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COMMENTS

OUT OF JAIL . . . BUT STILL  
NOT FREE TO LITIGATE?  
USING CONGRESSIONAL INTENT  
TO INTERPRET 28 U.S.C. § 1915(b)'S  
APPLICATION TO RELEASED PRISONERS

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#### INTRODUCTION

A prisoner wants to file a lawsuit in federal court. After drafting a complaint, he learns he has two options: pay the entire \$350 filing fee up front, or submit to an alternative arrangement whereby prison officials will debit smaller monthly payments from his commissary account. Unable to afford the entire fee at the start of proceedings, he chooses the second option and files a poverty affidavit with the court. Each month thereafter, as he earns wages for work performed in the prison facility, an administrator forwards payment from his account to the court clerk. Several months later, while still making payments, he is released from prison. His inmate account no longer exists, but he wants to continue his lawsuit. He has not yet paid off the filing fee. What should happen next? Should he have to pay the balance immediately? Should it be waived entirely? The answer remains unclear.

The federal circuits have adopted varied interpretations of 28 U.S.C. § 1915(b), the provision of the Prison Litigation Reform Act (PLRA)<sup>1</sup> that defines a prisoner's payment obligations when initiating a civil lawsuit or filing an appeal. In an attempt to prevent abuse of the federal judicial system,<sup>2</sup> the PLRA eliminated state funding for prisoner lawsuits.<sup>3</sup> Previously, indigent prisoners could

1. Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.). Passed as a rider to the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, the PLRA became law on April 26, 1996. See generally Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1558-59 (2003) (recounting the statute's proposal and passage).

2. See *infra* Part III.B.1 (summarizing the high incidence of frivolous prisoner lawsuits in federal courts).

3. See 28 U.S.C. § 1915(b)(1) (2006) (mandating that all prisoners, even impoverished ones, pay the full filing fee when commencing an action in district court).

apply for traditional *in forma pauperis* (IFP) status, which provides for a waiver of the filing fee and certain other court-imposed costs.<sup>4</sup> Under the PLRA, however, all prisoners must now pay the full amount of the filing fee, regardless of their eligibility for a waiver.<sup>5</sup> Thirteen years after the PLRA's passage, the circuits have yet to agree on how this requirement applies to prisoners who are released after filing their complaint or notice of appeal but before completing payment under the installment plan outlined in § 1915(b)(1)–(2).<sup>6</sup> The confusion lies in the statute's mandate that payment be debited over time from a prisoner's institutional account.<sup>7</sup> Section 1915(b)(2) contemplates no other methods of payment and therefore fails to explain how prisoners can satisfy the filing fee after being released.

Faced with this issue soon after the statute's enactment, the United States Court of Appeals for the Second Circuit opted not to apply the PLRA's payment requirements to prisoners released during the pendency of their suit.<sup>8</sup> Concerned that an alternative holding would require prisoners to pay a large lump sum immediately upon release, the court ruled to waive any remaining balance of the filing fee under

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4. See *infra* Part I.B (discussing the origin and purpose of the IFP doctrine). For purposes of this Comment, "traditional IFP status" refers to a waiver of the filing fee pursuant to 28 U.S.C. § 1915(a)(1), the provision of the United States Code predating and postdating the PLRA that regulates IFP procedures for non-prisoner litigants.

5. See 28 U.S.C. § 1915(b)(1)–(2) (replacing the waiver system with a repayment plan for prisoners bringing civil actions).

6. See *infra* Part II (documenting the courts' conflicting views of a released prisoner's continuing payment obligations under the PLRA). Courts have uniformly agreed that the PLRA does not affect former prisoners who file a lawsuit after release. See, e.g., *Kerr v. Puckett*, 138 F.3d 321, 323 (7th Cir. 1998) (holding that the PLRA did not apply to an inmate who filed a civil rights action after he was released on parole); see also *Schlanger*, *supra* note 1, at 1641 ("[T]he PLRA's provisions generally apply only to nonhabeas civil actions 'brought' by 'prisoners'—that is, not by former inmates or by inmates' families or estates.").

7. See 28 U.S.C. § 1915(b)(1)–(2) (instructing courts to collect the filing fee from funds in the prisoner's commissary account). Since 1930, the Department of Justice has created individual "bank type accounts" for federal inmates so that they can purchase items at the prison commissary, which stocks food and other goods. Federal Bureau of Prisons, Inmate Money, [http://www.bop.gov/inmate\\_programs/money.jsp](http://www.bop.gov/inmate_programs/money.jsp) (last visited July 29, 2009). These accounts enable prison administrators to "maintain inmates' monies" during their incarceration. *Id.* Each facility records prisoners' account transactions, including purchases at the commissary and deposits of wages earned from prison labor. *Id.* Inmates typically earn twelve to forty cents per hour for maintenance work performed at their prison facility. Federal Bureau of Prisons, Work Programs, [http://www.bop.gov/inmate\\_programs/work\\_prgms.jsp](http://www.bop.gov/inmate_programs/work_prgms.jsp) (last visited July 29, 2009). In addition, approximately eighteen percent of inmates participate in the Federal Prison Industries (FPI) program and earn between twenty-three cents and one dollar per hour while manufacturing metals, furniture, electronics, and textiles. *Id.*

8. See *infra* Part II.A (describing the Second Circuit's analysis of a released prisoner's payment obligations under the PLRA).

28 U.S.C. § 1915(a)(1).<sup>9</sup> The United States Courts of Appeals for the Fourth and Sixth Circuits later adopted similar holdings.<sup>10</sup> The United States Courts of Appeals for the Fifth, Seventh, and District of Columbia Circuits, on the other hand, relied on what they characterized as a plain reading of § 1915(b) to hold that the PLRA's payment mandate continues to apply after a prisoner's release from custody.<sup>11</sup> In these jurisdictions, despite shedding prisoner status upon release, the litigant does not shed the obligation to pay the full filing fee.<sup>12</sup> Thus, released prisoners find themselves caught somewhere between the jailhouse and courthouse doors, even though they are no longer under the care of the state and must assume the same financial responsibilities as non-prisoners.<sup>13</sup>

This Comment argues that, based on the PLRA's purpose and legislative history, prisoners who fulfilled the statute's payment obligations while incarcerated should be entitled to apply for traditional IFP status under § 1915(a)(1) upon release. Part I traces the historical development of prisoners' right of access to the courts and its ties to the IFP doctrine. It then examines the PLRA's many amendments to the federal IFP statute. Part II explains the divergent readings that circuit courts currently apply to § 1915(b). After analyzing the statute's plain language and legislative history, Part III concludes that Congress sought to impose the filing fee requirement on prisoners because they encounter fewer financial and logistical obstacles throughout the litigation process, a justification that cannot extend to released inmates. Finally, Part IV recommends that courts decide the continuing application of the PLRA on a case-by-case basis that first takes into account a released prisoner's prior compliance with the payment formula, a solution that upholds both the prisoner's constitutional right of access and the countervailing government interests.

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9. See *infra* Part II.A.

10. See *infra* Part II.A.

11. See *infra* Part II.B (explaining that these circuits consider a prisoner's payment obligations under § 1915(b) to attach at the time of filing, making his subsequent release irrelevant).

12. See *infra* Part II.B.

13. See *infra* Part III.B (comparing the litigation and living expenses incurred by prisoners and non-prisoners).

## I. BACKGROUND

A. *The Constitutional Right of Access to the Courts*

The Supreme Court granted new rights to prisoners in a series of historic cases beginning in 1940.<sup>14</sup> First, *Ex parte Hull*<sup>15</sup> established the right of inmates to file petitions in federal court to challenge the legality and conditions of their confinement.<sup>16</sup> Despite this ruling, many courts still hesitated to interfere with the practices of prison administrators.<sup>17</sup> Several years later in *Cooper v. Pate*,<sup>18</sup> however, the Supreme Court signaled the end of this “hands-off” policy by authorizing state inmates to seek damages for civil rights violations in federal court.<sup>19</sup>

In 1969, *Johnson v. Avery*<sup>20</sup> reaffirmed and extended inmates’ right of access to the courts by invalidating a Tennessee regulation that prohibited prisoners from providing legal advice or services to one another.<sup>21</sup> The Court reasoned that the rule effectively forbade

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14. See Jennifer Winslow, Comment, *The Prison Litigation Reform Act’s Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant To?*, 49 UCLA L. REV. 1655, 1678 (2002) (“[T]he Supreme Court, in the sixty years prior to the passage of the PLRA, gradually built up the cadre of civil rights afforded to inmates in the nations’ prisons.”). See generally JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 145–47 (8th ed. 2006) (tracing the history of prisoner access to the federal court system).

15. 312 U.S. 546 (1941).

16. See *id.* at 642 (invalidating a state prison regulation that required a prisoner to submit all legal documents to a prison official for examination and censorship before he filed them with the court on the ground that “the state and its officers may not abridge or impair petitioner’s right to apply to a federal court for a writ of habeas corpus”).

17. See United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953, 955 (7th Cir. 1956) (“[I]t is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries . . . .” (quoting *Stroud v. Swope*, 187 F.2d 850, 851–52 (9th Cir. 1951))); United States *ex rel.* Palmer v. Ragen, 159 F.2d 356, 358 (7th Cir. 1947) (“Under repeated decisions, state governmental bodies, who are charged with prosecution and punishment of offenders, are not to be interfered with except in case of extraordinary circumstances.” (quoting *Davis v. Dowd*, 119 F.2d 338, 338 (7th Cir. 1941))); TODD R. CLEAR ET AL., AMERICAN CORRECTIONS 101 (7th ed. 2006) (commenting that courts maintained a “hands-off” policy with respect to corrections and refused to set standards for the treatment of prisoners by claiming that they lacked the authority and the expertise to do so).

18. 378 U.S. 546 (1964) (per curiam).

19. See *id.* at 546 (granting state prison inmates standing to sue in federal court to address their grievances under the Civil Rights Act of 1871); see also 1 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 1.03 (2d ed. 1993) (describing a variety of developments in the federal judiciary and the American political system that combined “to shake the foundations” of the hands-off doctrine in the 1960s).

20. 393 U.S. 483 (1969).

21. See *id.* at 490 (“[U]nless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation . . . barring inmates from furnishing such assistance to other prisoners.”).

illiterate and non-English-speaking prisoners from filing habeas corpus petitions because they were incapable of drafting petitions without the aid of other inmates.<sup>22</sup> Eight years later, the Supreme Court broadened prisoner access even further in *Bounds v. Smith*,<sup>23</sup> a landmark case in which the Court imposed an affirmative duty on prison authorities to assist inmates in the preparation and filing of legal documents by providing adequate law libraries or adequate assistance from persons trained in the law.<sup>24</sup> In essence, the decision required that prisoners receive “a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.”<sup>25</sup> The Court explained that states could fulfill this obligation by providing items such as paper, writing utensils, notary services, stamps, funds to pay for transcripts, and court-appointed attorneys.<sup>26</sup>

At different times since the inception of the right to court access, the Supreme Court has identified its source as the Due Process Clause,<sup>27</sup> the Equal Protection Clause,<sup>28</sup> and the First Amendment.<sup>29</sup> In recent years, the circuit courts have upheld restrictions on the availability of legal resources in prisons in order to maintain security and internal order,<sup>30</sup> prevent the introduction of contraband,<sup>31</sup> and

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22. See *id.* at 487 (finding that the statute amounted to a denial of access to the courts).

23. 430 U.S. 817 (1977).

24. See *id.* at 822 (mandating that prisoners receive “adequate, effective, and meaningful” access).

25. *Id.* at 825.

26. *Id.* at 824–25. Several decades later, the Court refuted the idea that prisoners have an absolute right to adequate prison libraries or legal services in *Lewis v. Casey*, 518 U.S. 343, 356 (1996). According to the majority in *Lewis*, *Bounds* “guarantees no particular methodology” but rather the more general right of access to the courts. *Id.* Nevertheless, even under this more restrictive interpretation, prisoners still retain a fundamental right to access the courts to pursue direct appeals from the convictions for which they are incarcerated, to present habeas corpus petitions, and to bring actions under 42 U.S.C. § 1983 to challenge conditions of their confinement. *Id.* at 354–55.

27. See, e.g., *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.”), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995).

28. See, e.g., *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (referencing the “equal protection guarantee of ‘meaningful access’” to the courts).

29. See, e.g., *Bill Johnson’s Rests. v. NLRB*, 461 U.S. 731, 741 (1983) (describing the right of access to the courts as “an aspect of the First Amendment right to petition the Government for redress of grievances”).

30. See *Caldwell v. Miller*, 790 F.2d 589, 606 (7th Cir. 1986) (finding that legitimate concerns during a post-riot lockdown that resulted in the death of an inmate and two guards justified temporary restrictions on inmates’ access to library materials).

31. See *Lavado v. Keohane*, 992 F.2d 601, 608–10 (6th Cir. 1993) (authorizing prison officials to open and inspect packages from inmates’ attorneys).

manage budgetary needs.<sup>32</sup> Nevertheless, in the absence of such administrative concerns, courts continue to recognize prisoners' right of access as a fundamental constitutional entitlement.<sup>33</sup> To overcome the financial obstacles that would otherwise prevent them from exercising this right, most prisoners petition for IFP status when filing suit.<sup>34</sup>

### B. IFP Proceedings in Federal Courts Before the PLRA

To commence a civil lawsuit in federal district court, the initiating party must prepay a filing fee.<sup>35</sup> Although the Constitution does not guarantee free access to the courts in all cases,<sup>36</sup> prior to 1996 almost all courts had a statutory or administrative procedure excusing the payment of judicial costs and fees for any indigent litigant, including prisoners.<sup>37</sup>

32. See *Gaines v. Lane*, 790 F.2d 1299, 1308 (7th Cir. 1986) (holding that prison authorities may reasonably attempt to limit inmates' use of the mail system in light of budgetary cutbacks).

33. See, e.g., *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992) ("Because a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most 'fundamental political right, because [sic] preservative of all rights.'" (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886))); *Beville v. Ednie*, 74 F.3d 210, 212 (10th Cir. 1996) ("A prison inmate's right of access to the courts is the most fundamental right he or she holds." (quoting *DeMallory v. Cullen*, 855 F.2d 442, 446 (7th Cir. 1988))); *Adams v. Carlson*, 488 F.2d 619, 630 (7th Cir. 1973) ("[A]n inmate's right of unfettered access to the courts is as fundamental a right as any other he may hold. . . . All other rights of an inmate are illusory without it, being entirely dependent for their existence on the whim or caprice of the prison warden.").

34. See Jody L. Sturtz, Comment, *A Prisoner's Privilege to File In forma pauperis Proceedings: May It Be Numerically Restricted?*, 1995 DETROIT C.L. MICH. ST. U. L. REV. 1349, 1351 (1995) ("Since a vast majority of inmates are indigent, the constitutional right to access would be meaningless without the *In forma pauperis* Statute.").

35. Parties instituting a civil action in federal district court must pay a filing fee of \$350. 28 U.S.C. § 1914(a) (2006). To appeal a judgment of the district court, appellants must prepay a filing fee of \$450. 28 U.S.C. § 1913 (2006).

36. The Supreme Court has mandated waivers of filing fees in civil cases only where the litigant has a fundamental interest at stake. Compare *Boddie v. Connecticut*, 401 U.S. 371, 380–83 (1971) (invalidating a Connecticut statute that required payment of pretrial fees as a condition precedent to initiating a divorce proceeding), and *M.L.B. v. S.L.J.*, 519 U.S. 102, 124–28 (1996) (classifying the right to maintain ties with one's children as fundamental and holding that Mississippi state courts could not impose fees that prevented indigent parents from obtaining appellate review of a judicial termination of their guardianship rights), with *United States v. Kras*, 409 U.S. 434, 450 (1973) (refusing to recognize a fundamental right of access for the purpose of obtaining a discharge of one's debts in bankruptcy and declining to adopt "an unlimited rule that an indigent at all times and in all cases has the right to relief without the payment of fees"). The types of fundamental interests that can trigger IFP assistance extend beyond the family context. See *supra* note 33 and accompanying text (noting that courts have recognized prisoners' fundamental interest in being able to vindicate their constitutional rights through litigation).

37. For example, state legislatures enacted statutes to facilitate court access "[e]arly in this country's history." Stephen M. Feldman, *Indigents in the Federal Courts*:

Congress passed the original federal IFP statute in 1892, thereby giving courts the discretionary power to permit indigent plaintiffs to initiate civil actions without first paying a filing fee.<sup>38</sup> By enacting the statute, Congress sought “to guarantee that no citizen [would] be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, ‘in any court of the United States’ solely because his poverty [made] it impossible for him to pay or secure the costs.”<sup>39</sup> Until the PLRA, subsequent versions of this statute allowed qualifying indigent litigants, prisoners and non-prisoners alike, to bypass the filing fee when bringing a civil suit.<sup>40</sup> No repayment provision existed, and federal courts could bestow the IFP designation on any litigant who, in good faith, filed a poverty affidavit and demonstrated an inability to pay fees.<sup>41</sup>

When applying the IFP statute, courts have attempted to balance the interest of the state in collecting fees with the interest of indigent citizens in presenting their grievances.<sup>42</sup> IFP status has never been

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*The In Forma Pauperis Statute—Equality and Frivolity*, 54 FORDHAM L. REV. 413, 413 (1985).

38. Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252, 252 (current version at 28 U.S.C. § 1915 (2006)).

39. *Adkins v. E. I. Du Pont de Nemours & Co.*, 335 U.S. 331, 342 (1948). Congress desired that the government not prohibit indigent citizens from litigating a case “because they happen to be without the money to advance pay to the tribunals of justice.” Feldman, *supra* note 37, at 413–14 (quoting H.R. REP. No. 52-1079, at 2 (1892)).

40. See 28 U.S.C. § 1915(a) (1994) (amended 1996) (“Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor . . .”).

41. See *id.* (requiring IFP applicants to submit an affidavit that described their assets, liabilities, and employment opportunities and stated the nature of the action). In an effort to prevent fraud, courts required the supporting affidavit to state facts concerning the plaintiff’s poverty with some level of “particularity, definiteness, and certainty.” *Jefferson v. United States*, 277 F.2d 723, 725 (9th Cir. 1960) (per curiam). Courts also retained the authority to deny IFP status if a plaintiff deliberately failed to report available assets. See, e.g., *Cofield v. Ala. Pub. Serv. Comm’n*, 936 F.2d 512, 517–19 (11th Cir. 1991) (affirming the lower court’s denial of IFP status because it appeared that the applicant had access to an unknown amount of money either through his family, his extortion activities, or his legal work on behalf of fellow inmates). But see *Acevedo v. Reid*, 653 F. Supp. 347, 348–49 (S.D.N.Y. 1986) (excusing an inmate’s failure to report his veterans’ benefits and prison salary on his application for IFP status where (1) there was no evidence that he had acted in bad faith, and (2) he would have been eligible for IFP status even if those assets were taken into account). Similarly, courts could deny IFP status if they found that an applicant had intentionally depleted his resources in order to qualify for a fee waiver. See, e.g., *Collier v. Tatum*, 722 F.2d 653, 655 (11th Cir. 1983) (authorizing the lower court to examine the plaintiff’s financial dealings during the time period immediately preceding the filing of the suit to determine whether he had intentionally shifted or wasted assets that he otherwise could have used to finance the action).

42. Compare *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973) (per curiam) (upholding a filing fee requirement in Oregon in part because it helped the state

recognized as a constitutional right; rather, courts characterize it as a congressionally created benefit that can be extended or limited by the legislature.<sup>43</sup> At the same time, federal courts have never required that a litigant be absolutely destitute to qualify for IFP assistance.<sup>44</sup> For example, an applicant made a sufficient showing of poverty to proceed IFP by testifying that she had been unemployed for two years, received \$163 per month in Aid to Families with Dependent Children (AFDC) benefits and a \$385 housing subsidy, had no cash or savings account, and resided with her fourteen-year-old daughter.<sup>45</sup>

Recognizing that IFP litigants lack an economic deterrent from filing meritless complaints, Congress previously enabled federal courts to dismiss frivolous or malicious lawsuits in an effort to prevent potential abuse of § 1915.<sup>46</sup> Despite that provision, prisoners increasingly exploited the statute to file repetitive and often frivolous lawsuits against prison officials at the states' expense.<sup>47</sup> Eventually, in

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court system offset some of its operating costs), *with Adkins*, 335 U.S. at 339 (holding that the ability to pay does not require that plaintiffs contribute "the last dollar they have or can get, and thus make themselves and their dependents wholly destitute").

43. *See* *United States v. MacCollom*, 426 U.S. 317, 321 (1976) ("[T]he expenditure of public funds [on behalf of an indigent litigant] is proper only when authorized by Congress . . .").

44. *See, e.g., Jones v. State*, 893 F. Supp. 643, 646 (E.D. Tex. 1995) ("An affidavit to proceed *in forma pauperis* is sufficient if it states that one cannot, because of poverty, afford to pay for the costs of litigation and still provide for him or herself and any dependents." (citing *Adkins*, 335 U.S. at 339)).

45. *Tatum v. Cmty. Bank*, 866 F. Supp. 988, 994 (E.D. Tex. 1994). Some decisions in the last several decades have sought to limit the scope of the federal IFP statute by distinguishing between direct and indirect barriers to court access. *See, e.g., Doe v. United States*, 112 F.R.D. 183, 185 (1986) (holding that 28 U.S.C. § 1915 does not require the government to advance funds for deposition expenses because the statute only seeks to provide indigent parties with a reasonable opportunity to litigate their claims); *Johnson v. Hubbard*, 698 F.2d 286, 288–90 (6th Cir. 1983) (suggesting that a state's refusal to waive the costs of transcripts, expert witness fees, or fees to secure depositions does not deny or infringe on a person's right of access to the courts because it does not totally bar him or her from bringing a case). Thus, some courts waive only mandatory costs that affect a litigant's ability to physically access the courtroom. *See, e.g., Crowder v. Sinyard*, 884 F.2d 804, 811 (5th Cir. 1989) ("In its most obvious and formal manifestation, the right [of access] protects one's physical access to the courts."); *Johnson*, 698 F.2d at 288–90 (differentiating between actual access to the courts and procedures involved in the trial process such as depositions and transcripts). *See generally* Robert F. Koets, Annotation, *What Constitutes "Fees" or "Costs" Within Meaning of Federal Statutory Provision (28 U.S.C.A. § 1915 and Similar Predecessor Statutes) Permitting Party to Proceed In Forma Pauperis Without Prepayment of Fees and Costs or Security Therefor*, 142 A.L.R. FED. 627 (1998) (analyzing federal cases in which courts have determined whether particular expenses fall within the scope of the IFP statute).

46. *See* 28 U.S.C. § 1915(d) (1994) (amended 1996) (giving courts discretionary power to dismiss an IFP proceeding "if satisfied that the action [was] frivolous or malicious").

47. *See* 141 CONG. REC. 26,548 (1995) (statement of Sen. Dole) (lamenting that "[m]any prisoners filing lawsuits today in Federal court claim indigent status" and that they therefore experience "no economic disincentive to going to court").

response to remarkably high filing rates in the 1980s and 1990s, Congress resolved to completely transform the IFP program.<sup>48</sup>

C. *The Amended Language of the Federal IFP Statute*

Introduced as an amendment to the Civil Rights of Institutionalized Persons Act (CRIPA),<sup>49</sup> the PLRA modified and supplemented the U.S. Code in a number of ways to restrict prisoner litigation.<sup>50</sup> It redesigned the statutory subsections of § 1915 so that all prisoners bringing a civil action, even indigent ones, must pay the full filing fee.<sup>51</sup> The statute states in pertinent part:

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48. See *infra* Part III.B.1 (documenting the statistical and anecdotal evidence of prisoner filing rates that prompted passage of the PLRA).

49. Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified as amended at 42 U.S.C. § 1997 (2006)). The CRIPA provides a statutory basis for the United States Attorney General to conduct litigation on behalf of institutionalized citizens. See *id.* § 1997a(a). Congress enacted the statute in 1980 in response to alleged constitutional rights violations in “prisons, jails, mental health facilities, and other [confinement] institutions throughout the country.” 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 CORNELL L. REV. 483, 493 (2001).

50. Specifically, the PLRA requires prisoners to exhaust all administrative remedies before filing suit, places strict limitations on attorneys’ fees, precludes compensatory damage awards for mental or emotional injuries, and allows for revocation of prisoners’ good time credits in certain instances. See Schlanger, *supra* note 1, at 1627–32 (discussing the statute’s new procedural mandates and limitations on recovery). Many commentators have criticized the statute for the restrictions it places on prisoners’ ability to challenge conditions of their confinement in court. See Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1779 (2003) (“[T]he PLRA met a predominantly hostile academic reaction and a large number of court challenges.”). In February 2007, the American Bar Association’s general policy-making body passed a resolution urging Congress to repeal or amend certain sections of the PLRA. See ROBERT M.A. JOHNSON, AMERICAN BAR ASSOCIATION, REPORT TO THE HOUSE OF DELEGATES (2007), <http://www.savecoalition.org/americanbar.html> (listing proposed amendments and contending that Congress never fully vetted the statute’s implications). Despite these criticisms, however, “the statute has survived judicial scrutiny essentially unchanged.” Roosevelt, *supra*, at 1778.

51. See *Gay v. Tex. Dep’t of Corr. State Jail Div.*, 117 F.3d 240, 241 (5th Cir. 1997) (“Under the PLRA, a prisoner is not entitled to commence an action or file an appeal without prepayment in some form (§ 1915(b)(2)), a privilege afforded to non-prisoners under § 1915(a)(1).”); *McGore v. Wrigglesworth*, 114 F.3d 601, 604 (6th Cir. 1997) (“Pauper status for inmates, as we previously knew it, no longer exists.”). Courts had begun to condition IFP status on payment of a partial filing fee, calculated in accordance with various formulas, even prior to the passage of the PLRA. See *In re Epps*, 888 F.2d 964, 967 (2d Cir. 1989) (remarking that a district court’s power to waive the entire filing fee includes the power to waive only a portion of it); *Lumbert v. Ill. Dep’t of Corr.*, 827 F.2d 257, 260 (7th Cir. 1987) (affirming the dismissal of an inmate’s civil rights suit when he failed to pay a \$7.20 partial filing fee); *Smith v. Martinez*, 706 F.2d 572, 573 (5th Cir. 1983) (ruling that the district court had discretion to require an indigent prisoner to pay at least minimal service and filing fees where data of his present assets showed that he could do so without undue financial hardship); *Evans v. Croom*, 650 F.2d 521, 524 (4th Cir. 1981)

[I]f a prisoner brings a civil action or files an appeal *in forma pauperis*, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of (A) the average monthly deposits to the prisoner's account; or (B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.<sup>52</sup>

The statute further provides:

After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds \$10 until the filing fees are paid.<sup>53</sup>

Thus, inmates must either pay the entire filing fee at the initiation of the proceeding or apply for revised IFP status and proceed under the strict installment plan set forth in § 1915(b)(1)–(2). The latter option requires an inmate to pay an initial partial filing fee from funds in his inmate account.<sup>54</sup> Once he pays the initial partial filing fee in full, the prisoner must make installment payments equal to twenty percent of his preceding month's income, as long as that amount exceeds ten dollars.<sup>55</sup> For example, if a prisoner maintains an average monthly account balance of twenty dollars for the six months preceding the filing of his complaint, he would have to pay twenty percent of that amount, or four dollars, as an initial partial filing fee. Thereafter, assuming that the prisoner continues to accumulate twenty dollars in his account each month, he would pay four-dollar installments for roughly eighty-eight months to satisfy the \$350 filing fee.

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(finding nothing impermissible in compelling a prisoner to make "some partial contribution" out of resources from his commissary account, accumulated either from earnings or private resources); *In re Stump*, 449 F.2d 1297, 1298 (1st Cir. 1971) (requiring a state prisoner who had a \$218 cash credit with the prison warden to pay a \$15 filing fee in a civil rights action arising out of his parole revocation).

52. 28 U.S.C. § 1915(b)(1) (2006).

53. *Id.* § 1915(b)(2).

54. *Id.* § 1915(b)(1). The amended statute requires prisoners to eventually pay the initial partial filing fee even if they lack financial resources at the time they file the complaint or appeal. *See id.* (instructing courts to collect the initial partial filing fee "when funds exist"). Therefore, if funds accumulate in a prisoner's account at a later date, the prison administrator must immediately forward that money to the court, even if it amounts to less than ten dollars. *Id.*

55. *Id.* § 1915(b)(2).

The PLRA also demands more detailed documentation of a prisoner's indigent status than previous versions of the IFP statute demanded.<sup>56</sup> In addition, courts can charge a prisoner who loses a case for the full costs related to the action.<sup>57</sup> The process for a non-incarcerated indigent litigant remains the same as before the PLRA's enactment.<sup>58</sup> Thus, if a non-prisoner moves for traditional IFP status under

§ 1915(a)(1), the court can waive the filing fee as long as the litigant demonstrates a lack of financial resources.<sup>59</sup> While trial courts retain broad discretion in assessing an IFP applicant's indigency, the PLRA mandates dismissal upon a finding that the litigant falsified his poverty affidavit; the suit is frivolous or malicious; the complaint fails to state a claim on which relief may be granted; or the litigant seeks monetary relief against a defendant who qualifies for immunity.<sup>60</sup> Courts handle the timing of the indigency and frivolity determinations differently.<sup>61</sup>

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56. *See id.* § 1915(a)(2) (requiring submission of "a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined").

57. *Id.* § 1915(f)(2)(A). Courts retain discretion to excuse the payment of costs. *See, e.g.,* Culp v. Zaccagnino, No. 96 CIV 3280, 2000 WL 35861, at \*2 (S.D.N.Y. Jan. 18, 2000) (declining to assess costs in the amount of \$2,693.85 against a prisoner who had no checking accounts, stocks or bonds and had only \$0.12 in his commissary account).

58. *See* 28 U.S.C. § 1915(a)(1) ("[A]ny court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor."). The section's use of the phrase "statement of all assets such prisoner possesses" does not preclude non-prisoners from proceeding IFP in federal court but rather appears to be a typographical error by which Congress substituted "prisoner" for "person." *See* Floyd v. U.S. Postal Serv., 105 F.3d 274, 275-76 (6th Cir. 1997) (reaching this conclusion in light of the statute's purpose to curtail inmate litigation, the grammatical structure of the paragraph, and the general references to a "person" before and after the "prisoner" reference).

59. *See supra* Part I.B (describing the scope of the pre-PLRA IFP procedure).

60. 28 U.S.C. § 1915(e)(2)(A)-(B).

61. In order to create an adequate record for appeal, most circuits conduct a two-step inquiry that begins with an examination of the applicant's affidavit of poverty. *See, e.g.,* McGore v. Wrigglesworth, 114 F.3d 601, 604 (6th Cir. 1997) (remarking that under the PLRA courts must initially examine a prisoner's financial status before considering the merits of his complaint), *abrogated on other grounds by* Jones v. Bock, 549 U.S. 199 (2007). If the court grants IFP status, it then evaluates the substance of the complaint. *Id.* at 608. In contrast, some courts review the petitioner's IFP application while simultaneously deciding the merits of his claim. *See, e.g.,* Carson v. Tulsa Police Dep't, 266 Fed. App'x 763, 766-67 (10th Cir. 2008) (declining to decide whether the PLRA's payment requirements apply to a released prisoner and instead concluding that the plaintiff's complaint was frivolous). Under this approach, the court automatically denies IFP status upon a finding that

Additionally, the PLRA neither defines “civil action” nor expressly excludes habeas corpus proceedings from its scope.<sup>62</sup> However, most courts have determined that habeas corpus and other post-judgment proceedings challenging criminal convictions or sentences do not constitute civil actions for purposes of the PLRA.<sup>63</sup> Courts have further reasoned that the PLRA’s provisions apply to mandamus and other extraordinary writs when the relief sought is similar to that in a civil action, but not when the writ concerns criminal matters.<sup>64</sup> As a general rule, the PLRA’s fee requirements for a “civil action” apply primarily to cases where prisoners seek to challenge conditions of their confinement.<sup>65</sup>

## II. THE CONFLICT AMONG FEDERAL COURTS: DIVERGENT READINGS OF § 1915(b)

Congress failed to articulate a payment procedure for litigants released after filing a complaint or notice of appeal, and, as a result, the circuits have had to decide whether released prisoners should be liable for the full amount of the filing fee pursuant to § 1915(b)(1) in the same way as those who remain incarcerated.<sup>66</sup> The Fifth, Seventh,

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the claim is frivolous or malicious and thereby dismisses the case. *See, e.g., Carson*, 266 Fed. App’x at 767 (dismissing the plaintiff’s civil rights complaint without evaluating his eligibility for revised IFP status under the PLRA). Courts utilize the one-step procedure in part because it “helps minimize the drain on public funds and judicial resources that *in forma pauperis* litigants might otherwise cause.” Feldman, *supra* note 37, at 425.

62. *See* Prisoner Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

63. *See, e.g., Walker v. O’Brien*, 216 F.3d 626, 636–37 (7th Cir. 2000) (relying on other courts’ analyses of the legislative history of the PLRA, which “supports a clear line between civil actions attacking conditions of confinement (subject to the PLRA) and habeas corpus petitions attacking the fact or duration of confinement (subject to the rules governing habeas corpus)”).

64. *Compare In re Jacobs*, 213 F.3d 289, 291 (5th Cir. 2000) (characterizing a petition for mandamus as a civil action for purposes of the PLRA’s three strikes provision), and *In re Crittenden*, 143 F.3d 919, 920 (5th Cir. 1998) (barring a plaintiff with three dismissals from seeking a writ of mandamus without the payment of fees), with *Martin v. United States*, 96 F.3d 853, 855 (7th Cir. 1996) (concluding that a petition for a writ of mandamus in a criminal proceeding is not a civil action for the purposes of § 1915(b)(1)).

65. *See Santana v. United States*, 98 F.3d 752, 755 (3d Cir. 1996) (stating that the PLRA applies to claims brought by prisoners under 42 U.S.C. § 1983 and the Federal Torts Claims Act, most of which concern prison conditions).

66. The question of § 1915’s applicability to released prisoners continually arises in the federal court system. For example, courts in the Tenth Circuit have recently discussed the issue but dismissed relevant cases on other grounds. *See Carson*, 266 Fed. App’x at 766–67 (declining to decide the issue and dismissing the case as frivolous); *Hobbs v. El Paso County*, No. 07-00434, 2008 WL 2787246, at \*4–5 (D. Colo. July 16, 2008) (identifying the circuit split but dismissing the action due to the plaintiff’s failure to file court-ordered documents). Courts have also differed over the application of other PLRA provisions to prisoners released after filing a

and D.C. Circuits have held that the obligation to pay the fee arises at the time of filing and continues upon release because of specific language in the first sentence of § 1915(b)(1), namely the term “prisoner” and the phrase “brings a civil action.”<sup>67</sup>

The Second, Fourth, and Sixth Circuits, on the other hand, have reasoned that because the rest of § 1915(b)(1) and all of § 1915(b)(2) refer exclusively to the litigant’s inmate account, the installment plan can only apply to those who remain incarcerated.<sup>68</sup> With no indication from Congress as to the proper mechanism by which to collect payment in this scenario, these circuits allow released prisoners to apply to proceed under the provision of the IFP statute applicable to non-prisoners: § 1915(a)(1).<sup>69</sup>

Thus, the Second, Fourth, and Sixth Circuits have focused their analyses on the inconsistencies in the installment plan, while the Fifth, Seventh, and D.C. Circuits have ascribed greater importance to the mandate of § 1915(b)(1) that prisoners pay the full filing fee.<sup>70</sup> These decisions demonstrate the difficulty in trying to give indigent prisoners an adequate opportunity to litigate a case while also maintaining the integrity of the judicial system. As discussed in Part IV, requiring former prisoners to meet all past due obligations

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complaint or notice of appeal. *Compare* *Harris v. Garner*, 216 F.3d 970, 973–76 (11th Cir. 2000) (en banc) (holding that plaintiffs released after filing a lawsuit remain prisoners for purposes of the PLRA’s physical injury requirement), *and* *Becker v. Vargo*, No. 02-7380, 2004 WL 1068779, at \*3 (D. Or. Feb. 17, 2004) (holding that plaintiffs released after filing a lawsuit remain prisoners for purposes of the PLRA’s exhaustion requirement), *with* *Dennison v. Prison Health Serv.*, No. 00-266, 2001 WL 761218, at \*2–3 (D. Me. July 6, 2001) (holding the opposite with respect to the exhaustion requirement), *and* *Murphy v. Magnusson*, No. 98-439, 1999 WL 615895, at \*3 (D. Me. July 27, 1999) (holding that a former prisoner need not exhaust administrative remedies after his release from custody). Unlike the physical injury and exhaustion requirements, which must be satisfied either before or at the time of filing, the IFP provision involves a continuing obligation. *Compare* 42 U.S.C. § 1997e(e) (2006) (precluding prisoners from filing federal civil actions “for mental or emotional injury suffered while in custody without a prior showing of physical injury”), *and* *id.* § 1997e(a) (requiring prisoners to exhaust all available administrative remedies before filing suit), *with* 28 U.S.C. § 1915(b)(1)–(2) (2006) (requiring inmates to pay the filing fee in installments over an indefinite period).

67. *See, e.g.,* *Gay v. Tex. Dep’t of Corr. State Jail Div.*, 117 F.3d 240, 242 (5th Cir. 1997) (emphasizing the litigant’s incarceration status at the time he filed his appeal).

68. *See* *McGann v. Comm’r, Soc. Sec. Admin.*, 96 F.3d 28, 30 (2d Cir. 1996) (reasoning that the detailed mechanism Congress created for implementing the payment obligation—deductions from prison accounts—demonstrates that it expected the requirement to apply to a prisoner who remains incarcerated).

69. *See id.* at 30 (“A released prisoner may litigate without further prepayment of fees upon satisfying the poverty affidavit requirement applicable to all non-prisoners.”).

70. *Compare id.* (suggesting the difficulties continuing fee obligations impose on indigent released prisoners), *with* *Gay*, 117 F.3d at 241 (describing the revised IFP procedure for prisoner-plaintiffs as a necessary “front-end deterrent” that came in response to a congressional desire to reduce frivolous filings in federal courts).

under the PLRA achieves the proper balance between these competing interests.

A. *The Second, Fourth, and Sixth Circuits Have Authorized § 1915(a)(1)'s Application to Released Prisoners*

Emphasizing the inconsistencies in § 1915(b)'s installment plan, the Second, Fourth, and Sixth Circuits have endorsed pre-PLRA IFP eligibility for released prisoners. The Second Circuit first adopted this position in *McGann v. Commissioner, Social Security Administration*,<sup>71</sup> holding that a prisoner's obligation to pay the remainder of the filing fee upon release depends solely on whether he qualifies for a traditional IFP waiver under § 1915(a)(1).<sup>72</sup> McGann filed his complaint while he was a New York state prisoner and challenged a policy of the Social Security Administration denying certain benefits to inmates.<sup>73</sup> On appeal, the court required that McGann either pay the required fees, move anew for leave to proceed IFP, or authorize his former prison to release his prison account information and debit the payments owed under the PLRA's installment plan.<sup>74</sup> Responding by letter, McGann contended that because he had been released from prison, he qualified for IFP status under § 1915(a)(1), as opposed to § 1915(b), and was therefore excused from complying with the PLRA's requirements.<sup>75</sup>

In considering whether McGann had a continued obligation to pay the filing fee, the court found that § 1915(b)(1)–(2) creates “a facial inconsistency” as applied to released prisoners.<sup>76</sup> According to the court, the statute “broadly” states that “a prisoner who files an appeal ‘shall be required’ to pay filing fees” but in the very next sentence mandates that the payment amounts be calculated as percentages of the balances of, or deposits into, the prisoner's account.<sup>77</sup> Because McGann was no longer a prisoner, there was no account from which to calculate and debit the required payments.<sup>78</sup> The court reasoned that because the statute ties payment to the existence and amount of a prisoner's commissary account, it could not apply the law without such an account.<sup>79</sup> Thus, the court concluded that “a literal reading

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71. 96 F.3d 28 (2d Cir. 1996).

72. *Id.* at 30.

73. *Id.* at 29.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 29–30.

79. *Id.*

of all provisions of the PLRA, as applied to released prisoners, [was] not possible.”<sup>80</sup>

The Second Circuit then proposed that § 1915(b) means either that (1) if released, the prisoner must immediately pay the entire remaining amount of the filing fee; or (2) the prisoner must make the installment payments only while incarcerated, and that, upon his release, he can qualify for traditional IFP status under § 1915(a)(1).<sup>81</sup> The court ultimately selected the second construction because, although § 1915(b)(1) specifies that a prisoner “shall” pay the full filing fee, the detailed mechanism Congress created for implementing that obligation by debiting prison accounts demonstrated that it “expected the new payment requirement to apply to a prisoner who remains incarcerated.”<sup>82</sup> According to the court, the alternative reading would mean that the litigant would have to pay the entire balance of the fee in a single payment upon release from prison, “a result that would be more onerous than that imposed on those who remain incarcerated.”<sup>83</sup>

Later cases in the Second Circuit and other jurisdictions have construed this decision to mean that a prisoner’s release relieves him of any liability for the balance of the filing fee, regardless of whether he made all required payments under the installment scheme during his incarceration.<sup>84</sup> Thus, under this rationale, a released prisoner may litigate without further payment of fees upon satisfying the poverty affidavit requirement applicable to all non-prisoners.<sup>85</sup> At least one court in the Eighth Circuit has adopted the *McGann* rationale in a decision regarding a prisoner’s continuing obligations under the PLRA.<sup>86</sup> The Sixth Circuit has also applied the *McGann*

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80. *Id.* at 30.

81. *Id.*

82. *Id.*

83. *Id.* Recently, one court in the Ninth Circuit has gone so far as to require full payment immediately upon a prisoner’s release without creating any kind of specialized schedule. *See* *Murphy v. Maricopa County Sheriff’s Office*, No. 05-2553, 2005 WL 3273573, at \*1 (D. Ariz. Dec. 1, 2005) (holding that the plaintiff could not avail himself of the partial payment provisions of § 1915(b)(1)–(2) upon release and therefore had to pay the filing fee in full within thirty days).

84. *See, e.g.,* *Whitfield v. Scully*, 241 F.3d 264, 277 (2d Cir. 2001) (“[T]he mandatory payment provisions of § 1915(b) . . . do not apply to a released prisoner.”).

85. *See McGann*, 96 F.3d at 29–30 (reasoning that if a prisoner were to have continuing payment obligations upon release, he would be obligated to pay the balance of the fees in full at that time because his prison account would be closed, thus cutting off the source provided in the PLRA for collection of the installment payments).

86. *See Lewis v. Univ. Med. Ctr.*, No. 07-3012, 2007 WL 2123753, at \*1 (D. Neb. July 20, 2007) (citing *McGann*, 96 F.3d at 30) (holding that the plaintiff, a released prisoner being held at a mental hospital at the time of trial, was not required to pay

ruling, finding that it provides an efficient resolution of the procedural issues created by § 1915(b)(1)–(2).<sup>87</sup>

While still recognizing a released prisoner's eligibility for traditional IFP status, the Fourth Circuit retreated from *McGann's* broad holding in *DeBlasio v. Gilmore*.<sup>88</sup> Upon receiving DeBlasio's IFP application, the district court required him to pay the full filing fee in installments from funds in his commissary account pursuant to the PLRA.<sup>89</sup> The court directed DeBlasio to pay \$11.37 as the initial portion of his filing fee, and he forwarded \$12 to the court clerk soon after.<sup>90</sup> Two months later, when the court learned of DeBlasio's release from prison, it directed him to pay the rest of the filing fee within thirty days.<sup>91</sup> DeBlasio sought traditional IFP status under 28 U.S.C. § 1915(a)(1), pleading that he had insufficient assets to pay the remaining balance; however, the district court dismissed the action without considering his application.<sup>92</sup>

On appeal, the Fourth Circuit reversed the dismissal, holding that a prisoner who has no outstanding debts under the PLRA's installment plan and who is released before paying the entire filing fee does not have to pay the remaining balance; rather, the litigant should apply for a waiver under § 1915(a)(1).<sup>93</sup> Because DeBlasio had paid the requisite initial partial filing fee and was released from prison before any subsequent payment obligations under the installment plan came due, he could apply for traditional IFP assistance.<sup>94</sup> According to the court, "[a] released prisoner should not have to shoulder a more difficult financial burden than the

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the unpaid balance of the filing fee for his case). *But see* Williams v. Doe #1, No. 06-1344, 2006 WL 3804027, at \*1 n.1 (E.D. Mo. Nov. 7, 2006) (citing *In re Smith*, 114 F.3d 1247, 1251 (D.C. Cir. 1997)) (holding that § 1915(b)(1) continues to apply after a prisoner's release).

87. *See* McGore v. Wrigglesworth, 114 F.3d 601, 612–13 (6th Cir. 1997) (recounting the Second Circuit's analysis in *McGann* and deciding to adopt its same solution for assessing fees against a released prisoner), *abrogated on other grounds by* Jones v. Bock, 549 U.S. 199 (2007); Taylor v. Luttrell, No. 06-2533, 2008 WL 4065927, at \*2–3 (W.D. Tenn. Aug. 27, 2008) (granting the plaintiff IFP status under 28 U.S.C. § 1915(a)(1) and waiving the \$350 filing fee without inquiring into whether the plaintiff had funds available to pay the initial partial fee between the filing of the complaint in August 2006 and his subsequent release).

88. 315 F.3d 396 (4th Cir. 2003).

89. *Id.* at 397.

90. *Id.*

91. *Id.*

92. *Id.*

93. *See id.* at 399 ("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.")

94. *See id.*

average indigent plaintiff in order to continue his lawsuit.”<sup>95</sup> The Fourth Circuit limited its holding to prisoners who make all required installment payments while incarcerated, thereby deviating from the *McGann* court’s more generous waiver procedure.<sup>96</sup>

*B. The Fifth, Seventh, and D.C. Circuits Have Authorized § 1915(b)(1)’s Application to Released Prisoners*

Focusing on the PLRA’s purpose in deterring frivolous inmate filings, the Fifth, Seventh, and D.C. Circuits have interpreted § 1915(b) as imposing a continuing obligation on released prisoners to satisfy the full filing fee. In *Gay v. Texas Department of Corrections State Jail Division*,<sup>97</sup> for example, the Fifth Circuit held that a prisoner-plaintiff released during the pendency of his action must still fulfill the PLRA’s filing fee requirements.<sup>98</sup> After appealing a lower court decision dismissing his pro se civil rights complaint, Gay filed a motion to proceed under § 1915(a)(1), a supporting affidavit, and a statement of account in which he alerted the court to his release from prison and to his full-time enrollment at a community college.<sup>99</sup> The court concluded that the filing of a complaint or appeal triggers the PLRA’s fee obligations because the plain language of § 1915(b)(1) requires a “prisoner” who “brings a civil action or files an appeal” to “pay the full amount of the filing fee.”<sup>100</sup> The court reasoned that “to bring” means “to file”—in other words, notwithstanding his subsequent release, Gay still qualified as a “prisoner” who had *filed* an appeal while incarcerated.<sup>101</sup> Based on that conclusion and its desire “to put some teeth into” § 1915(b)’s deterrent effect, the court remanded the case to the district court for an assessment and collection of fees.<sup>102</sup>

The court also directly addressed the *McGann* decision and stated that it found “no support in the plain language of the PLRA” to justify the Second Circuit’s construction of the filing fee provision.<sup>103</sup> The Fifth Circuit focused on § 1915(b)(1)’s mandate that one who

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95. *Id.*

96. *See id.* at 398 (indicating that the trial court must fully review the litigant’s financial data when considering his eligibility for an IFP waiver, including his performance under the installment plan).

97. 117 F.3d 240 (5th Cir. 1997).

98. *Id.* at 241.

99. *Id.*

100. *Id.* at 242.

101. *Id.*

102. *Id.*

103. *Id.* at 242 n.3 (remarking that the PLRA contains no provision instructing courts to forgive a prisoner’s debt under the installment plan upon his release from confinement).

chooses to sue or appeal while incarcerated be held responsible for the payment of the entire filing fee and dismissed the payment formula outlined in § 1915(b)(2) as “one means of payment.”<sup>104</sup> Importantly, the court did not suggest any other means to assess fees against an ex-prisoner nor did it indicate whether it would demand lump sum payments. In addition, the court made no indication that it would consider a prisoner’s prior compliance with the installment plan when assessing fees, and lower courts have not done so.<sup>105</sup>

The D.C. and Seventh Circuits adopted the Fifth Circuit’s reasoning in part, explicitly holding that a prisoner’s obligation to pay the full filing fee arises at the time of filing.<sup>106</sup> However, they provided expanded analyses of the issue and considered the relevance of a prisoner’s payment record while in custody. In *In re Smith*,<sup>107</sup> for example, the plaintiff had no income or assets when he filed a petition against the United States Department of Justice and the United States Parole Commission shortly before his release from prison.<sup>108</sup> The D.C. Circuit began its analysis by evaluating his compliance with the PLRA’s relevant provisions.<sup>109</sup> The record revealed that he had failed to submit the prison account statements required by § 1915(a)(2), pay the initial partial filing fee required by § 1915(b)(1), or make any of the monthly payments required by § 1915(b)(2).<sup>110</sup>

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104. *Id.* (quoting *McGann v. Comm’r, Soc. Sec. Admin.*, 96 F.3d 28, 30–31 (2d Cir. 1996) (Miner, J., dissenting)).

105. *See, e.g.*, *Hunt v. Brannon*, No. 06-00227, 2008 WL 553218, at \*1 (S.D. Ala. Feb. 22, 2008) (obligating the released prisoner-plaintiff to pay the entire \$350 filing fee without requesting or examining his commissary account records); *Stone v. Ferrell*, No. 05-0062, 2007 WL 4589748, at \*1 (S.D. Ala. Dec. 28, 2007) (ordering the released prisoner-plaintiff to pay a balance of \$147 without requesting or examining his commissary account records).

106. *See In re Smith*, 114 F.3d 1247, 1251 (D.C. Cir. 1997) (“Because Smith was a prisoner when he filed his petition, he is obligated to fulfill the applicable PLRA procedural requirements and pay the amounts due under the statute, notwithstanding the fact of his release.”); *Robbins v. Switzer*, 104 F.3d 895, 898 (7th Cir. 1997) (differentiating between the plaintiff’s status as a prisoner at the time of filing and his status as a non-prisoner at the time of trial).

107. 114 F.3d 1247 (D.C. Cir. 1997).

108. *Id.* at 1249. In his petition, Smith contended (1) that the Commission’s files erroneously failed to reflect that the Commission ceased to have authority over him on November 1, 1992; (2) that the Commission’s calculation of his parole date violated § 235(b) of the Sentencing Reform Act of 1984, Pub. L. No. 98–473, 98 Stat. 1988 (codified as amended at 18 U.S.C. § 3551 (2006)); (3) that the Federal Bureau of Prisons ignored its own rules in calculating the length of his sentence; (4) that the search of his residence violated his Fourth Amendment rights; and (5) that his trial attorney was constitutionally ineffective. *Id.*

109. *Id.* at 1251.

110. *Id.*

In response, Smith contended that because § 1915(b)(1) and other PLRA provisions refer exclusively to “prisoners,” the statute’s requirements could not bind him upon release.<sup>111</sup> Like the Fourth Circuit in *DeBlasio*, however, the court held that Smith’s current inability to pay the applicable filing fee did not relieve him of his obligation to comply with past due procedural and payment obligations under the PLRA.<sup>112</sup> According to the court, failure to comply with any of these requirements results in dismissal.<sup>113</sup> The court ultimately deferred any decision regarding Smith’s petition until he complied with the PLRA filing fee requirements.<sup>114</sup> By limiting its holding to the facts of Smith’s case, the court left unanswered the question of whether a prisoner who did meet his PLRA obligations while in prison should have to continue to make payments toward the filing fee after release.

The Seventh Circuit used a slightly different analysis in determining a released prisoner’s continuing obligations under the PLRA. In *Robbins v. Switzer*,<sup>115</sup> the plaintiff initiated his lawsuit under the PLRA’s installment plan but was subsequently released from prison.<sup>116</sup> He did not comply with the court’s orders requiring him to provide a prison trust account statement or an affidavit showing his current resources and income pursuant to § 1915(a)(2).<sup>117</sup> Without the account statement, the court could not determine whether Robbins owed any fees under the statutory formula.<sup>118</sup> Therefore, the court granted him twenty-one days to supply copies of the statement so that it could determine the balance at the time he filed his notices of appeal in addition to his income for the preceding six months.<sup>119</sup> Nevertheless, the court stated that an indigent former inmate was obliged to pay those portions of the filing fee that he should have remitted before his release, based on the balances in his prison trust account at the time he filed the complaint or notice of appeal.<sup>120</sup>

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111. *Id.*

112. *Id.* at 1251–52.

113. *Id.* at 1252 (remarking that prisoners cannot “evade the statute by withholding required payments and win permanent reprieve from their obligations by pleading poverty upon release”).

114. *Id.* (finding it appropriate to afford Smith time to comply with the filing fee requirements because the circuit had not previously addressed the issue of the PLRA’s applicability to a released petitioner).

115. 104 F.3d 895 (7th Cir. 1997).

116. *Id.* at 896.

117. *Id.* at 898.

118. *Id.*

119. *Id.* at 898–99.

120. *Id.* The court further reasoned that 28 U.S.C. § 1915(b)(4), another section of the PLRA known as the “safety-valve” provision, could enable released prisoners who lack the necessary funds to pay the full filing fee to continue to litigate their

### III. PROPER INTERPRETATION OF THE PLRA'S PAYMENT REQUIREMENTS

Section 1915(b)(1)–(2) offers no solution to the procedural problems its language creates, necessitating an examination of the PLRA's legislative history.<sup>121</sup> This history demonstrates that released prisoners with no outstanding payments under the installment plan can receive more lenient IFP treatment without offending the purpose of the statute.<sup>122</sup> Because Congress intended for the payment requirement to counteract the advantages *prisoners* receive throughout the litigation process, *released prisoners* can remain eligible for traditional IFP status.

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case. *See id.* at 898 (asserting that § 1915(b)(4) excuses “destitute” former prisoners from further payment under the statutory formula). However, § 1915(b)(4) merely 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.*” 28 U.S.C. § 1915(b)(4) (2006) (emphasis added). This section does not exonerate the plaintiff from payment; it temporarily excuses only the initial partial sum required by § 1915(b)(1) at the time of filing. *See Newlin v. Helman*, 123 F.3d 429, 435 (7th Cir. 1997) (confirming that § 1915(b)(4) applies only to the initial partial filing fee), *abrogated on other grounds by Lee v. Clinton*, 209 F.3d 1025 (7th Cir. 2000). Section 1915(b)(4) would not help a former prisoner who managed to satisfy the initial partial fee but could not afford to make subsequent payments.

121. The Supreme Court has established that legislative interpretation must begin with an assessment of the plain language of the statutory provision at issue. *See, e.g.,* *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993) (“Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.”) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982)); *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (instructing that the plain meaning is conclusive “except in the ‘rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters’” (quoting *Griffin*, 458 U.S. at 571)). However, when Congress’s intent cannot be determined from the plain wording of a statute, the Court has resorted to legislative history. *See United States v. Great N. Ry. Co.*, 287 U.S. 144, 154–55 (1932) (“In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress.”). While some commentators and judges oppose reliance on legislative history, others recognize its value in construing statutes. *See* Stephen G. Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992) (suggesting the value of legislative history in understanding a statute’s “relevant context, conventions, and purpose”); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2389 (2003) (endorsing the use of legislative history in light of the fact that “Congress does not always accurately reduce its intentions to words” and because “legislators necessarily draft statutes within the constraints of bounded foresight, limited resources, and imperfect language”).

122. *See infra* Part IV (explaining that compliant ex-prisoners pose a lesser burden on the judiciary because their willingness to make the installment payments indicates their respect for the system).

A. *No Alternative Reading Can Reconcile the Inconsistency  
in the PLRA's Payment Formula*

Congress likely intended for courts to interpret the terms “prisoner” and “bring” in § 1915(b)(1) according to their plain meanings. Section 1915(b)(1) begins with the sentence: “[I]f a prisoner brings a civil action . . . the prisoner shall be required to pay the full amount of a filing fee.”<sup>123</sup> Inmates released after filing a complaint or appeal have contended that the PLRA’s obligations do not apply to them because the Act refers exclusively to “prisoners” who “bring” civil actions, suggesting that the payment obligations instituted by § 1915(b)(1) only apply to litigants who remain incarcerated for the duration of their lawsuits.<sup>124</sup> The statute itself precludes alternative interpretations of the term “prisoner,” expressly defining it 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.”<sup>125</sup>

In addition, based on its dictionary definition and relevant case authority, “bring” as used in § 1915(b)(1) means to file an action in court, not to see it through to a final disposition. *Black’s Law Dictionary* provides that to “bring an action” means to institute legal proceedings.<sup>126</sup> Moreover, in *Hoffman v. Blaski*,<sup>127</sup> the Supreme Court interpreted the term’s meaning in the context of the federal venue provision, 28 U.S.C. § 1404(a).<sup>128</sup> The venue statute permits the transfer of “any civil action to any other district or division where it might have been brought.”<sup>129</sup> The petitioner in *Hoffman* argued that the words “where it might have been brought” related not only to the filing of the action, but also to the time of the transfer.<sup>130</sup> The Supreme Court rejected that position because the statutory language was “unambiguous, direct, [and] clear” and interpreting “might have been brought” to refer to anything other than the time the lawsuit was filed would “do violence to the plain words of [the statute].”<sup>131</sup>

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123. 28 U.S.C. § 1915(b)(1) (emphasis added).

124. See, e.g., *In re Smith*, 114 F.3d 1247, 1251 (D.C. Cir. 1997) (referencing the petitioner’s argument that the PLRA’s elaborate payment scheme applies only to prisoners).

125. 28 U.S.C. § 1915(h) (emphasis added).

126. BLACK’S LAW DICTIONARY 205 (8th ed. 2004).

127. 363 U.S. 335 (1960).

128. *Id.* at 335.

129. 28 U.S.C. § 1404(a) (2006).

130. 363 U.S. at 342.

131. *Id.* at 343–44.

The Eleventh Circuit examined the term's significance in a divided en banc opinion addressing the application of the PLRA's controversial physical injury requirement<sup>132</sup> to plaintiffs released from custody before the completion of their lawsuit. In *Harris v. Garner*,<sup>133</sup> a six-judge majority held that § 1997e(e) applies to suits filed while a plaintiff is in prison but decided after his release.<sup>134</sup> The majority reasoned that the statute's use of the term "brought" refers to the filing or commencement of a lawsuit, not to its continuation, and rejected the argument that the statute no longer applies to a complaint once a plaintiff sheds prisoner status.<sup>135</sup> The court based its interpretation on the premise that "Congress knows the settled legal definition of the words it uses, and uses them in the settled [legal] sense."<sup>136</sup>

Despite the fixed language of § 1915(b)(1), Congress simultaneously created a detailed payment formula in § 1915(b)(2) based on periodic withdrawals from a plaintiff's commissary account and articulated no alternative collection method.<sup>137</sup> Therefore, while § 1915(b)(1) requires that its application depend on the confinement status of the plaintiff at the time of commencing the lawsuit or appeal, the language of § 1915(b)(2) provides no express instructions on its application to released prisoners and calls for a consideration of the PLRA's legislative history.<sup>138</sup>

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132. The PLRA's physical injury provision requires that prisoners suffer a physical injury in order to recover for mental or emotional injuries caused by their subjection to cruel and unusual punishment or other illegal conduct. See 42 U.S.C. § 1997e(e) (2006) ("No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.").

133. 216 F.3d 970 (11th Cir. 2000) (en banc).

134. *Id.* at 985.

135. See *id.* at 974 (drawing on court interpretations of the term in other statutes and within the PLRA to support the premise that "brought" refers to the filing of a suit). But see *id.* at 986 (Tjoflat, J., concurring in part and dissenting in part) (reasoning that § 1997e(e) should not apply to a pending complaint after a prisoner's release because requiring the newly freed plaintiff and defendant(s) to start afresh in the litigation process would needlessly strain judicial resources while failing to further the PLRA's goals of reducing filings).

136. *Id.* at 974 (citing *Comm'r v. Keystone Consol. Indus.*, 508 U.S. 152, 159 (1993)).

137. See *McGann v. Comm'r, Soc. Sec. Admin.*, 96 F.3d 28, 29–30 (2d Cir. 1996) ("[N]ow that [the plaintiff] is no longer a prisoner, there is no prison account from which to calculate and debit the required payments. Thus, a literal reading of all provisions of the PLRA, as applied to released prisoners, is not possible.").

138. See *supra* note 121 (discussing appropriate uses of legislative history in statutory interpretation).

B. *IFP Status for Released, Compliant Prisoners Comports with the Purpose and Legislative History of the PLRA*

While allowing prisoners to evade their payment obligations before release certainly offends the purpose of the PLRA, allowing compliant ex-prisoners to seek and receive traditional IFP status after release does not. An examination of the PLRA's legislative history reveals that deciding an indigent ex-prisoner's obligation to pay more money towards the filing fee on the basis of his pre-release compliance with the installment plan, as opposed to the time of filing, still fulfills the statute's goals.<sup>139</sup>

1. *Courts must hold prisoners accountable for the debts that they incur before release*

As the courts in *Gay* and *In re Smith* noted, Congress amended the IFP statute in an effort to alleviate the burden of frivolous inmate complaints on the federal courts and to encourage a sense of financial responsibility in prisoners.<sup>140</sup> Indeed, proponents introduced the PLRA "to address the alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners."<sup>141</sup> Facing little opposition, they secured the statute's passage after minimal debate.<sup>142</sup>

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139. See *infra* Part III.B.1 (contending that examining a litigant's pre-release compliance with the PLRA still effectuates Congress's desire to instill a sense of financial responsibility in prisoners).

140. See, e.g., *Gay v. Tex. Dep't of Corr. State Jail Div.*, 117 F.3d 240, 241 (5th Cir. 1997) (proposing that Congress wanted the revised IFP procedure to serve as a deterrent because "too many prisoners were filing too many frivolous or repetitive lawsuits"); *In re Smith*, 114 F.3d 1247, 1249 (D.C. Cir. 1997) ("Congress 'endeavored to reduce frivolous prisoner litigation by making all prisoners seeking to bring lawsuits or appeals feel the deterrent effect created by liability for filing fees.'" (internal brackets omitted) (quoting *Leonard v. Lacy*, 88 F.3d 181, 185 (2d Cir. 1996))); see also SAVE: COALITION TO STOP ABUSE AND VIOLENCE EVERYWHERE, PROTECT VICTIMS OF RAPE AND OTHER ABUSES: REFORM THE PRISON LITIGATION REFORM ACT (PLRA) 5, [http://www.savecoalition.org/pdfs/save\\_final\\_report.pdf](http://www.savecoalition.org/pdfs/save_final_report.pdf) (last visited July 29, 2009) ("The theory behind this provision was to make prisoners 'stop and think' before filing cases that might not be meritorious.").

141. 141 CONG. REC. 26,548 (1995) (statement of Sen. Dole); see also *id.* at 26,553 (statement of Sen. Hatch) (urging passage to "bring relief to a civil justice system overburdened by frivolous prisoner lawsuits"). The PLRA's legislative history consists mostly of legislators' comments found in the Congressional Record and the testimony of witnesses produced during hearings in the Senate and House of Representatives. See Branham, *supra* note 49, at 487 n.12 (discussing the availability of the PLRA's legislative history).

142. See *Benjamin v. Jacobson*, 935 F. Supp. 332, 340 (S.D.N.Y. 1996) ("[I]t is worth noting that some believe that this legislation which has a far-reaching effect on prison conditions and prisoners' rights deserved to have been the subject of significant debate. It was not."); 142 CONG. REC. 5,193 (1996) (statement of Sen. Kennedy) ("The PLRA was the subject of a single hearing in the Judiciary Committee, hardly the type of thorough review that a measure of this scope

The increase in inmate filings referenced by the PLRA's proponents came as a result of the gradual turnaround in judicial treatment of prisoner-plaintiffs identified in Part I.A.<sup>143</sup> Over time, these decisions, in combination with the passage of the CRIPA, gave way to an upsurge in prisoner litigation.<sup>144</sup> Between the early 1980s and the late 1990s, prisoner petitions rose from 23,230 to 68,235, an increase of nearly 300%.<sup>145</sup> In addition to the increase in claims, empirical and anecdotal evidence indicated that many claims were meritless or frivolous.<sup>146</sup> This perceived onslaught in prisoner litigation drew heavy criticism from "correctional officials . . . , conservatives who opposed federal intervention in prison administration, and legislators who argued that judges should refrain

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deserves."). *But see* Branham, *supra* note 49, at 538 (suggesting that Congress's treatment of the PLRA was not "atypical").

143. *See* CLEAR ET AL., *supra* note 17, at 102 (remarking that giving prisoners access to the courts to address their grievances politicized and "heightened prisoners' consciousness").

144. *Id.*

145. JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980–2000 1 (2002), <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf>. In her comprehensive study on inmate litigation, Professor Margo Schlanger calculated that in 1995 inmates brought approximately 40,000 federal civil lawsuits, which accounted for nearly one-fifth of the federal civil docket. Schlanger, *supra* note 1, at 1558. Schlanger made her calculations using statistics from the Administrative Office of the United States Courts, which records data on a fiscal year basis. *Id.* at 1558 n.3.

146. *See* 141 CONG. REC. 26,548 (1995) (statement of Sen. Dole) (recounting prisoner lawsuits that concerned issues such as insufficient locker space; defective haircuts; invitations to a pizza party; and being served chunky instead of creamy peanut butter); PALMER, *supra* note 14, at 391 ("Whether true or not, stories were reported that prisons were nothing less than country clubs, where the prisoners enjoyed a standard of living surpassing many citizens in free society, with luxuries such as cable TV, catered food, and exercise facilities."); Danielle M. McGill, Note, *To Exhaust or Not to Exhaust?: The Prisoner Litigation Reform Act Requires Prisoners to Exhaust All Administrative Remedies Before Filing Excessive Force Claims in Federal Court*, 50 CLEV. ST. L. REV. 129, 130 n.4 (2003) (providing further examples of outlandish prisoner claims); *cf.* Schlanger, *supra* note 1, at 1594 (noting that between 1990 and 1995, eighty percent or more of cases involving prisoner-plaintiffs ended in a pretrial judgment for the defendant). Notably, commentators have advised that these statistics and anecdotes fail to take into account the concomitant rise in the number of prisoners as well as the reality that inmates are more likely to have their trials dismissed for non-substantive reasons such as failure to pay a filing fee or to make a timely response to a court request. *See* Lyon v. Krol, 127 F.3d 763, 766 n.6 (8th Cir. 1997) (Heaney, J., dissenting) ("A list of reasons for any increase in the number of complaints . . . would likely include the high incidence of prison overcrowding, a lack of carefully trained correctional officers, and inadequate and frequently unfair internal grievance procedures."); Schlanger, *supra* note 1, at 1568 (charging that the critics of inmate litigation "used stylized anecdotes and gerrymandered statistics" to push the litigation-reform effort); Greg Moran, *Cruel and Unusual: Where Does Punishment End and Cruelty Begin?*, SAN DIEGO UNION-TRIBUNE, Aug. 9, 1996, at A1 ("The high dismissal rate of prisoner lawsuits . . . is not solely due to frivolous filings, but to potentially valid claims that are thrown out for minute procedural or technical reasons.").

from making public policy.”<sup>147</sup> The PLRA instituted major procedural barriers to the filing of prisoner lawsuits to stem this rise in cases.<sup>148</sup>

In light of this history, the *McGann* court and its followers in the Sixth and Eighth Circuits have frustrated congressional intent by failing to examine a released prisoner’s payment records and pre-release compliance. Congress designed the statute’s filing fee provisions to reduce frivolous prisoner litigation “by making all prisoners seeking to bring lawsuits or appeals feel the deterrent effect created by liability for filing fees.”<sup>149</sup> Congress believed that the lack of economic disincentives to filing meritless cases had contributed to the proliferation of prisoner litigation.<sup>150</sup> Without addressing the issue of prior compliance, the Second Circuit focused its analysis exclusively on the potential effects of requiring ongoing payment.<sup>151</sup> Excusing a released prisoner’s failure to comply with the installment plan while still incarcerated encourages all prisoners nearing completion of their sentences to eschew the payment process.<sup>152</sup> As the court in *Robbins v. Switzer* noted, “[t]he Act’s effectiveness would be eroded if, during their final year of custody, prisoners could file suits and appeals without considering the financial consequences, planning to ignore the statute while in custody, divert trust account funds to other purposes, and plead poverty upon release.”<sup>153</sup> Therefore, allowing inmates who never authorized prison administrators to submit the requisite monthly payments on their

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147. See CLEAR ET AL., *supra* note 17, at 102 (commenting that these groups pushed for legislation that would both curb prisoner filings and minimize judicial micro-management of state and federal prisons).

148. The PLRA contains ten sections that amended several different provisions of the United States Code. See, e.g., 42 U.S.C. § 1997e(c) (2006) (requiring district courts to weed out prisoner claims that clearly lack merit); 42 U.S.C. § 1997e(d) (restricting attorneys’ fees); 42 U.S.C. § 1997e(e) (prohibiting claims for emotional injury without a prior showing of physical injury). Recent empirical evidence confirms the statute’s effectiveness in reducing prisoner filings. See Roosevelt, *supra* note 50, at 1779 (“[T]o the extent that success can be measured by the volume of suits, the PLRA has worked.”).

149. *In re Smith*, 114 F.3d 1247, 1249 (D.C. Cir. 1997) (quoting *Leonard v. Lacy*, 88 F.3d 181, 185 (2d Cir. 1996)).

150. See *Kerr v. Puckett*, 138 F.3d 321, 323 (7th Cir. 1998) (“Congress deemed prisoners to be pestiferous litigants because they have so much free time on their hands and there are few costs to filing suit.”); 141 CONG. REC. 14,572 (1995) (statement of Sen. Kyl) (reasoning that the new filing fee requirement “will force prisoners to think twice about the case and not just file reflexively”).

151. See *McGann v. Comm’r, Soc. Sec. Admin.*, 96 F.3d 28, 30 (2d Cir. 1996) (voicing concern that imposing continuing payment obligations on released prisoners would lead to an “onerous” result because it might require them to pay the balance of the filing fee in one large installment).

152. See *id.* at 31 (Miner, J., dissenting) (“[I]t just makes no sense to me to allow a prisoner to take the balance in his prison account with him upon his release . . .”).

153. 104 F.3d 895, 899 (7th Cir. 1997).

behalf to nonetheless continue their case in federal court upon release conflicts with the legislature's expressed desire to infuse a sense of accountability in prisoners.

2. *Granting traditional IFP status to compliant ex-prisoners supports the PLRA's goals*

Although the legislative history of the PLRA does not contain any specific comment on its applicability to released prisoners, it plainly discloses that Congress sought to distinguish incarcerated from non-incarcerated litigants because the former encounter fewer obstacles throughout the litigation process.<sup>154</sup> Congress did not intend for the PLRA to inhibit the right of access of indigents not cared for by the state,<sup>155</sup> a category that includes released prisoners.

While in custody, prisoners depend on the government for their means of subsistence.<sup>156</sup> As Senator Jon Kyl noted in his floor statement:

Unlike other prospective litigants who seek poor person status, prisoners have all the necessities of life supplied, including the materials required to bring their lawsuits. For a prisoner who qualifies for poor person status, there is no cost to bring a suit and, therefore, no incentive to limit suits to cases that have some chance of success.<sup>157</sup>

Kyl further observed that because inmates have their basic material needs provided at state expense, and because they are further provided with free paper, postage, and legal assistance, “[f]iling frivolous . . . lawsuits has become a recreational activity for long-term

154. See *Witzke v. Femal*, 376 F.3d 744, 750 (7th Cir. 2004) (explaining that the PLRA targets current as opposed to former prisoners because they “encounter a uniquely low opportunity cost relative to the typical litigant”).

155. See *supra* Part I.C (establishing that the PLRA did not alter the IFP procedure for non-incarcerated indigent litigants).

156. See *Hampton v. Hobbs*, 106 F.3d 1281, 1285 (6th Cir. 1997) (noting that the government provides prisoners with the “essentials of life” (quoting *Evans v. Croom*, 650 F.2d 521, 523 (4th Cir. 1981))). In evaluating prisoners’ unique relationship with the government, the Supreme Court has noted:

For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State . . . . 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.

*Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973). Consequently, prisoners have gradually garnered a reputation as frequent, frivolous filers. See *Cleavinger v. Saxner*, 474 U.S. 193, 211 (1985) (Rehnquist, J., dissenting) (“With less to profitably occupy their time than potential litigants on the outside, and with a justified feeling that they have much to gain and virtually nothing to lose, prisoners appear to be far more prolific litigants than other groups in the population.”).

157. 141 CONG. REC. 14,572–73 (1995).

residents of our prisons.”<sup>158</sup> In addition, as many commentators have noted, prisoners have greater incentives to file frivolous lawsuits.<sup>159</sup> Based on these realities and the statistical evidence discussed above, Congress concluded that inmate abuse of the federal judicial system was likely to continue absent significant changes to the IFP statute.<sup>160</sup>

While proponents of the PLRA did not want to prevent inmates from bringing meritorious suits,<sup>161</sup> they were concerned that prisoners put an especially heavy burden on courts’ civil dockets while incurring few opportunity costs.<sup>162</sup> For example, Senator Harry Reid opined that the judicial system allowed prisoners to maintain frivolous litigation with the state and provided them not only “an up-to-date library and a legal assistant,” but also “three square meals a day” and the ability to “watch cable TV in the rec room or lift weights in a nice modern gym” if they “get tired of legal research.”<sup>163</sup> Senator Orrin Hatch commented that “[j]ailhouse lawyers with little else to do are tying our courts in knots with an endless flood of frivolous litigation.”<sup>164</sup>

Inmates can litigate in the first place because, in addition to providing food, medical care, and shelter, prisons also supply them with various legal resources in accordance with the landmark *Bounds*

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158. *Id.* at 14,572.

159. *See Cruz v. Beto*, 405 U.S. 319, 327 (1972) (stating that prisoners have unique incentives to file meritless or frivolous lawsuits because they can obtain a “short sabbatical in the nearest federal courthouse”); 141 CONG. REC. 26,553 (1995) (statement of Sen. Kyl) (“[A] courtroom is certainly a more hospitable place to spend an afternoon than a prison cell.”).

160. *See* 141 CONG. REC. 26,548 (1995) (statement of Sen. Dole) (lamenting that frivolous prisoner lawsuits “waste valuable legal resources” and characterizing the PLRA as a necessary measure to curtail massive abuse of the judicial process); Schlanger, *supra* note 1, at 1567–68 (commenting that the PLRA’s supporters viewed inmate litigation as “a wasteful system demanding drastic amendment, even all-but-complete elimination”).

161. *See* 142 CONG. REC. 5,118 (1996) (statement of Sen. Reid) (“If somebody has a good case, a prisoner, let him file it.”); 141 CONG. REC. 27,042 (1995) (statement of Sen. Hatch) (“I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised.”). *But see* Winslow, *supra* note 14, at 1666–67 (“Absent from the vociferous dialogue regarding frivolous and meritless prisoner lawsuits was any significant discussion about meritorious prisoner suits and the constitutional protections afforded to prisoners.”). Meritorious prisoner claims tend to address issues such as inadequate medical treatment, overcrowding, unsanitary and dilapidated facilities, lack of physical security, and administrative transfer or segregation without due process. *See* Roger Roots, *Of Prisoners and Plaintiffs’ Lawyers: A Tale of Two Litigation Reform Efforts*, 38 WILLAMETTE L. REV. 210, 221–22 (2002) (discussing examples of successful civil rights suits brought by pro se inmate-litigants).

162. 141 CONG. REC. 26,553 (1995) (statement of Sen. Hatch) (urging passage to “bring relief to a civil justice system overburdened by frivolous prisoner lawsuits”).

163. *Id.* at 27,043.

164. *Id.* at 26,553.

*v. Smith* decision.<sup>165</sup> Common methods of attempting to provide inmates with meaningful court access include establishing and maintaining an up-to-date law library,<sup>166</sup> employing assistants in the library<sup>167</sup> and persons trained in the law,<sup>168</sup> and providing supplies.<sup>169</sup> Moreover, as a result of *Johnson v. Avery*, incarcerated litigants can receive assistance from other inmates.<sup>170</sup> These materials effectuate a prisoner's right of access not just at the time of filing, but from commencement of the suit until its conclusion.<sup>171</sup>

Prisoners released during the pendency of their suit lose access to the resources once available to them in the prison facility and immediately begin to face the same costs of prosecuting their action as non-prisoners.<sup>172</sup> To litigate in federal court, indigent *non-prisoners* can secure IFP status without enduring the complicated installment plan,<sup>173</sup> and indigent *prisoners* in the custody of the state generally do

165. See 430 U.S. 817, 828 (1977) (instructing that the state can discharge its obligation either by providing an adequate library or by providing inmates with access to attorneys or other persons trained in the law to assist them).

166. Library necessities include relevant state and federal statutes and federal law reporters. See, e.g., *Corgain v. Miller*, 708 F.2d 1241, 1250–52 (7th Cir. 1983) (requiring state law materials); *Cruz v. Hauck*, 627 F.2d 710, 720 (5th Cir. 1980) (requiring *Federal Supplements*); see also *Wade v. Kane*, 448 F. Supp. 678, 684 (E.D. Pa. 1978), *aff'd*, 591 F.2d 1338 (3d Cir. 1979) (requiring current volumes of *United States Reports* and current copies of the state criminal code).

167. See, e.g., *Gluth v. Kangas*, 773 F. Supp. 1309, 1318–19 (D. Ariz. 1988), *aff'd*, 951 F.2d 1504 (9th Cir. 1991) (ordering direct assistance for a prisoner whose minimal knowledge of the English language prevented him from properly preparing his claims).

168. See *Bounds*, 430 U.S. at 831 (“Among the alternatives are the training of inmates as paralegal assistants to work under lawyers’ supervision, the use of paraprofessionals and law students, either as volunteers or in formal clinical programs, the organization of volunteer attorneys through bar associations or other groups, the hiring of lawyers on a part-time consultant basis, and the use of full-time staff attorneys . . .”).

169. *Gluth*, 773 F. Supp. at 1321 (reasoning that writing instruments effectuate meaningful access by helping prisoners prepare and deliver acceptable court papers).

170. Courts have struck down rules that unreasonably interfere with the essential work of jailhouse lawyers. See, e.g., *In re Harrell*, 470 P.2d 640, 647 (Cal. 1970) (invalidating a rule that prevented a jailhouse lawyer from keeping a client’s legal papers in his cell).

171. See *Toussaint v. McCarthy*, 926 F.2d 800, 810 (9th Cir. 1991) (Wiggins, J., concurring and dissenting) (“[W]ithout legal assistance or library access at all stages of a proceeding, an inmate’s right of access to the courts is not effective or meaningful.”); *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir. 1985) (holding that meaningful access includes access to legal resources for post-filing needs).

172. See *Kerr v. Puckett*, 138 F.3d 321, 323 (7th Cir. 1998) (noting that an indigent’s release from prison triggers an immediate rise in litigating costs because the state no longer provides for him). See generally JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 112–25 (2003) (describing the employment and financial difficulties prisoners encounter upon their release from prison).

173. See 28 U.S.C. § 1915(a) (2006) (bestowing discretion on federal courts to authorize IFP status for non-prisoner litigants).

not have to “make the choice between [their] lawsuit[s] and the necessities of life in the same manner that a non-prisoner would.”<sup>174</sup> Indigent *ex-prisoners*—no longer benefitting from free legal resources and having to provide for themselves—again need the assistance of traditional IFP status to maintain court access.

#### IV. A UNIFORM APPLICATION OF § 1915 TO RELEASED PRISONERS

Because the installment pay plan contemplates a mechanism at the prison for collecting a part of the filing fee and remitting it to the court,<sup>175</sup> its requirements and safeguards cannot apply equally to released prisoners.<sup>176</sup> Courts have consistently upheld the PLRA’s amendments to the federal IFP statute—as applied to incarcerated litigants—against various constitutional challenges.<sup>177</sup> According to these decisions, the filing fee requirements placed on prisoners under § 1915(b) “do not deprive them of adequate, effective, and meaningful [court] access.”<sup>178</sup> Although the new provisions make IFP proceedings more onerous for prisoners than for other classes of indigent plaintiffs, Congress can impose such conditions without violating the Constitution.<sup>179</sup>

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174. *Taylor v. Delatoore*, 281 F.3d 844, 849 (9th Cir. 2002).

175. *See* 28 U.S.C. § 1915(b)(2) (2006) (“The agency having custody of the prisoner shall forward payments from the prisoner’s account to the clerk of the court . . .”).

176. *See supra* Part III.A (establishing the deficiencies in the plain language of § 1915(b)(1)–(2)).

177. Courts have reasoned that the PLRA’s fee requirements do not violate prisoners’ First Amendment right to engage in the expressive conduct of litigation, as a prisoner who complies with the periodic payment schedule still has access to the federal court system. *See, e.g., Hampton v. Hobbs*, 106 F.3d 1281, 1286 (6th Cir. 1997) (concluding that Congress’s refusal to subsidize a prisoner’s exercise of his First Amendment rights does not constitute a violation of those rights). Courts have also held that § 1915(b) satisfies equal protection standards. *See Tucker v. Branker*, 142 F.3d 1294, 1300–01 (D.C. Cir. 1998) (reasoning that Congress’s legitimate interest in curbing meritless litigation provides a rational basis for treating prisoners and non-prisoners dissimilarly); *Hampton*, 106 F.3d at 1286–87 (refusing to apply strict scrutiny because prisoners are not a suspect class and finding that the filing fee requirement rationally relates to legitimate governmental interests in curtailing frivolous tort and civil rights litigation). These same courts have further concluded that liability for the full filing fee does not deny prisoners either procedural or substantive due process. *See Tucker*, 142 F.3d at 1299 (holding that periodic payments do not constitute an “insurmountable barrier” to litigating a case and therefore do not violate any right, privilege, or immunity safeguarded by the Constitution or federal statute); *Hampton*, 106 F.3d at 1287–88 (finding that the statute satisfies the constitutional requirements of procedural due process because although prisoners have a protected property interest in their money, the filing fee requirement does not absolutely deprive them of their assets).

178. *Hampton*, 106 F.3d at 1284.

179. *See Roller v. Gunn*, 107 F.3d 227, 231 (4th Cir. 1997), *cert. denied*, 522 U.S. 874 (1997) (“[T]he right of access to federal courts is not a free-floating right, but rather is subject to Congress’ Article III power to set limits on federal jurisdiction.”).

In support of this conclusion, courts have reasoned that the PLRA affords prisoners certain procedural safeguards that mitigate the burden of the filing fee requirement.<sup>180</sup> Under this rationale, the PLRA revisions of the IFP statute do not qualify as an absolute bar to court access because prisoners can apply to use the installment plan under § 1915(b), which allows them to pay the filing fee in smaller monthly sums and therefore constitutes a minimal financial burden.<sup>181</sup> In *Hampton v. Hobbs*,<sup>182</sup> for example, the Sixth Circuit reasoned that although the prisoner had to pay an initial partial filing fee and monthly payments thereafter, other provisions of the statute tempered those requirements significantly.<sup>183</sup> As examples, the court cited the sections allowing the initial fee to be collected only “when funds exist” and the monthly payments to be deducted only when the prisoner’s account balance exceeds ten dollars.<sup>184</sup>

If courts required indigent prisoners to pay an unaffordable lump sum upon release to continue their lawsuit—a possibility that the *McGann* court feared and none of the opposing circuits have explicitly rejected—those prisoners would in effect be “denied a reasonable opportunity to petition the court because the fee, and therefore access, would be beyond their reach.”<sup>185</sup> The rationales used in *Hampton* and similar cases do not hold merit if prisoners cannot apply for traditional IFP status upon release because, without an institutional account to facilitate payment, the litigant lacks the ten dollar and twenty percent safeguards of § 1915(b)(1)–(2).

In order to maintain the constitutionality of § 1915(b) as applied to released prisoners while also preserving Congress’s goals in enacting the PLRA, all circuits should adopt the middle-ground approach used in cases like *DeBlasio v. Gilmore*.<sup>186</sup> Thus, courts should assess a released prisoner’s trust account statements before dismissing

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180. See *Tucker*, 142 F.3d at 1298 (commenting that the PLRA never exacts more than twenty percent of an indigent prisoner’s assets or income); *Lucien v. DeTella*, 141 F.3d 773, 775 (7th Cir. 1998) (noting that the PLRA authorizes only periodic collections from prisoners’ commissary accounts).

181. See 141 CONG. REC. 14,573 (statement of Sen. Kyl) (“The filing fee is small enough not to deter a prisoner with a meritorious claim, yet large enough to deter frivolous claims and multiple filings.”).

182. 106 F.3d 1281 (6th Cir. 1997).

183. *Id.* at 1284.

184. *Id.*

185. Simone Schonenberger, Note, *Access Denied: The Prison Litigation Reform Act*, 86 Ky. L.J. 457, 465 (1997) (discussing the potential negative effect of one large fee payment on the ability of incarcerated litigants to maintain access to the courts).

186. See 315 F.3d 396 (4th Cir. 2003) (evaluating a former prisoner’s qualification for *in forma pauperis* status before deciding whether he owed filing fees for a civil action commenced while he was in prison).

his action or appeal for failure to pay the full filing fee.<sup>187</sup> If the court determines that the released prisoner had the financial means to pay any part of the PLRA fees, he must pay such amounts that, according to the prison account statements, he could have paid when he filed his petition in court and in subsequent installments; if he does not pay his outstanding debts, the court should dismiss his complaint for failure to comply with its order.<sup>188</sup> If the prisoner demonstrates that, after filing the complaint or notice of appeal, he either (1) satisfied all of his installment payments or (2) lacked the assets to pay any portion of the filing fee, the court should allow him to apply for traditional IFP status and then proceed to address his petition.

This solution furthers the PLRA's goals of reducing frivolous suits in federal courts and improving their quality.<sup>189</sup> If the prisoner abides by payment deadlines and forwards available funds, and then seeks to continue to litigate the case after release from prison, the likelihood that his claim is frivolous dissipates.<sup>190</sup> In addition, many courts have limited the scope of § 1915(a)(1) so that, at most, it waives the filing fee and other court-imposed costs and requires the IFP litigant to personally finance other aspects of the litigation process such as depositions and transcripts.<sup>191</sup> Thus, if former prisoners choose to continue litigating upon their release, they have engaged in the exact type of economic decision-making that Congress hoped to encourage.<sup>192</sup>

Lastly, this formula strikes a proper balance between the government's interest in deterring inmates from filing meritless suits and prisoners' interests in having access to a forum in which they can vindicate their rights. Under this scheme, an individual's release from prison does not excuse his prior noncompliance with § 1915(b), but it also does not immediately trigger an absolute obligation to pay any outstanding balance of the filing fee. Even though the prisoner

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187. See *supra* Part II.A (describing the procedure endorsed by the Fourth Circuit).

188. See *Robbins v. Switzer*, 104 F.3d 895, 898 (7th Cir. 1997) (emphasizing the need to examine a released inmate's trust account to identify any outstanding debts).

189. See *supra* Part III.B (describing Congress's objectives in enacting the PLRA).

190. See *Roosevelt*, *supra* note 50, at 1779 n.53 (suggesting that an inmate whose suit is frivolous "presumably has less at stake and will be less willing to pay a filing fee" as a condition of proceeding in federal court).

191. See cases cited *supra* note 45.

192. Courts could subject the ex-prisoner's financial condition to continuous review during the remainder of the lawsuit and require him to pay—to the extent possible—all or part of the filing fee if he acquired a sufficient source of income. Before the PLRA, some courts revoked leave to proceed IFP if evidence indicated that the plaintiff's economic situation had improved. See *Treff v. Galetka*, 74 F.3d 191, 197 (10th Cir. 1996) (requiring the plaintiff to pay service and mileage costs after the court confirmed that he no longer qualified for pauper status).

can continue his lawsuit without further payment of fees, the court still holds him responsible for any installment payments that came due before release, thereby instilling a sense of financial responsibility.

#### CONCLUSION

Before the PLRA's enactment, district courts retained broad discretion to grant or deny IFP petitions from incarcerated and non-incarcerated litigants.<sup>193</sup> The PLRA amendments have confined this discretion by mandating that courts assess and collect filing fees from prisoners bringing civil suits.<sup>194</sup> Although the PLRA's drafters hoped that these amendments would simplify the IFP procedure and reduce the workload of the federal judiciary, courts have expended time and resources to resolve § 1915's ambiguities each time a prisoner seeks to continue a pending lawsuit upon release.<sup>195</sup>

According to the most recent data available, 713,473 prisoners were released during 2006, an increase of 2.1% from the number released in 2005.<sup>196</sup> The recent increase in the federal filing fee<sup>197</sup> amplifies the need for a uniform solution to the procedural issues presented by § 1915. The higher the fee, the longer it will take for prisoners to complete the installment plan, making it more likely that they will be released before finishing payment.

Deciding released prisoners' continuing payment obligations according to their debts under the PLRA's fee formula provides a straight-forward procedure for courts to follow and fulfills the statute's purpose in deterring meritless lawsuits. As the PLRA's legislative history demonstrates, Congress sought to create a more demanding payment procedure for prisoners because of the unique advantages their living arrangement provides. When a litigant leaves

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193. See, e.g., *Pace v. Evans*, 709 F.2d 1428, 1429 (11th Cir. 1983) (commenting that a trial court could deny an application for leave to proceed IFP as long as it did not act arbitrarily or deny the petition on erroneous grounds).

194. See 28 U.S.C. § 1915(b)(1)–(2) (2006) (requiring district courts to make a series of factual findings regarding the prisoner's monthly account balances or deposits in the six-month period preceding the filing of the complaint as a basis for collecting fees).

195. See Branham, *supra* note 49, at 543 (commenting that “courts [have been] confronted [with numerous questions] regarding the PLRA's meaning [and] scope” even though the statute was “purportedly designed to curb the burdens of inmate litigation”).

196. WILLIAM J. SABOL & HEATHER COUTURE, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2007 4 (2008), <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf>.

197. See 28 U.S.C. § 1914(a) (2006) (increasing the federal filing fee from \$250 to \$350).

prison having satisfied all past due payment obligations, nothing differentiates him from the general population except his criminal record. If he desires to continue his lawsuit, he poses no greater risk than any other non-incarcerated citizen who seeks a traditional IFP waiver. Having met the PLRA's deadlines, his status as an ex-prisoner should not determine his right of access; rather, his compliance with the statute should entitle him to apply for IFP assistance under § 1915(a)(1).