissary List*]. Union Supple Group also operates as the only or primary commissary vendor in 6 other states: Kentucky, New Hampshire, New Mexico, Utah, West Virginia, and Wisconsin. *See* Weill-Greenberg & Corey, *supra* note 187.

ones through other financially demanding channels.[204] Until 2025, these costs had continued to proliferate with minimal regulatory oversight.[205]

Following the de-regulation of the prison communication services industry in 1996, two companies have dominated the telecommunication services market for prisons: JPay (also known as Securus) and GTL.[206] Between 1996 and 2024, JPay and GTL drove up the price of prison telecommunication rates significantly higher than outside prison. For example, a 15-minute phone call could cost as much as $11.35 in a large jail and $12.10 in a small jail.[207] The most significant mark-ups were in jails, which in almost every state were multiple times the cost of a phone call from prisons.[208]

In 2024, the FCC capped interstate telecommunication rates from $0.06/minute for telephone calls and $0.16/minute for video calls.[209] The FCC promptly rescinded these limits in 2025 under the Trump Administration by increasing the cap to $0.11/minute for telephone calls and $0.23/minute for video calls, citing "public safety and security interests."[210] Some states, like Arkansas, opted to cut prison

204. *See, e.g.*, Complaint, S.L. v. Swanson, No. 2024-120601-CZ (Mich. Cir. Ct. Genesee Cnty. Mar. 15, 2024), https://perma.cc/5TYH-52SG (discussing that beginning in 2014, Genesee County enacted a family visitation ban prohibiting people from visiting their family detained inside the county jail, while simultaneously engaging in a kickback scheme with their technology provider, GTL, who pays Genesee Country $240,000 to use their technology).

205. *See* 47 U.S.C. § 276(b) (explaining that in 1996, Congress enacted the Telecommunications Act of 1996, which restricted the FCC's ability to set rates for intrastate calls).

206. *See* Stephen Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 HASTINGS RACE & POVERTY L.J. 3, 17 (2020) (explaining that in 2013, the FCC determined that Jpay, GTL, and a third company, Telmate, controlled 85% of the prison telecommunications market and the competition narrowed to two companies in 2017 when GTL acquired Telcom).

207. *See* Press Release, FCC, FCC Caps Exorbitant Phone & Video Call Rates for Incarcerated Persons & Their Families 1 (Jul. 18, 2024) [hereinafter *FCC Cap Press Statement*], https://perma.cc/PU5Q-NR5W.

208. *See* Peter Wagner & Wanda Bertram, *State of Phone Justice 2022: The Problem, the Progress, and What's Next*, PRISON POL'Y INITIATIVE (2022), https://perma.cc/E3L2-TUXA (showing that the greatest disparity can be found in Illinois, which charged 20.1 times higher for jail phone calls than prison phone calls (some online viewers may need to zoom-out to view the map)).

209. *See* FCC Cap Press Statement, *supra* note 207, at 1–2 (the FCC regulation follows Congress's passage of the *Martha Wright-Reed Just and Reasonable Communications Act*, Pub. L. No. 117-338, 136 Stat. 6156 (2023), with bipartisan support, which significantly expanded the FCC's jurisdiction over incarcerated people's communications services (IPCS)).

210. Ben Blatt, *F.C.C. Changes Course on the Price of Prisoners' Phone Calls*, N.Y. TIMES (Oct. 28, 2025), https://perma.cc/9GRV-RFJR; *see* Federal Communications Commission, Fact Sheet: Incarcerated People's Communications Services; Implementation of the Martha Wright-Reed Act; Rates for Interstate Inmate Calling Services, FCC-CIRC2510-08 (Oct. 7, 2025) [hereinafter *2025 FCC Cap Report*], https://perma.cc/HZ7F-6ZVS. The FCC's purported nexus between the 2024 FCC cap

telecommunications altogether rather than comply with the FCC's price cap.[211] Nevertheless, even at the capped rate for phone calls, communication represents a significant financial burden for incarcerated individuals who may have to pay almost the same cost per minute of phone usage as they earn per hour of labor. For someone earning the average national minimum wage in prisons of $0.13/hour, a 15-minute phone call represents a cost equivalent to 13 hours of labor, and a 15-minute video call would cost 27 hours of labor.[212]

In recent years, prisons increasingly offer incarcerated individuals the ability to use tablets to electronically communicate with family members and friends.[213] Some prisons offer tablets for free, whereas others charge incarcerated individuals to purchase or rent the tablets.[214] Either way, the true cost of these tablets are extracted from the fees incarcerated individuals pay to use the tablets' features, such as using them to communicate with people outside prison.[215] JPay and GTL, who also dominate the prison electronic messaging services market,[216] require incarcerated individuals to purchase a "stamp" for each electronic message, with an additional stamp charge for a photo attachment. As the FCC's cap does not apply to tablet-based products, like the ones used to send electronic messages, the cost of a stamp varies across the country and averages around $0.27–$0.30 per message, with an additional stamp needed for photo attachments and three more stamps for a "videogram."[217] For an incarcerated individual earning their state's average minimum wage, the real cost of each electronic message can be

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and public safety and security is questionable at best. While the FCC describes that prior cap was "too low to ensure sufficient funding for necessary safety and security tools such as call monitoring or recording and to account for correctional facility costs," *id.* at 1, the concern the FCC repeatedly goes back to is that the caps do not "sufficiently recover" provider's safety costs, including costs for communication security, recording, monitoring, "law enforcement support," voice biometric services, and other costs. *Id.* Arguably, few of these costs are actually necessary other than to surveil the private communications of incarcerated individuals—a practice Makar describes as a "digital panopticon" in prisons. *See generally* Zina Makar, *The Digital Prison Panopticon*, 38 HARV J. L. & TECH 961 (2025).

211. *See* Jericho Casper, *Arkansas Jail Cutting Inmate Phone Service Entirely March 30*, BROADBAND BREAKFAST (Mar. 8, 2025), https://perma.cc/UN49-N8Z4.

212. 15 minutes at $0.11/minute totals $1.65, which is 13 hours of labor at $0.13/hour. Similarly, 15 minutes at $0.23/minute totals $3.45, which is 27 hours of labor at $0.13/hour.

213. *See generally* Makar, *supra* note 210.

214. *See id.* at 966 n.20.

215. *See id.*

216. *See* Mike Wessler, *SMH: The Rapid & Unregulated Growth of E-messaging in Prison*s, PRISON POL'Y INITIATIVE (Mar. 2023), https://perma.cc/5JZ5-5JM5.

217. *Pay-for-Play Tablets: The Costly New Prison Paradigm*, PRISON LEGAL NEWS (Mar. 1, 2025), https://perma.cc/3GCH-B46D; *see also* Wessler, *supra* note 216, for a breakdown of the price of electronic messaging per state.

up to four hours of labor, which quadruples if they wish to send a video message to their family.[218]

Even the more traditional forms of communication, such as letters, can present nontrivial costs. For example, many courts require an incarcerated litigant to inform the court in writing if their address changes, including when they transfer between prisons. These costs fall on the incarcerated litigant, who has to buy the envelope and stamps needed to write to the court, which also costs numerous hours of labor.[219] If the incarcerated litigant fails to inform the court for any reason, their action may be dismissed.[220]

b. Food

Despite the constitutional obligation to provide incarcerated individuals with food, many prisons intentionally deplete the amount of food they provide. As a result, incarcerated individuals consistently report feeling hungry between meals and that they do not receive enough food to sustain their daily nutritional needs.[221] To reduce expenditures, a number of prisons have reduced the traditional provision of three meals a day, instead serving only two. Prisons frequently outsource food services to private contractors that produce meals low in quality and nutritional value, often with no fruit or vegetables.[222] Menu planning within these facilities typically standardize meals to a "one size fits all" approach, neglecting to modify meals for diverse dietary needs or medical conditions.[223] The food served may also be inedible, with incarcerated people reporting food contaminated with maggots, rat droppings,

218. *See infra* app. 1, tbl. 2.

219. *See infra* app. 1, tbl. 2.

220. *See* Judith Resnik et al., *Lawyerless Litigants, Filing Fees, Transaction Costs, and the Federal Courts: Learning from SCALES*, 119 NW. L. REV. 109, 128–29 (2024).

221. *See* CAPTIVE LABOR, *supra* note 1, at 73; Alysia Santo & Lisa Iaboni, *Whats in a Prison Meal?*, MARSHALL PROJ. (July 7, 2015), https://perma.cc/FY9U-Z7L9; Leslie Soble et al., *Eating Behind Bars: Ending the Hidden Punishment of Prison Food*, IMPACT JUST. (2020), at 49–50, https://perma.cc/K45W-SHVL (finding 94% of surveyed individuals could not eat enough to feel full, and 93% felt hungry in between meals); PENNSYLVANIA PRISON SOCIETY, HUNGRY AND MALNOURISHED: FOOD SERVICE IN THE PENNSYLVANIA DEPARTMENT OF CORRECTIONS 9 (2024), https://perma.cc/YSC3-WTRH (finding 70–80% of incarcerated individuals, depending on gender, report feeling hungry between meals).

222. *See* Santo & Iaboni*, supra* note 221; Soble et al., *supra* note 221, at 71–73, 76; *see also* Katherine Mommaerts et al., *Nutrition Availability for those Incarcerated in Jail: Implications for Mental Health*, 19 INT'L J. PRISONER HEALTH 350, 351 (2022), https://perma.cc/E9RX-ET32 (finding evidence that prisons meet daily caloric recommendations but "serve[] foods that are high in fat, salt, sugar, and carbohydrates and little-to-no fresh fruits or vegetables. Essentially, menus in correctional facilities are diets that do not support dietary guideline recommendations and that the general population are advised to avoid").

223. Soble et al., *supra* note 221, at 71.

cockroaches, dirt, and mold.[224] Consequently, for many, the commissary is a critical source of daily nutrition.

Given the inadequacy of prison food, it is unsurprising that most food purchases go toward ready meals, beverages, and snacks. Empirical data underscores the magnitude of this burden: incarcerated people spend an average of $585 per person each year on food—the equivalent of $1.60 per day.[225] Ramen, for example, is a staple food consumed across prisons as it is among the cheapest options from the commissary and incarcerated individuals can easily store it.[226] Nevertheless, a cup of ramen can cost between three and ten hours of prison labor at the average minimum wage, assuming an incarcerated worker can keep all of their income.[227] An instant meal can cost as much as 86 hours of prison labor. Even bottled water can cost up to nine hours of prison labor.[228] And the jar of peanut butter that newspapers and legislators widely mocked throughout the passage of the PLRA can cost up to 43 hours of labor.[229] Judge Newman, who reviewed the mythologized peanut butter case, recognized that even if a jar cost $2.50, this sum is "not trivial to the prisoner whose limited prison funds are improperly debited."[230]

c. Menstrual Health

Menstrual health products are another essential purchase for incarcerated women. Whereas some state and federal facilities provide menstrual health products,[231] prisons often distribute them in insufficient quantities or on an inconsistent basis. Correctional officers have great discretion over how they distribute menstrual health products, leading to

224. *See* CAPTIVE LABOR, *supra* note 1, at 73; Soble et al., *supra* note 221, at 23. In a 2018 survey of incarcerated people conducted by the Incarcerated Workers Organizing Committee, 66% of respondents reported that in the last year they had been served food that contained bugs, was moldy or spoiled, or that was not intended for humans. Our surveys and interviews document accounts of weevils in grits, rocks in turnip greens, maggots in meat, a rat tail buried in one day's entree, and oatmeal ladled up with human hair, pieces of metal, or cockroaches.

Id.

225. *See* Raher, *A Deeper Look at Prison Commissaries*, *supra* note 190. From the annual per-person commissary sales reviewed, $227 went towards ready meals, $191 towards snack food, and $117 towards beverages.

226. *See* Claudia Geib, *In 'Prison Ramen,' Author Gustavo Alvarez Wants to Put Inmates' Culinary Ingenuity on Full Display*, EATER (Oct. 4, 2023, at 09:30 ET), https://perma.cc/H47J-CRL7.

227. *See infra* app. 1, tbl. 3.

228. *See infra* app. 1, tbl. 3.

229. *See infra* app. 1, tbl. 3; *see also* Newman, *supra* note 42, at 521.

230. Newman, *supra* note 42, at 521.

231. Since 2018, the Federal Bureau of Prisons ("Federal BOP") must provide sanitary napkins and tampons at no charge to incarcerated individuals. *See* First Step Act of 2018, Pub. L. No. 115-391, § 611, 132 Stat. 5194, 5247.

uneven distribution or guards forcing women to compete for tampons or pads.[232] In some instances, correctional officers intentionally withheld menstrual health products to control incarcerated women, punish them, or coerce them into sexual favors.[233] And even when incarcerated women receive pads, they are often of such poor quality that women need to wear multiple pads at a time.[234]

This leaves many incarcerated women with no choice but to turn to the commissary each month for menstrual health products. A study in New York State found over 37% of surveyed women had to buy their own menstrual products, and 29.5% had to trade or barter to receive menstrual products through food, other hygiene items, or personal favors.[235]

As with most commissary goods, the price of menstrual health products can be steep, which forces incarcerated women to spend a significant portion of their monthly income on pads and tampons.[236] The average commissary charges $0.56 per tampon,[237] which equates to five hours of labor (or nine if the prison deducts 50% of their income) for an incarcerated woman working the average minimum wage of $0.13/hour.[238]

Over the course of a cycle, these costs add up significantly. On average, women use somewhere between 20 and 23 pads throughout a cycle, although this figure can be much greater depending on a woman's

232. *See* Note, Lauren Shaw, *Bloody Hell: How Insufficient Access to Menstrual Hygiene Products Creates Inhumane Conditions for Incarcerated Women*, 6 TEX. A&M L. REV. 475, 478–79 (2019) ("[A] prisoner reported that a guard at Rikers Island Prison 'threw a bag of tampons into the air and watched as inmates dived to the ground to retrieve them, because they did not know when they would next be able to get tampons.'" (quoting Zoe Greenberg, *In Jail, Pads and Tampons as Bargaining Chips*, N.Y. TIMES (Apr. 20, 2017), https://perma.cc/DBE5-GB6E)); ACLU, THE UNEQUAL PRICE OF PERIODS: MENSTRUAL INEQUALITY IN THE UNITED STATES 3 (2019) [hereinafter THE UNEQUAL PRICE], https://perma.cc/8R25-2GGM ("[P]rison staff forced those in their care to compete for limited menstrual products, in one case ordering 30 women to share a pack of 12 pads.").

233. *See* THE UNEQUAL PRICE, *supra* note 232, at 4.

234. *See* Mitchell O'Shea Carney, *Cycles of Punishment: The Constitutionality of Restricting Access to Menstrual Health Products in Prisons*, 61 B.C. L. REV. 2541, 2547 (2020).

235. *See* Shilpa Darivemula et al., *Menstrual Equity in the Criminal Legal System*, 32 J. WOMEN'S HEALTH 927, 929 (2023); Avery Broome, *Menstrual Product Deprivation in Prison: A Sex-Neutral Litigation Strategy*, 2022 U. CHI. L. FORUM 241, 243 (2023), https://perma.cc/2EXP-EFC6.

236. *See* THE UNEQUAL PRICE, *supra* note 232, at 4.

237. *See* Carney, *supra* note 234, at 2547; *see also infra* app. 1, tbl. 3. These can be significantly marked up compared with the price of menstrual health products outside of prison. *See, e.g.*, Grant Schulte, *Nebraska's ACLU: Prisons Charge Inmates Too Much for Tampons*, ASSOCIATED PRESS (Oct. 19, 2017), https://perma.cc/G93Z-N6FD.

238. *See infra* Section IV.B.1.

menstrual flow.[239] An incarcerated woman relying on the commissary to buy 24 tampons may pay 104 hours of her wages on her menstrual hygiene alone.[240] Incarcerated women who choose to use pads instead can still pay somewhere between 20 to 40 hours of labor on average each cycle.[241] Again, depending on how much of her salary the prison deducts, these figures may multiply by a factor of two or three, meaning an incarcerated woman could have to devote her entire monthly salary on menstrual health products alone.

d. Hygiene

Basic toiletries, such as toothpaste, toilet paper, and soap, constitute routine commissary purchases indispensable to a person's health and dignity. While some prison systems provide a limited number of toiletries each month, the National Institute for Jail Operations does not consider them "essential," leaving many incarcerated people bearing costs for their hygiene out of their own pocket.[242]

On average, incarcerated people spend $89 per year on hygiene products (including menstrual health products).[243] In Massachusetts, for example, incarcerated people spent an average of $22 each year on soap alone.[244] Purchasing toilet paper can cost between 7 and 50 hours of labor at the average minimum wage (assuming the prison deducts no income).[245] A tube of toothpaste can cost between 5 and 81 hours of labor.[246] Deodorant can cost between 4 and 47 hours of labor.[247] And a bottle of shampoo or body wash can cost up to 98 hours of labor.[248]

e. Healthcare

Almost 50 years after the Supreme Court guaranteed the right to adequate healthcare in prisons,[249] this right is still subject to a financial

239. *See* Sophie Williams, *How Many Pads a Day is Normal When You're on Your Period?*, COSMOPOLITAN (Aug. 8, 2023), https://perma.cc/S38G-CQNN. Some states give women extra tampons if they provide a doctor's note, although many incarcerated women still end up needing to pay a medical copay to see the doctor. *See* Carney, *supra* note 234, at 2546; Wendy Sawyer, *The Steep Cost of Medical Co-Pays in Prison Puts Health at Risk*, PRISON POL'Y INITIATIVE (Apr. 19, 2017), https://perma.cc/F4Z5-J8MD.

240. Twenty-four tampons at an average of $0.56 per tampon totals $13.44. *See* Carney, *supra* note 234. For an incarcerated woman earning the national average minimum wage of $0.13/hour, this amounts to 104 hours of labor.

241. *See infra* app. 1, tbl. 4.

242. *See* CAPTIVE LABOR, *supra* note 1, at 73.

243. *See* Raher, *A Deeper Look at Prison Commissaries*, *supra* note 190.

244. *See* CAPTIVE LABOR, *supra* note 1, at 73.

245. *See infra* app. 1, tbl. 5.

246. *See infra* app. 1, tbl. 5.

247. *See infra* app. 1, tbl. 5.

248. *See infra* app. 1, tbl. 5.

249. *See* Estelle v. Gamble, 429 U.S. 97, 103 (1976).

barrier for most incarcerated people. At least 35 states authorize either state or correctional facilities to charge incarcerated people directly for medical fees associated with their medical care—typically around $5—which includes accessing a prescription or attending a medical appointment.[250]

While $5 may seem small, it is a considerable expense for prison workers, and even more so in the states that don't pay incarcerated workers at all. Sixteen state prison systems impose medical fees that are greater than the state's average weekly earnings of incarcerated workers.[251] Texas, which pays nothing to its state-employed incarcerated workers, imposes a $13.55 "health care services fee."[252] Even when states provide exemptions from the medical fees, those waivers are often inconsistent, confusing, and subject to the discretion of a single member of staff.[253] A medical fee of $5, constituting up to 39 labor hours at $0.13/hour, would be the equivalent of a $279 medical copay or prescription cost for a worker outside prison earning the $7.25 federal minimum wage, or a $962 charge for a worker earning $25/hour.

The result, unsurprisingly, is that imposing these copays worsens the quality of healthcare and disincentivizes incarcerated individuals from seeking medical care. A 2024 study of almost 25,000 respondents found that the existence of medical fees correlates with worse access to medical care, especially among the most vulnerable people in the criminal justice system, such as pregnant women and individuals with chronic health conditions.[254]

3. Judicial Validation of an Extortionate Prison Commissary Market

The inflated costs of commissary products are unlikely to subside in the near future, as litigation challenging the financial burdens of incarceration has achieved little success. In *Henry v. Blagojevich*, the district court reviewed a challenge to the Illinois Department of Correction's commissary mark-ups, which the Illinois Auditor General

250. *See* Eisen, *supra* note 175, at 3; *see also* Emily Widra, *New Research Links Medical Copays to Reduced Healthcare Access in Prison*, PRISON POL'Y INITIATIVE (Aug. 29, 2024), https://perma.cc/7FHA-F5N7.

251. *See* Emily Widra & Emily Lupez, *Policies for Waiving Medical Copays in Prisons are Not Enough to Undo the Harm Caused by Charging Incarcerated People for Health Care Access*, PRISON POL'Y INITIATIVE (May 15, 2025), https://perma.cc/YL5D-389G.

252. TEX. GOV'T CODE ANN. § 501.063 (West 2019).

253. *See* Widra & Lupez, *supra* note 251.

254. *See* Emily L. Lupez et al., *Health, Access to Care, and Financial Barriers to Care Among People Incarcerated in US Prisons*, 184 JAMA INT. MED. 1176, 1180 (2024); *see also* Widra, *supra* note 250.

had determined was in violation of the statutory cap of 25% for goods sold at prison commissaries.[255] Nevertheless, the court dismissed the plaintiffs' challenge to the mark-ups, holding that they "have no federal constitutional right to purchase commissary items, [meaning] they have no right to purchase commissary items at a particular price or to have Defendants restrained from charging certain prices."[256] The court further justified its decision by leaning on a familiar line of argument: "[b]ecause prisons provide for the basic necessities of living for its inmates, the Plaintiffs have no protected property or liberty interest in commissary privileges."[257]

Blagojevich is no outlier. The overwhelming majority of district and circuit courts that have addressed the issue have held that "exorbitant prices charged at a penal institution's commissary implicates no federal constitutional right."[258] This conclusion often rests on the same recurring and unexamined fiction that prisons already provide incarcerated individuals with the basic necessities of life.[259] The reality could not be more different. As discussed above, prison institutions routinely fail to provide adequate nutrition, hygiene, and other essentials, thereby rendering commissary purchases not optional but essential. The perpetuation of this myth enables states to justify compensating

255. *See* Tenny v. Blagojevich, 659 F.3d 578, 580 (7th Cir. 2011) (describing the factual history in the district court case filed as *Henry v. Blagojevich*). Subsequent lawsuits have since unsuccessfully challenged similar violations of Illinois' statutory cap, 730 ILL. COMP. STAT. ANN. 5/3-7-2a (2006), on commissary goods. *See* Ruhl v. Dep't of Corrs., 35 N.E.3d 982, 986 (Ill. App. Ct. 2015); *see also* Jackson v. Randle, 957 N.E.2d 572, 575 (Ill. App. Ct. 2011).

256. Henry v. Blagojevich, No. 10 C 3683, 2010 U.S. Dist. LEXIS 66042, at *6 (N.D. Ill., June 30, 2010), *aff'd*, Tenny v. Blagojevich, 659 F.3d 578 (7th Cir. 2011).

257. *Id.* at *5–6.

258. Hopkins v. Keefe Commissary Network Sales, No. 07-745, 2007 U.S. Dist. LEXIS 50961, at *1 (W.D. Pa. July 12, 2007); *see also* Debrew v. Atwood, 792 F.3d 118, 129 (D.C. Cir. 2015) (holding there is no constitutionally protected right against paying "extraordinarily high rates" for telephone calls or from high commissary mark-ups); McCall v. Keefe Supply Co., 71 Fed. App'x. 779, 780 (10th Cir. 2003) (holding there is no constitutionally protected interest in buying stamps as cheaply as possible); Acree v. Petterson, No. 99-1085, 2000 WL 1141587, at *7 (D. Or. Aug. 1, 2000) ("Plaintiff has no protected property interest to purchase commissary items."); Tokar v. Armontrout, 97 F.3d 1078, 1083 (8th Cir. 1996) ("[W]e note that we know of no constitutional right of access to a prison gift or snack shop."); French v. Butterworth, 614 F.2d 23, 25 (1st Cir. 1980) ("We also reject [the plaintiff's] contention that he and fellow inmates have a constitutionally protected interest in buying food as cheaply as possible."); Ahlgrim v. Keefe Grp., No. 16-177 JB, 2016 U.S. Dist. LEXIS 166006, at *9 (D.N.M. Oct. 19, 2016); *Ruhl*, 35 N.E.3d at 986; *Jackson*, 957 N.E.2d at 575.

259. *See, e.g.*, Bennett v. Sheahan, No. 99-C-2270, 1999 U.S. Dist. LEXIS 16339, at *10 (N.D. Ill. Oct. 4, 1999) ("Commissary prices implicate no constitutional right. Because the county provided for the plaintiff's basic necessities (food, shelter, clothing, medical care, etc.), he had no protected property or liberty interest in commissary privileges.").

incarcerated labor cents on the hour (or not at all) while extracting whatever savings remain through inflated commissary pricing. It financially punishes one of the most disadvantaged populations, whose wellbeing, dignity, and access to basic subsistence is entirely at the mercy of the state. And time and time again, courts are willing to play along with minimal scrutiny.

V. EVALUATING THE CARCERAL LITIGATION PENALTY

Incarcerated individuals face a stark financial reality—one which Congress overlooked and one which the majority of courts still neglect in interpreting the carceral litigation penalty. Yet pointing out the economic hardship is only the first step in a discourse intending to promote more informed prison law. This section uses that financial reality to evaluate how the carceral litigation penalty functions as a structural burden placed solely upon incarcerated individuals, which prevents them from asserting their rights, forces them to choose between their legal remedies and basic necessities, and leaves them vulnerable to abusive conditions.

A. Denying Access to the Courts

Over the three decades since Congress enacted the PLRA, the number of prison lawsuits has declined dramatically. In the years immediately following the PLRA, the number of civil rights lawsuits in prisons dropped sharply from around 23 lawsuits per 1,000 people to around 12.[260] Filing rates continued to decrease until around 2007, after which they plateaued at a rate of ten lawsuits per 1,000 people.[261] To that end, Congress certainly achieved its aim of disincentivizing prison litigation.

Despite this, and more crucially, Congress has failed to achieve its implied promise of preserving meritorious litigation. If the PLRA were only filtering out frivolous cases, we would expect to see an increase in the rate of settlements and jury verdicts in favor of prison litigants. But as Schlanger observes:

> [I]n cases brought by prisoners, the government defendants are winning more cases pretrial, settling fewer matters, and going to trial less often. Those settlements that do occur are harder fought; they are finalized later in the litigation process. Plaintiffs are, correspondingly, winning and settling less often, and losing outright

260. *See* Schlanger, *Inmate Litigation*, *supra* note 30, at 1586, fig. I.B.

261. Margo Schlanger, *Trends in Prisoner Litigation, As the PLRA Reaches Adulthood*, 5 U.C. IRVINE L. REV. 153, 156–57 & tbl. 1 (2015).

> more often . . . . Prisoner plaintiffs not only lose more often than other plaintiffs—they lose faster.[262]

Declines in plaintiff success rates are attributable to the PLRA in its entirety, including its physical injury requirement, the three strikes rule, the exhaustion requirement, and the limit on attorney's fees, among other restrictions. Yet, in light of the profound financial hardships experienced by a prison population that is disproportionately drawn from the most economically disadvantaged in society and subjected to a system of financial exploitation, the carceral litigation penalty naturally creates another unique and insurmountable barrier for many meritorious civil rights claims. The cumulative effect of multiple filing fees across several cases can, in effect, result in a de facto litigation bar on access to the courts for those with the most complex or pressing legal harms, thereby penalizing precisely those most in need of judicial protection.

Incarcerated individuals should only bear the costs of their litigation if they have fair means for doing so. When Congress enacted the PLRA, the federal filing fee was $120 for a district court filing and $105 for an appeal. Even then, the filing fee would have cost hundreds of hours of prison labor. Today, those figures have risen sharply: as of 2026, the filing fee is $350 in district courts[263] and $605 in appellate courts. For an incarcerated plaintiff earning the average minimum wage of $0.13/hour, it would take 2,693 hours to afford the $350 district court filing fee and 4,654 hours to afford the appellate filing fee. If these plaintiffs have 50% of their income deducted, as is commonplace, this doubles to 5,385 hours and 9,308 hours, respectively.

Another way to conceptualize the burden would be to calculate the "real prison cost" of the filing fee by comparing them to the federal minimum wage of $7.25/hour. A $350 cost for an incarcerated worker paid $0.13/hour would be comparable to charging $19,520 to a non-incarcerated individual at minimum wage to file a civil rights action in district court. The $605 appellate fee would similarly translate to a cost of $33,741. Even if a litigant could stagger their payment of these fees, and might conceivably recover costs upon prevailing, the imposition of this financial burden would nonetheless operate as a significant deterrent to the pursuit of meritorious claims. Many potential litigants would no doubt make the same calculation Senator Kyl envisioned. They too would ask, "Is the lawsuit worth the price?" and decide that no matter how great the injury they sustained, the cost is too steep.

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262. *Id.* at 162–63, 165; *see also* Schlanger, *Inmate Litigation*, *supra* note 30, at 1663.

263. District courts typically waive the additional $55 administrative for incarcerated litigants who are granted *in forma pauperis* status.

A second part of that calculus is the likely payout an incarcerated plaintiff would receive. The injuries incarcerated individuals suffer are inherently devalued relative to those experienced by individuals outside prison.[264] Such devaluation reflects a broader social animus toward incarcerated people and is likely to be especially present in jury pools drawn from a community that more likely identifies closely with the prison and correctional officers. In such contexts, plaintiffs are likely perceived as deviant outsiders attempting to extort local heroes, instead of as human beings endowed with dignity and deserving of basic rights. Plaintiffs, knowing this dynamic, may reasonably conclude that, even if they were to prevail on their claims, their potential recovery may be so modest that the financial sacrifice required by the carceral litigation penalty would no longer be worthwhile.

The carceral litigation penalty also blocks access to the courts by draining critical resources that would otherwise be used in litigation. Incarcerated individuals suing *in forma pauperis* can get certain litigation costs waived under the PLRA, such as service of process fees[265] or the cost of transcripts or the case record.[266] However, incarcerated individuals still bear the costs for numerous other critical litigation discovery expenses.[267] For example, incarcerated individuals must be able to pay the transcript and subpoena fees if they want to depose a witness.[268] The cost of a transcript can be around $4.40 per page, meaning an incarcerated litigant can pay $220 for a 50-page transcript (which is the approximate length of a 30-minute deposition).[269] Incarcerated individuals are also responsible for the cost of procuring an expert, which are often necessary to prove technical factual questions,

264. In 2012, the median damages for a successful prison civil rights lawsuit was $4,185. *See Data Update*, INCARCERATION & L. tbl. E, https://perma.cc/TF3Q-CFXH. By comparison, data between 1990 and 2006 shows that successful non-incarcerated civil rights suits received a median between $114,000 (1990) and $154,500 (2005) in damages—almost thirty-seven times the median for successful incarcerated verdicts. U.S. Dep't of Justice, Bureau of Justice Statistics, *Civil Rights Complaints in U.S. District Courts, 1990–2006*, at 5 (2008), https://perma.cc/TC89-LM95.

265. *See* 28 U.S.C. § 1915(d).

266. *See* 28 U.S.C. § 1915(c).

267. *See, e.g.*, Shon R. Hopwood, *A Sunny Deposition: How the In Forma Pauperis Statute Provides an Avenue for Indigent Prisoners to Seek Depositions Without Accompanying Fees*, 46 HARV. C.R.-C.L. L. REV. 195, 197 n.9 ("[O]ne of the 'three main financial barriers to effective access to the trial court' is 'third-party expenses,' such as "deposition costs and expert witness fees.").

268. *See* Shon R. Hopwood, *Slicing Through the Great Legal Gordian Knot: Ways to Assist Pro Se Litigants in their Quest for Justice*, 80 FORDHAM L. REV. 1229, 1235–36 (2011) [hereinafter Hopwood, *Slicing Through*] ("Since John made only twenty cents an hour at his prison job, he was unable to afford the witness, transcription, and subpoena fees required to perform a deposition.").

269. *See, e.g.*, United States District Court for the District of Columbia, Maximum Transcript Rates, https://perma.cc/3C5A-M9B4.

such as whether a correctional officer acted with deliberate indifference to a serious medical need.[270] As one author explains:

> For certain claims—prime among them medical deliberate indifference—expert reports are invaluable. Nonetheless, incarcerated plaintiffs can only use them if they can afford to; courts stress that these plaintiffs bear "sole responsibility" for "lack[ing] the financial resources to pay an expert." And of course, expert reports are far too expensive for incarcerated plaintiffs to fund.[271]

The same goes for the costs necessary to comply with the discovery requests of the defendant. Incarcerated plaintiffs, who typically lack access to electronic discovery, must pay the costs of purchasing envelopes and copying physical documents.[272] If the plaintiff fails to comply, even for a lack of funds, they risk dismissal of their case.[273] Together, these costs alone place incarcerated litigants at a significant disadvantage. However, following the carceral litigation penalty, incarcerated individuals have even less money to pay for the critical discovery expenses they need to successfully litigate the lawsuits they are paying hundreds of hours of prison labor for.[274]

Ultimately, the PLRA's carceral litigation penalty disproportionately burdens the poorest in society. Its disincentive mechanism targets financial capacity, not frivolity. For an individual with financial means or family wealth, who can better afford the inflated costs of commissary goods, the carceral litigation penalty would likely not deter them from filing frivolous lawsuits. But for most incarcerated individuals, who arrive at prison gates indigent and who cannot afford even basic necessities, the penalty functions as a formidable barrier to judicial access. In effect, by shifting the costs of access to justice squarely onto those least able to afford them, the PLRA's carceral litigation penalty entrenches a two-tiered justice system: one tier accessible to the free and the resourced, and another functionally inaccessible for the incarcerated poor.

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270. *See, e.g.*, VA. CODE ANN. § 8.01-20.1 (West 2025) (requiring plaintiffs to secure a documented opinion from a qualified expert before initiating a medical malpractice lawsuit).

271. James Stone, *The Prison Discovery Crisis*, 134 YALE L.J. 2751, 2788 (footnote omitted) (quoting Williams v. Kort, No. CV-02-2320, 2007 WL 2071886, at *2 (M.D. Pa. July 19, 2007) (alteration in original)).

272. *See id.* at 2786.

273. *See id.*

274. *See id.* at 2765 ("Resource restrictions make valuable discovery tools like depositions and expert reports inaccessible to imprisoned litigants, shutting off any real hope of poking holes in a defendant's story or proving a doctor's indifference to a medical condition.").

B. Forcing Individuals to Choose between Basic Necessities and Access to Justice

Imposing the carceral litigation penalty also places incarcerated individuals in a position where they may need to choose between paying for their basic necessities and exercising their legal rights. The PLRA deducts 20% of an incarcerated individual's income from their commissary account each time their account exceeds $10, regardless of the source of income.[275] This means that the PLRA deducts supplemental income they receive from family for basic goods, such as food and telecommunications. Either they receive less support or their loved ones incur even greater financial strain to sustain them.

There is a gulf between the constitutional minimum standard of care a prison must provide and the level of care that human dignity and basic well-being actually require. Even the recognition of a theoretical constitutional standard, such as the requirement to provide adequate nutrition, remains meaningless if courts do not meaningfully compel prisons to comply. Either way, incarcerated individuals and their families pay the difference between what a state actually provides and what it ought to.

Forcing individuals to choose between lawsuits and basic necessities cuts both ways. Some may decide against bringing the lawsuit, but others may suffer by proceeding with the lawsuit, paying a portion of their income towards the carceral litigation penalty, and then lacking funds to make their necessary purchases each month, or having their case dismissed later after failing to make their monthly payments towards the penalty. As it stands, many incarcerated people already make calculated decisions regarding their basic necessities. For example, if a box of menstrual pads cost two weeks wages, that might be two weeks of going hungry by being unable to afford food at the commissary, or two weeks without being able to pay for a phone call to one's family. The carceral litigation penalty's imposition of an additional monthly payment obligation—one that can consume up to 100% of an individual's income[276]—renders these sacrifices even more onerous.

The ramifications of this additional financial burden extend beyond the period of incarceration itself. Many families of incarcerated individuals already experience significant financial hardship due to the loss of an important source of income. By effectively taxing income sent by families, the carceral litigation penalty exacerbates financial strain on households and increases the likelihood that an incarcerated litigant, once released, returns to communities in a worsened economic position. Such

275. *See* 28 U.S.C. § 1915(b)(2).

276. *See* Bruce v. Samuels, 577 U.S. 82, 90 (2016); *see also supra* Section III.B.2.

consequences directly undermine the objectives of ensuring successful reentry into society and can increase the chances of recidivism by leaving incarcerated people vulnerable to the types of financial instability that precede economic offenses.

Proponents of the penalty may highlight that many non-incarcerated individuals already have to make difficult financial sacrifices and that a carceral litigation penalty simply balances the scales. In proposing the PLRA, Dole exclaimed, "[c]onvicted criminals shouldn't get preferential treatment: If a law-abiding citizen has to pay the costs associated with a lawsuit, so too should a convicted criminal."[277] Yet non-incarcerated plaintiffs don't have to pay the filing fee if they lack the means to do so. This is precisely the protection enshrined by the *in forma pauperis* Act of 1892: financial means should not be a barrier to justice.[278] Incarcerated individuals are also subject to distinctive constraints on how they earn and spend their money. They cannot choose where they live and have very little meaningful opportunity for income mobility. The commissary is effectively a state-sanctioned monopoly that forecloses inmates' ability to shop around for better-priced products, meaning if an incarcerated person cannot afford to purchase what they need, they have no choice but to forgo it altogether.

As Chief Justice Burger once explained, once a person crosses through the prison gates, "[w]e have tolled the bell for him. And whether we like it or not, we have made him our collective responsibility. We are free to do something about him; he is not."[279] What the carceral litigation penalty did was explicitly single incarcerated people out, knowing that most of them were indigent and could not afford to pay the cost of bringing a lawsuit.[280] In doing so, the penalty effectively imposed a financial penalty on incarcerated individuals that the law otherwise shields against for impoverished plaintiffs outside prison.

C. Limiting a Critical Accountability Mechanism in Prisons

"The true measure of our character," Brian Stevenson writes, "is how we treat the poor, the disfavored, the accused, the incarcerated, and

277. 141 CONG. REC. 14571 (1995) (statement of Sen. Bob Dole); *id.* at 26546 (statement of Sen. Dole).

278. *See* H.R. REP. NO. 52-1079, at 1 (1892). According to the House Report of the 52nd Congress, a leading sentiment behind the *in forma pauperis* statute was to ensure that a lack of financial means would not prevent indigent plaintiffs from redressing meritorious claims. *See id.*

279. INCARCERATION TRANSPARENCY (quoting Address by The Chief Justice Warren Burger, *in* 25 REC. ASS'N BAR N.Y.C. 14, 17 (Mar. 1970 Supp.)), https://perma.cc/6ZFF-9RJP (last visited Oct. 29, 2025).

280. *See* 141 CONG. REC. 14573 (1995) (statement of Sen. Jon Kyl).

the condemned."[281] As it stands, incarcerated individuals have limited options to remedy the treatment they receive. They cannot vote in most states and cannot organize unions to advocate for themselves.[282] Their stories attract little public appeal and, because they often live in remote prisons or in far-away states, they are disconnected from the people who would advocate for them. There is no option of shopping around for a prison with better conditions. The consent decrees Congress characterized as judicial micromanagement were therefore, in many cases, a critical constitutional protection issued by the lower courts reviewing many of the shocking conditions prisons subject incarcerated people to.[283]

While prisons adopt grievance systems for incarcerated individuals to address the harms they experience, they are arguably as effective as a fox guarding a henhouse.[284] Those accused of committing abuses, or their friends and colleagues, are often the ones administering the procedures.[285] The PLRA's onerous exhaustion requirement also encourages prisons to create unreasonably complex grievance processes or for officers to commit procedural errors that increase the likelihood that a potential litigant would lose their lawsuit before it even starts.[286]

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281. BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 18 (2014).

282. *See Disenfranchisement Laws*, BRENNAN CTR. FOR JUST., https://perma.cc/PXQ2-2YFB (detailing disenfranchisement laws in each state).

283. *See* Rhodes v. Chapman, 452 U.S. 337, 354 (1981) (Brennan, J., concurring) ("[L]ower courts have learned from repeated investigation and bitter experience that judicial intervention is indispensable if constitutional dictates-not to mention considerations of basic humanity-are to be observed in the prisons.").

284. *See* David M. Alderstein, *In Need of Correction: The "Iron Triangle" of the Prison Litigation Reform Act*, 101 COLUM. L. REV. 1681, 1695–96 (2001):

> Over the years, prisoners have documented the complete failure of the grievance procedure to resolve grievances effectively. Prison staff seldom respond to informal complaints within the time period prescribed, and some don't respond at all. Even institutional inspectors and the Chief Inspector's office often fail to respond . . . . They say they did not receive it, or that they didn't receive it until two or three weeks after it was sent. Some say they responded, but the prisoner does not receive the response. Getting proper forms is also a problem . . . . If the forms aren't filed within the time limits stated in the Administrative Regulations, then the Chief Inspector's office can turn down the appeal . . . . Even though the grievance procedure contains a good-faith clause that is meant to protect prisoners from reprisals, . . . [i]f a staff-member denies an accusation made by a prisoner in a grievance, there is no amount of evidence a prisoner can present that would outweigh the staff member's denial.

Id. (quoting Diane Malloy & Dan Cahill, *Grievance Procedure Certification Should Be Challenged*, Sep.–Oct. 1997 (on file with the *Columbia Law Review*)).

285. *See* PRISON JUSTICE LEAGUE, A RIGGED SYSTEM: HOW THE TEXAS GRIEVANCE SYSTEM FAILS PRISONERS AND THE PUBLIC 17–18 (2017), https://perma.cc/TAF8-EDPK.

286. *See* Brief of the Am. C.L. Union et al. as Amici Curiae in Support of Respondent at 6 n.1, Woodford v. Ngo, 548 U.S. 81 (2006) (No. 05-416), 2006 WL 284226 (listing grievance procedures in different states, which includes "five states with

Before the PLRA, individual claims "had a real, though undeniably partial, tendency to pressure jail and prison authorities to comply with the (quite minimal) constitutional law of corrections."[287] By removing one of the remaining accountability mechanisms for prisons, the carceral litigation penalty helps insulate prison systems from public scrutiny, even when constitutional violations occur.

Most civil rights lawsuits concern claims which, if true, are of great concern to society. These include physical assaults, deprivation of medical care, challenges to the conditions of confinement, and due process disciplinary violations.[288] Without these important civil rights lawsuits, there would be little left to check prison administrations from creating more punitive and inhumane conditions within prisons.

Jeremy Bentham famously warned that "publicity is the very soul of justice . . . and the surest of all guards against improbity,"[289] without which "all other checks are fruitless."[290] The principle of judicial openness is especially relevant after the PLRA. Along with the carceral litigation penalty and the barriers on individual lawsuits, the PLRA adopted numerous ways of restricting the ability of courts to create broader relief and limiting the extent to which litigation can shine a spotlight on the reality of prison conditions. First, the PLRA created a limit on prospective judicial relief, including consent decrees, unless it is "the least intrusive means necessary" to correct a violation of a federal right.[291] Second, any preliminary injunctive relief that a court grants automatically expires 90 days after the finding of a court order unless the court makes a final finding of prospective relief.[292] Third, any consent decrees or injunctions issued are automatically terminable within two years of the order of prospective relief.[293] Even when courts have already found constitutional violations in a prison's administration, these

initial deadlines for inmate grievances, 'formal' or 'informal,' of two or three business or calendar days . . . four states with 5-day limits . . . four states with 7-day limits . . . three states with 10-day limits . . . [and] sixteen states with 14 or 15-day limits"); *see also* Eugene Novikov, *Stacking the Deck: Futility and the Exhaustion Provision of the Prison Litigation Reform Act*, 156 U. PA. L. REV. 817, 830 (2008); PRISON JUSTICE LEAGUE, *supra* note 285, at 19.

287. Schlanger, *Inmate Litigation*, *supra* note 30, at 1666.

288. *See id.* at 1571 & n.48.

289. 4 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 494 (John Bowring ed. 1843) (reproduced online by Liberty Fund, Inc.), https://perma.cc/MYK4-HEKX.

290. *Id.*

291. 18 U.S.C. § 3626(a)(1)(A); *see also id.* § 3626(c)(1).

292. *See id.* § 3626(a)(2).

293. *See id.* § 3626(b)(1)(A).

provisions shift the burden onto courts and away from the prison—the party in violation—thereby limiting courts' remedial power.[294]

The predictable consequence is that prisons likely commit more constitutional violations now than in 1995. Numerous post-PLRA investigations and reports conclude that inhumane conditions, inadequate mental health resources, violence and abuse, and overcrowding have persisted and, in some cases, increased.[295] Even the conditions that legislators derided during the passage of the PLRA, such as "how warm the food is . . . how bright the lights are . . . and whether air and water temperatures are comfortable,"[296] are all important necessities to protect an individual's wellbeing and dignity. These, too, now find little protection.

Consequently, systemic and widespread harms can only be addressed in one of two ways: by bringing an individual lawsuit seeking narrow relief for the plaintiff alone, or through a challenging and resource-intensive class action, which may take years to reach a settlement or resolution and which could involve hundreds of thousands of pages worth of documents and dozens of depositions.[297] It is reasonable to conclude that the scale of many of these class-wide lawsuits would be beyond the capacity of most *pro se* litigants and

294. *See* Kiira J. Johal, *Judges Behind Bars: The Intrusiveness Requirement's Restriction on the Implementation of Relief under the Prison Litigation Reform Act*, 114 COLUM. L. REV. 715, 749 (2014).

295. *See, e.g.*, Matt Ford, *The Everyday Brutality of America's Prisons*, NEW REPUBLIC (Apr. 5, 2019), https://perma.cc/U542-5VMX; SOLITARY WATCH AND THE UNLOCK THE BOX CAMPAIGN, CALCULATING TORTURE: ANALYSIS OF FEDERAL, STATE, AND LOCAL DATA SHOWING MORE THAN 122,000 PEOPLE IN SOLITARY CONFINEMENT IN U.S. PRISONS AND JAILS (2023), https://perma.cc/3PAC-F6M3 (documenting that over 122,000 people in the United States are subject to solitary confinement for over 22 hours a day). U.S. Dep't of Just., C.R. Div., Investigation of Alabama's State Prisons for Men 1–2 (2019), https://perma.cc/95W2-CWDD (finding "severe," "systemic," and "exacerbate[d]" violations of incarcerated individuals' Eighth Amendment rights in Alabama's prisons).

296. 141 CONG. REC. 26448 (1995) (statement of Sen. Spencer Abraham); *see also id.* ("[People] deserve better than to have their money spent, on keeping prisoners in conditions some Federal judge feels are desirable . . . . [Convicted criminals'] lives should, on the whole, be describable by the old concept known as hard time.").

297. For example, in 2019 the ACLU brought a class action lawsuit against VDOC for imposing a solitary confinement program in the super-max state prisons of Wallens Ridge and Red Onion, which left incarcerated individuals "to languish in long-term solitary confinement for years or even decades." Complaint at 133, Thorpe v. Va. Dep't Corrs., No. 3:19-cv-332 (E.D. Va. May 6, 2019), Dkt No. 1. The plaintiffs only received class certification in 2023, and are still in active litigation as of 2025. *See* Thorpe v. Va. Dep't Corrs., No. 2:20CV00007, 2023 WL 2908575, at *1. *See* Thorpe v. Va. Dep't Corrs., No. 2:20CV00007 (Dec. 11, 2025), Dkt. 515 (the last docket update, as of January 7, 2026) [hereinafter *Thorpe* Docket].

jailhouse lawyers to conduct alone.[298] This reality underscores that the main form of a civil rights action comes through individual litigants filing claims for personalized relief, subject to the carceral litigation penalty and the other procedural and financial barriers brought by the PLRA. By burdening the ability to bring these lawsuits, the penalty ensures abusive conditions within prisons will continue unchecked. The resulting harm extends not only to the individual plaintiffs, but to "the entire system of accountability that ensures that [prison and jail] officials comply with constitutional mandates."[299]

As an example, the Virginia Department of Corrections (VDOC) employs patrol canines in its prisons, most notably in its high-security prisons: Red Onion, Wallens Ridge, Keen Mountain, River North, Sussex I, and Sussex II.[300] VDOC uses these patrol canines to "terrify and intimidate" incarcerated individuals into compliance, and often to attack incarcerated individuals.[301] These attacks are brutal; prison officials frequently order their canines to maul their victims on their heads, necks, and torsos, and often when the victim is already on the ground, restrained, or hiding.[302] The bites are often severe and can be disfiguring or permanently disabling.[303]

Between 2017 and 2022, patrol canines attacked at least 271 individuals in Virginia.[304] Many of these attacks are unimaginably savage. Jaeon Chavis, who was incarcerated in Red Onion, describes

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298. Even in *Thorpe v. Virginia Department of Corrections*, the ACLU partnered up with civil rights boutique Ali Lockwood and the transnational law firm Covington & Burling LLP. *See generally Thorpe* Docket, *supra* note 297.

299. Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA J. CONST. L. 139, 140 (2008).

300. Hannah Beckler, *Patrol Dogs are Terrorizing and Mauling Prisoners Inside the United States*, BUS. INSIDER (July 23, 2023), https://perma.cc/DZ7D-DV9N.

301. *See id.* ("[VDOC] argue[s] that the presence of the dogs alone—their barking and snarling—is so intimidating that it deters many violent incidents from taking place.").

302. *See id.* Through my conversations with people living in VDOC prisons, it has become increasingly apparent that VDOC relies on the violence and brutality of these canine attacks to coerce incarcerated individuals into submission. In other words, VDOC intentionally weaponizes patrol canines as instruments of terror to create an environment where incarcerated individuals live in daily fear of being arbitrarily attacked by the patrol dogs. Incarcerated individuals describe the daily terror of hearing barking and snarling echoing around the prison.

303. *See* Hannah Beckler, *An Attack Dog Sank His 42 Teeth into My Arm and Wouldn't Let Go*, BUS. INSIDER (July 23, 2023), https://perma.cc/V2YA-LP23:

> An attack dog's bite is powerful enough to puncture light sheet metal. The 42 strong, curved teeth of the [patrol canine] are backed by 50 or more pounds of compact, athletic animal. They're so committed to their bites that they're known to break teeth on impact . . . . The dogs will launch themselves with such ferocity that they're snap their own necks on an unyielding target.

Id.

304. *See id.*

such a scene in his complaint.[305] There, he alleges how several correctional officers pinned him to the ground and allowed a patrol canine, under the close control of its handler, to tear into his knee with ferocious violence until it looked like "taco meat."[306] And yet, despite the prevalence of these attacks and the obvious merits of a lawsuit challenging their use under the Eighth Amendment, publicly available records show only 33 lawsuits challenging these dog attacks in Virginia as of December 2025. That amounts to only 12% of all known cases resulting in a lawsuit—likely less accounting for the number of incidents that were not reported. If incarcerated individuals were litigating "at the drop of a hat," one would expect to see a much greater percentage of these cases turning up in state or federal dockets. Instead, incarcerated individuals are choosing not to raise important and obviously meritorious lawsuits challenging the barbaric use of patrol canines.

In this instance it is not possible to specifically identify the cause of that deterrence—whether it comes from incarcerated individuals being unwilling or unable to pay the filing fee or from burdens arising from other provisions in the PLRA, such as their failure to exhaust administrate remedies. But it is perhaps not our goal to determine which provision is most directly responsible. Instead, what this helps illustrate is that the PLRA in its entirety, including the carceral litigation penalty, creates a web of indiscriminate barriers preventing incarcerated individuals from challenging many of the undeniably inhumane conditions of confinement that persist within prisons. Thirty years ago, an individual lawsuit like Mr. Chavis's challenging VDOC's use of patrol dogs may have helped establish a consent decree removing or severely restricting VDOC's ability to use patrol dogs in this manner. Now, unless they file a costly and lengthy class action lawsuit, incarcerated individuals in VDOC have almost no viable ways of protecting themselves from a canine attack.

VI. CREATING BETTER INFORMED LAW

In theory, a future Supreme Court could one day strike down the carceral litigation penalty as unconstitutional. The findings raised in this Article support an argument that the penalty deprives many indigent incarcerated individuals of their First Amendment and Due Process rights to access the courts and petition the government,[307] or deprives

305. *See* Complaint, Chavis v. Murray, No. 1:25-cv-14 (W.D. Va. Mar. 17, 2025). The Author represented Chavis in drafting the complaint, from which the following description of the alleged assault are taken.

306. *Id.* ¶¶ 46–60.

307. *See* Cal. Motor Transp. Co. v. Trucking Unltd., 404 U.S. 508, 513 (1972) (upholding the right of court access as "part of the right of petition protected by the First

them of a right afforded to those with financial resources in violation of the Equal Protection Clause.[308] And while those arguments may one day prove legally significant, exploring them in this moment is likely little more than an academic exercise.

As it stands, representing the rights of incarcerated individuals is an uphill battle against an onslaught of jurisprudence systematically diminishing their rights and dignity under the guise of deference to the prison's penological interests. This judicial apathy is unlikely to subside any time soon, at least not while judges remain ignorant to the lived reality incarcerated individuals experience.

Moreover, the courts have so far been unwilling to question the legislative history and process behind the PLRA. Circuit courts reviewing early constitutional challenges to the carceral litigation penalty unanimously found it to be a valid exercise of Congress's broad ability to regulate Article III courts.[309] The Supreme Court has similarly reviewed questions around the PLRA on nine occasions over the last 30 years and, on many occasions, given similar deference to Congress's deterrent intent.[310] It is therefore unlikely that courts will invalidate the PLRA or the carceral litigation penalty as unconstitutional any time soon.

We can also draw another important structural lesson from the judicial amplification of the carceral litigation penalty: judges lacking proximity to the facts often create more harmful law. It is no coincidence that the judiciary has played two conflicting roles throughout the history of prison litigation. For many years prior to the PLRA, trial courts held the role of pouring through thousands of pages of policies and incidents to understand the conditions of specific prisons and prescribe specific remedies. Yet, as we have seen since the passage of the PLRA, appellate courts disconnected from the reality of prison life and prison litigation are the ones setting the precedent. These judges may be motivated by the

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Amendment"); M.L.B. v. S.L.J., 519 U.S. 102, 128 (1996) (striking down a fee barrier to an appeal in a parental rights case and affirming that economic status cannot be a bar to accessing the courts when fundamental rights are involved); Boddie v. Connecticut, 401 U.S. 371, 374 (1971) (holding a state could not deny a divorce to a married couple based on their inability to pay approximately $60 in court costs).

308. *See* Griffin v. Illinois, 351 U.S. 12, 16–19 (1956) (striking an appellate requirement to procure a paid transcript denied indigent defendants the means to appeal, when such means are available to those with financial resources, and was therefore a violation of the Equal Protection Clause).

309. *See supra* Section III.A.

310. *See generally* Martin v. Hadix, 527 U.S. 343 (1999); Miller v. French, 530 U.S. 327 (2000); Porter v. Nussle, 534 U.S. 516 (2002); Woodford v. Ngo, 548 U.S. 81 (2006); Jones v. Bock, 549 U.S. 199 (2006); Bruce v. Samuels, 577 U.S. 82 (2016); Ross v. Blake, 578 U.S. 632 (2016); Lomax v. Ortiz-Marquez, 590 U.S. 595 (2020). *See* Perttu v. Richards, 605 U.S. 460, 464–65 (2025).

same animus Congress possessed in 1996.[311] They may never have conducted a trial, stepped foot inside a prison, or interacted with an incarcerated person other than to review the pro se appeals that occasionally arrive on their desk. Nevertheless, these judges often have the final say about how to interpret the PLRA and shape fundamental constitutional rights for millions of people.

There are numerous remedies that would take meaningful steps towards addressing the harms presented in this Article. For example, authors and advocates have pointed to the need for labor reforms that would cover incarcerated workers under the Fair Labor Standards Act or pay them an amount comparable to the federal or state minimum wage.[312] These are important proposals that go beyond economic justice and material access to the courts, but also towards a person's dignity. For people already navigating the challenging prison environment, the opportunity to earn a fair wage offers a form of affirmation and recognition of their labor that can be deeply motivational, can improve mental health, and can encourage increased feelings of responsibility,

311. It is no surprise that most judges and clerks dislike reviewing pro se complaints and briefs, which accounts for over 90% of prison lawsuits and which are often hand-written by individuals with no legal training and limited legal resources. *See Data Update*, INCARCERATION & L. tbl. B, https://perma.cc/E7LQ-FD9S (last visited Jan. 8, 2026); Hopwood, *Slicing Through*, *supra* note 268, at 1230:

> Dealing with pro se litigants is not easy. When a brief comes into Cockle, the office manager sets the documents on a counter where one of the staff will snatch it up to start the process. When a pro se brief is placed on the counter, more often than not, it lingers longer than an attorney prepared brief. To be sure, someone will eventually take it, but nobody really wants to; they are twice, often four times, more work than a normal brief. I bet avoiding pro se briefs is a common occurrence among clerks in courts across the country. I recently read a legal blog post discussing a particularly poor circuit brief written by an attorney. In the comment area, someone said that while the brief was awful, it was better than the ones he had read in his three years as a pro se clerk. The next comment was telling on the state of pro se litigation. The comment said: "They should award purple hearts for suffering through that."

Id.

312. *See* Tanisha Mink Aggarwal, *Prison Labor and the Fair Labor Standards Act: Resolving the Circuit Split on Whether Incarcerated Workers are Entitled to the Federal Minimum Wage*, 13 COLUM. J. RACE & L. 893, 916–29 (2023); Ryanne Bamieh, *The New Abolition: The Legal Consequences of Ending All Slavery and Involuntary Servitude*, 59 HARV. C.R.-C.L. L. REV. 245, 282–93 (2024); Josh Halladay, *The Thirteenth Amendment, Prison Labor Wages, and Interrupting the Intergenerational Cycle of Subjugation*, 42 SEATTLE U. L. REV. 937, 958–60 (2019); Katie Miller, *Why Incarcerated Workers Should Be Protected by the Fair Labor Standards Act*, PENN ST. L. REV.: F. BLOG (Apr. 22, 2024), https://perma.cc/WC3E-CJAB; Nina Mast, *Forced Prison Labor in the "Land of the Free"*, ECON. POL'Y INSTITUTE (Jan. 16, 2025), https://perma.cc/UN3Z-UBVN; CAPTIVE LABOR, *supra* note 1, at 86–87; RUTH DELANEY ET AL., REIMAGINING PRISON WEB REPORT (2018), https://perma.cc/4U6C-J8F4 (outlining recommendations for providing incarcerated people with a fair wage and the means to save earnings).

agency, and self-worth.[313] A person recognizing the value of their actions is likely more willing and able to exercise their legal rights and strive to improve the conditions of their community, both in prison and upon reentry to society. Such proposals are therefore worthy of serious attention in their own right.

At the heart of this Article, however, is the flawed legislative history that gave birth to the PLRA's carceral litigation penalty and the ignorant deference courts have given to this history by imposing more prohibitive interpretations of the PLRA. In this light, this Article proposes two optimistic yet viable remedies to the entrenched legal framework of the carceral litigation penalty: (A) re-legislating or amending the PLRA; and (B) promoting more informed judicial and legislative decision-making. While both have their limitations, they nevertheless offer remedial avenues to ensure that incarcerated individuals, who are already some of the most vulnerable in society, receive meaningful judicial protection.

A. Re-legislating or Amending the PLRA

The most obvious and effective solution is for Congress to do the work it neglected in 1996: to pass legislation that is based on a well-informed understanding of the factual reality in prisons, sound expert advice, and careful deliberation, all of which thoroughly address the proper procedures for prison litigation and for incarcerated litigants who claim *in forma pauperis* status. A frank review of the legislative history, as described in Part II, shows Congress failed to do this in 1996. But Congress can still atone for this by repealing or amending the PLRA now.

Given the deference courts have provided to congressional intent, this solution would be ideal. As shown in Part III, courts regularly peer into the pages of legislative history to decipher intent and resolve ambiguities in the statutory text. This means that the analysis provided by Congress has ripple effects throughout the lifetime of a law. Not only do courts rely on their explicit intent, but they frequently find Congress's silence to be instructive.

Two recent Supreme Court cases, *Perttu v. Richards* and *Jones v. Bock* illustrate this principle. In *Perttu*, the Supreme Court weighed whether a prison litigant has a right to a jury trial to determine whether they exhausted their remedies under the PLRA when the dispute of

313. *See Increasing Prison Wages to Dollars Just Makes Sense*, VERA (Feb. 7, 2023), https://perma.cc/BU7R-PVKA ("Denying a person a reasonable wage is, in essence, refusing to see their worth and value. For incarcerated people who are struggling to overcome many challenges, even those self-imposed, any positive affirmation is motivational and a step in the right direction.").

exhaustion is intertwined with the merits of the case.[314] In *Jones*, the Supreme Court reviewed a series of questions concerning the incarcerated litigant's burden of proving administrative exhaustion under the PLRA.[315] In both cases, the Supreme Court found that the PLRA's silence on certain procedural questions of exhaustion implicated "strong evidence" that Congress did not want to change the prior practice.[316]

The legislative history of the PRLA shows that this practice would lead to absurd results. Congress was silent on *almost all* provisions and implications of the PLRA—not because they did not want to change prior practice, but because they considered few very practical consequences of the PLRA as they were primarily concerned with limiting judicial oversight of prison conditions. By re-legislating the PLRA and the carceral litigation penalty, Congress can finally take up the analysis they previously neglected by asking certain fundamental questions.

1. Is There a Problem with Prison Litigation?

Sherlock Holmes famously cautioned, "[i]t is a capital mistake to theorise before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts."[317] Any attempt to address issues in prison litigation has to first confront the underlying data concerning lawsuits brought by incarcerated persons before determining whether there is a problem with prison litigation.

Numerous researchers before and since the PLRA have found "inmates' civil rights suits, at least in federal court . . . mostly concern real hardships inherent in prison life."[318] Moreover, even before the PLRA, the rate of prison litigation was not greater than the rate of litigation for non-incarcerated individuals at the federal and state level.[319] Instead, the increase in prison litigation has been directly attributed to mass incarceration and the increase in the prison population, meaning "it

314. *See* 605 U.S. 460, 464 (2025) (concerning the plaintiff's allegations that a prison employee sexually harassed him and retaliated by threatening to kill him and destroying his grievance forms—claims that the magistrate judge dismissed).

315. *See* 549 U.S. 199, 212 (2007) (addressing (1) whether the plaintiff bears the burden of proving exhaustion; (2) whether the presence of a single unexhausted claim bars suit; and (3) the effect of filing multiple claims in a complaint).

316. *Perttu*, 605 U.S. at 461; *Jones*, 549 U.S. at 212 (2007).

317. SIR ARTHUR CONAN DOYLE, THE ADVENTURES OF SHERLOCK HOLMES 7 (Global Media ed. 2006).

318. Schlanger, *Inmate Litigation*, *supra* note 30, at 1571; *see also id.* at 1572–73 & n.51 (compiling authors discussing the meritorious nature of most prison claims).

319. *See id.* at 1588 ("[T]he evidence is clear: once state and federal filings are combined, inmates and noninmates have comparable per capita civil litigation rates.").

would equally be appropriate to talk about a 'deluge' of inmate requests for food" than it would for the "veritable torrent" of prison lawsuits.[320]

In assessing the propensity for prison lawsuits to be frivolous, Congress ought to account for two important considerations. First, it would be misleading for courts to assess the rate of frivolous lawsuits by looking solely to statistics for how many cases are dismissed before trial. Even the distinction between "meritorious" and "non-meritorious" claims do not account for the wide range of harms. For example, many claims may have substantive merit even if the plaintiff does not have a legal remedy or their claims are barred by an affirmative defense.[321] These claims, while doomed, are not frivolous; they advocate for rights that are morally identifiable yet lacking legal recognition. Prison litigation also has to overcome numerous other doctrines that impose higher burdens to prove constitutional violations than those applicable to non-incarcerated litigants. These include the heightened "deliberate indifference" or "malicious and sadistic" mens rea standards for Eighth Amendment lawsuits,[322] and the "rational basis" test, which broadly defers to prison regulations infringing on constitutional rights, so long as it serves a "valid penological interest[]."[323]

Second, Congress should acknowledge that prison litigants are significantly more likely to proceed pro se. According to the Judiciary Data and Analysis Office, between 2000 and 2019, 91% of petition filings brought by incarcerated individuals were brought pro se, compared with 11% of cases brought by non-incarcerated individuals.[324] Procedurally, these litigants face uphill battles at every stage of their lawsuit, such as limited access to legal materials and the internet, resistance from prisons and judges to sharing critical information, and informational asymmetries throughout the discovery process.[325] It is

320. *Id.* at 1586–87; 141 CONG. REC. 26448 (1995) (statement of Sen. Spencer Abraham).

321. *See* Melissa Benerofe, *Collaterally Attacking the Prison Litigation Reform Act's Application to Meritorious Prisoner Civil Litigation*, 90 FORDHAM L. REV. 142, 151 (2021).

322. Farmer v. Brennan, 511 U.S. 825, 837 (1994); *see id.* (establishing "deliberate indifference"—the equivalent of criminal recklessness—as the mens rea standard for Eighth Amendment conditions of confinement claims); Whitley v. Albers, 475 U.S. 312, 320–21 (1986) (establishing an additional "malicious[] and sadistic[]" standard for Eighth Amendment excessive force claims); *see also* Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 301, 307–11 (2022) (discussing the heightened legal standards for Eighth Amendment claims).

323. Turner v. Safley, 482 U.S. 78, 88 (1987).

324. *See Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, U.S. CTS. (Feb. 11, 2021), https://perma.cc/H6M2-HSDX.

325. *See* Melissa Benerofe, *Collaterally Attacking the Prison Litigation Reform Act's Application to Meritorious Prisoner Civil Litigation*, 90 FORDHAM L. REV. 141, 163 (2021); James Stone, *The Prison Discovery Crisis*, 134 YALE L.J. 2751, 2780–89.

therefore of little surprise that prison lawsuits face such a low rate of success.

2. What are Prison Lawsuits Challenging?

Congress should also take the time to interview experts in prison administration and prison litigation, such as jailhouse lawyers, to understand the conditions and grievances that incarcerated individuals litigate and the barriers the PLRA currently imposes. If incarcerated individuals have a greater propensity to bring a lawsuit, what might contribute to that?

An obvious answer would be to first examine the nature of prison conditions around the country. Do the concerns about overcrowded prisons that dominated the consent decrees in the 1980s and 1990s still exist today? Is solitary confinement a persistent issue? Inadequate medical care? Brutality and assault by correctional officers or other incarcerated individuals? The nature of the docket would indicate that these have remained significant problems over the last 30 years. But independent review of federal, state, and private prison systems would undoubtedly become central to a determination about the harms incarcerated people experience that warrant the court's protection. If prison conditions are demonstrably unconstitutional or harmful, surely the most direct remedy is to take direct steps to regulate and improve those prisons. How easy would it be, for example, for a court to strike down VDOC's policy of using attack dogs to intimidate and terrify incarcerated individuals.

This author's own experience of speaking with incarcerated individuals about their prison grievances and lawsuits reveals that, contrary to cynical stereotypes, many incarcerated people possess a strong sense of justice. Having faced the coercive arm of the law for their own actions (or alleged actions) and having seen the futility of most prison administrations' grievance processes, many people harmed and mistreated in prison regard the judicial system as a potent remedial instrument, if not the only one. If the courts are holding them accountable for their actions, it is only fair that the courts can bring those that harm them to account as well.

3. Is a Carceral Litigation Penalty Better than the Alternatives?

If Congress determines that there is still a need to deter frivolous prison litigation, and intends to protect the ability for meritorious claims to be heard, does a carceral litigation penalty achieve these goals better than its alternatives?

The "rational consumer" modeled in economic theories might suggest that a deterrent would be effective for someone who reasonably

undervalues their claim. But human beings are not perfectly rational, and the cost-benefit analysis each person conducts would differ based on their means and experiences. Moreover, there is no relationship between poverty and frivolity. An incarcerated person with means may unreasonably overvalue their claim and remain a prolific litigator unperturbed by the filing fee. By contrast, a risk-averse pro se litigant with limited means may unreasonably undervalue their claims and conclude that, no matter the validity of their claims or the harms they suffered, the cost of bringing a lawsuit would be too steep. Because the PLRA imposes the cost on everyone, regardless of their claims, the carceral litigation penalty is overbroad and does not effectively reach its stated promise of deterring only frivolous lawsuits.

The PLRA already implemented a screening procedure that allows courts to review and filter out prison lawsuits sua sponte without committing significant resources from the courts or defendants.[326] This may be sufficient to remove the vast majority of obviously frivolous claims. Even if Congress decided to make incarcerated plaintiffs pay some degree of the court filing fee, Congress could once again grant courts discretion to make that fee proportional to the capacity of each plaintiff and could create "opt out" measures for plaintiffs willing to voluntarily dismiss their cases before any party commits significant judicial resources. Congress could also designate certain classes of claims that would be altogether exempt from paying the court filing fee. While defining these classes may to some extent appear arbitrary, it is of the utmost importance that certain claims, such as sexual abuse, physical violence, and medical negligence, still receive judicial protection.

Unfortunately, repealing or amending the PLRA and the carceral litigation penalty also appears unlikely in the current political environment. Politicians now, just as they did in 1996, seem to compete over who can be toughest on crime. Yet legislative reform is not altogether precluded. The 2018 First Step Act is an example of strong bi-partisan cooperation promoting significant criminal justice reforms in prisons.[327] Similarly, the 2023 Martha Wright-Reed Just and Reasonable Communications Act, which capped the rates for phone and video calls in prisons and jails, paid special attention to the financial burden the existing costs placed on incarcerated individuals and their families.[328] Numerous state legislatures have also enacted laws giving greater protections to the rights of incarcerated individuals. These include reforms eliminating or reducing solitary confinement and "restrictive

326. *See* 28 U.S.C. § 1915(e)(2); 28 U.S.C. § 1915A; 42 U.S.C. § 1997e(c)(1).

327. The First Step Act passed into law by 87 votes to 12. *See* Pub. L. No. 115-391, 132 Stat. 5194 (2018).

328. *See supra* Section IV.B.2.

housing,"[329] removing the costs of phone call charges in state prisons,[330] repealing "pay to stay" charges for incarceration,[331] and abolishing the penal exception to slavery in state constitutions.[332]

Together, these represent significant shifts in jurisdictions across the U.S. toward providing greater protection for incarcerated individuals, which may pave the way for more meaningful national reform. Guided by accurate information and belief in the inherent dignity of each person, a future Congress can either repeal or purposefully review and amend the glaring shortcomings of the PLRA and its carceral litigation penalty.

B. Adopting More Informed Legislative and Judicial Decision-Making

As demonstrated in Section III.B, certain courts interpreting the terms of the PLRA have shown capacity to render decisions that better protect access to the courts, even if it is only in a minority of cases. By paying close attention to the evidence and the lived reality within prisons, courts can establish precedent that better safeguards meritorious prison litigation.

For example, in addressing the treatment of multiple claims or appeals, the Second and Fourth Circuits expressly considered the consequences of cumulative payments of the filing fees. These courts recognized that cumulative payments "creat[es] a risk that inmates would have to surrender the necessities of daily subsistence,"[333] and that forcing a newly released plaintiff to immediately pay the remaining filing fee imposes on them "a more difficult financial burden than the average indigent plaintiff."[334] Had other courts afforded meaningful weight to an incarcerated person's financial capacity to afford their "essentials of life," instead of dismissing commissary expenditures as unnecessary,[335] they may have evaluated these risks more accurately.

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329. *See, e.g.*, PROTECT Act, SB 459, 2022 Conn. Acts 22-18 (Reg. Sess.) (Connecticut); Isolated Confinement Restriction Act, A314, 2019 N.J. Laws ch. 160 (New Jersey); Criminal Justice Reform Act (CJRA), SB2371, 2018 Mass. Acts ch. 69 (Massachusetts); Nevada, SB307, 2023 Nev. Stat. BDR 16-881.

330. *See, e.g.*, An Act Concerning Communication Services in Correctional and Juvenile Detention Facilities, SB 972, 2021 Conn. Acts 21-54 (Connecticut); Keep Families Connected Act, SB 1008, 2022 Cal. Stat. ch. 827 (California); Cost of Phone Calls for Persons in Custody, HB 23-1133, 2023 Colo. Sess. Laws ch. 421 (Colorado).

331. *See* 2019 Ill. Laws SB1158 (Illinois).

332. *See* Aaron Morrison, *Voters in 4 States Reject Slavery, Involuntary Servitude as Punishment for Crime*, PBS (Nov. 9, 2022, at 18:51 ET), https://perma.cc/8QP6-DCXP.

333. Torres v. O'Quinn, 612 F.3d 237, 247 (4th Cir. 2010).

334. DeBlasio v. Gilmore, 315 F.3d 396, 399 (4th Cir. 2003); *see also* McGann v. Comm'r, SSA, 96 F.3d 28, 30 (2d Cir. 1996).

335. Hendon v. Ramsey, 478 F. Supp. 2d 1214, 1220 (S.D. Cal. 2007); *see also* Atchison v. Collins, 288 F.3d 177, 181 (5th Cir. 2002).

Proponents of the carceral litigation penalty's harsher interpretations may argue that focusing on the financial reality within prison may lead to decisions that weaken Congress's deterrent intent. After all, a person is less disincentivized to file a lawsuit if the monthly deduction caps at 20% or if they can pro-rate the filing fee with other plaintiffs. Yet, as shown by the Second and Fourth Circuits' reasoning, this intent should only be one consideration, and courts should weigh it against the likelihood that creating too great a burden on allowing meaningful access to the courts is not simply deterrence, but punishment.[336]

Additionally, interpreting the carceral litigation penalty by deferring solely to its prohibitive purpose can lead to worse outcomes for the courts, which Congress surely did not intend. For example, having multiple plaintiffs challenging the same condition or treatment and pro-rating the penalty does not significantly alter the demands on the court reviewing the claim. But by making them each pay the full carceral litigation or prohibiting them from joining or interpleading a case, prospective litigants have a greater incentive to each pursue an independent lawsuit, which would increase the federal docket.[337] Courts' overreliance on deterrence have thereby produced interpretations that undermine the PLRA's original purpose of promoting judicial economy.

Relying on more informed judicial decision-making is, at best, more of an interim solution. While there is significant scope for interpreting some of the PLRA's provisions, others are crystal clear. This leaves judges with little latitude, even when the results are manifestly unjust. For instance, judges are bound to impose the carceral litigation penalty and to dismiss cases that failed to exhaust administrative remedies or when the harm, no matter how unconstitutional, lacks a physical injury. But, as demonstrated throughout Part III, informed reasoning can be the difference between deducting 20% of a person's salary or 100%—in other words, between allowing an incarcerated plaintiff to have money to purchase basic necessities or not. Therefore, until Congress repeals or amends the PLRA, judicial interpretation retains an important role in mitigating the harm posed by the carceral litigation penalty.

VII. CONCLUSION

Congress passed the PLRA on the flawed premise that frivolous litigation was overburdening the federal courts. Relying on exaggerated anecdotes and false assumptions, courts have validated and amplified

336. *See Hendon*, 478 F. Supp. 2d at 1220; Whitfield v. Scully, 241 F.3d 264, 277 (2d Cir. 2001); *DeBlasio*, 315 F.3d at 399 (4th Cir. 2003).

337. *See supra* Section III.B.3.

Congress's deterrent intent. As a result, many incarcerated plaintiffs are altogether deterred from bringing meritorious civil rights lawsuits challenging their conditions of confinement or forced to bear an even greater financial burden to pay for their basic necessities. Legislators and courts have been the problem, but by paying attention to facts and data, rather than tropes and assumptions, they may also be part of the remedy.

More informed decision-making would likely not arise in isolation. Judges and legislators who have given little regard to the rights of incarcerated people will not suddenly wake with an epiphany. A change in mentality requires a paradigm shift in the way American society views rights and punishments—a shift that the law will eventually reflect. Nevertheless, the road toward such change is trodden one step at a time and must be directed by the triumph of information over assumptions and truth over ignorance.

Ultimately, meaningful reform of access to justice within prisons requires more than refining statutory interpretation; it necessitates a broader recognition that incarcerated individuals should retain their civil rights, guided by an inviolable sense of human dignity. Yet, honoring our individual and collective dignity is unattainable so long as we treat sections of the human body as caricatures whose lived experiences do not deserve to be heard. If courts and legislators recalibrate their approach to civil rights prison litigation by anchoring their reasoning in truth and evidence, rather than in misguided assumptions, we can take steps towards redressing a flawed system that has disproportionately silenced vulnerable claimants.

VIII. APPENDIX 1

Methodology: The tables below calculate the "real cost" of commissary goods, calculated using the national or state average minimum wage for incarcerated labor in non-industry jobs. For the purposes of this Section, $0.13 is the national average minimum wage for non-industry jobs, which make up the vast majority of prison jobs.[338] The state minimum wage of non-industry jobs serves as a rough benchmark of what most people are likely to earn in prison and what the most financially vulnerable population will earn in prison. In states that do not offer a minimum wage for incarcerated workers (Texas, Florida,

338. There are two comprehensive sources for this data, which derive from the studies conducted by the ACLU and University of Chicago Law School Global Human Rights Clinic in 2022 and the Prison Policy Initiative in 2017. *Compare* CAPTIVE LABOR, *supra* note 1, at 101 tbl. C (finding, in 2022, that the national hourly wage for incarcerated labor ranged between a minimum of $0.13 and a maximum of $0.52), and Sawyer, *supra* note 159 (finding, in 2017, that the national hourly wage ranged from $0.14 to $0.63). This Article follows the 2022 average minimum wage given its recency.

Georgia), the national average minimum wage is instead used to approximate what the few incarcerated workers receiving a wage will earn. The "real labor cost" rounds up to the nearest hour, assuming that a person is typically only paid for the hours of work they complete. The "real labor cost" does not account for deductions from income.

Table 2: Sample of Prison Communication Costs

Product	Texas DCJ[339]		Florida DOC[340]		CCWF (California)[341]		Atlanta Federal BOP (Georgia)[342]		Wisconsin DOC[343]	
	Comm. Price	Real Labor Cost*	Comm. Price	Real Labor Cost*	Comm. Price	Real Labor Cost†	Comm. Price	Real Labor Cost*	Comm. Price	Real Labor Cost‡
Stamps (each)	$0.01 - $9.85 (unknown quantity)	1 - 76 hours	$0.01 - $0.73	1 - 6 hours	$0.66	9 hours	$0.55	5 hours	$0.84 (stamped envelope)	10 hours
Envelopes (each)	$0.63 - $1.50	5 - 12 hours	$0.19 - $0.25	2 hours	$0.05 -$0.20	1 - 3 hours	$0.20 – $1.85	2 - 15 hours		
Electronic messaging	$0.47	4 hours	$0.39	3 hours	$0.05	1 hour	$0.30	3 hours	$0.10	2 hours

* Calculated per hours worked at the national average minimum wage of $0.13/hour, assuming no deductions.
† Calculated per hours worked at California's minimum wage/hour average of $0.08/hour, assuming no deductions.
‡ Calculated per hours worked at Wisconsin's minimum wage/hour average of $0.09/hour, assuming no deductions.

339 *See Texas Commissary List*, *supra* note 199; Wesler, *supra* note 216.
340 *See Florida Commissary List*, *supra* note 200; Wesler, *supra* note 216.
341 *See CCWF (CA) Commissary List*, *supra* note 201; Wesler, *supra* note 216.
342 *See Atlanta BOP (GA) Commissary List*, *supra* note 202; Wesler, *supra* note 216.
343 *See Wisconsin Commissary List*, *supra* note 203; Wesler, *supra* note 216.

Table 3: Sample of Commissary Food Items

Product	Texas DCJ[344]		Florida DOC[345]		CCWF (CA)[346]		Atlanta BOP (GA) [347]		Wisconsin DOC[348]	
	Comm. Price	Real Labor Cost	Comm. Price	Real Labor Cost	Comm. Price	Real Labor Cost	Comm. Price	Real Labor Cost	Comm. Price	Real Labor Cost
Candy & cookies	$0.15 - $3.50	2 - 27 hours	$1.47 - $2.49	12 - 20 hours	$1.15 - $3.75	15 - 47 hours	$0.25 - $5.70	2 - 44 hours	$0.65 - $2.26	8 - 26 hours
Cereal & oatmeal	$4.75	37 hours	$1.42	11 hours	$2.60 - $4.40	33 - 55 hours	$2.60 - $3.35	20 - 26 hours	$2.69 - $3.57	30 - 40 hours
Chips & crackers	$0.30 - $2.80	3 - 22 hours	$1.06 - $3.86	9 - 30 hours	$1.95 - $3.35	25 - 42 hours	$0.45 - $4.10	4 - 32 hours	$0.44 - $4.87	5 - 55 hours
Instant foods & packaged meat	$0.30 - $3.50	3 - 27 hours	$1.09 - $11.11	9 - 86 hours	$0.80 - $5.35	10 - 67 hours	$1.00 - $3.15	8 - 25 hours	$1.39 - $5.10	16 - 57 hours
Nuts & trail mix	$0.45 - $3.25	4 - 25 hours	$0.81 - $2.18	7 - 17 hours	/	/	$0.80 - $3.70	7 - 29 hours	$1.08 - $2.70	12 - 30 hours
Peanut butter	$2.95	23 hours	$0.94	8 hours	$3.15	40 hours	$2.70	21 hours	$3.40 - $3.82	38 - 43 hours
Ramen	$0.35	3 hours	$0.78 - $1.29	6 - 10 hours	$0.35	5 hours	$0.30	3 hours	$0.60	7 hours
Rice, tortillas, & beans	$1.40 - $2.30	11 – 18 hours	$2.27 - $3.18	18 - 25 hours	$1.10 - $2.85	14 - 36 hours	$1.00 - $2.05	8 - 16 hours	$0.95 - $1.84	11 - 21 hours
Water	$0.20	2 hours	$0.85	7 hours	$0.70	9 hours	$9.75 (case)	75 hours	$0.58	7 hours

[344] *See Texas Commissary List*, *supra* note 199.
[345] *See Florida Commissary List*, *supra* note 200.
[346] *See CCWF (CA) Commissary List*, *supra* note 201.
[347] *See Atlanta BOP (GA) Commissary List*, *supra* note 202.
[348] *See Wisconsin Commissary List*, *supra* note 203.

Table 4: Sample of Commissary Menstrual Health Items

Product	Texas DCJ[349]		Florida DOC[350]		CCWF (CA)[351]		Atlanta BOP (GA)[352]		Wisconsin DOC[353]	
	Comm. Price	Real Labor Cost	Comm. Price	Real Labor Cost	Comm. Price	Real Labor Cost	Comm. Price	Real Labor Cost	Comm. Price	Real Labor Cost
Pads (box)	$3.00 (22 count)	24 hours	$5.20 (22 -24 count)	40 hours	/	/	/	/	$1.76 (24 count)	20 hours
Pad (each)	$0.14 each	2 hours	$0.18 - $0.20 each	2 hours	/	/	/	/	$0.07 -$0.10 each	1 - 2 hours
Tampons (box)	$6.00 - $15.00 (count not specified)	47 - 116 hours	$5.94 (10 count)	46 hours	/	/	/	/	$2.61 (8 count)	29 hours
Tampon (each)	Unknown	/	$0.59 each	5 hours	/	/	/	/	$0.33 each	4 hours

[349] *See Texas Commissary List*, *supra* note 199.
[350] *See Florida Commissary List*, *supra* note 200.
[351] *See CCWF (CA) Commissary List*, *supra* note 201.
[352] *See Atlanta BOP (GA) Commissary List*, *supra* note 202.
[353] *See Wisconsin Commissary List*, *supra* note 203.

Table 5: Sample of Commissary Hygiene Items

Product	Texas DCJ[354]		Florida DOC[355]		CCWF (California) [356]		Atlanta Federal BOP (Georgia)[357]		Wisconsin DOC[358]	
	Comm. Price	Real Labor Cost*	Comm. Price	Real Labor Cost*	Comm. Price	Real Labor Cost†	Comm. Price	Real Labor Cost*	Comm. Price	Real Labor Cost‡
Deodorant	$1.40 - $3.00	11 - 24 hours	$1.83 - $2.73	15 - 21 hours	$2.85 - $3.40	36 - 43 hours	$1.55 - $2.55	12 - 20 hours	$0.31 - $4.17	4 - 47 hours
Floss	$1.15	9 hours	$4.36	34 hours	$0.90	12	$1.80	14 hours	$0.15 - $1.06	2 - 12 hours
Mouthwash	$1.35 - $1.75	11 - 14 hours	/	/	$1.25	16	$2.65	21 hours	$1.46 - $8.42	17 - 94 hours
Razor	$1.75	14 hours	$15.82	122 hours	$1.25	16	$1.70 - $7.30	14 - 57 hours	$0.19 - $1.58	3 - 18 hours
Soap / shampoo / body wash	$0.15 - $3.50	2 - 27 hours	$1.09 - $7.34	9 - 57 hours	$0.55 - $6.50	7 - 82 hours	$0.80 - $6.25	7 - 49 hours	$0.78 - $8.80	9 - 98 hours
Shaving cream	$7.00	54 hours	$6.21	48 hours	/	/	$2.10 - $4.25	17 - 33 hours	$6.90	77 hours
Toilet paper	$0.90	7 hours	$1.15	9 hours	$0.90	12	$6.50 (6 rolls)	50 hours	$0.99	11 hours
Toothbrush	$0.50	4 hours	$0.86	7 hours	$0.60 - $0.80	8 - 10 hours	$0.95 - $3.20	8 - 25 hours	$0.11 - $0.44	2 - 5 hours
Toothpaste	$3.00 - $10.50	24 - 81 hours	$3.01- $5.05	24 - 39 hours	$1.50 - $4.65	19 - 59 hours	$3.30 - $5.60	26 – 44 hours	$0.42 - $3.11	5 - 35 hours

[354] *See Texas Commissary List*, *supra* note 199.
[355] *See Florida Commissary List*, *supra* note 200.
[356] *See CCWF (CA) Commissary List*, *supra* note 201.
[357] *See Atlanta BOP (GA) Commissary List*, *supra* note 202.
[358] *See Wisconsin Commissary List*, *supra* note 203.