

## PERMISSIVE JOINDER UNDER THE PRISON LITIGATION REFORM ACT: MORE THAN JUST A PROCEDURAL TOOL

by  
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*The prison system in the United States has undergone a major transformation in the last century, for better and for worse. Prison litigation during the 1960s and 1970s, often in the form of joined or class-action suits, led to many improvements to conditions of confinement and treatment of inmates. Inmates sought to assert their rights under the Constitution by filing suit, often paralleling similar civil rights movements of that era. In the 1980s and 1990s, rates of incarceration in the United States soared, resulting in some of the highest levels in the world. Accordingly, inmate lawsuits against prison administrators increased as well. Lawsuits filed by inmates were seen as consuming court dockets and wasting judicial resources. In response, and coupled with other “tough on crime” legislation of the era, Congress passed the Prison Litigation Reform Act, limiting the opportunities for inmates to file suit against their captors. Several Circuits have interpreted the Act as prohibiting inmates from utilizing permissive joinder under the Federal Rules of Civil Procedure. This interpretation not only undercuts the aim towards judicial economy that Congress sought to further in passing the PLRA, but also stymies reforms that inmates seek to attain through joined litigation. Correct interpretation of the PLRA serves not only to further congressional intent, but also properly maintains litigation as a viable tool for prison oversight.*

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## I. INTRODUCTION

In *Hubbard v. Haley*,<sup>1</sup> 18 prisoners filed suit jointly against administrators at Alabama's St. Clair Correctional Facility, alleging that the medical care and diet for dialysis patients fell below constitutional standards.<sup>2</sup> The plaintiffs filed for *in forma pauperis* status and sought an injunction requiring the facility to change the diet and treatment for dialysis patients.<sup>3</sup> Several years earlier, four inmates had died from allegedly negligent dialysis treatment in the same facility.<sup>4</sup> Instead of allowing the prisoners to proceed in a joint action, the district court required each prisoner to file an individual complaint and proceed separately.<sup>5</sup> Despite the potentially widespread problem within the facility, the Eleventh Circuit interpreted language in the Prison Litigation Reform Act<sup>6</sup> (PLRA) to mean that the prisoners could not bring a common claim together in one suit and affirmed the district court in dismissing the joint claim before reaching the merits.<sup>7</sup> The court's interpretation required 18 separate suits to come before the trial court. Surprisingly, the court's decision stemmed from interpreting legislation intended to reduce the number of prisoner lawsuits overwhelming the federal docket and wasting judicial resources.<sup>8</sup>

This Comment seeks to explore the circuit split on whether prisoners seeking pauper status may join similar claims together under the Prison Litigation Reform Act. I argue that joinder must be allowed under the PLRA for two main reasons. First, barring joint prisoner suits may act to inhibit needed improvements in the nation's prisons because multi-party prison litigation has historically served as the major vehicle for reform and continues to be a vital tool for change. Second, congressional intent underlying the PLRA meant to reduce the number of prisoner suits, not burden judicial resources by inhibiting similar suits to be heard together before one judge. This intent aligns with the underlying purpose of joinder: to promote judicial economy.

<sup>1</sup> 262 F.3d 1194 (11th Cir. 2001).

<sup>2</sup> *Id.* at 1195.

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

<sup>4</sup> *Lawsuit Says Four Inmates Dead After Negligence in Dialysis*, TUSCALOOSA NEWS, May 4, 1997, at 5B.

<sup>5</sup> *Hubbard*, 262 F.3d at 1195.

<sup>6</sup> Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 66-77 (1996).

<sup>7</sup> *Hubbard*, 262 F.3d at 1198.

<sup>8</sup> 141 CONG. REC. 14571 (1995).

Part II describes the role multi-party litigation has played in prison reform since the 1960s and the critical role litigation still serves in protecting prisoners' rights today. I continue by analyzing congressional intent in passing the PLRA to deter frivolous prisoner suits and conserve judicial resources. I argue that the passage of the PLRA was merely a quick fix by Congress which did little to solve the larger issues, but that the desire for judicial economy constituted a sound goal. I close Part II by discussing the unique features of prison litigation and why judges implementing the PLRA must exercise special caution to safeguard prisoners' rights.

In Part III, I analyze the tools a trial judge has to encourage judicial economy, namely, the Federal Rules of Civil Procedure which allow a judge to make determinations on multi-party litigation and joinder. Part IV describes the conflict between several provisions of the PLRA and the use of the joinder rules. I then discuss the circuit split on the viability of joint litigation under the PLRA and solutions offered by several courts. I conclude by offering best practices for the circuits and adding my own recommendations on how joinder may be reconciled with the PLRA. This Comment demonstrates that the PLRA and joinder can—and must—coexist to both protect prisoners' rights and conserve judicial resources.

## II. PRISON LITIGATION: THEN AND NOW

### A. *The Role of Litigation in Reforming America's Prisons*

Prior to the 1960s, the courts took a hands-off approach to constitutional issues of conditions in American prisons and only intervened in cases of illegal confinement. The courts gave prison officials wide discretion in safeguarding the prisoners under their care.<sup>9</sup> From the 1770s to the early 1960s, prisoners suffered abuses seen today as inhumane. The most notorious abuses occurred in southern prisons following the Plantation Model that replaced prisoners for slaves and operated facilities for profit.<sup>10</sup> The Arkansas system provided a particularly gruesome model in confining prisoners at the Cummins Farm, described by the Supreme Court in *Hutto v. Finney*:<sup>11</sup>

The administrators of Arkansas' prison system evidently tried to operate their prisons at a profit. Cummins Farm, the institution at the center of this litigation, required its 1,000 inmates to work in the fields 10 hours a day, six days a week, using mule-drawn tools and tending crops by hand. . . . They worked in all sorts of weather,

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<sup>9</sup> MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 30–31 (1998).

<sup>10</sup> Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications*, 24 PACE L. REV. 433, 433 (2004).

<sup>11</sup> 437 U.S. 678 (1978).

so long as the temperature was above freezing, sometimes in unsuitably light clothing or without shoes.

The inmates slept together in large, 100-man barracks, and some convicts, known as “creepers,” would slip from their beds to crawl along the floor, stalking their sleeping enemies. In one 18-month period, there were 17 stabbings, all but 1 occurring in the barracks. Homosexual rape was so common and uncontrolled that some potential victims dared not sleep; instead they would leave their beds and spend the night clinging to the bars nearest the guards’ station.

Inmates were lashed with a wooden-handled leather strap five feet long and four inches wide. Although it was not official policy to do so, some inmates were apparently whipped for minor offenses until their skin was bloody and bruised.

The “Tucker telephone,” a hand-cranked device, was used to administer electrical shocks to various sensitive parts of an inmate’s body.

Most of the guards were simply inmates who had been issued guns.<sup>12</sup>

Horrendous conditions in Arkansas and elsewhere became a focus for reform in accord with other civil rights issues during the Warren Court Era in the 1960s. The federal judiciary began taking a larger role in ensuring that state prisons met bare minimum levels of constitutional compliance.<sup>13</sup> Over time, a prisoner’s right to access the courts expanded from the ability to challenge a conviction through habeas proceedings to the ability to challenge the conditions of confinement via civil rights actions.<sup>14</sup> Judges responded to legitimate complaints from prisoners, vindicating their civil rights under 42 U.S.C. § 1983.<sup>15</sup>

In the decades following the 1960s, prison litigation proved vital in reforming the jails and prisons nationwide. In *Rhodes v. Chapman*,<sup>16</sup> a 1981 case, the Court noted that individual prisons or prison systems in 24 states had conditions deemed unconstitutional, stating that “the lower courts have learned from repeated investigation and bitter experience

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<sup>12</sup> *Id.* at 681–82, nn.3–6 (internal citations omitted).

<sup>13</sup> *The Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act: Implications for Federal District Judges*, 115 HARV. L. REV. 1846, 1847–48 (2002) [hereinafter *Implications for Federal District Judges*].

<sup>14</sup> Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You’re Out of Court—It May Be Effective, but Is It Constitutional?*, 70 TEMP. L. REV. 471, 474–78 (1997) (“Recognition [by the U.S. Supreme Court] of the fundamental nature of the right of access to the courts was an evolutionary process that occurred gradually over several decades.”); Michael A. Millemann, *Collateral Remedies in Criminal Cases in Maryland: An Assessment*, 64 MD. L. REV. 968, 972–73 (2005) (explaining that state courts followed suit behind the U.S. Supreme Court in recognizing a broader scope of rights that could be vindicated through habeas petitions).

<sup>15</sup> Lukens, *supra* note 14, at 474.

<sup>16</sup> 452 U.S. 337 (1981).

that judicial intervention is *indispensible* if constitutional dictates—not to mention considerations of basic humanity—are to be observed in prisons.”<sup>17</sup> Many of these suits and reforms stemmed from class-action litigation.<sup>18</sup> In addition, many suits that began with several joined plaintiffs or as individual suits were later consolidated or certified as class-actions as more widespread problems came to light.<sup>19</sup> The use of multi-party plaintiff litigation thus helped alert a federal judge that a state facility needed oversight.

Remedial measures taken by judges in the form of consent decrees, injunctions, and complex orders spanned decades of prison oversight, marking a distinct difference from typical dispute resolution used by courts.<sup>20</sup> Judges, in tandem with litigators, acted as policy makers in rehabilitating prisons.<sup>21</sup> Commentators note that prison litigation “has probably been the single most important source of change in prisons and jails during the past forty years.”<sup>22</sup> Arguably, these reforms stemmed not only from greater judicial intervention, but also from a greater awareness by prisoners of their rights and a greater public consciousness of problems in America’s prisons.<sup>23</sup> Prison litigation operated not only to

<sup>17</sup> *Id.* at 353–54.

<sup>18</sup> See, e.g., *Lightfoot v. Walker*, 486 F. Supp. 504 (S.D. Ill. 1980) (prisoners in a class action sought and received injunctive relief to stop prison officials from maintaining inadequate health care system); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 959, 984–86 (D.R.I. 1977) (class action lawsuit filed by prisoners in which the court found that the conditions at the Rhode Island adult correctional facility were so horrendous that if the minimum standards set by the court order were not met, the facility would be closed as unfit for human habitation).

<sup>19</sup> See, e.g., *Williams v. Edwards*, 547 F.2d 1206, 1208, 1219 (5th Cir. 1997) (suit initiated by four prisoners and later certified as a class action led court to affirm district court’s order that Angola prison in Louisiana be operated under constitutional standards) (for more information, see generally Case Profile of *Williams v. McKeithen*, UNIVERSITY OF MICHIGAN LAW SCHOOL: THE CIVIL RIGHTS LITIGATION CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=722>); *Burks v. Teasdale*, 603 F.2d 59, 61–63 (8th Cir. 1979) (plaintiffs had originally brought four separate cases that were later consolidated and executed as a class action; the Eighth Circuit held that the district court had not abused its discretion by directing unconstitutional overcrowding in state prisons to be eliminated and setting a timetable for completion); *Johnson v. Levine*, 450 F. Supp. 648, 649–50 (D. Md. 1978) (court consolidated three suits that had been filed individually; all the suits raised the same question as to whether the Maryland House of Correction was violating prisoners’ constitutional rights by subjecting prisoners to overcrowding); *Pugh v. Locke*, 406 F. Supp. 318, 321, 331–36 (M.D. Ala. 1976) (the court considered consolidated actions filed by inmates, found that the action was maintainable as a class action, and held that the conditions of confinement in the Alabama penal system constituted cruel and unusual punishment; the court then issued a detailed order for the penal system to bring facilities up to an acceptable standard).

<sup>20</sup> FEELEY & RUBIN, *supra* note 9, at 27–29.

<sup>21</sup> Feeley & Swearingen, *supra* note 10, at 434–41.

<sup>22</sup> *Id.* at 442.

<sup>23</sup> Vincent M. Nathan, *Have the Courts Made a Difference in the Quality of Prison Conditions? What Have We Accomplished to Date?*, 24 PACE L. REV. 419, 424–26 (2004).

benefit prisoners, but also the institutions themselves and prison administrators as well. Many prison administrators actually welcomed judicial intervention because the administrator could use the judge's order as just cause for requesting more funds, more attention, and more improvements.<sup>24</sup>

The impact and importance of prison litigation as a tool for reform rings true today. According to Jeanne Woodford, former San Quentin warden and California corrections director, "litigation is probably the only thing that allows us to our jobs as professionals. . . . I said to the judge, 'if it wasn't for this litigation, I wouldn't be able to do my job as a warden, and my job as a warden is to keep everyone safe.'" <sup>25</sup> Though prison conditions greatly improved following the reform efforts between the 1960s and 1990s, problems demanding attention persist today.

While plantation-style prisons and chain gangs may be largely a thing of the past, certain problems, the widespread incidence of prison rape and overcrowding, for example, present issues ripe for litigation and reform. Prison rape and sexual assault continues to plague modern prisons. In passing the Prison Rape Elimination Act in 2006, Congress noted "[t]he high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution" and that "[m]embers of the public and government officials are largely unaware of the epidemic character of prison rape and the day-to-day horror experienced by victimized inmates."<sup>26</sup> Indeed, lawsuits filed since the passage of the PLRA demonstrate the continuing need for oversight and reform. The horrendous conditions for female inmates in the District of Columbia prison system presents just one example of the persistent problem. Despite lengthy court orders and oversight, sexual abuse, coercion, and rape of female prisoners by male staff purportedly continues.<sup>27</sup> Past litigation by female prisoners in the D.C. prisons has exposed but not solved the crisis. Several recently filed suits serve as a

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<sup>24</sup> Feeley & Swearingen, *supra* note 10, at 469–70.

<sup>25</sup> HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT OF THE UNITED STATES 8 (2009), <http://www.hrw.org/en/reports/2009/06/16/no-equal-justice-0>, (quoting Telephone Interview by Human Rights Watch with Jeanne Woodford, former San Quentin warden and California corrections director (Oct. 29, 2008)).

<sup>26</sup> Prison Rape Elimination Act, 42 U.S.C. § 15601(12)–(13) (2006).

<sup>27</sup> Katherine C. Parker, Comment, *Female Inmates Living in Fear: Sexual Abuse by Correctional Officers in the District of Columbia*, 10 AM. U.J. GENDER SOC. POL'Y & L. 443, 444–49 (2002) (Katherine Parker documents the persistent problem of abuse in District of Columbia prisons and notes that "[t]here are few words that can describe the horrendous conditions that all inmates face in the District of Columbia Correctional Facilities. However, no possible description of the sexual abuse, torture and rape, inadequate medical care, overcrowding, and deplorable physical conditions faced each day by female inmates could come close to the actual conditions in which they live." (footnotes omitted)).

reminder that the problems still demand attention.<sup>28</sup> Furthermore, overcrowding caused by tough-on-crime laws require judicial oversight and intervention into dangerously overwhelmed prisons.<sup>29</sup> Courts have seen the need to cap the overall prison population in California because overcrowding led to violations of prisoners' Eighth Amendment right of access to medical care.<sup>30</sup>

Since the United States does not have an independent national agency responsible for ensuring minimal prison standards,<sup>31</sup> litigation remains an important tool for prisoners and administrators alike to oversee conditions and remedy these and other problems.<sup>32</sup> Despite the

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<sup>28</sup> One suit filed recently alleged that male officers preyed on women, acted as sexual predators, and locked women in solitary confinement when their advances were rebuffed. Complaint for Violation of Civil Rights, Invasion of Privacy, and Assault at 5-7, *Chase v. District of Columbia*, 2010 WL 2757780 (D.D.C. 2010) (No. 10-261), available at <http://www.courthousenews.com/2010/02/23/CCA2.pdf>. Another suit alleged sexual harassment and coercion by a correctional officer during a prison-sponsored rehabilitation program. Complaint for Violation of Civil Rights at 3-5, *Rubio v. District of Columbia*, No. 1:10-cv-00262 (D.D.C. filed Feb. 9, 2010), available at <http://www.courthousenews.com/2010/02/23/CCA1.pdf>.

<sup>29</sup> Solomon Moore, *Court Panel Orders California to Reduce Prison Population by 55,000 in 3 Years*, N.Y. TIMES, Feb. 10, 2009, at A12.

<sup>30</sup> *Id.*

<sup>31</sup> HUMAN RIGHTS WATCH, *supra* note 25, at 3. Federal oversight may ultimately offer a valuable solution for monitoring prison conditions. However, extensive overall monitoring of America's prisons seems an unlikely priority in the near future as concerns regarding health care, the economy, and war occupy our government. For now, I argue that litigation continues to be a potent alternative. While national oversight may be beneficial, prisoners filing suit themselves may serve as better internal watchdogs than the outside perspective of the bureaucratic process could provide.

<sup>32</sup> Litigation remains a valuable tool, but other reform efforts should not be overlooked. Many states are changing their ways and making valid prison reform efforts to avoid overspending on high prison populations and to improve corrections overall. A Pew Center study conducted in 2008 concluded that more than one out of every one hundred Americans is currently confined in a jail or prison. THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 3, available at [http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS\\_Prison08\\_FINAL\\_2-1-1\\_FORWEB.pdf](http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf) [hereinafter, PEW CENTER, ONE IN 100]. More recently, however, in 2010, the Pew Center noted that for the first time in almost 40 years, the prison population in state prisons declined. The study reasoned that state budget deficits, coupled with changes in sentencing laws, decreasing parole revocation rates, and a general change in the overall population due to the aging of the Baby Boom generation explains the decreased rate. Further, states have enacted reforms by including strengthened community supervision and re-entry programs and accelerating the release of low-risk inmates who complete risk-reduction programs. These strategies are aimed at obtaining a better public safety return on taxpayer expenditures. Though the number of prisoners in the state system declined, growth of prison populations in the federal prison system continues. THE PEW CENTER ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS 1-4 (Revised April 2010), available at [http://www.pewcenteronthestates.org/uploadedFiles/Prison\\_Count\\_2010.pdf](http://www.pewcenteronthestates.org/uploadedFiles/Prison_Count_2010.pdf) [hereinafter, PEW CENTER, PRISON COUNT 2010].

importance of litigation, the passage of the PLRA created various obstacles to using lawsuits as a means to spark reform.

*B. The Passage of the Prison Litigation Reform Act*

In the mid-1990s, Congress wanted to quell what it saw as an explosion of prisoner litigation overwhelming the federal court dockets.<sup>33</sup> Congressional intent in promulgating the PLRA stemmed from a desire to curtail frivolous prisoner suits and preserve meritorious claims.<sup>34</sup> Aside from decreasing frivolous prisoner lawsuits, conservatives were also anxious to limit the federal judiciary's involvement and management of state correctional facilities.<sup>35</sup> The impact of federal court judgments and consent decrees regarding state prison systems raised both federalism and separation of powers issues which Congress sought to remedy.<sup>36</sup> In passing the bill, however, a few extreme examples of frivolous prisoner suits overwhelming the courts, not federalism arguments, took center stage.<sup>37</sup> In presenting the PLRA, Senator Bob Dole discussed several truly ludicrous cases, making all prisoner litigation sound frivolous. Senator Dole noted that there were lawsuits filed claiming such grievances as "insufficient storage locker space, being prohibited from attending a

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<sup>33</sup> 141 CONG. REC. 14570 (1995) (Senator Dole noted that in the past two decades, there had been "an alarming explosion in the number of lawsuits filed by State and Federal prisoners."). The number of prisoner suits had risen dramatically. Between 1970 and 1995, the number of civil rights filings per 1,000 inmates rose from 6.3 to 24.6. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1583 (2003). However, Congress did little to explore the underlying reasons for this "explosion." See *infra* notes 42–51.

<sup>34</sup> *Hubbard v. Haley*, 262 F.3d 1194, 1196 (11th Cir. 2001).

<sup>35</sup> Senators relied upon anecdotal evidence to expose the alleged frivolity and wasted resources resulting from the majority of prisoner lawsuits. Though this concern was most oft expressed, the legislature was also concerned with the federal judiciary's involvement and management of state correctional systems through consent decrees and other oversight mechanisms. Eugene J. Kuzinski, Note, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361, 369–70 (1998). According to Margo Schlanger, "[t]he PLRA thus marked the thematic joining of conservative tort reform and anti-judicial-activist rhetoric." Schlanger, *supra* note 33, at 1566.

<sup>36</sup> Kuzinski, *supra* note 35, at 369–75. Justice Thomas articulated his concerns in *Lewis v. Casey*, noting that

too frequently, federal district courts in the name of the Constitution effect wholesale takeovers of state correctional facilities and run them by judicial decree. . . . Such gross overreaching by a federal district court simply cannot be tolerated in our federal system. Principles of federalism and separation of powers dictate that exclusive responsibility for administering state prisons resides with the State and its officials.

518 U.S. 343, 364 (1996) (Thomas, J., concurring). While Congress had this dual purpose of reconfiguring the federal courts' relationship with state prisons, this Comment focuses primarily on Congress' intent to prevent frivolous litigation and reduce the burden on court dockets.

<sup>37</sup> Schlanger, *supra* note 33, at 1568–70.



wedding anniversary party, and yes, being served creamy peanut butter instead of the chunky variety they had ordered.”<sup>38</sup> Prisoners were perceived as content to continue filing frivolous lawsuits because most plaintiffs were indigent and had “no economic disincentive to going to court.”<sup>39</sup> Indeed, numerous judges lamented the drain that frivolous suits had on judicial time and energy.<sup>40</sup> Judges expressed concerns that meritorious claims were being lost in a sea of frivolity.<sup>41</sup>

While Congress correctly observed an overall increase in prisoner litigation between the 1960s and 1990s, the anecdotal evidence offered by Congress did little to examine the underlying reasons causing the rise.<sup>42</sup> Surely, the prisoners’ rights movement acted as a corollary to the civil rights movement in the 1960s, increasing prisoner awareness and the sense of entitlement to rights, which led to more lawsuits.<sup>43</sup> More significantly, the root cause of the growth in prisoner litigation was simply the increase in incarceration nationwide,<sup>44</sup> with the prison and jail population rising in the decades prior to the PLRA from 357,292 to 1,585,586.<sup>45</sup> Lawsuits by prisoners may have been solely an extension of “overcrowding and deterioration that is only growing worse.”<sup>46</sup> Further, supposed frivolity in many of the suits stems from the fact that most prisoners appear pro se, without the assistance of any counsel, and must draft complaints and submit pleadings based on little legal education or knowledge.<sup>47</sup> While the courts dismissed a majority of inmate cases filed before the 1996 passage of the PLRA, inmate litigiousness cannot be considered the sole factor for the rise in lawsuits.<sup>48</sup>

Professor Schlanger notes in her exhaustive study of inmate litigation that numerous factors lead to a low success rate for prison suits. Prior to the PLRA, inmates could usually file without payment of the

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<sup>38</sup> 141 CONG. REC. 14570.

<sup>39</sup> *Id.* at 14571.

<sup>40</sup> Kuzinski, *supra* note 35, at 368–69, n.43.

<sup>41</sup> *Id.* at 369.

<sup>42</sup> Lukens, *supra* note 14, at 490; Schlanger, *supra* note 33, at 1568 (In referring to legislative history supporting the PLRA, Professor Schlanger notes that “[a]s is typical in litigation-reform efforts (and, perhaps, in most of lawmaking), they instead used stylized anecdotes and gerrymandered statistics.”).

<sup>43</sup> James B. Jacobs, *The Prisoners’ Rights Movement and Its Impacts, 1960–80*, in 2 CRIME AND JUSTICE 429, 433–34 (Norval Morris & Michael Tonry eds., 1980) (arguing in part that the federal judiciary’s recognition of prisoners as persons with rights heightened prisoners’ consciousness and helped politicize them; this receptiveness by the courts encouraged prisoners and civil rights advocates to fight for changes).

<sup>44</sup> Schlanger, *supra* note 33, at 1570.

<sup>45</sup> *Id.* at 1583.

<sup>46</sup> Cindy Chen, Note, *The Prison Litigation Reform Act of 1995: Doing Away with More Than Just Crunchy Peanut Butter*, 78 ST. JOHN’S L. REV. 203, 213 (2004).

<sup>47</sup> *Id.* at 215.

<sup>48</sup> *Contra* Kuzinski, *supra* note 35, at 364–66 (describing the rise in inmate litigation as “punctuated by instances of incredible individual litigiousness” and as “recreational activity”).

ordinary filing fee, and they had little other litigation costs. Thus, as Senator Dole pointed out, prisoners had little disincentive to file suit even when the likelihood of success was low.<sup>49</sup> Moreover, prison officials are less likely to settle cases with prisoners, which leads to a higher percentage of suits that go to trial and ultimately fail.<sup>50</sup> Further, since most prisoners file suit pro se, they lack counsel both to assist in the case itself and screen out cases that have little likelihood of success.<sup>51</sup>

While the majority of prisoner suits prior to the PLRA did not see any relief, Congress failed to synthesize the more complex issues leading to the problem and offer more widespread solutions. Congress could have addressed the rise in litigation in several ways. It could have created a national administrative body responsible for handling prisoner grievances. It also could have mandated reforms at the state level to ensure that all state prisons met uniform national standards. Instead, by passing the PLRA, Congress focused on creating monetary disincentives for prisoners and otherwise limiting prisoner access to the courts.<sup>52</sup> This choice was undeniably easier and more politically popular.

Congress created three basic limitations on prisoner suits through the PLRA. First, Congress gave trial judges the discretion to deter frivolous suits immediately upon the filing of a complaint. Under section 1915A, the trial court judge must screen out these potentially frivolous complaints “before docketing, if feasible or, in any event, as soon as practicable after docketing . . . in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.”<sup>53</sup> The trial judge must therefore take sua sponte action to weed out frivolous prisoner complaints.

Second, Congress created a series of financial disincentives for prisoners filing suit *in forma pauperis* (IFP). The financial disincentives in the PLRA consist of two provisions in Title 28 of the United States Code, sections 1915 and 1915A.<sup>54</sup> Section 1915 describes restrictions on a

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<sup>49</sup> Schlanger, *supra* note 33, at 1607–08.

<sup>50</sup> *Id.* at 1614–21. Prison officials and prisoners may be less likely to settle because they have unequal access to information (reducing bargaining power), litigation costs are low for prisoners (discouraging the need for settlement), settling by prison officials encourages filings by other prisoners, and the culture within the corrections institution present antagonistic, not cooperative, behavior.

<sup>51</sup> *Id.* at 1611.

<sup>52</sup> Though this Comment focuses primarily on the financial limitations of *in forma pauperis* litigants under the PLRA, the Act further limits prisoners’ access to the courts by requiring an exhaustion of administrative remedies and prohibits “awards of compensatory damages for ‘mental or emotional injury suffered while in custody without a prior showing of physical injury.’” 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, 141 (2008) (quoting the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e(e) (2006)).

<sup>53</sup> PLRA, 28 U.S.C. § 1915A(a) (2006).

<sup>54</sup> *Id.* §§ 1915(a)–(h), 1915A (referring to the financial disincentives for proceedings IFP and screening under the PLRA).

prisoner's ability to proceed with a civil action IFP.<sup>55</sup> A prisoner who brings a civil action or appeal IFP under the PLRA "shall be required to pay the full amount of a filing fee," but the payment of the full fee may be dispersed over a set of monthly payments.<sup>56</sup> Further, the IFP limitations require that "[i]n no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment."<sup>57</sup> These two filing fee provisions have resulted in various interpretations by the courts, particularly when dealing with multi-party plaintiffs.<sup>58</sup>

In addition to the qualifications on IFP status, any prisoner who, on three or more prior occasions brought a civil action that was dismissed on the grounds that it was "frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted" may not bring an additional action claiming IFP status under the PLRA.<sup>59</sup> Commentators deem this restriction as the "Three Strikes (and you're out!) Rule" because it effectively prohibits an indigent prisoner seeking IFP status from bringing suit following her third strike, absent "imminent danger of serious physical injury."<sup>60</sup>

The provisions of the PLRA thus seek to limit the number of suits by prisoners seeking IFP status in several ways. First, the Act gives trial judges considerable discretion to limit the flow of prison litigation by dismissing cases and assessing strikes. Moreover, the Act provides deterrents to discourage prisoners from filing suit in the first place. In passing these provisions, Congress hoped to halt the "explosion" of prisoner suits, decrease the burden on court dockets, and preserve judicial resources. However, Congress seemingly failed to recognize that prisoners are a "discrete and insular minority," and that limiting prisoners' access to the courts may cut off an entire class of people from seeking redress for grievances.<sup>61</sup> The responsibility thus falls on trial judges to strive toward judicial economy while still recognizing the distinctive characteristics of prison suits that make a judge's role in protecting prisoners critical.

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<sup>55</sup> *Id.* § 1915. The PLRA applies to "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." *Id.* § 1915(h) (emphasis added). In short, the PLRA applies to persons currently detained in either a prison or a jail.

<sup>56</sup> *Id.* § 1915(b)(1).

<sup>57</sup> *Id.* § 1915(b)(3).

<sup>58</sup> See *infra* Part IV.

<sup>59</sup> PLRA, 28 U.S.C. § 1915(g) (2006).

<sup>60</sup> *Id.*; Lukens *supra* note 14, at 497; Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 485 n.179 (2005). The PLRA also contains a catch-all provision that states 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." § 1915(b)(4).

<sup>61</sup> *Implications for Federal District Judges*, *supra* note 13, at 1863 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

Imposing the rigid requirements of the PLRA on this vulnerable population may further exacerbate prison problems. Prison is simply not the same as normal society, litigation often serves a different purpose, and the repercussions of not allowing a prisoner to sue could be far more dangerous than for a civilian.

*C. Unique Features of Prison Litigation*

A trial judge must approach prison litigation differently from typical civil litigation for several reasons. Prison litigation differs substantively from the types of issues and parties typically heard in civil court. Additionally, prisoners face limitations to solving complaints beyond what normal civil litigants face and have limited alternatives to otherwise address problems in the prison. The trial judge should note these differences, along with the critical role that civil litigation continues to play in reforming American prisons, when addressing prisoner complaints.

Prison suits are unique merely by their circumstances. Prisoners sue their captors—those individuals responsible for feeding, clothing, and protecting inmates. While opposing parties in standard litigation may be antagonistic, a prisoner's relationship with a correctional facility and its staff will likely be hostile. A prisoner may indeed use a lawsuit to harass a prison guard; alternatively, a prisoner may fear retaliation for filing suit for a legitimate claim.<sup>62</sup> The unusual relationship between the prisoner as a plaintiff and the captor as a defendant presents a unique scenario from most other litigation. Dismissing a suit prior to docketing may exacerbate a potentially dangerous conflict between a prisoner and a facility employee without properly addressing the underlying issue.

Second, prison litigation has played a vital role in prison reform in past decades,<sup>63</sup> but judicial oversight may be needed now more than ever. The Pew Center noted that between 1987 and 2007, the prison population in the United States nearly tripled.<sup>64</sup> While later studies in 2010 indicate that prison populations are dropping for the first time in decades,<sup>65</sup> the dramatic increase in potential litigants merits special attention. Prisoner litigants may act as unique "whistleblowers," raising red flags that identify problems that persist while prison populations remain dramatically high.

Despite these differences, the ability of a prisoner to address a complaint diminishes procedurally through the PLRA and politically via disenfranchisement. The PLRA imposes additional procedural limitations on prisoners who file suit IFP. In particular, where the prisoner seeks redress from a government entity or government

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<sup>62</sup> Schlanger, *supra* note 33, at 1578.

<sup>63</sup> See *supra* Part II.

<sup>64</sup> PEW CENTER, ONE IN 100, *supra* note 32, at 5.

<sup>65</sup> PEW CENTER, PRISON COUNT 2010, *supra* note 32, at 1–5.

employee, the PLRA requires that judges screen prisoner suits before docketing.<sup>66</sup> The judge then has the power to dismiss claims deemed “frivolous, malicious, or [that] fail[] to state a claim upon which relief may be granted.”<sup>67</sup> Admittedly, the threshold standard to avoid dismissal at this stage is low.<sup>68</sup> However, dismissal by a judge under section 1915A could prove more costly for a prisoner than dismissal of a claim for an ordinary civil litigant.

Prisoners facing a section 1915A dismissal face severe disadvantages when compared to a typical civil litigant responding to a Federal Rules of Civil Procedure 12(b)(6) motion to dismiss.<sup>69</sup> Under a 12(b)(6) motion by the defendant, the plaintiff has the opportunity to either rebut the motion or amend the allegations. This provides a plaintiff with procedural protections “by which the adversarial process ‘crystallizes the pertinent issues and facilitates appellate review of a trial court dismissal by creating a more complete record of the case.’”<sup>70</sup> However, under section 1915A, the complaint may be dismissed before ever being served on the defendant.<sup>71</sup> Further, the circuits are divided as to whether the provision allows prisoners leave to amend the complaint to cure the deficiencies.<sup>72</sup> A prisoner with a dismissed complaint may have missed the one opportunity to create a record of litigation that is helpful on appeal. Thus, the discretion of a judge to dismiss a prisoner claim may have more critical repercussions than in standard litigation. Since prisoners typically lack investigatory and discovery mechanisms, a judge could be dismissing a case before a prisoner fully vets her complaint based on the defendant’s response. The claim thus goes unexplored and unheard, but the problem may persist.

Though a prisoner’s claim may be dismissed prematurely, she lacks other alternatives to redress her grievance. Assuming she has exhausted the prison’s internal administrative remedies as required before filing suit under the PLRA,<sup>73</sup> the prisoner has no other avenue to solve her complaint. Since most states disenfranchise prisoners,<sup>74</sup> a prisoner may be powerless to challenge the prison’s conditions even gradually through the political process. A prisoner’s problem may go unaddressed by the

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<sup>66</sup> PLRA, 28 U.S.C. § 1915A (2006). This provision applies regardless of whether the prisoner seeks IFP status. *See id.* § 1915(e)(2).

<sup>67</sup> *Id.* § 1915A(b)(1).

<sup>68</sup> MICHAEL B. MUSHLIN, 3 RIGHTS OF PRISONERS 677 (4th ed. 2009).

<sup>69</sup> FED. R. CIV. P. 12(b)(6).

<sup>70</sup> MUSHLIN, *supra* note 68, at 674 (quoting *Nietzke v. Williams*, 490 U.S. 319, 330 (1989)).

<sup>71</sup> *Id.*

<sup>72</sup> Elizabeth Alexander, *Prison Litigation Reform Act Raises the Bar*, CRIM. JUST., Winter 2002, at 10, 12.

<sup>73</sup> Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e(a) (2006).

<sup>74</sup> Tanya Dugree-Pearson, *Disenfranchisement—A Race Neutral Punishment for Felony Offenders or a Way to Diminish the Minority Vote?*, 23 HAMLINE J. PUB. L. & POL’Y 359, 370 (2002).

courts and by the legislature, leaving the prisoner powerless to raise a valid claim.

A trial judge must therefore juggle a variety of underlying concerns when initially analyzing a prisoner suit. History reminds us that multi-party prisoner litigation has been used to reform deplorable conditions and that judges have played a key role in that overhaul. However, prisoner suits have the potential to overwhelm dockets. Mixed messages from Congress further complicate this dilemma. Though Congress insisted on passing the PLRA to limit frivolous lawsuits and decrease the burden on the judiciary, the language of the Act has complicated the use of procedural mechanisms that trial judges already had in their toolbox to increase efficiency and conserve resources.

### III. THE USE OF PROCEDURAL MECHANISMS AND JOINT LITIGATION IN PROMULGATING EFFICIENCY

The Federal Rules of Civil Procedure contain several key provisions that trial judges may use to encourage economy and convenience in support of the PLRA's underlying objective of limiting frivolous and burdensome litigation. Of the utmost concern for this Comment is Rule 20(a), which permits plaintiffs to join together as parties when sharing common facts and legal questions.<sup>75</sup> Other mechanisms, such as Rule 21,<sup>76</sup> Rule 42,<sup>77</sup> and Rule 23,<sup>78</sup> evince the considerable discretion that trial judges have to promote judicial economy and efficiency when structuring lawsuits. The underlying principles supporting the use of joinder and these other mechanisms align with the rational but faulty mechanisms implemented by Congress in the PLRA, to promote judicial economy. On the surface, Congress had commendable big-picture objectives in passing the PLRA: limit frivolous litigation and decrease the burden on courts. However, the trial judge's use of permissive joinder and other procedural mechanisms that already exist within the Federal Rules of Civil Procedure could advance these goals while still permitting prisoner plaintiffs with valid claims to air their grievances and expose larger problems. Thus, trial judges should be able to use their informed discretion to utilize the procedural tools in place to benefit the PLRA's underlying economy rationale.

Employing joinder in lawsuits with the same facts, parties, and claims encourages conservation. Permissible joinder by multi-party plaintiffs under the Federal Rules of Civil Procedure rests in Rule 20 and reads:

(1) *Plaintiffs.* Persons may join in one action as plaintiffs if:

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<sup>75</sup> FED. R. CIV. P. 20(a).

<sup>76</sup> FED. R. CIV. P. 21.

<sup>77</sup> FED. R. CIV. P. 42.

<sup>78</sup> FED. R. CIV. P. 23.

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.<sup>79</sup>

The primary purpose for allowing joinder is to promote judicial economy and for trial convenience.<sup>80</sup> The use of the term “trial convenience” encompasses a variety of factors to determine lawsuit size, including costs to the judicial system and litigants, harm to parties from litigation delay, potential jury confusion, and possible prejudice to the parties substantive rights stemming from consolidated adjudication.<sup>81</sup> While joint litigation may not be feasible in all situations, duplicitous lawsuits containing the same facts, parties, and claims harm society by draining judicial resources. Since courts are public resources, the public pays for each lawsuit a judge must entertain. Thus, joining litigants serves the public interest in conserving scarce judicial resources.<sup>82</sup>

Judicial interpretation of Rule 20 further supports notions of promoting judicial economy and trial convenience. In *United Mine Workers of America v. Gibbs*,<sup>83</sup> the Supreme Court stated that “the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.”<sup>84</sup> The informed discretion of the trial judge dictates whether joinder may be permitted in any instance. The judge should not invoke joinder if the result would be an “unmanageable morass,” thereby undercutting the values of economy and efficiency.<sup>85</sup> However, in making these determinations, the trial judge should be guided by the principles of joinder, “thereby eliminating unnecessary lawsuits.”<sup>86</sup>

Trial judges have several other tools to encourage efficiency while also protecting the rights of parties to the suit. Rules 21 and 42 permit

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<sup>79</sup> FED. R. CIV. P. 20(a)(1).

<sup>80</sup> Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 59 (1989).

<sup>81</sup> *Id.* at 107.

<sup>82</sup> See Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 823–27 (1989) (arguing for compulsory joinder under Rule 20 as a means to serve the public interest in conserving judicial resources). Freer argues that Rule 20 represents a “packaging ideal” for lawsuits but that the ideal is rarely achieved because the rules leave the structure of the lawsuit in the hands of the parties who make decisions based on self-interest. *Id.*

<sup>83</sup> 383 U.S. 715 (1966).

<sup>84</sup> *Id.* at 724.

<sup>85</sup> Freer, *supra* note 82, at 846–47.

<sup>86</sup> *Swan v. Ray*, 293 F.3d 1252, 1253 (11th Cir. 2002) (quoting *A.M. Alexander v. Fulton County Georgia*, 207 F.3d 1303, 1323 (11th Cir. 2000)). This language by the Eleventh Circuit seems to contradict the Circuit’s treatment of permissive joinder under the PLRA. See *infra* Part IV.

considerable discretionary control by the trial judge to either consolidate or sever trials and parties.<sup>87</sup> Under Rule 21, a court may mis-join parties and sever any claim against a party either by motion or on its own.<sup>88</sup> Similarly, the court has discretion to consolidate or sever actions under Rule 42.<sup>89</sup> In exercising the power to consolidate, the judge is guided by principles of attempting “to avoid (1) overlapping trials containing duplicative proof; (2) excess costs incurred by all parties and the government; (3) the waste of valuable court time in the trial of repetitive claims; and (4) the burden placed on a new judge in gaining familiarity with the cases.”<sup>90</sup> Moreover, the judge has the authority to require separate litigation for convenience, to avoid prejudice, and to promote “expeditious or economical adjudication.”<sup>91</sup> The trial judge also retains discretion under Rule 23 to certify litigation as a class action when common issues of law and fact exist but the parties are so numerous as to make joinder impracticable.<sup>92</sup>

The availability of these procedural rules demonstrates that trial judges have numerous means to promote economy and efficiency in their dockets, with or without the PLRA. Though joinder may not always be a feasible or preferable option, the courts may allow joinder when serving the value for which it stands. In light of the principles of efficiency and economy in allowing joinder, one would think that permissive joinder would be a natural corollary under the PLRA because both joinder and the PLRA aim to reduce the burden on the courts and conserve judicial resources. Despite this apparent link, several provisions within the PLRA create considerable hurdles to joinder, creating discord among the circuits.

#### IV. THE SPLIT IN THE CIRCUITS: THE CONFLICT BETWEEN THE PLRA AND JOINDER

The framework of the PLRA’s monetary disincentive structure for IFP litigants does not align well with joinder mechanisms. First, problems arise because an IFP plaintiff must pay the full amount of a filing fee in installments<sup>93</sup> but not exceed the amount permitted by statute for the commencement of a civil action.<sup>94</sup> Secondly, the prior dismissal of three or more claims deemed to lack merit or be frivolous prohibits a prisoner

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<sup>87</sup> FED. R. CIV. P. 21; FED. R. CIV. P. 42.

<sup>88</sup> FED. R. CIV. P. 21.

<sup>89</sup> FED. R. CIV. P. 42.

<sup>90</sup> Eunice A. Eichelberger, Annotation, *Propriety of Ordering Consolidation Under Rule 42(a) of Federal Rules of Civil Procedure in Civil Rights Actions*, 81 A.L.R. FED. 732, § 2b (1987).

<sup>91</sup> 75 AM. JUR. 2D *Trial* § 65 (2007).

<sup>92</sup> FED. R. CIV. P. 23(a).

<sup>93</sup> PLRA, 28 U.S.C. § 1915(b)(1) (2006).

<sup>94</sup> *Id.* § 1915(b)(3).



from bringing claims IFP.<sup>95</sup> The conflict between these provisions raises numerous issues. At the outset, the circuits split on whether to *ever* permit joinder in IFP prisoner cases.<sup>96</sup> In particular, the courts have struggled with how the filing fees should be assessed among multi-party plaintiffs.<sup>97</sup> Further, the assessment of “strikes” in a multi-plaintiff action raises questions of fairness and efficacy for plaintiffs with valid claims.<sup>98</sup>

Though both the procedural and pragmatic questions demonstrate a dilemma in allowing permissive joinder for PLRA litigants, decisions to allow or deny joinder in any one situation should remain in the discretion of the trial judge. Prohibiting the use of permissive joinder outright creates two larger issues. First, prison litigation serves a valuable purpose in effectuating reform in America’s prisons and has often been done through class action, consolidated duplicitous litigation, or joined litigation.<sup>99</sup> Prohibiting joinder among plaintiffs with similar grievances regarding common issues would severely inhibit necessary reforms and awareness of larger-scale problems. Moreover, prohibition undercuts the values of economy, judicial efficiency, and conservation of judicial resources intrinsic in the joinder rules and promulgated by advocates as a justification for the PLRA’s limitations on IFP litigants. The circuits split on whether the PLRA has left room for permissive joinder in prison litigation.<sup>100</sup> The broader implications of judicial decisions on joinder cannot be overlooked. Since litigation has served as a tool for prison reform, inhibiting litigants with shared problems from filing suit together threatens to limit needed oversight of America’s prisons while burdening court dockets.

#### A. *Joinder Under the PLRA Found Impermissible*

Though the minority view, the Eleventh Circuit’s determination that the PLRA prohibits joinder of multiple plaintiffs seeking IFP designation<sup>101</sup> has found favor among several district courts, whereas the respective courts of appeals have not decided the issue.<sup>102</sup> In *Hubbard v. Haley*,<sup>103</sup> the Eleventh Circuit considered the question of whether the PLRA would permit 18 pro se prisoners in an Alabama prison to file a joint action alleging that medical care and diet for dialysis patients fell below the constitutional standards established by the Eighth

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<sup>95</sup> *Id.* § 1915(g).

<sup>96</sup> *Osterloth v. Hopwood*, No. CV 06 152 M JCL, 2006 WL 3337505, at \*2 (D. Mont. Nov. 15, 2006); *Ray v. Evercom Sys. Inc.*, No. 4:05-2904-RBH, 2006 WL 2475264, at \*5 (D.S.C. Aug. 25, 2006).

<sup>97</sup> *Ray*, 2006 WL 2475264, at \*5–6.

<sup>98</sup> *Boriboune v. Berge*, 391 F.3d 852, 854 (7th Cir. 2004).

<sup>99</sup> *See supra* Part II.A.

<sup>100</sup> *Osterloth*, 2006 WL 3337505, at \*2; *Ray*, 2006 WL 2475264, at \*5.

<sup>101</sup> *Hubbard v. Haley*, 262 F.3d 1194, 1197–98 (11th Cir. 2001).

<sup>102</sup> *Osterloth*, 2006 WL 3337505, at \*2; *Ray*, 2006 WL 2475264, at \*5.

<sup>103</sup> *Hubbard*, 262 F.3d at 1194.

Amendment.<sup>104</sup> The prisoners sought an injunction requiring the facility to provide a less harmful diet and necessary medical treatment.<sup>105</sup> Though the claims seemed to easily fit within the standards for permissive joinder (a common transaction or occurrence, and a question of law or fact common to all persons seeking to be joined),<sup>106</sup> the case never reached the merits. The district court dismissed the case, determining that each plaintiff must file a separate complaint and pay a separate filing fee.<sup>107</sup> Further, the district court indicated that a new suit with a separate number would be filed and the original complaint would be considered to be each individual prisoner's complaint.<sup>108</sup> The court further directed each plaintiff to file individual petitions to proceed under pauper status.<sup>109</sup> The plaintiffs filed motions for reconsideration and for class certification, but each was denied by the district court.<sup>110</sup>

On appeal, the Eleventh Circuit considered the general question of whether the PLRA permits multi-plaintiff IFP actions.<sup>111</sup> In determining that the PLRA did not permit such permissive joinder, the court focused both on congressional intent to curtail abusive prisoner litigation and the plain language of section 1915(b)(1).<sup>112</sup> The court noted that Congress specifically put financial disincentives in place to deter prisoners from filing suit.<sup>113</sup> Further, the court's analysis focused on the language of section 1915(b)(1), which the court held "clearly and unambiguously" requires that each prisoner pay the full amount of the filing fee.<sup>114</sup> In determining that the language of the PLRA was unambiguous, the court held that joinder under Rule 20 could not be read to harmonize with section 1915(b)(1) because doing so would allow multiple prisoners to file suit but share payment of the filing fee.<sup>115</sup> Permitting a division of the filing fee payment would contradict congressional intent to create financial disincentives to filing suit.<sup>116</sup> In effect, the court ruled that the

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<sup>104</sup> *Id.* at 1195.

<sup>105</sup> *Id.*

<sup>106</sup> FED. R. CIV. P. 20(a)(1)(A), (B).

<sup>107</sup> *Hubbard*, 262 F.3d at 1195.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* On appeal, Mr. Hubbard had the aid of counsel, but the remaining litigants appeared pro se. *Id.* at 1194.

<sup>111</sup> *See id.* at 1196.

<sup>112</sup> *See id.* at 1196–98.

<sup>113</sup> *See id.*

<sup>114</sup> *Id.* at 1197.

<sup>115</sup> *Id.* at 1197–98.

<sup>116</sup> *Id.* The Eleventh Circuit did not consider the possibility, raised later by the Seventh and Third Circuits, that each prisoner in the joint action be required to pay the full filing fee individually. *See infra* Part IV.B.

later-enacted PLRA implicitly repealed Rule 20 as it relates to prisoner litigants.<sup>117</sup>

Several district courts have agreed with the *Hubbard* rationale and added reasons for disallowing joinder. In *Ray v. Evercom Systems Inc.*,<sup>118</sup> the district court denied joinder in a suit by prisoners regarding various telephone contracts at prisons and detention centers in South Carolina.<sup>119</sup> In following the reasoning set forth by *Hubbard* and affirming a denial of joinder as consistent with the PLRA, the court stated that “[i]f prisoners were allowed to bring an action together and pay the filing fee collectively, the monetary deterrence intended by the PLRA would be drastically reduced.”<sup>120</sup>

Another district court in Montana adopted the *Hubbard* reasoning but further analyzed the repeal of Rule 20 by the PLRA. In *Osterloth v. Hopwood*, the court agreed with the reasoning that Rule 20 “actually conflicts” with the requirement that each prisoner pay the full amount of the filing fee.<sup>121</sup> In addition to agreeing with this rationale for repeal, the court in *Osterloth* also noted the conflict between permissive joinder and section 1915(b)(3) of the PLRA. The court rejected the Seventh Circuit’s reasoning in *Boriboune*<sup>122</sup> that joinder was permissible if each prisoner seeking IFP status individually paid the full filing fee.<sup>123</sup> In rejecting this option, the court described the conflict with section 1915(b)(3), which requires that the amount of the filing “fee collected must not exceed the fee imposed for ‘commencement of a civil action.’”<sup>124</sup> Allowing each prisoner-plaintiff to pay the full amount of the filing fee would conflict with this provision.<sup>125</sup> Furthermore, the *Osterloth* court noted the practical difficulties in allowing permissive joinder under the PLRA, such as the transitory nature of most prisons, the difficulties in having each co-plaintiff authorize documents under Rule 5,<sup>126</sup> and the administrative headache of supervising numerous prisoner litigants’ mail.<sup>127</sup>

While the concerns raised by these three courts present genuine issues pertaining to the cohesiveness of the PLRA and permissive joinder, courts allowing joinder present a better analysis of the statute by reading the filing fee provisions in sequence and in context. Moreover, allowing

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<sup>117</sup> See *Osterloth v. Hopwood*, No. CV 06 152 M JCL, 2006 WL 3337505, at \*2 (D. Mont. Nov. 15, 2006) (analyzing the Eleventh Circuit’s reading of the statutory language as the PLRA repealing FRCP 20).

<sup>118</sup> No. 4:05-2904-RBH, 2006 WL 2475264, at \*1 (D.S.C. Aug. 25, 2006).

<sup>119</sup> *Id.* at \*1.

<sup>120</sup> *Id.* at \*6.

<sup>121</sup> *Osterloth*, 2006 WL 3337505, at \*2 (quoting *Hubbard*, 262 F.3d at 1198).

<sup>122</sup> *Boriboune v. Berge*, 391 F.3d 852 (7th Cir. 2004). Discussed *infra* Part IV.B.

<sup>123</sup> *Osterloth*, 2006 WL 3337505, at \*2–3.

<sup>124</sup> *Id.* at \*2 (quoting PLRA, 28 U.S.C. § 1915(b)(3) (2006)).

<sup>125</sup> *Id.*

<sup>126</sup> FED. R. CIV. P. 5. (requiring service of process to each co-plaintiff for every pleading or motion filed by another co-plaintiff).

<sup>127</sup> *Osterloth*, 2006 WL 3337505, at \*4.

permissive joinder better serves the underlying goals of deterring frivolous litigation and promoting judicial efficiency while still enabling prison litigation as a vehicle for reform. Barring joinder undercuts these values. The solutions offered by courts allowing joinder serve as an excellent starting point to analyze these issues, but additional changes may be necessary.

*B. Joinder Under the PLRA Found Permissible*

Three circuits have stated that the PLRA and joinder may be read together to allow multi-party IFP lawsuits by prisoners. Soon after the passage of the PLRA, the Sixth Circuit issued an administrative order specifying the new requirements for pauper status inmates.<sup>128</sup> Though the court's mandate does not affirmatively permit multi-party litigation, under section VII of the order, "Multiple Prisoners as Parties," the court notes that:

The statute does not specify how fees are to be assessed when multiple prisoners constitute the plaintiffs or appellants. Because each prisoner chose to join in the prosecution of the case, each prisoner should be proportionally liable for any fees and costs that may be assessed. Thus, any fees and costs that the district court or the court of appeals may impose shall be equally divided among all the prisoners.<sup>129</sup>

In issuing the order, the court both implied that multi-party IFP suits were permissible and set the standard for payment of fees under section 1915(b). The order met with mixed reception, however, as some district courts chose to follow the Sixth Circuit's recommended interpretation of the filing fee provision<sup>130</sup> while others rejected it.<sup>131</sup> Notably, the administrative order lacked any reference to congressional intent to create a financial scheme to deter prisoners from filing suit.<sup>132</sup>

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<sup>128</sup> See *In re Prison Litig. Reform Act*, 105 F.3d 1131 (6th Cir. 1997).

<sup>129</sup> *Id.* at 1137–38.

<sup>130</sup> See, e.g., *Burke v. Helman*, 208 F.R.D. 246, 246–47 (C.D. Ill. 2002) (denying a defendant's motion to require each co-litigant to pay the full filing fee but instead allowing the prisoners to divide up the fee).

<sup>131</sup> See, e.g., *Jones v. Fletcher*, No. Civ.A.05CV07-JMH, 2005 WL 1175960, at \*6 (E.D. Ky. May 5, 2005) (requiring each plaintiff to pay the filing fee individually).

<sup>132</sup> *Id.*; see also *In re Prison Litig. Reform Act*, 105 F.3d 1131 (no discussion of legislative intent). The court in *Jones* refused to follow the action recommended by the administrative order, instead denying joinder and requiring each plaintiff to file separate actions and file separate fees. In refusing to follow the order, the court noted: "[u]nlike the court opinions in *Boriboune*, *Hubbard*, and *Clay*, in the administrative order the Chief Judge did not consider the impact of Fed.R.Civ.P. 20 on implementation of the PLRA. Implementation of the PLRA was designed to make prisoners feel the deterrent effect of the filing fee." *Jones*, 2005 WL 1175960, at \*6 (footnote omitted).

The Seventh Circuit has also addressed the IFP filing provision but has reached a different solution. In *Boriboune v. Berge*,<sup>133</sup> the court overturned a ruling by the district court that dismissed the complaint before defendants were served with process and without reaching the merits.<sup>134</sup> Four inmates in a top-security prison filed suit under 42 U.S.C. § 1983 and asked the district judge to allow them to proceed IFP.<sup>135</sup> Among the claims were several conditions of confinement claims, as well as several claims specific to individual petitioners, including the deprivation of a Muslim petitioner's right to participate in Ramadan, and the denial of access to mental health care for another petitioner.<sup>136</sup> On the motion for reconsideration, the district court judge elaborated on her reasons for dismissing the complaint. The judge expressed concern that the interaction between Rule 20 and the PLRA would undermine the Act's financial deterrents. Further, she expressed fears of an "administrative headache" in attempting to apportion filing fees among multiple litigants. In addition, she was uncertain how plaintiffs should be assessed "strikes" under section 1915(g).<sup>137</sup>

In rejecting the district court's findings, the Seventh Circuit held that PLRA section 1915 has not superseded Rule 20, nor does "[t]he PLRA . . . mention Rule 20 or joint litigation." Rather, "[r]epeal by implication occurs only when the newer rule is logically incompatible with the older one" and the effect of dividing a filing fee among litigants "is well short of incompatibility."<sup>138</sup> Instead of dividing up the fee, however, the court preserved the deterrent effect intended by the financial disincentive scheme. The court held that joinder should be allowed and that section 1915(b)(1) should be taken at "face value," requiring each prisoner to pay the full fee.<sup>139</sup>

Furthermore, the court also addressed other concerns related to joint litigation and the Three Strikes Rule. The court noted the potential problem with joined litigants being held accountable (or not accountable) for the strikes of others. In hopes of simplifying litigation, the court recommended that the district judge alert prisoners filing joint suits that they will be held accountable for their co-plaintiff's claims (as potentially frivolous) and give them an opportunity to drop out.<sup>140</sup> By holding co-plaintiffs liable for the strikes of other litigants and mandating that each co-plaintiff pay the full filing fee, the *Boriboune* court

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<sup>133</sup> 391 F.3d 852 (7th Cir. 2004).

<sup>134</sup> *Id.* at 853.

<sup>135</sup> *Id.*

<sup>136</sup> *Boriboune v. Berge*, No. 04-C-0015-C, 2005 WL 147400, at \*1 (W.D. Wis. Jan. 12, 2005).

<sup>137</sup> *Boriboune*, 391 F.3d at 853–54.

<sup>138</sup> *Id.* at 854.

<sup>139</sup> *Id.* at 856.

<sup>140</sup> *Id.* On remand, the district court provided an explicit warning to the litigants that they were permitted to drop out at that point and that they would likely be held liable for their co-plaintiffs' strikes. *Boriboune*, 2005 WL 147400, at \*3.

promulgated the deterrent effect sought by Congress while allowing trial judges to retain discretion on joinder decisions.

The Third Circuit's recent decision in *Hagan v. Rogers*<sup>141</sup> combines several important facets of other cases and provides a good framework for how Rule 20 should be read with the PLRA. In *Hagan*, 14 inmates jointly filed a single complaint on behalf of themselves and a purported class, alleging that prison officials had "violated their constitutional rights by failing to contain and treat a serious and contagious skin condition" (potentially scabies).<sup>142</sup> The prisoners sought IFP status. The district court dismissed 13 of the prisoners from the complaint but granted leave to amend, determining that the PLRA barred prisoners from permissive joinder under Rule 20.<sup>143</sup>

In overruling the district court, the Third Circuit concluded that the PLRA did not remove prisoners from the definition of "persons" permitted to join claims under Rule 20.<sup>144</sup> The court addressed several concerns surrounding the interplay between the PLRA and Rule 20 and concluded that joinder is permissible but that each litigant must pay the full filing fee. First, they lauded the analysis in *Boriboune* that the PLRA did not alter or make any reference to the text of Rule 20 or joint litigation, and thus the PLRA did not repeal Rule 20 by implication. In construing the statute, the court further noted that "[r]epeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest."<sup>145</sup> Moreover, the court concluded that reading section 1915(b)(1) as meaning that each litigant must pay the full filing fee harmonizes the provision with Rule 20 while still serving a deterrent effect.<sup>146</sup>

Second, the court addressed the apparent conflict between subsections 1915(b)(1) and 1915(b)(3). The *Osterloth* court noted the conflict between subsections (1) and (3) of this provision when each prisoner pays the full amount of the filing fee in joined litigation.<sup>147</sup> Since subsection (1) requires a prisoner to pay the full amount, and subsection (3) deems that the full amount cannot exceed the amount permitted by statute for the commencement of a civil action, if multiple plaintiffs each paid the full filing fee in one action, subsection (3) would be violated.<sup>148</sup> The *Hagan* court, however, read the multiple provisions differently. By reading subsections (1) to (3) in sequence, it becomes apparent that

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<sup>141</sup> 570 F.3d 146 (3d Cir. 2009).

<sup>142</sup> *Id.* at 149.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 154–55 (quoting Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2532 (2007)).

<sup>146</sup> *Id.* at 155.

<sup>147</sup> See *supra* notes 121–25.

<sup>148</sup> *Osterloth v. Hopwood*, No. CV 06 152 M JCL, 2006 WL 3337505, at \*2 (D. Mont. Nov. 15, 2006).

subsection (1) provides that a court must collect a full filing fee. Subsection (2) establishes procedures for installment payments of that fee by a prisoner. Last, subsection (3) “merely ensures that an IFP prisoner’s fees, when paid by installment, will not exceed the standard individual filing fee paid in full.”<sup>149</sup> Since the PLRA does not mention Rule 20, and Congress did not indicate a desire to bar joint litigation (but on the contrary encouraged fewer suits), requiring each litigant to pay the full filing fee but allowing joinder harmonizes the internal provisions of section 1915, and harmonizes the PLRA and Rule 20.<sup>150</sup>

Lastly, like in *Boriboune*, the court also emphasized the deterrent effect of holding prisoners accountable for the strikes of their co-plaintiffs.<sup>151</sup> Though the *Hagan* court did not directly decide the issue, the court noted that “when combined with a full filing fee requirement, § 1915(g) may actually dissuade joint litigation since a court could hold that, reading the PLRA and Rule 20 together, a plaintiff is accountable for the dismissal of a co-plaintiff’s claims.”<sup>152</sup> Thus, the court in *Hagan* not only confirmed the *Boriboune* court’s holding that each prisoner should pay the full filing fee and be accountable for the strikes of others, it also addressed the apparent internal inconsistency between sections 1915(b)(1) and (3). The *Hagan* court answered many of these concerns raised by the apparent conflict between the PLRA and Rule 20, but several issues remain.

## V. CONCLUSIONS AND RECOMMENDATIONS

The courts have begun to unwind how multi-party litigation may survive post-PLRA while still preserving valuable deterrents and promoting judicial economy. Despite these advances, the PLRA still presents problems for joinder. First, the courts in both *Hagan* and *Boriboune* provided a sound starting point by allowing joinder but requiring each litigant to pay the full filing fee to achieve deterrence of frivolous claims. Second, while the *Hagan* court touched upon the applicability of the Three Strikes provisions against co-plaintiffs, I offer an alternative suggestion to protect valid claims. Third, trial judges should recognize the connection between the underlying purposes of the PLRA to promote efficiency when making determinations on joinder. The objective of the PLRA should act as an additional rationale for allowing joinder in a particular case. Finally, trial judges should be ever-mindful of the role the judiciary has played (and needs to play) in safeguarding prisoners through joint litigation. I recommend that trial judges follow these key points when managing joint prisoner litigation.

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<sup>149</sup> *Hagan*, 570 F.3d at 155.

<sup>150</sup> *Id.* at 155–56.

<sup>151</sup> *Id.* at 156.

<sup>152</sup> *Id.*

The combination of the *Hagan* and *Boriboune* analyses offers the best solution to the current split. By reading the two opinions together, one can see that the underlying values Congress sought to realize in passing the PLRA may be served, trial judges may retain their discretionary powers, and prisoners with similar claims may be able to stand together to promote necessary reform and address grievances. In passing section 1915 of the PLRA, Congress intended to create monetary disincentives to filing suit.<sup>153</sup> By requiring each co-plaintiff in joint litigation to pay the full amount of the filing fee, the *Boriboune* and *Hagan* courts' analyses align with the underlying congressional goal of deterrence. Thus, the simple initial suggestion would be to require each prisoner litigant to pay the full amount of the filing fee as a means to deter frivolous suits.

Though both courts recognized the value of deterrence in requiring individual filing fees, the interplay between joinder and the Three Strikes provision needs refining. The courts in *Hagan* and *Boriboune* both stated that holding a co-plaintiff accountable for the strikes of another litigant may deter frivolous suits.<sup>154</sup> While this may act as a deterrent, valid claims may also be dismissed. When exercising the discretion to dismiss claims under section 1915A, trial judges should recognize the value in allowing claims to develop before removing them from court. A suit filed by multiple litigants should raise awareness in the mind of a trial judge that the claim in front of them may be representative of a larger-scale problem in the particular facility. Joint litigation may expose concerns with the entire environment of a prison setting in a way that individual litigation cannot.<sup>155</sup> Dismissing an entire group of plaintiffs and imposing a strike—by throwing out the baby with the bathwater—could prevent valid claims and needed institutional overhaul.

A judge should initially temper her powers to dismiss the entire claim when one co-plaintiff's claims are deemed frivolous. During the initial screening stage under section 1915A, a judge should grant the plaintiff or plaintiffs with valid claims leave to amend the joined complaint and extract the "bad claims." If the extracted plaintiff chooses to pursue her suit in a successive individual complaint, she alone will face a "strike." The remaining plaintiffs with good claims may continue to later phases of adjudication. This solution utilizes the discretionary power afforded to the judge to review and dismiss frivolous suits while also preserving cognizable claims.

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<sup>153</sup> See *supra* Part II.B.

<sup>154</sup> See *supra* notes 140, 151–52 and accompanying text.

<sup>155</sup> See Amy Laderberg, Note, *The "Dirty Little Secret": Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse*, 40 WM. & MARY L. REV. 323, 328 (1998) (arguing that female prisoners in class-action prison abuse cases may better meet the "subjective prong" of an Eighth Amendment claim in multi-party litigation than they would in individual suits). By proceeding in class action, prisoners may better demonstrate a "sexualized environment" and a greater perception of harm by the courts and public. *Id.*



Moreover, trial judges should be persuaded by the underlying purposes of both joinder and the PLRA when deciding whether to permit joinder. The *Hagan* court hinted at the judicial economy rationale by quoting the Supreme Court in *United Mine Workers of America v. Gibbs*<sup>156</sup> in saying that “[f]or courts applying Rule 20 and related rules, ‘the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.’”<sup>157</sup> Since the PLRA ultimately sought to reduce the burden on court dockets, permitting discretionary power to allow (or deny) joinder enables judges to make choices as to the weight on their dockets and the need (or lack thereof) for joinder in any given case. As noted by the court in *Boriboune*, “[c]ivil cases can be complex whether or not any plaintiff is a prisoner, and the [Federal Rules of Civil Procedure] provide palliatives: severance or pretrial orders providing for a logical sequence of decision.”<sup>158</sup>

Permitting judges to apply joinder in prison litigation maintains the status quo—trial judges make determinations on whether issues of law and fact common to plaintiffs and defendants should be tried jointly. These considerations do not constitute an “activist” judiciary meddling in the affairs of state prison systems, which Congress disapproved of in passing the PLRA.<sup>159</sup> Rather, this simply permits judges to treat prisoner litigation as normal civil litigation when making joinder decisions. Even district courts following the *Hubbard* reasoning and determining that joinder is prohibited have recognized the value joint litigation serves in promoting the PLRA’s purpose:

While it might seem that requiring plaintiffs with similar claims to bring separate suits will work against Congress’s purpose of reducing the burden of prisoner litigation on federal courts, local rules in this district (and presumably in other districts) permit related cases to be reassigned to a single judge, who may then apply Rule 41(a) of the Federal Rules to consolidate cases presenting common issues of law or fact, effectively treating them as a single suit.<sup>160</sup>

Instead of this roundabout approach—denying joinder as barred, then later being able to consolidate—courts should exercise freedom to permit joinder from the beginning. Permitting joinder from the outset would enable prisoners to alert the judge of potentially wide-scale problems best represented and understood by joint litigation.

Lastly, the trial judge should recognize the greater values served by allowing joint litigation in any one case. The discretionary power the

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<sup>156</sup> 383 U.S. 715 (1966).

<sup>157</sup> *Hagan*, 570 F.3d at 153 (quoting *Gibbs*, 383 U.S. at 724).

<sup>158</sup> *Boriboune v. Berge*, 391 F.3d 852, 854 (7th Cir. 2004) (citing FED. R. CIV. P. 16, 20(b), 21, 42(b)).

<sup>159</sup> See *supra* notes 35–36 and accompanying text.

<sup>160</sup> *Clay v. Rice*, No. 01 C 50203, 2001 WL 1380526, at \*2 (N.D. Ill. Nov. 5, 2001).

judge exercises should always focus on the underlying goals of fairness and judicial economy. However, in prison litigation especially, the judge should recognize the impact prison litigation has had on prison reform in decades past. The judiciary and litigators worked to reform America's prisons via multi-plaintiff lawsuits. While great strides have been made, America's prisons need improvement. Joined litigation remains as one tool that prisoners may use to challenge conditions of confinement and invoke widespread reform. Though an individual trial judge's role may be limited to reform on a case-by-case basis, the effect of permitting joint litigation nationwide may effectuate great and necessary change.