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# INCARCERATED WOMEN: REPRODUCTIVE HEALTHCARE CONCERNS SILENCED BY THE PRISON LITIGATION REFORM ACT



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Amanda Feldman

## **Incarcerated Women: Reproductive Healthcare Concerns Silenced by the Prison Litigation Reform Act**

Women in prison face serious reproductive healthcare injustices and their complaints are ignored by both the prison officials and the justice system. Ambiguous prison policies allow prison staff to ignore inmates' complaints. Such policies can lead to abusive behavior by prison staff. In an Eighth Circuit case, a pregnant woman was shackled to the bed during labor, which resulted in "extreme mental anguish, permanent hip injury, torn stomach muscles, and an umbilical hernia requiring surgical repair, as well as damage to [the] sciatic nerve."<sup>1</sup> This shackling incident rose to the Eighth Amendment standard of deliberate indifference however liability could only be attributed to the individual correctional officer who ordered the shackling. The result of the case created little incentive to change prison policies because the Director of the Department of Corrections faced no liability.

A federal court in Georgia found no Eighth Amendment violation and no objectively serious medical need present when a twenty-four week pregnant Plaintiff suffered severe pelvic pain, cramping, and vomiting.<sup>2</sup> Left alone for hours before she entered an infirmary, the Plaintiff could not see a doctor for a physical or an ultrasound. Ultimately, she gave birth alone in the infirmary bathroom where her child died soon after. A federal court in Michigan held that short-term deprivation of pads and tampons "lead to the conclusion that Plaintiffs have not stated a plausible Eighth Amendment violation" despite the fact that one menstruating Plaintiff had numerous requests for pads ignored by the guards during the span of one day. She consequently

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<sup>1</sup> *Nelson v. Corr. Med. Servs.*, 583 F.3d 522 (8th Cir. 2009).

<sup>2</sup> *Hogan v. Wellstar Health Network, Inc.*, No. 1:12-CV-1418-RWS, 2013 U.S. Dist. LEXIS 35841, at \*24-25 (N.D. Ga. Mar. 14, 2013).

bled onto her uniform. After requesting a new uniform, the Plaintiff was told that “it was her own fault,” and was not provided a replacement uniform for another twenty-four hours.<sup>3</sup> A California state prison waited a decade before allowing an inmate to get a mammogram despite her frequent complaints about lumps in her breast and pleas for medication. The staff figured that she was a drug seeker but in actuality, the mammogram result determined that she had breast cancer. After her mastectomy, the medical staff did not allow her to spend even one post-surgery night at the hospital. The inmate filed a class action along with other medically neglected women, and when the lawsuit settled, the settlement allowed the Department of Corrections to admit no culpability for wrongdoing.<sup>4</sup> Women in prison face serious reproductive healthcare injustices and their complaints are oftentimes ignored by the prison staff. The Prison Litigation Reform Act’s (PLRA) restrictive policies are at the heart of the harms suffered by women inmates, as women's reproductive healthcare claims are dismissed for not rising to the level of actionable Eighth Amendment claims. In essence, the PLRA limits the ability for women in prison to effectuate their eight amendment rights. The legislation precludes viable claims with its restrictive provisions.

The Prison Litigation Reform Act is a 1996 statute that limits inmate litigation challenging conditions of confinement or actions by government officials that affects inmates’ lives. The PLRA has a few vehicles to limit prisoner litigation including an exhaustion of administrative remedies requirements, a physical injury requirement, a filing fees provision and

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<sup>3</sup> Semelbauer, 2015 WL 9906265, at \*9.

<sup>4</sup> Talvi, Silja J. A. *Women behind Bars: The Crisis of Women in the U.S. Prison System*. Seal Press, 2007.

Three Strikes rule, and limitations on attorney's fees.<sup>5</sup> This statute specifically limits the ability of women prisoners to litigate their reproductive healthcare claims.

Reproductive healthcare resources are a human right denied to incarcerated women. When wronged women assert their claims legally, they face insurmountable obstacles, which demonstrate that not even the courts are on their side. When they seek legal recourse, the justice system rejects their claims because congressional policies under the Prison Litigation Reform Act (PLRA) embolden such action. The Prison Litigation Reform Act is legislation that specifically curtails an inmate's ability to assert claims about prison conditions. This harm is most severely felt by women who assert claims based on reproductive healthcare concerns.

Prison policies and officials overlook women's healthcare, which leads to severe inadequacies and illness. When women try to address these shortcomings, they are unsuccessful due to the various Prison Litigation Reform Act (PLRA) provisions that limit inmate litigation. The PLRA provisions are biased against women in a way that makes it unfathomably difficult for their claims to be adjudicated. The PLRA hinders women's ability to bring complaints based on reproductive healthcare inadequacies and violations because of the restrictive procedures that block inmate litigation which are biased against women. This article shall explore the difficulties that women in prison face and their ability to seek recourse in the justice system. The Background section will give a brief overview about prison demographics in the United States and information about the type of offenses that women commit. Part I discusses the reproductive healthcare inadequacies in women's prisons. Part II presents the background of the PLRA and delves into how the statute wrongly bars inmate litigation. Part III considers how women

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<sup>5</sup> 28 U.S.C. §1915(g) (*in forma pauperis* provision); 42 USCS § 1997(e) (exhaustion of administrative remedies provision); 42 U.S.C. 1997e(e) (physical injury requirement) 42 USCS § 1988(b) (attorney's fees).

prisoners are not able to litigate their reproductive healthcare claims under the restrictive provisions of the statute. The Conclusion considers solutions to various issues regarding reproductive healthcare in prison and litigating claims.

### **Background on Women in Prison**

While women make up a smaller percentage of the prison population than men, there are still significant numbers of women in prisons in the U.S. Worldwide, there are half a million female prisoners, and the United States alone constitutes one third (183,400) of this figure, despite representing less than five percent of the world's population.<sup>6</sup> Additionally, the incarceration rate among women is growing.<sup>7</sup> Between 1980 and 2014, the number of women in prison and jail increased from 26,378 to approximately 215,000.<sup>8</sup> Women's state prison populations grew more than 800% over nearly 40 years compared to a mere 40% increase in the general U.S. population.<sup>9</sup> This rate doubles the pace of growth among male prisoners.<sup>10</sup> The trend is clear: the United States has a disproportionately high population of incarcerated women.

The types of crimes that women generally commit are more non-violent or more related to property as compared to men.<sup>11</sup> Incarcerated women are more likely to have a drug offense

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<sup>6</sup> Moloney, K. P., et al. "Women in Prison: The Central Issues of Gender Characteristics and Trauma History." *Public Health*, vol. 123, no. 6, June 2009, pp. 426–30. *DOI.org (Crossref)*, doi:10.1016/j.puhe.2009.04.002 Moloney, 426; Ocen, Priscilla. "Incapacitating Motherhood." *51 U.C. Davis L. Rev.* 2191, June 2018..

<sup>7</sup> Moloney, *supra* note 6; (Between 2000 and 2006, the female prison population increased at an average annual rate of 3.3% in the state and federal jurisdictions); Laufer, Samantha. "Reproductive Healthcare for Incarcerated Women: From 'Rights' to 'Dignity.'" *56 Am. Crim. L. Rev.* 1785, Fall 2019 (Incarceration of women has increased sevenfold, at a rate of 50% higher than the incarceration of men).

<sup>8</sup> Laufer, *supra* note 7; Chang, Ailsa. *Pregnant Behind Bars: What We Do And Don't Know About Pregnancy And Incarceration*. <https://www.npr.org/sections/health-shots/2019/03/21/705587775/pregnant-behind-bars-what-we-do-and-dont-know-about-pregnancy-and-incarceration>. Accessed 21 Mar. 2019; Ocen, *supra* note 6.

<sup>9</sup> Sawyer, Wendy. *The Gender Divide: Tracking Women's State Prison Growth*. 9 Jan. 2018, [https://www.prisonpolicy.org/reports/women\\_overtime.html](https://www.prisonpolicy.org/reports/women_overtime.html).

<sup>10</sup> *Id.*

<sup>11</sup> Moloney, *supra* note 6.

than a violent one as compared to incarcerated men.<sup>12</sup> Although the crimes perpetrated by women are not generally a threat to public safety, they are still subject to disproportionately severe punitive measures and high-level prison security.<sup>13</sup>

It is important to consider the demographic makeup of women's prisons to understand the socio-economic inequality present in the justice system. Women in prison do not reflect an accurate composition of the United States due to the fact that prison populations overly represent the most socially and economically disadvantaged individuals within the country.<sup>14</sup> African-American and Latinx women represent more than 60% of incarcerated women in federal prisons whereas they comprise of a combined 31.5% of the national population.<sup>15</sup> Studies find that women who identify as lesbian or bisexual receive longer sentences than their heterosexual counterparts.<sup>16</sup> This bias is significant when considering that one third of people in women's prisons identify as lesbian or bisexual, as compared to 10% of male prisoners who identify as queer.<sup>17</sup> Additionally, 64 % of women entering prison do not have a high school diploma.<sup>18</sup> Moreover, the statistics clearly indicate that minority populations are overrepresented in prisons.

### **Part I: Inadequacies of Reproductive Healthcare in Women's Prisons**

A variety of resource, institutional, and administrative barriers in prison lead to the dearth of reproductive healthcare available for female inmates. Women lack essential reproductive

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<sup>12</sup> Kilgore, James William. *Understanding Mass Incarceration: A People's Guide to the Key Civil Rights Struggle of Our Time*. New Press, The, 2015.

<sup>13</sup> Moloney, *supra* note 6.

<sup>14</sup> *Id.*

<sup>15</sup> Talvi, *supra* note 4.

<sup>16</sup> Kajstura, Aleks. *Women's Mass Incarceration: The Whole Pie 2019*. Prison Policy Initiative, 29 Oct. 2019, <https://www.prisonpolicy.org/reports/pie2019women.html>.

<sup>17</sup> Kajstura, *supra* note 16.

<sup>18</sup> *Statistics: Women Prisoners*. <https://www.prisonfellowship.org/resources/newsroom/media-background-information/media-additional/statistics-women-prisoners/>.



healthcare resources in prison. Notably, women are unable to receive reproductive healthcare necessities like menstrual products. There are many issues stemming from healthcare services including improper administration or inability to receive pap-smears, abortion, and pregnancy care. There are administrative obstacles, such as the inability of female inmates to visit a doctor, due to a hierarchical system that hinders medical care. Additionally, there is administrative indifference reflected in prison policies. The overall infrastructure in prison was not created to accommodate women. Constitutional protections under the Eighth Amendment fall flat when addressing women's concerns. These shortcomings in both administrative prison policy and law enforce value judgments cast on female inmates that reflect their care in prison. Lastly, the political and societal rhetoric surrounding women in prison limits the way that they are able to access reproductive health services.

### **Lack of resources: Menstrual Products**

Women in prison lack basic productive healthcare resources like menstrual products. The major issues encompass the lack of provisioning as well as the steep price of the products. In 2018, the federal First Step Act was enacted, which provided that the Director of the Bureau of Prisons make tampons and sanitary napkins available to prisoners for free and in a quantity that is appropriate to the healthcare needs of each prisoner.<sup>19</sup> This act makes menstrual products for women available in federal facilities, but it is vague in that it does not specify how the availability of the products is enforced. For women unaffected by the legislation in state or private prisons, menstrual product provisioning continues to be a challenge.

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<sup>19</sup> Johnson, Margaret. "Menstrual Justice." *53 UC Davis Law Review* 1, May 2019, <https://ssrn.com/abstract=3389773>.

Women not covered by the First Step Act have to purchase menstrual products in commissary at inflated prices while they already have meager wages. In a study of New York prisons, the “commissary price for two tampons is \$5.55 and two panty liners cost \$1.35, while the average monthly pay for a resident of a federal correctional facility is only five dollars.”<sup>20</sup> The high prices for necessary reproductive healthcare items is unsustainable considering that women are forced to pay two to three times the market rate in prison for female hygiene products and the wages that women inmates make render these items unaffordable.<sup>21</sup> In fact, “it can take more than 20 hours of work at prison wages to earn enough money to purchase a one-month supply of pads or tampons.”<sup>22</sup> If they cannot purchase the products, women are oftentimes faced with degrading options in their attempts to get menstrual resources. Many incarcerated women must negotiate with or beg correctional officers to obtain menstrual products that are essential to maintain a healthy body and manage their bleeding.<sup>23</sup> These degrading circumstances go unchecked when correctional officers have control over menstrual products. “One woman...recounted that at the New York Rikers Island jail facility, a ‘correction officer threw a bag of tampons into the air and watched as inmates dived to the ground to retrieve them, because they didn’t know when they would next be able to get tampons.’”<sup>24</sup> Additionally, “formerly incarcerated women have stated that the lack of menstrual products was one of the most degrading aspects of incarceration.”<sup>25</sup> Moreover, 54% of inmates said that the monthly supply of

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<sup>20</sup> *Id.*

<sup>21</sup> Hill, Amy. “Death through Administrative Indifference: The Prison Litigation Reform Act Allows Women to Die in California’s Substandard Prison Health Care System.” *Hastings Women’s L.J.* 223.

<sup>22</sup> Laufer, *supra* note 7.

<sup>23</sup> Johnson, *supra* note 19.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

sanitary napkins does not meet their needs according to a 2015 study of New York women's prisons.<sup>26</sup>

Women face dangerous health consequences when they do not have access to necessary reproductive health resources. When women are denied feminine hygiene products, they are forced to resort to using unsanitary and dirty rags.<sup>27</sup> This can lead to infections and an increased risk of diseases such as cervical cancer. Moreover, these makeshift products will do nothing to staunch the blood, which poses a health risk to the women and the general prison population.<sup>28</sup> Without menstrual products to absorb the flow, there is a risk that infectious disease such as HIV, hepatitis B, or hepatitis C could be transmitted through contact with the menses.<sup>29</sup> The lack of menstrual products is a public health crisis in women's prisons for the specific individuals in need of them and for the general population. Additionally, the issue of the dearth of resources creates a psychological punishment for women. When women are denied routine reproductive hygiene products, they are humiliated. They are ostracized physically when their clothes are soiled, and they are shamed because of their indigent status if they cannot afford to purchase the necessary hygiene products.<sup>30</sup>

### **Lack of resources: Inability to pay/ Copayments**

Prison copayment systems serve as a preeminent challenge for women who need medical attention but cannot afford to see a doctor. Research finds that, "in 35 states, inmates have medical copayments, which go toward prison revenue."<sup>31</sup> Money is removed from commissary

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Ocen, *supra* note 6.

<sup>31</sup> *Is Charging Inmates to Stay in Prison Smart Policy?* 9 Sept. 2019, <https://www.brennancenter.org/our-work/research-reports/charging-inmates-stay-prison-smart-policy>.

accounts, which consist of earnings from prison jobs and family contribution.<sup>32</sup> These copayments are particularly burdensome for women who make an income as low as seven to twelve cents per hour and who already have financial strain.<sup>33</sup> Despite the presence of a copayment system in place, there is no guarantee that a prisoner submitting a copayment will see a medical provider or will receive care because the medical staff have discretion to determine if an appointment with a provider is necessary. There are other barriers associated with the copayment system. It “requires that you are able to read, write, speak English, and articulate your health care needs, and it can present a prohibitive financial burden in relation to the other costs people have within [] prison.” These standards are ineffable expectations and demands for inmates to comply with.

### **Healthcare inadequacies: Pap smears, Abortions, and Pregnancy Care**

Healthcare inadequacies are rampant in women’s prisons. For example, inmates in California women's prisons describe their Pap smear services as “erratic and often degrading,” and they note that the follow-up care is often non-existent.<sup>34</sup> Inmates have complained about the privacy, size, and level of cleanliness of the examination rooms as well as the lack of communication between the doctor and the patient before, during, or after their Pap smear examination.<sup>35</sup>

In terms of abortion services, women in prison have additional barriers to accessing the procedure including cost, physical accessibility, and medical referral procedures. Financially, it

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<sup>32</sup> *Id.*

<sup>33</sup> Andrews, Jordan. *The Current State of Public and Private Prison Healthcare*. 24 Feb. 2017, [https://publicpolicy.wharton.upenn.edu/live/news/1736-the-current-state-of-public-and-private-prison-for-students/blog/news.php#\\_edn7](https://publicpolicy.wharton.upenn.edu/live/news/1736-the-current-state-of-public-and-private-prison-for-students/blog/news.php#_edn7); Human Rights Program at Justice Now+. “Symposium On Gender, Parenting, And The Law: Article: Prisons as a Tool of Reproductive Oppression.” 5 *Stan. J.C.R. & C.L.* 309, 17.

<sup>34</sup> Human Rights Program at Justice Now+, *supra* note 33.

<sup>35</sup> *Id.*

can be difficult to get an abortion because not only do women usually have to pay for the procedure, they must also pay for the transportation and prison staff who must accompany them.<sup>36</sup> Additionally, many prisons are located in rural areas that do not have easy access to nearby healthcare clinics that are capable of providing abortion procedures. Hence travel to the clinics may be unreasonably expensive. Moreover, contracted medical providers inside the prison may hinder access to abortions for women. The private providers may refuse to arrange for abortions as they would any other outside medical care.<sup>37</sup> Therefore, abortion procedures prove administratively and financially infeasible for many women in prison.

If women are not able to get abortions, many of them carry the pregnancy to term and have children during their custodial sentence. There are more than 200,000 women in U.S. prisons or jails each year, and approximately 6-10%, or 12,000, of those women are pregnant when they are incarcerated.<sup>38</sup> Studies have found that "among women who were pregnant at admission to jail, less than half had received an obstetric exam since admission, and roughly one-third had received other pregnancy care."<sup>39</sup> When incarcerated women give birth, it is oftentimes a degrading ordeal because many prisons and jails condone the routine practice of using restraints on pregnant inmates during labor and delivery.<sup>40</sup> However, "federal agencies, several federal circuit courts, some state legislatures, and the majority of medical and health organizations prohibit or condemn the practice in most cases."<sup>41</sup> The American Congress of

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<sup>36</sup> Roth, Rachel. "Obstructing Justice: Prisons as Barriers to Medical Care for Pregnant Women." *18 UCLA Women's L.J.* 79, 2010.

<sup>37</sup> *Id.*

<sup>38</sup> Duff. "Reproduction as a Site of Punishment: Shackling Pregnant Women During Labor and Delivery in Modern American Prisons." *7 Va. J. Crim. L.* 16, 2019; American Civil Liberties Union. *The Shackling of Pregnant Women & Girls in U.S. Prisons, Jails & Youth Detention Centers*. ACLU Reproductive Freedom Project & ACLU National Prison Project, [https://www.aclu.org/files/assets/anti-shackling\\_briefing\\_paper\\_stand\\_alone.pdf](https://www.aclu.org/files/assets/anti-shackling_briefing_paper_stand_alone.pdf).

<sup>39</sup> Ocen, *supra* note 6.

<sup>40</sup> Duff, *supra* note 38; *Nelson v. Correctional Medical Services*, 583 F.3d 522, 534 (8th Cir. 2009) (holding the shackling of women in labor in or the late stages of pregnancy unconstitutional).

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

Obstetricians and Gynecologists finds that shackling women inmates during labor interferes with the ability of physicians to safely practice medicine and is “demeaning and unnecessary.”<sup>42</sup>

Shackling during labor and birth is hardly justified by concerns for the safety of the correctional and medical staff. The practice also presents various risks to the women and baby’s health, and it can be interpreted as a violation of constitutional law under the Eighth Amendment and international human rights law.<sup>43</sup>

Theorists have discussed how the punitive system targets certain demographics of women to regulate population growth. Professor Priscilla Ocen of Loyola Law School examines the relationship between race, gender, and systems of punishment. She argues that motherhood is incapacitated because the system of mass incarceration removes women, specifically poor women of color, from the ability to procreate or parent.<sup>44</sup> Various practices enforce this “incapacitation of motherhood” including the conditions of confinement that women endure while serving their sentences. Various penal means incapacitate women. The location of the prison may hinder the ability for visitation, lengthy sentences strip women of their procreative capacities when they are incarcerated at their peak reproductive age, coerced sterilization practices are commonplace in prison, and accelerated timelines for the termination of parental rights is a consequence of incarceration.<sup>45</sup> Moreover, women’s reproductive healthcare concerns are not aptly addressed by the penal system.

### **Administrative Obstacles/ Administrative indifference**

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<sup>42</sup> American Civil Liberties Union, *supra* note 38.

<sup>43</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <https://www.refworld.org/docid/3ae6b3a94.html>.

<sup>44</sup> Ocen, *supra* note 6.

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

Women seeking to address reproductive healthcare concerns are met with administrative indifference. Internal prison policies give a dangerous amount of deference to the whims of corrections staff while there is a dearth of women correctional officers and doctors. Prison staff and administrative procedures cause serious obstacles for women seeking reproductive healthcare treatments. Studies of California prisons found that for most prisoners “the most difficult part of obtaining treatment from medical staff is gaining access to a doctor” because of the rigorous screening provisions. Prisoners are required to first pay a copayment and confer with a medical technical assistant (MTA), a guard trained with vocational nursing skills, before gaining clearance to see a doctor.<sup>46</sup> MTAs pose an obstacle to women’s healthcare treatment because they have broad discretion to determine if a woman’s pain is substantial enough to get medical treatment. According to their estimation of a woman’s pain, they have the power to keep a genuinely sick prisoner from accessing essential medical care. Additionally, for state women’s prisons in California, the administrative relief process, known as a 602 Appeal, places no time limits on the CDC’s response to an application for relief.<sup>47</sup> This means that healthcare complaints do not need to be addressed in a timely fashion and prisoners bear the reproductive healthcare consequences of delayed treatment.

There is an underrepresentation of female correctional officers and doctors at women’s prison facilities, which leads to situations where women’s reproductive healthcare claims are not handled seriously. Surveys of women’s prison healthcare experiences found that, although most prison doctors are male, almost all of the women reported a preference for a female doctor.<sup>48</sup> “The women recounted difficulties discussing menstrual symptoms or ‘women’s problems’ with

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<sup>46</sup> Hill, *supra* note 21.

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

<sup>48</sup> Smith, Catrin. “A Period in Custody: Menstruation and the Imprisoned Body.” *Internet Journal of Criminology*, 2009.

a male doctor, describing the experience as ‘degrading’, ‘embarrassing’, and ‘shameful.’”<sup>49</sup> Additionally, “women who had suffered sexual abuse stated that they found it particularly difficult to talk to a medical officer about such intimate issues and found bodily examination especially traumatic.”<sup>50</sup> The difference in employment of female versus male correctional officers falls on the type of prison. Federal prisons, which pay the most, employ the fewest women as officers, and private prisons, which pay the least, employ the largest number of female officers.<sup>51</sup> Information from the Bureau of Justice found that “in 2005 [women] constituted 26% of correctional officer positions in state prisons, 13% of correctional officers in federal prison, and 48% of correctional officers and private prisons.”<sup>52</sup> As a result, the lack of female correctional officers in women’s prisons causes healthcare consequences because incarcerated women may not feel comfortable coming to male officers to speak about reproductive concerns. Additionally, if inmates confront male officers, their concerns may be dismissed because male officers cannot understand the seriousness of their discomfort.

### **Infrastructure Dissonance**

Prison institutions were not historically built to accommodate women and are still not equipped to do so. Women’s correctional facilities are historically based on physical structures and regulations designed for men.<sup>53</sup> For example, in most federal, state, and private prisons across the United States, there is a lack of proper medical care during pregnancy and delivery.<sup>54</sup> The infrastructure of many facilities is not equipped to “provide appropriate

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Stohr, Mary K., and Anthony Walsh. *Corrections: The Essentials*. SAGE, 2012.

<sup>52</sup> *Id.*

<sup>53</sup> Talvi, *supra* note 4.

<sup>54</sup> Duff, *supra* note 38.



gynecological/obstetric exams, nutrition, or parenting classes.”<sup>55</sup> As a response, gender-responsive programming is one method some prisons utilize to adapt prisons to be more amenable to women’s needs.<sup>56</sup> This can include education on women’s healthcare concerns, including information on practicing good hygiene.

Transgender women placed in men’s facilities face a serious danger. They are female-identifying, yet their bodies may not reflect that. Oftentimes, these individuals are not given proper hormones.<sup>57</sup> This could lead to many psychological and physical problems as well as exposure to violence and sexual assault.

### **Value Judgments: Effects on Women’s Reproductive Healthcare**

Women in prison are often overlooked in society or are branded with stereotypes that ultimately influence the quality of care that they receive while incarcerated. In penological reform history, starting in the last half of the 1800s and the first half of the 1900s, there were primarily two schools of thought in terms of guiding rehabilitation for women: the moralist ideology and the liberal feminist ideology.<sup>58</sup> The moralists hold the belief that “women and girls involved in the criminal justice system were in effect morally impaired and therefore in need of religious and social remedies (prayers, efforts to keep them chaste, etc.).”<sup>59</sup> Moralists branded women as “good” or “bad,” depending on whether they conform to their expected gender role. This branding is to the detriment of non-conforming women in the justice system because, “despite the fact that women are usually treated as if they are men, prison guards respond to

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<sup>55</sup> *Id.*

<sup>56</sup> Talvi, *supra* note 4.

<sup>57</sup> Andrews, *supra* note 33.

<sup>58</sup> Stohr, *supra* note 51.

<sup>59</sup> *Id.*

‘unladylike’ behavior with a certain degree of harshness.”<sup>60</sup> The struggles of non-conforming women are duplicated when considering the stigmatizing force of race and class discrimination.

The liberal feminist perspective associates ongoing incarceration with the social structure of women’s lives, including their level of poverty, their lack of sufficient schooling or training, or the patriarchal beliefs that pervaded their lives.<sup>61</sup> The moralist ideology, which is overly concerned with the sexuality of inmates, has been the dominant force of the criminal justice system over the past century.<sup>62</sup> Women in prison are often stereotyped as “sexually deviant ‘bad women’ and as reckless ‘bad mothers’ who deserve whatever conditions or treatment they face.”<sup>63</sup> Further, these stigmas paint women of color as “sexually promiscuous, incompetent mothers, and welfare queens who threaten society.”<sup>64</sup> The penal system stigmatizes these women and removes this perceived danger from society.<sup>65</sup> Society is uncomfortable with the idea that women, like men, can be violent. They “are seen neither as sane nor as women,” which is a justification accepted because society has not yet created a discourse that articulates both men and women can be violent.<sup>66</sup> These rejected women are denied access to fundamental reproductive healthcare while in prison because officials do not reconcile that female inmates are real women in their own right.

## **Eighth Amendment Constitutional Protections Incompatibility with Prison Standards**

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<sup>60</sup> Talvi, *supra* note 4.

<sup>61</sup> Stohr, *supra* note 51.

<sup>62</sup> *Id.*

<sup>63</sup> Duff, *supra* note 38.

<sup>64</sup> Ocen, *supra* note 6.

<sup>65</sup> *Id.*

<sup>66</sup> Gilbert, Paula Ruth. “Discourses of Female Violence and Societal Gender Stereotypes.” *Violence Against Women*, vol. 8, no. 11, Nov. 2002, pp. 1271–1300, doi:[10.1177/107780102762478019](https://doi.org/10.1177/107780102762478019).

In 1976, the Supreme Court ruled in *Estelle v. Gamble*<sup>67</sup> that all prisoners are entitled to adequate medical care. To assert an Eighth Amendment claim against cruel and unusual punishment, an inmate must show that a correctional official exhibited [1] a “deliberate indifference” toward her [2] “serious medical need.”<sup>68</sup> *Estelle* is vague in its definition of “deliberate indifference” and “serious medical need,” but the case provided some examples. The Court finds that “indifference is manifested by prison doctors in their response to the prisoner's needs”; deliberate indifference includes a prison official “intentionally denying or delaying access to medical care,” or “intentionally interfering with the treatment once proscribed.”<sup>69</sup> The Supreme Court left the standard for “serious medical need” open for lower courts to define.<sup>70</sup> The standard established by *Estelle* may seem gender-neutral on its face, however, it in effect requires that women prisoners compare their medical needs to those of men.<sup>71</sup>

The constitutional standards of the Eighth Amendment are not clearly defined under *Estelle*, and this leads to a lack of transparency in prison policy. There is a veil of secrecy around medical policies for prisons and jails. Interestingly, “about a quarter of state prison systems have no official written policy; others have written policies that are ambiguous, incomplete, or buried in provisions that are not directly related to women's health.”<sup>72</sup> This ambiguity makes it difficult for women to point to specific violations of prison medical policy. “No woman's sentence

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<sup>67</sup> *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285 (1976)

<sup>68</sup> Gutierrez, Alexandria. “Sufferings Peculiarly Their Own: The Thirteenth Amendment, In Defense of Incarcerated Women’s Reproductive Rights.” *15 Berkeley J. Afr.-Am. L. & Pol’y* 117, 2013.

<sup>69</sup> Gutierrez, *supra* note 68; Marquis, Estalyn. “‘Nothing Less Than the Dignity of Man’: Women Prisoners, Reproductive Health, and Unequal Access to Justice Under the Eighth Amendment.” *106 Calif. L. Rev.* 203, Feb. 2018.

<sup>70</sup> Gutierrez, *supra* note 68.

<sup>71</sup> Marquis, *supra* note 69.

<sup>72</sup> Roth, *supra* note 36.

includes a term of ‘medical neglect’... yet this is undeniably the result of imprisonment for some women.”<sup>73</sup>

### **Constitutional Shortcomings and Rhetoric-Based Solutions**

Using the Eighth Amendment, women in prison focus their complaints on the breach of their rights, however the constitutional provisions only go so far in securing medical care. A rhetorical change from rights to dignity discourse, which shifts emphasis on legal rights to general principles of morality and justice, is essential to address the failing reproductive healthcare system for incarcerated women.<sup>74</sup> This rhetorical shift has the potential to address issues that courts have deemed to be outside of their purview. “While courts may not find that women are constitutionally entitled to free menstrual hygiene products, basic conceptions of dignity and humanity dictate otherwise.”<sup>75</sup> A rhetorical shift can help courts go beyond the limitations of the constitutional protections of the Eighth Amendment to help women in prison get essential reproductive healthcare treatment that is essential to human dignity.

## **Part II: PLRA Restrictions to Inmate Justice**

### **PLRA History, Provisions, Goals**

The Prison Litigation Reform Act (PLRA) was attached as a rider to an omnibus appropriations bill, which was signed into law on April 26, 1996.<sup>76</sup> The provisions of the PLRA “limit civil actions in federal courts that either raise challenges to conditions of confinement, or

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<sup>73</sup> *Id.*

<sup>74</sup> Laufer, *supra* note 7.

<sup>75</sup> *Id.*

<sup>76</sup> Branham, Lynn. “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, 2001.

to actions by government officials that affect the lives of persons confined in prison.”<sup>77</sup> The PLRA limits inmate litigation primarily in three ways, through “restrictions on the powers of the federal courts; restrictions on the relief available in prisoner cases; and restrictions on the ability of [individual] prisoner litigants to get into court.”<sup>78</sup> The PLRA’s main goal is to limit frivolous lawsuits that clog the federal courts. The legislation proposed was a response to the perceived over-interference of the judiciary in the function of correctional facilities.<sup>79</sup> Ostensibly, the legislation strips litigants of their ability to argue meritorious claims in court. The PLRA achieved its desired result; the legislation has drastically reduced the number of cases filed. In 1995, inmates filed twenty-six federal cases per thousand inmates while in 2006 that number shrunk to less than eleven cases per thousand inmates, a 60% decline in litigation.<sup>80</sup>

There are a variety of provisions in the PLRA that limit lawsuits brought by inmates. The requirement to exhaust administrative remedies, the physical-injury requirement, and the filing fees requirement for indigent inmates that is coupled with a three strikes provision and court screening, as well as limitations on attorney’s fees, all serve as major obstacles for inmate claim adjudication.

### **Exhaustion of Administrative Remedies**

The PLRA requires prisoners to exhaust administrative remedies before filing suit. The provisions states that “no action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other

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<sup>77</sup> Hill, Tasha. “Inmates’ Need for Federally Funded Lawyers: How the Prison Litigation Reform Act, Casey, and Iqbal Combine With Implicit Bias to Eviscerate Inmate Civil Rights.” *62 UCLA L. Rev.* 176.

<sup>78</sup> Hill, Tasha, *supra* note 77.

<sup>79</sup> Branham, *supra* note 76.

<sup>80</sup> Schlanger, Margo, and Giovanna Shay. “Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act.” *U. Pa. J. Const. L.* 11, 2008.

correctional facility until such administrative remedies as are available are exhausted.”<sup>81</sup> The PLRA requires both substantive exhaustion via notice to officials and procedural exhaustion, via the adherence of prison policy guidelines.<sup>82</sup> There are many obstacles associated with the exhaustion requirement, which make it difficult for inmates to litigate their claims. The PLRA bars even meritorious claims from court if an inmate has failed to comply with the specific technical requirements of the prison’s grievance system.<sup>83</sup>

The exhaustion requirement incentivizes prisons to conjure specific and complex procedural hurdles to foreclose litigation, oftentimes making it too difficult for inmates to follow the correct procedure.<sup>84</sup> For example, many prisons institute short deadlines, as little as two to five days, to file a complaint.<sup>85</sup> Although dismissals on account of failure to exhaust administrative procedures are often without prejudice, “prison grievance deadlines are so short that prisoners who failed to exhaust before filing suit generally are unable to return to court.”<sup>86</sup> Additionally, prisons oftentimes require a large number of procedural appeals before an inmate can exhaust the requirements prior to filing a legal claim.<sup>87</sup> Prisons can set an indefinite amount of mandatory appeals that inmates must complete before they are deemed to have exhausted all available procedures.<sup>88</sup> When inmates go to file administrative complaints, the requisite forms may be repeatedly unavailable, further delaying the resolution of the matter.<sup>89</sup> Finally, when inmates fill out the forms, their complaints may be denied due to minor technical errors.<sup>90</sup>

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

<sup>82</sup> Boston, John, and Daniel E. Manville. *Prisoners’ Self Help Litigation Manual*. Oxford University Press, USA, 2010. *Open WorldCat*, <http://qut.eblib.com.au/patron/FullRecord.aspx?p=728791>.

<sup>83</sup> Schlanger, *supra* note 80.

<sup>84</sup> Hill, Tasha, *supra* note 77.

<sup>85</sup> *Id.*

<sup>86</sup> Schlanger, *supra* note 80.

<sup>87</sup> Hill, Tasha, *supra* note 77.

<sup>88</sup> Boston, *supra* note 82.

<sup>89</sup> Hill, Tasha, *supra* note 77.

<sup>90</sup> *Id.*

Paradoxically, the exhaustion requirement commonly applies to prisoners seeking monetary relief even though such relief is not obtainable under current grievance procedures.<sup>91</sup> For example, in a Seventh Circuit case, a prisoner was injured in a shower and was diagnosed with a large extruded disc fragment. The medical professional recommended surgery but the prison opted to provide a non-surgery solution. The Plaintiff filed suit under Eight Amendment with claims of cruel and unusual punishment and sought monetary damages. The Defendant, the Department of Corrections, argued to dismiss the claim because the Plaintiff did not obtain administrative review of his treatment before filing suit. However, the prison administrative process did not even provide for the remedy the Plaintiff sought.<sup>92</sup> The Court decided the statutory question was whether *any remedies* were available rather than if the preferred remedy of the prisoner was available. The court dismissed the Plaintiff's case for failing to exhaust prison procedure requirements.

The various ways that prison policies shirk responsibilities to address prisoner complaints, through mandatory appeals, complicated forms, and time restrictions for filing complaints, are all permitted by the PLRA. However, under the *Turner v. Safley* standard, grievance rules that unreasonably limit prisoners' right to access to courts might be unconstitutional.<sup>93</sup> The requirements of pre-PLRA law (CRIPA) that remedies be "plain, speedy and effective" have been repealed.<sup>94</sup> Under CRIPA, "courts could defer adjudicating a prisoner's claim for, at most, 180 days while the prisoner attempted to obtain redress through the prison's grievance process."<sup>95</sup> Now, under the PLRA, there is no designated time period in which

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<sup>91</sup> Branham, *supra* note 76.

<sup>92</sup> *Perez v. Wis. Dep't of Corr.*, 182 F.3d 532, 538 (7th Cir. 1999).

<sup>93</sup> Boston, *supra* note 82.

<sup>94</sup> *Id.*

<sup>95</sup> Branham, *supra* note 76.

correctional officials must process a grievance to avoid court adjudication of the claim.<sup>96</sup> The prisons' grievance procedures are often non-transparent to the point that not even prison officials know the proper policy.<sup>97</sup> The PLRA does not provide guidance on prison policy, so this ambiguity issue goes unaddressed.

Prisoners may also fear retaliation for use of the grievance system, especially if complaints are filed with the officer whose conduct is the subject of their complaint.<sup>98</sup> In such cases, some courts have recognized exceptions to the exhaustion requirement based on estoppel or "special circumstances," but others have refused to excuse prisoner's mistakes in fulfilling procedural requirements.<sup>99</sup> Further, prison officials can reject grievances on the ground that the prisoner has already received the relief sought. In that situation, a court would find that the inmate has exhausted the administrative grievance process.<sup>100</sup> According to the PLRA, the relief does not have to be extensive; it does not have to go further than necessary to correct the violation of the prisoner's federal right.<sup>101</sup> If the court adjudicated the inmate's claim, it will tailor the relief to be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right."<sup>102</sup> The court is very deferential to the operation of the criminal justice system, namely its prison policies.<sup>103</sup>

The PLRA is an outlier in the way that the statute handles exhaustion procedures. Under the normal practices of administrative law, exhaustion is not required where it would be futile.

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<sup>96</sup> *Id.*

<sup>97</sup> Boston, *supra* note 82.

<sup>98</sup> Hill, Tasha, *supra* note 77.

<sup>99</sup> Schlanger, *supra* note 80.

<sup>100</sup> Boston, *supra* note 82.

<sup>101</sup> Boston, John. "The Prison Litigation Reform Act: The New Face of Court Stripping." *67 Brook. L. Rev.* 429, 2001.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*



However, the Supreme Court has held that the PLRA forecloses a futility exception to its exhaustion requirement.<sup>104</sup> Even if an inmate is illiterate, sick, injured, mentally ill, or otherwise incapacitated, the exhaustion provisions still maintain that the prisoner must exhaust all the facilities grievance procedures.<sup>105</sup> Courts will dismiss rather than stay a litigant's case if the inmate has not exhausted all administrative procedures.<sup>106</sup> Additionally, the PLRA forces courts to dismiss complaints rather than allow prisoners to amend their complaints.<sup>107</sup> The PLRA does not afford prisoners the equivalent courtesy that ordinary administrative law provides, thus casting an inherent value judgement on who is worthy of litigating their claims.

### **Physical Injury Requirement**

The PLRA states that inmate plaintiffs may not recover damages for “mental or emotional injury suffered while in custody without a prior showing of physical injury” or the commission of a sexual act.<sup>108</sup> This physical injury requirement is oppressive to inmates who have suffered psychological or emotional harm. It forbids recovery for non-physical injury, which limits the damages that prisoners can receive for certain kinds of constitutional violations. For example, in an appellate court case in the District of Columbia, the Court affirmed a district court case that dismissed the prisoner action for lack of physical injury.<sup>109</sup> The prisoner alleged that a prison official violated his right to privacy when the officer “broke the seal on the

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<sup>104</sup> *Booth v. Churner*, 532 U.S. 731, 121 S. Ct. 1819 (2001) (finding that even though prison grievance procedure did not provide for requested monetary relief, inmate was nonetheless required to exhaust administrative remedies before filing suit with respect to prison conditions); Schlanger, *supra* note 80.

<sup>105</sup> Hill, Tasha, *supra* note 77.

<sup>106</sup> Boston, *supra* note 82.

<sup>107</sup> Hill, *supra* note 21.

<sup>108</sup> 42 U.S.C. 1997e(e); Schlanger, *supra* note 80.; Hill, Tasha, *supra* note 77; *Zehner v. Trigg*, 133 F.3d 459 (7th Cir. 1997) (holding that physical-injury requirement barred suit seeking compensatory damages for emotional distress sustained by prisoners exposed to asbestos).

<sup>109</sup> *Davis v. District of Columbia*, 332 U.S. App. D.C. 436, 158 F.3d 1342 (1998).

Plaintiff's medical files and disclosed their contents to others without the Plaintiff's consent."<sup>110</sup>

The officer told others that the prisoner was dying of HIV, which caused the Plaintiff emotional and mental distress but no physical injury. Prisoners who try to litigate violations of their privacy rights are not afforded justice due to the PLRA's restrictive physical injury requirements that discount the pain of mental trauma.

Courts have "read [the physical injury requirement to be] a less-than-significant-but-more-than-de minimis physical injury as a predicate to allowing the successful pleading of an emotional injury."<sup>111</sup> One court has held that "headaches, insomnia, stress, and stomach anxiety are *de minimis* symptoms that do not constitute a physical injury sufficient to overcome the PLRA's bar."<sup>112</sup> Further, a Third Circuit court has found that a Plaintiff's claim citing deprivation of food, sleep, and drink for four days did not, in and of themselves, state a claim for physical injury.<sup>113</sup> To determine the scope of physical injuries that, standing alone, would satisfy the PLRA, courts have turned to principles of tort law.<sup>114</sup> For example, a Fifth Circuit case found that rough handling, which resulted in a temporary increase of pain in his "already injured neck" did not constitute more than a *de minimis* physical injury to plaintiff.<sup>115</sup> In another Fifth Circuit case, the court denied recovery for mental and emotional damages when the physical injury was *de minimus*, when a prisoner had soreness and bruising in his ear that lasted for three days after a correctional officer verbally abused the plaintiff and twisted his arm and

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<sup>110</sup> *Id.*

<sup>111</sup> *Mitchell v. Horn*, 318 F.3d 523, 536 (3rd Cir. 2003).

<sup>112</sup> *Clifton v. Eubank*, 418 F. Supp. 2d 1243, 1245 (D. Colo. 2006) citing *Cannon v. Burkybile*, 2000 U.S. Dist. LEXIS 14139, \*19 (N.D. Ill. Sept. 21, 2000).

<sup>113</sup> *Mitchell*, 318 F.3d 523 (3rd Cir. 2003).

<sup>114</sup> *Zehner v. Trigg*, 952 F. Supp. 1318, 1322-1323 (S.D. Ind. 1997), *aff'd*, 133 F.3d 459 (7th Cir. 1997).

<sup>115</sup> *Herron v. Patrolman # 1*, 111 Fed. Appx. 710, 713 (5th Cir. 2004).

ear.<sup>116</sup> Moreover, the standard of physical injury is a fact-specific inquiry with unclear boundaries that are somewhat rooted in tort law.

### **Filing Fees and Three Strikes Rule**

The PLRA makes it difficult for inmates to pursue claims in court because the statute provides that indigent prisoners, unlike non-incarcerated indigent litigants, must pay filing fees in installments. A typical filing fee of \$150 represents an enormous financial commitment for a person who makes an income as low as 7 to 12 cents per hour.<sup>117</sup> Inmates are among the most impoverished population in the United States, and the pay-to-play system of justice is seriously unfair to them. The PLRA allows for indigent Plaintiffs to request *in forma pauperis* status, meaning the court can waive its filing fees due to the financial status of the prisoner. However, for inmates, unlike the general public, the fees are not waived. Inmates must fully pay the filing fees in installments.<sup>118</sup> They must pay at the time of filing and “monthly thereafter until the filing fee is satisfied, 20 percent of the greater of (1) the amount of money in the prisoner's inmate account or (2) the average of funds in the inmate's account for the preceding six months.”<sup>119</sup> This precludes the inmate from using their income to buy necessary items from the commissary until the court fee is fully paid.<sup>120</sup>

There are further limitations under the fee filing provisions, which demand the full payment of filing fees to bring a lawsuit or to appeal an action. The Three Strikes provisions bars inmates from using the *in forma pauperis* procedures completely under circumstances where

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<sup>116</sup> *Siglar v. Hightower*, 112 F.3d 191, 193-194 (5th Cir. 1997).

<sup>117</sup> *Andrews*, *supra* note 33; Human Rights Program at Justice Now+, *supra* note 33; Boston, *supra* note 82.

<sup>118</sup> Hill, Tasha, *supra* note 77.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

their claims have already been dismissed three times.<sup>121</sup> “Inmates who had civil suits or appeals dismissed on three or more occasions because they were frivolous, malicious, or failed to state a claim for which relief can be granted must, in most cases, pay the full filing fee up front when bringing a lawsuit or appeal in a civil case.”<sup>122</sup> There is, however, an exception to the Three Strikes provisions. If an inmate is unable to pay the full fee and is facing an "imminent" threat of "serious physical injury," they may proceed via the *in forma pauperis* provisions.<sup>123</sup> If a federal court deems that a prisoner filed a claim that was “frivolous, malicious, or [which] fail[ed] to state a claim upon which relief can be granted” three times, the inmate can never again file *in forma pauperis*.<sup>124</sup> This standard renders many incarcerated litigants unable to afford arguing their subsequent meritorious claims.

The Three Strikes rule is a financial barrier. It does not forbid inmates to file suits; rather it mandates that they pay the full filing fee before bringing the matter to court. Additionally, prisoners cannot challenge the correctness of the prior dismissals that are counted as strikes.<sup>125</sup> A court can dismiss a claim *sua sponte* if it deems it that the action is frivolous, malicious, or fails to state a claim; these dismissals will count against the inmates under the Three Strikes rule.<sup>126</sup> The Three Strikes provision thwarts prisoners who have “who made mistakes in prior cases, usually due to their lack of access to counsel or legal training,” by making it financially infeasible to pursue their claims after previous unsuccessful attempts.<sup>127</sup> Further if a court finds

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<sup>121</sup> See, e.g., *Harris v. Guichard*, 1996 WL 524371 (N.D. Cal. Sept. 5, 1996) (dismissal for three prior dismissals of prisoner actions); (same); *Washington v. Gomez*, 1996 WL 557609 (N.D. Cal. Sept. 19, 1996) (same); *Harris v. Spellberg*, 1996 WL 557738 (N.D. Cal.) (same); *Aguilar v. P.S.U. Staff*, 1996 WL 557731 (N.D. Cal. Sept. 25, 1996) (same).

<sup>122</sup> Branham, *supra* note 76.

<sup>123</sup> *Id.*

<sup>124</sup> Hill, Tasha, *supra* note 77.

<sup>125</sup> Boston, *supra* note 82.

<sup>126</sup> Hill, Tasha, *supra* note 77.

<sup>127</sup> *Id.*

that a prisoner has brought a claim for malicious reasons or to harass the defendant, the inmate can lose good-time credits, thereby extending the length of his or her incarceration.<sup>128</sup> These harsh repercussions are serious deterrents for inmates who want to file claims for their injuries.

### **Attorney's Fees**

Prisoners are not constitutionally entitled to legal representation for civil actions, so if they cannot afford an attorney, inmates usually appear before the court *pro se*, meaning they represent themselves. The PLRA further hinders the ability for inmates to hire attorneys to represent them in their litigation due to limitations on attorney's fees. The PLRA sets a strict limit on the recovery of attorneys' fees for representing inmates.<sup>129</sup> "Attorneys' fees cannot be an hourly rate greater than 150 % of the hourly rate established under the Criminal Justice Act for payment of court appointed costs" and "in damages cases, attorney's fees cannot be greater than 150 percent of the plaintiff's monetary recovery."<sup>130</sup> This goes against the judicial efficiency goals of the PLRA because the attorney's fees provisions make it cost prohibitive for attorneys to represent prisoners. Instead, courts will process cases in which prisoners, who are unfamiliar with the language and procedures of the court, must represent themselves.

Through these restrictive provisions, fewer inmates litigate their claims, more cases are dismissed, and fewer inmates successfully settle their claims.<sup>131</sup> Meritorious claims are thwarted by procedural obstacles, and inmates are unable to get their day in court.

### **Part III: PLRA Restrictions to Women's Reproductive Healthcare Claims**

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<sup>128</sup> Branham, *supra* note 76.

<sup>129</sup> Hill, Tasha, *supra* note 77.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

Women and their reproductive health outcomes are uniquely hindered by the PLRA's provisions that limit inmate litigation. Women are specifically at risk of having their case foreclosed due to a variety of factors in the statute which disproportionately affect them. The exhaustion provisions are distinctively oppressive towards women because they leave too much discretion to prison officials and prison policies, which, for aforementioned reasons, make it infeasible for women to adjudicate their claims. This can have detrimental consequences for women's health. The bar on recovering damages for non-physical injuries ignores the emotional injuries and the invisible reproductive injuries borne out of trauma for many female inmates. The high bar of the physical injury requirement ignores the reproductive pain suffered by women, which further imitates the societal tendency of dismissing women's pain. It also brings up questions about risk of injury to female-identifying women in men's prison or transgender women who do not receive the proper hormones. The filing fee provisions put women in harm because they are forced to choose to either spend their funds on adjudicating their claims or accessing necessary reproductive healthcare resources, a struggle which is uniquely female. Additionally, the language of the Three Strikes provision of the filing fee requirement is particularly biased against women's claims because of its dismissal of "frivolous" litigation. Lastly, the attorney's fee provision is harmful to female litigants because the demographic makeup of the population has low levels of education, making it difficult for the individuals in this population to navigate the judicial process without a lawyer.

### **Women and Exhaustion of Administrative Remedies**

Women are particularly disadvantaged by the PLRA's stringent exhaustion of administrative remedies requirements. Not only is it mandatory to report to a prison official, the

inmate must also go through the administrative steps outlined in the prison's policies. Not to mention, the policies may not be widely available and even the prison officials may not clearly understand the proper procedures. It is impossible to fulfill exhaustion requirements when they are unknown to the prisoners and even to the prison officials.

The exhaustion procedure system dissuades women from filing grievances because they may see the substantive exhaustion, reporting to the prison officials, as an insurmountable roadblock. The inmates may fear their complaints falling upon deaf ears to prison officials who do not care about their reproductive needs. The moralist prison system that categorizes female prisoners as sexually deviant creates biases within prison that these women do not deserve proper medical care for their reproductive health claims. Concurrently, many women may not feel comfortable reporting issues related to reproductive care to male correctional officers. This is highlighted by the fact that female correctional officers are under-represented, especially in federal prisons. Women may also fear retaliation from prison officials, especially if the procedural hierarchy requires that the inmate file a grievance with the prison official who is the subject of the complaint.

The procedural exhaustion requirements are arduous for all inmates, but women are particularly burdened by the extensive requirements. Since the PLRA eliminated the cap on the exhaustion period, women's serious reproductive healthcare needs can go unaddressed for indefinite periods of time, which is evidenced in the 602 Appeal process in California prisons. This can make complaints completely futile, especially in the case of unwanted pregnancies. Shirking responsibility on addressing reproductive healthcare complaints for women is deadly, incredibly injurious, and can permit unwanted pregnancies or sterilizations. The "PLRA has allowed the states to play a waiting game with sick inmates; until the prison system completes its

handling of the grievance, the prisoner cannot seek relief from a federal court.”<sup>132</sup> Since courts are deferential to prison policies and provide a remedy that is "narrowly drawn" and uses the "least intrusive means" of fixing the violation, few incentives exist for prisons to amend their convoluted procedural requirements.<sup>133</sup>

Current procedural exhaustion requirements are unduly burdensome for women. The rigorous screening provisions in California prisons, where prisoners are required to pay copayments and meet with a medical technical assistant, are improper. Women already must spend above their means to get menstrual products and on top of that make copayments for medical services that they do not know if they will receive. Before they meet with a doctor, they must first meet with an officer who may disregard the severity of their reproductive health claim. In each step of the administrative exhaustion process, women’s pain is overlooked and scoffed, making the arduous process of administrative exhaustion even more difficult. Additionally, too much discretion given to correctional officers may cause difficulties to exhaust the administrative procedures for women. If the officers do not believe that the pain the inmates experience is severe enough, they will not help the inmates get proper medical care.

In a New Mexico District court case, the court found that a Plaintiff, a female prisoner, failed to exhaust the administrative remedies available to her when she filed an excessive force claim under the Eight and Fourteenth Amendments.<sup>134</sup> The Plaintiff was subject to a strip search and in the process, the prison official tasered her twice. Because she did not file the suit during the same incarceration as the one in which the alleged violation took place, the court found that her claim was not valid. The court decided that the PLRA's exhaustion of administrative

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<sup>132</sup> Hill, *supra* note 21.

<sup>133</sup> *Id.*

<sup>134</sup> *Tomlin v. Sanchez*, No. 17-1084 WJ/GBW, 2019 U.S. Dist. LEXIS 13702 (D.N.M. Jan. 29, 2019).



remedies requirement applies when a Plaintiff prisoner is released from incarceration but later re-incarcerated and remains incarcerated at the time the lawsuit is filed.<sup>135</sup> There is a split in the judicial authority on this issue of whether a Plaintiff must exhaust administrative resources when she is out of prison. A Sixth Circuit case stated that the “exhaustion requirement applies only to those who are 'currently detained,' not former prisoners, and noting agreement of the Second, Seventh, and Eighth Circuits,”<sup>136</sup> while other courts find that former prisoners were required to comply with the PLRA's exhaustion requirements.<sup>137</sup>

### **Women and Physical Injury Requirement**

The PLRA bars inmate actions alleging mental or emotional injury in the absence of physical injury, and this raises particular harm to women.<sup>138</sup> Many injuries that women face in prison create emotional trauma that the PLRA dismisses. Women who experience serious medical abuse claims have emotional attachment to their situations but they are not able to procure damages for their mental trauma.

Many reproductive healthcare issues may seem invisible to the observer but can be extremely painful to women. For example, women who have endometriosis, a chronic disease that affects one in ten women worldwide, encounter frequent misdiagnoses of suffering from PMS pain while complaining about severe abdominal pain.<sup>139</sup> Astoundingly, in the US “it takes a women with endometriosis an average of nine years to be diagnosed” because many doctors are

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<sup>135</sup> *Jewkes v. Shackleton*, 2012 U.S. Dist. LEXIS 105415, 2012 WL 3028054, at \*5 (D. Colo. Jul. 23, 2012).

<sup>136</sup> *Thomas v. Woolum*, 337 F.3d 720, 725 (6th Cir. 2003) citing *Page v. Torrey*, 201 F.3d 1136, 1139 (9th Cir.1999).

<sup>137</sup> *Morgan v. Maricopa County*, 259 F.Supp.2d 985 (D. Ariz. 2003), *Mason v. County of San Mateo*, 2005 U.S. Dist. LEXIS 1223, 2005 WL 3967924 (N.D. Cal. Jan. 26, 2005), *Reyes v. State of Oregon*, 2005 U.S. Dist. LEXIS 42167, 2005 WL 1459662 (D. Or. June 21, 2005).

<sup>138</sup> Branham, *supra* note 76.

<sup>139</sup> Furneaux, Rosa. *Living with Endometriosis, an Agonizing Disease with No Known Cause or Cure*. 27 July 2017, [https://www.vice.com/en\\_us/article/nevqpq/the-invisible-agonizing-struggle-of-living-with-endometriosis](https://www.vice.com/en_us/article/nevqpq/the-invisible-agonizing-struggle-of-living-with-endometriosis).

still under the assumption that female menstrual pain is a quotidian normal part of life and when women complain about such issues, doctors discount the complaints as normal pain. However, this pain is anything but normal; “the disease can progress as inflammation causes scar tissue and adhesions to build up around the lesions, ‘webbing’ organs and muscles together.”<sup>140</sup>

A 2001 study found that there are differences in health care providers’ perceptions of men and women’s pain.<sup>141</sup> Medical professionals train to rely on objective evidence of disease and infection, and this practice under-acknowledges women’s subjective experiential reports of pain.<sup>142</sup> The study found that men are more likely to receive medication when they report pain to doctors, while women are more likely to receive sedatives. Additionally, women are taken less seriously when they report pain, and women are less likely to have their pain treated.<sup>143</sup> Perhaps that is why it takes a woman with endometriosis an average of nine years to obtain a correct diagnosis.<sup>144</sup> Moreover, when prisoners complain about reproductive health issues, not only may they be considered not serious by the prison staff and the medical professionals, that pain may be disregarded by the justice system as well. The courts may consider that this pain does not rise to the *de minimus* physical injury requirement, which proves the current culture of assessing reproductive pain.

Female-identifying people in men’s prisons may not claim damages in their relief when their mental health complaints go ignored. When their injuries are not physical, the mental, emotional, and verbal dismissal of their gender identity is a claim that does not receive a judicial award of damages. Transgender women in prison may also not be successful in procuring a

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<sup>140</sup> *Id.*

<sup>141</sup> Hoffmann, Diane E., and Anita J. Tarzian. "The girl who cried pain: a bias against women in the treatment of pain." *The Journal of Law, Medicine & Ethics* 28 (2001): 13-27.

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

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

<sup>144</sup> Furneaux, *supra* note 138.

damages award in claims where they are not able to receive hormones because those claims focus on a mental or emotional injury rather than a physical one. The PLRA snubs these specific issues, when the pain experienced is unique to women.

Courts have used principles of tort law to determine the scope of physical injuries that would be actionable under the PLRA. However, many jurisdictions recognize two torts for emotional harm, including the intentional infliction of emotional distress and the negligent infliction of emotional distress. Despite courts looking to tort law to determine which physical injuries are actionable, the important emotional injury component of tort is ignored by PLRA case law. When even a prisoner's citing of deprivation of food, sleep, and drink for four days did not rise to as an actionable case in the eyes of the court, emotional injuries claims are repeatedly completely abandoned.

### **Women and Filing Fees and Three Strikes Rule**

The filing fee provisions of the PLRA uniquely disadvantage female inmates because they force women to choose between litigating their claims and purchasing vital reproductive health products. The *in forma pauperis* provision allows for indigent prisoners to pay the filing fee over time from money in their prison accounts. If a prisoner is denied the ability to proceed *in forma pauperis*, due to the Three Strikes rule, she must pay the entire fee up front.<sup>145</sup> It is a risky endeavor to litigate a claim as an inmate because they make a nominal wage, the filing fees are expensive, and once the suit is filed, the inmate is bound to pay the fee even if she decides to voluntarily withdraw the complaint or appeal.<sup>146</sup> “No matter how poor an inmate is, or how essential the items she must buy from the commissary with her meager funds, monthly payments

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<sup>145</sup> Boston, *supra* note 82.

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

of 20 % of her inmate account must be handed over until the court fees are paid in full,” under the *in forma pauperis* provision. When women cannot even afford the basic reproductive healthcare products, such as menstrual pads and tampons, pursuing adjudication of their legal claims is disincentivized. The filing fee provision of the PLRA is a major disincentive to file claims, because it necessitates women to choose purchasing their necessary reproductive healthcare items or spending their money to file claims. This is a major difference between the ability of men and women to litigate their claims, because men do not have to make this decision.

The Three Strikes provisions bars an inmate from receiving *in forma pauperis* deferral of filing fee payment. An inmate must pay the filing fee in full before proceeding with her claim if on three previous occasions, while incarcerated or detained in any facility, she brought a civil action that was dismissed on the grounds that it was frivolous, malicious, or failed to state a claim upon which relief may be granted.<sup>147</sup> There is an imminent danger of serious physical injury exception that is rarely applied. The PLRA forbids prisoners to contest the correctness of the prior dismissals that are counted as strikes.<sup>148</sup> According to the Supreme Court, a legally frivolous suit is one that fails to raise an “arguable question of law” or is based on an “indisputably meritless legal theory.”<sup>149</sup> The language of the PLRA is inherently biased against women since reproductive health in prison is not protected by existing law or policy, and likely leads to higher rates of dismissal of women’s reproductive health claims.

The term “frivolous” has gendered consequences, as women’s concerns are continuously labeled as frivolous throughout American history. Reproductive healthcare concerns may be

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* (citing *Neitzke v. Williams*, 490 U.S. 319 (1989)).

disregarded as “frivolous” by judges who do not understand the severity of the injuries that female inmates face. Reproductive healthcare claims are particularly easy for prison staff and judges to ignore because of the invisibility of reproductive healthcare issues and racial biases. As previously mentioned, studies find that endometriosis pain is often incorrectly discounted as PMS. Additionally, research finds that there are racial disparities in recognizing pain. Black people’s complaints of pain are more likely to be ignored; this trend may be also reproduced in prisons. A 2015 study finds Black patients receive less medication for their pain than their White counterparts. The study suggests that this result is predicated on the belief that Black people feel less pain than White people.<sup>150</sup> The research finds that “people assume that, relative to White people, Black people feel less pain in part because they assume Black people have faced more hardship.”<sup>151</sup> Another study conducted in 2010 tested societal racialized beliefs about pain.<sup>152</sup> Sociologists asked Black and White Americans to read descriptions about patients suffering from pain, and right before, they are presented with a Black or White target face. Participants in the study then estimated the amount of pain each patient felt. The results found a racial bias; participants assumed Black patients felt less pain than did White patients.<sup>153</sup> This inequity is likely reproduced in prison. In practice, judges deciding whether a case is frivolous may disregard the severity of the reproductive healthcare problems that Black women experience and report.

Alternatively, judges may have a gender bias and dismiss the claim as frivolous simply because the litigant is a woman. The moralist ideology reaffirms this bias that pervades the

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<sup>150</sup> Trawalter, Sophie, and Kelly M. Hoffman. "Got pain? Racial bias in perceptions of pain." *Social and Personality Psychology Compass* 9.3 (2015): 146-157.

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

<sup>152</sup> Mathur, V. A., Harada, T., Lipke, T., & Chiao, J. Y. (2010). Neural basis of extraordinary empathy and altruistic motivation. *Neuroimage*, 51, 1468–1475.

<sup>153</sup> *Id.*

criminal justice system, which is the belief system that depicts incarcerated women as sexually deviant, bad women, and welfare freeloaders. Rhetoric scholars call people to challenge the reinforced worldview and language created by the patriarchy.<sup>154</sup> This is especially important when analyzing laws like the PLRA. Women have been the subjects or contemplated targets of many laws which are informed by “men's understanding of women, women's nature, women's capacities, and women's experiences.”<sup>155</sup>

The PLRA uses gendered language because it was crafted by male legislators, resulting in gender biases that are likely to dismiss women's reproductive healthcare actions. A study that focused on the policy priorities of women legislators in Nordic countries, the United States, and Argentina found that women legislators show a higher legislative priority on issues concerning women's rights, children, and families.<sup>156</sup> The study finds that women legislate differently than men, which signals that women's input into legislation would provide insightful policies that would benefit the quality of life for incarcerated women. If the PLRA were recrafted with the input of women legislators, the language would likely be less gendered and more inclusive. Perhaps women would recognize and ultimately rebuff the gendered connection between the term, “frivolousness,” and historic depictions of femininity and women. The term, “frivolousness,” is the standard by which claims are dismissed, so its connection to femininity is harmful to women's PLRA claims. The PLRA does not provide information as to the bounds of “frivolous” litigation; there is no standard which courts can use to parse out which claims are frivolous and which are not, which leaves a subjective determination for judges. A “frivolous”

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<sup>154</sup> Finley, Lucinda. “Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning.” *64 Notre Dame L. Rev.* 886, 1989.

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

<sup>156</sup> Taylor-Robinson, Michelle M., and Roseanna Michelle Heath. "Do women legislators have different policy priorities than their male colleagues? A critical case test." *Women & Politics* 24.4 (2003): 77-101.

legal complaint can simply be one that does not raise a claim the courts are willing to entertain.<sup>157</sup> This unclear boundary has “inspired many federal judges to follow suit and to err on the side of dismissing rather than hearing prisoner complaints even when a prisoner truly has a serious grievance.”<sup>158</sup> The gendered language of the Three Strikes provision of the PLRA can harm female inmates in their ability to bring claims using the *in forma pauperis* provisions because they may be disqualified and unable to afford the filing fee up front.

### **Women and Attorney’s Fees**

The attorney’s fee provisions of the PLRA, which disincentivize attorneys to represent inmate litigants, are particularly damaging to women’s reproductive health actions. The PLRA’s main goals are to promote judicial efficiency and to limit the amount of inmate litigation, however due to the limitations of the legislation, its goals cannot advance. Women in prison oftentimes do not have the legal tact to file claims in court correctly or to exhaust administrative procedures correctly. With the assistance of legal counsel, these tasks would be a simpler task. However, attorneys do not have any professional motivation to take these clients because the PRLA forecloses appropriate payment for their services.

### **Solutions and Conclusion**

This article is an initial exploration of the issues of reproductive healthcare in prison and the way that women inmates are able to litigate their reproductive healthcare claims under the PLRA. This article set out to illuminate the issue that the PLRA’s restrictive provisions preclude

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<sup>157</sup> Herman, Susan. “Prison Litigation Reform Acts.” *Federal Sentencing Reporter*, vol. 24, no. 4, Apr. 2012, pp. 263–67. *DOI.org (Crossref)*, doi:[10.1525/fsr.2012.24.4.263](https://doi.org/10.1525/fsr.2012.24.4.263).

<sup>158</sup> *Id.*

women prisoners from litigating their reproductive healthcare claims. Further research must expand upon solutions to change prison policy and to amend the PLRA. The following are some general starting principles to reform the criminal justice system. Litigation or legislation can be solutions to address the PLRA's inadequate handling of reproductive healthcare claims. Although prison conditions for women are bleak and the PLRA creates prodigious obstacles, there is hope for reform.

In terms of prison conditions, a mandate of transparency can clarify the procedural requirements of exhaustion of the prison grievance system. The exhaustion principle of the PLRA demands prisoners to use all available administrative means to resolve their complaints prior to filing a lawsuit. The rules must be made evident and available so that prisoners can properly go through the steps in anticipation of litigation. A third party, like a prison policy expert, could review the procedures to make sure they are clear and not unduly burdensome to inmates. Anonymous reporting coupled with substantive action can greatly ease a prisoner's fear of retaliation and address their concerns adequately. Additionally, the adoption and meaningful implementation of the First Step Act across all prisons would allow for women to have free and readily accessible menstrual products. Many women in prison find that access to menstrual products is a major concern, and legislation that guarantees free menstrual products to inmates is an important solution.

Women may not receive medical care even after they pay a copay. This issue can be litigated under the Eighth Amendment and the principles established under *Estelle v. Gamble*. To ensure that women are actually provided healthcare services, lawyers can argue that if an inmate pays a copayment, they are entitled to an examination by a medical professional and not just by an MTA. If an inmate cannot afford a copayment, under *Estelle*, courts should find that the



prisoner should still have access to reproductive healthcare services. Furthermore, medically inadvisable practices such as shackling must be prohibited throughout all prisons under the Eighth Amendment.

In terms of hiring practices of correctional facilities, more female correctional officers must be employed. Female correctional officers facilitate an environment of candor where female inmates would feel comfortable making complaints regarding reproductive healthcare inadequacies. Following the trend of prison reform, correctional facilities are hopefully pressured to adopt gender-responsive programming to make the prison environment more suitable for women. Additionally, a rhetorical shift in litigation to dignity discourse can help courts circumvent the lapses in the law to afford women relief that is consistent with basic conceptions of dignity and humanity. This dignity approach may be the most proactive in reforming prison policies because this rhetoric is consistent with the moralist lens that has pervaded the prison system.

In conclusion, a general reform of the PLRA provisions that limit inmate litigation is essential to help women adjudicate their meritorious claims. A legislative change to modify the requirement to exhaust administrative remedies is key to prevent prisons from creating policies that make it unduly burdensome for inmates to file claims. Congressional action is necessary to revert to the pre-PLRA law (CRIPA) requirements, which mandate correctional officials to process a grievance in a plain, speedy and effective manner. The injury requirement must be expanded to include mental and emotional injuries for damages claims because the bar for the injury requirement is set too high. As previously noted, a prisoner who had soreness and bruising in his ear that lasted for three days did not meet the *de minimus* physical injury threshold to sustain a claim. Like for non-incarcerated indigent individuals, legislative changes must also

waive filing fees for inmate Plaintiffs. Congress should eliminate the PLRA's limitation on attorney's fees to promote judicial efficiency and to incentivize attorneys to help inmates in the arduous process of filing a claim. Generally, "we must pursue trying to bring more of women's experiences, perspectives, and voices into law to empower women and help legitimate these experiences."<sup>159</sup> The PLRA must be reformed with women legislators taking initiative to change the oppressive nature of the statute and justice system for women.

Meaningful reform can vastly change the nature of women's reproductive healthcare in prison. This population faces extraordinary burdens and litigation, which is a legal right, should not be foreclosed to them. A justice system that works for all must work for incarcerated women.

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<sup>159</sup> Finley, *supra* note 154.