

INDIANA'S "THREE STRIKES" INMATE LITIGATION LIMITATIONS: 2009 LEGISLATION DOES NOT HIT A HOME RUN

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INTRODUCTION

In 2008, the Indiana Supreme Court struck down a law that precluded inmates from filing civil suits in state court if a court had deemed three past claims frivolous.¹ The majority found that the Three Strikes Law violated the open courts clause of the Indiana Constitution.² In response to the Indiana Supreme Court's determination that the Three Strikes Law was unconstitutional as written, the Indiana General Assembly enacted a new version of the Three Strikes Law during its 2009 summer legislative session. The new version precludes an *indigent* inmate from further filings should he have brought three suits already deemed frivolous.³

Originally passed by the legislature in 2004, Indiana's Frivolous Claims Law⁴ and the Three Strikes Law⁵ were designed to reduce litigation initiated by prison inmates. The Frivolous Claims Law requires an Indiana court to "review a complaint or petition filed by an offender" and dismiss it if the claim "(1) is frivolous; (2) is not a claim upon which relief may be granted; or (3) seeks monetary relief from a defendant who is immune from liability for such relief."⁶ The Three Strikes Law mandated that

[i]f an offender has filed at least three (3) civil actions in which a state court has dismissed the action or a claim under . . . [Indiana Code section 34-58-1-2, the Frivolous Claims Law], the offender may not file a new complaint or petition unless a court determines that the offender is in immediate danger of serious bodily injury.⁷

However, in *Smith v. Indiana Department of Correction*,⁸ a 2008 split opinion, the Indiana Supreme Court determined that the Three Strikes Law was

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1. *Smith v. Ind. Dep't of Corr.*, 883 N.E.2d 802, 808-10 (Ind. 2008).

2. IND. CONST. art. I, § 12.

3. IND. CODE § 34-10-1-3 (2011).

4. *Id.* § 34-58-1-2.

5. *Id.* § 34-58-2-1, *repealed by* P.L. 128-2009, § 4 (codified at IND. CODE. § 34-10-1-3).

6. *Id.* § 34-58-1-2(a).

7. *Id.* § 34-58-2-1, *repealed by* P.L. 128-2009, § 4 (codified by IND. CODE. § 34-10-1-3).

8. 883 N.E.2d 802 (Ind. 2008).

unconstitutional based on the open courts clause of the Indiana Constitution.⁹ The open courts clause states, “All courts shall be open; and every person, for injury done to him . . . shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial, speedily, and without delay.”¹⁰ The majority in *Smith* held that as written, the Three Strikes Law was unconstitutional because the statute indiscriminately banned any inmate meeting the frivolous filing criteria from pursuing further claims.¹¹ The opinion explicitly cited six other states’ efforts to curb frivolous and frequent filings,¹² noting that “other courts have upheld other less stringent methods, such as requiring filing fees, to deter frivolous filing.”¹³ The justices in the majority maintained that the legislature can impose “*conditions on the pursuit of a claim* in court”¹⁴ and still comport with the open courts clause, but it cannot ban claims that are recognized by law.¹⁵

Consequently, during the 2009 summer legislative session, Indiana enacted a reworded version of the Three Strikes Law.¹⁶ The law now states:

If an offender has filed at least three (3) civil actions in which a state court has dismissed the action or a claim under . . . [Indiana Code section 34-58-1-2, the Frivolous Claims Law], the offender may not file a new complaint or petition *as an indigent person* under this chapter, unless a court determines the offender is in immediate danger of serious bodily injury.¹⁷

Presumably because the *Smith* opinion suggested that other courts have upheld statutes requiring filing fees to deter frivolous filing,¹⁸ the legislature reworded the statute to ban not all inmates, but specifically those who are indigent,¹⁹ from filing repeated suits.²⁰ However, no state statutory scheme cited by the *Smith* court outright precludes a court from allowing a suit to proceed based on the

9. *Id.* at 808-10.

10. IND. CONST. art. I, § 12.

11. *Smith*, 883 N.E.2d at 809.

12. *Id.* at 808-09 (citing statutes from California, Colorado, Delaware, Florida, Hawaii, and Texas).

13. *Id.* at 810.

14. *Id.* at 808 (emphasis added).

15. *Id.* at 810.

16. IND. CODE § 34-10-1-3 (2011).

17. *Id.* (emphasis added).

18. *Smith*, 883 N.E.2d at 810.

19. Litigants are able to petition Indiana courts to bring civil actions as indigents and be free from paying court fees or costs. IND. CODE § 33-37-3-2. An inmate who files as an indigent is required to pay a partial filing fee amounting to “twenty percent (20%) of the greater of: (1) the average monthly deposits to the offender’s account; or (2) the average monthly balance in the offender’s account; for the six (6) months immediately preceding the filing of the complaint or petition.” *Id.* § 33-37-3-3(b).

20. *Id.* § 34-10-1-3.

filer’s indigent status and history of previously filed frivolous suits.²¹

This Note explores the amended Three Strikes Law and discusses its effectiveness and its constitutionality under Indiana’s open courts clause. Throughout, the statutory schemes of the jurisdictions cited as exemplary in *Smith* will be used as a basis for comparison. Part I of this Note examines the historical background of open courts clauses found in state constitutions, as well as Indiana’s interpretation of its own clause.²² Part II discusses in greater detail Indiana’s statutory scheme for limiting frivolous inmate suits, the Indiana Supreme Court’s determination that the original Three Strikes Law did not comport with the state’s open courts clause,²³ and the amended version of the Three Strikes Law enacted by the Indiana legislature in response to *Smith*.²⁴ Part III explores the six state and federal frameworks cited as examples within the *Smith* opinion, comparing and contrasting how these schemes address suit frivolity, inmate status, and indigent status, along with constitutional challenges made via applicable open courts clauses.²⁵ Part IV analyzes the 2009 version of Indiana’s Three Strikes Law²⁶ to determine if it is an effective law and if it now comports with the open courts clause of the Indiana Constitution.²⁷ Part IV also suggests that Indiana abandon the Three Strikes Law as a means to limit frivolous inmate suits and instead add to its Frivolous Claims Law by adopting provisions similar to those of states highlighted by the *Smith* opinion.

I. OPEN COURTS CLAUSES—HISTORY AND INTERPRETATION

A. History

Today, thirty-seven state constitutions contain open courts clauses.²⁸

21. See *Smith*, 883 N.E.2d at 808-09.

22. IND. CONST. art. I, § 12.

23. *Smith*, 883 N.E.2d at 803.

24. IND. CODE § 34-10-1-3.

25. Only four of the six states cited in *Smith* have open courts clauses in their state constitutions: (1) Colorado, COLO. CONST. art. II, § 6; (2) Delaware, DEL. CONST. art. I, § 9; (3) Florida, FLA. CONST. art. I, § 21; and (4) Texas, TEX. CONST. art. I, § 13. The constitutions of California and Hawaii do not contain open courts clauses.

26. IND. CODE § 34-10-1-3.

27. IND. CONST. art. I, § 12.

28. ALA. CONST. art. I, § 13; ARK. CONST. art. II, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; IDAHO CONST. art. I, § 18; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12; KAN. CONST. BILL OF RIGHTS § 18; KY. CONST. BILL OF RIGHTS § 14; LA. CONST. art. I, § 22; ME. CONST. art. I, § 19; MD. CONST. BILL OF RIGHTS art. 19; MASS. CONST. art. XI; MINN. CONST. art. I, § 8; MISS. CONST. art. III, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.H. CONST. pt. I, art. 14; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; R.I. CONST. art. I, § 5; S.C. CONST. art. I, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11;

Although the exact wording varies among these states,²⁹ all of the clauses proclaim in some fashion that “[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.”³⁰ Other clauses similarly state that “[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.”³¹

Open courts clauses were derived from Sir Edward Coke’s interpretation of Chapter 40 of the Magna Carta.³² This document states, in translation, “[t]o no one will we sell, to no one will we refuse or delay, right or justice.”³³ Coke, writing in 1642 in *The Second Part of the Institutes of the Lawes of England*, wrote:

[E]very Subject of this Realm, for injury done to him in *bonis, terris, vel persona* [goods, lands, or person], . . . may take his remedy by the course of the Law, and have justice, and right for the injury done him, freely without sale, fully without any denial, and speedily without delay.³⁴

Coke’s writing, from which open courts clauses were derived,³⁵ focused on the independence of common law judges³⁶ and spoke out against “the sale of common-law justice through corruption.”³⁷ Jonathan Hoffman, a leading scholar on the history of open courts clauses,³⁸ suggests that open courts clauses are not meant to restrain a legislature’s properly enacted adjustments to substantive

VT. CONST. ch. I, art. 4, ch. II, § 28; W. VA. CONST. art. III, § 17; WIS. CONST. art. I, § 9; WYO. CONST. art. I, § 8; *see also* David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1201 n.25 (1992). Additionally, Arizona and New Mexico judiciaries have determined that the right to a remedy and open court exist in those states’ constitutions. *See id.*

29. Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L.J. 1005, 1005 n.1 (2001) [hereinafter Hoffman, *Questions Before Answers*]; Schuman, *supra* note 28, at 1201.

30. FLA. CONST. art. I, § 21.

31. TEX. CONST. art. I, § 13.

32. Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1281 (1995) [hereinafter Hoffman, *By the Course of the Law*]; Hoffman, *Questions Before Answers*, *supra* note 29, at 1006.

33. Hoffman, *By the Course of the Law*, *supra* note 32, at 1286 n.38 (quoting WILLIAM S. MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 395* (2d ed. 1914)). Hoffman explains that the “due course of law” language found in open courts clauses is distinguished from the concept of due process because the terms stemmed from different chapters of the Magna Carta. *Id.* at 1289.

34. *Id.* at 1294 n.96 (quoting SIR EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 55-56* (photo. reprint 1979) (1642) (emphasis added)).

35. *Id.* at 1281; Hoffman, *Questions Before Answers*, *supra* note 29, at 1006.

36. Hoffman, *By the Course of the Law*, *supra* note 32, at 1291.

37. *Id.* at 1294.

38. *See generally* Hoffman, *By the Course of the Law*, *supra* note 32; Hoffman, *Questions Before Answers*, *supra* note 29.

rights and remedies.³⁹ Rather, the clauses are meant “to assure that the remedies legally available were not to be denied because of the status of the parties.”⁴⁰

Delaware was the first state, a colony at the time, to incorporate an open courts clause in its founding documents.⁴¹ At that time, colonists were concerned about the closure of courts to civil actions, which had happened due to the Stamp Act⁴² (and later, the Townshend Act⁴³) during the years leading up to the Revolutionary War.⁴⁴ From this historical context, Hoffman further asserts, “An open courts clause analysis consistent with the origins of the provision should focus not on whether the legislature has abolished a ‘remedy’ but on whether the challenged action compromises the judiciary as an independent branch of government.”⁴⁵

B. *Indiana’s Interpretation of Its Open Courts Clause*

Indiana’s open courts clause states that “[a]ll courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.”⁴⁶ In

39. Hoffman, *By the Course of the Law*, *supra* note 32, at 1288. Hoffman’s legal analysis centers around the use of open courts clauses as a check against legislative limits on tort remedies. He argues that it was not the intent of early state constitutional drafters to have open courts clauses “limit the power of the legislature in prescribing remedies.” *Id.* at 1308. He argues further that the use of these clauses to protest legislative caps on tort remedies and awards is inappropriate. *Id.* at 1317-18.

40. *Id.* at 1314.

41. *Id.* at 1284-85.

42. The Stamp Act of 1765 interfered with judicial independence by forbidding judges to accept payment from local colonial assemblies, ensuring that they were paid (and controlled by) the British Crown. *See id.* at 1302-03. Judicial decisions on papers that had not been stamped (and taxed) were invalid, which effectively foreclosed civil litigation in the colonies. *Id.* at 1303.

43. The Townshend Act of 1767 replaced the Stamp Act and also subverted the independence of the colonial judiciary. *See id.* at 1305-06.

44. *Id.* at 1307. Hoffman’s research found that Thomas McKean, a Delaware judge and drafter of the Delaware Declaration of Rights, “most likely was responsible for inserting the open courts clause into the first bill of rights of any state when he drafted the Delaware Declaration of Rights in 1776” and did so in response to the Stamp Act, which closed colonial courts to civil litigation. *Id.* at 1298. *But cf.* Schuman, *supra* note 28, at 1200-01 (focusing on the “right to a remedy” language in open courts clauses and asserting that historically, when these clauses were adopted, “the evil was renegade legislatures”).

45. Hoffman, *By the Course of the Law*, *supra* note 32, at 1316. Schuman, although focusing on the “remedy” aspect that Hoffman downplays, agrees that “the object of the constitutional provision is merely to *see to it that the judicial system operates fairly.*” Schuman, *supra* note 28, at 1201 (emphasis added).

46. IND. CONST. art. I, § 12.

Smith v. Indiana Department of Correction,⁴⁷ the Indiana Supreme Court provided an overview of Indiana's historical and judicial interpretation of the clause.

The *Smith* court noted that the open courts clause was reworded and moved from article I, section eleven of the 1816 Indiana Constitution to article I, section twelve of the 1851 Constitution,⁴⁸ but that there seemed to be "no unique Indiana history surrounding the adoption . . . in 1816 or its redrafting in 1851."⁴⁹ While recognizing that little evidence exists as to the history or purpose behind the clause,⁵⁰ the Indiana Supreme Court essentially adopted Hoffman's view of the clause's historical background,⁵¹ attributing it to Sir Edward Coke's interpretation of Chapter 40 of the Magna Carta.⁵²

Based on a reading of *Smith*, the Indiana Supreme Court interprets the open courts clause both to prohibit "outright closure of access to the courts"⁵³ and to require "unpurchased and impartial justice."⁵⁴ Although there is limited history behind the adoption of the clause, the "ordinary usage . . . is readily understood to mean, at a minimum, that to the extent the law provides a remedy for a wrong, the courts are available and accessible to grant relief."⁵⁵ The Indiana legislature can impose jurisdictional regulations and restrictions, but the open courts clause prevents the legislature from wholly taking away jurisdiction.⁵⁶ Therefore, "[a]ny regulation which would virtually deny . . . citizens the right to resort to this court would necessarily be unreasonable."⁵⁷ The *Smith* court maintained that the clause "guarantees to any person the right of access to the court subject to reasonable conditions and a determination of whether the law affords a remedy."⁵⁸

II. STATUS AND DEVELOPMENT OF INDIANA'S TREATMENT OF FRIVOLOUS INMATE SUITS

A. *The Frivolous Claims Law and Credit Time Deprivation*

Indiana's Frivolous Claims Law requires courts to review all inmate complaints or petitions.⁵⁹ If the court determines that the claim is frivolous, does

47. 883 N.E.2d 802 (Ind. 2008).

48. *Id.* at 807.

49. *Id.* (quoting *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 974 (Ind. 2000)).

50. *Id.* at 806.

51. *Id.* (citing Hoffman, *By the Course of the Law*, *supra* note 32, at 1281).

52. *Id.*

53. *Id.* at 807.

54. *Id.* (quoting *State v. Laramore*, 94 N.E. 761, 763 (Ind. 1911)).

55. *Id.*

56. *Id.* at 808.

57. *Id.* (quoting *Square D. Co. v. O'Neal*, 72 N.E.2d 654, 657 (Ind. 1947)).

58. *Id.* at 810.

59. IND. CODE § 34-58-1-2 (2011).

not state a claim for which relief may be granted, or seeks monetary relief from an immune defendant, the claim may not proceed.⁶⁰ The statute defines a frivolous claim as one that “(1) is made primarily to harass a person; or (2) lacks an arguable basis either in: (A) law; or (B) fact.”⁶¹ Courts have used this statute not only to prevent inmates from filing claims,⁶² but also to permit claims to proceed that appear meritorious.⁶³

The Indiana Court of Appeals has compared the Frivolous Claims Law to a pre-filing Rule 12(B)(6) dismissal or grant of summary judgment.⁶⁴ In *Smith v. Huckins*,⁶⁵ the court noted that the failure to state “a claim upon which relief may be granted”⁶⁶ language in Indiana Code section 34-58-1-2 “mirrors the language of Trial Rule 12(B)(6) . . . that failure to state a claim upon which relief may be granted is cause for dismissal.”⁶⁷ The court also noted the distinction that unlike a Rule 12(B)(6) dismissal, a dismissal under section 34-58-1-2 is with prejudice because it prevents an offender from amending his complaint.⁶⁸ The court also noted that section 34-58-1-2 is similar to a motion for summary judgment except that “at the time of the trial court’s review of the complaint or petition, the defendant is not involved in the case.”⁶⁹ Altogether, the Frivolous Claims Law empowers courts to screen offender complaints discretionarily so that defendants named in frivolous suits need not invest any resources in answering the allegations.⁷⁰

In addition to a court dismissing his claim with prejudice, an inmate could be deprived of credit time⁷¹ if a state or administrative court determines, after a

60. *Id.* § 34-58-1-2(a).

61. *Id.* § 34-58-1-2(b).

62. *See, e.g.,* Abdul-Wadood v. Batchelor, 865 N.E.2d 621, 623 (Ind. Ct. App. 2007); Peterson v. Meyer, No. 77A01-0607-CV-298, 2007 WL 1240291, at *1 (Ind. Ct. App. Apr. 30, 2007). The Office of the Indiana Attorney General maintains a website listing of inmate suits that have been deemed frivolous. *Offender Litigation Screening*, OFFICE OF THE IND. ATT’Y GEN., <http://12.186.81.50/legal/litigation/litscreen/> (last visited June 25, 2011).

63. *See, e.g.,* Pallett v. Ind. Parole Bd., No. 77A01-0705-PC-200, 2007 WL 4463569, at *2 (Ind. Ct. App. Dec. 21, 2007) (reversing a trial court’s dismissal under Indiana Code section 34-58-1-2 because the inmate’s “allegations create an arguable basis in law and fact . . . and there is no suggestion his petition is made to harass a person”); Ellison v. Graddick, No. 45A03-0601-CV-26, 2006 WL 3823182, at *4 (Ind. Ct. App. Dec. 29, 2006) (noting that “the court completed the screening procedure of Indiana Code chapter 34-58-1 The court thereafter entered an order in which it determined that certain paragraphs of Ellison’s proposed complaint ‘could be a basis for an action for breach of contract and/or malpractice.’” (internal citation omitted)).

64. *Smith v. Huckins*, 850 N.E.2d 480, 483 (Ind. Ct. App. 2006).

65. *Id.*

66. IND. CODE § 34-58-1-2(a)(2).

67. *Smith*, 850 N.E.2d at 483.

68. *Id.*

69. *Id.*

70. *See id.*

71. Credit time, also referred to as gain time, is a reduction in the length of time of an

hearing, that he brought a civil claim that is “frivolous, unreasonable, or groundless.”⁷² In *Parks v. Madison County*,⁷³ the Indiana Court of Appeals upheld the validity of the law enabling revocation of earned credit time under multiple constitutional claims.⁷⁴ The court rejected inmate Parks’s arguments that Indiana Code section 35-50-6-5(a)(4) was void for vagueness, overbroad, violated his right to substantive due process and equal protection, and violated his First Amendment right to petition the courts.⁷⁵ The court noted that the statute “was clearly intended to discourage prisoners from filing repetitive and meritless actions that burden judicial resources”⁷⁶ and that Parks showed a pattern of “dressing old arguments in new clothes, and then pressing them forward again.”⁷⁷ The court reasoned that “good-time credit” is not a fundamental right and determined that the statute withstood rational basis review.⁷⁸

From 2004 to 2008, the Indiana Department of Correction Disciplinary Hearing Board found that forty-six inmates had filed frivolous claims, resulting in revocation of earned credit time.⁷⁹ In 2009, to address the issue of prison overcrowding and budgetary concerns,⁸⁰ the Commissioner for the Department of Correction set forth new sanctioning guidelines, including the guideline that credit time would no longer be revoked from inmates found to have filed a frivolous claim.⁸¹ However, due to judiciary pressure, the Department of Correction plans to reinstate credit time deprivation as punishment for filing frivolous claims.⁸² This reinstatement was set to take place on or after July 1, 2010.⁸³

B. *The Three Strikes Law*

The first version of Indiana’s Three Strikes Law⁸⁴ was passed in conjunction

inmate’s sentence. See IND. CODE §§ 35-50-6-3 to -8. Indiana inmates, depending on their crime, sentence, and other statutorily imposed limits, are able to earn credit time for obtaining an educational degree or participating in other programs such as substance abuse or life skills, so long as they also demonstrate “a pattern consistent with rehabilitation.” *Id.* § 35-50-6-3.3(a)(2).

72. IND. CODE § 35-50-6-5(a)(4).

73. 783 N.E.2d 711 (Ind. Ct. App. 2002).

74. *Id.* at 715-16.

75. *Id.* at 722.

76. *Id.* at 723.

77. *Id.* at 722.

78. *Id.* at 724.

79. E-mail from Sarah Schelle, Ind. Dep’t of Corr. Program Dir./Research Analyst, to author (Feb. 24, 2010, 14:27 EST) (on file with author).

80. See E-mail from Sarah Schelle, Ind. Dep’t of Corr. Program Dir./Research Analyst, to author (Feb. 25, 2010 13:07 EST) (on file with author).

81. STATE OF IND., DEP’T OF CORR., EXECUTIVE DIRECTIVE No. 09-07 (Jan. 21, 2009).

82. See E-mail from Sarah Schelle, *supra* note 80.

83. See *id.*

84. IND. CODE § 34-58-2-1, *repealed by* P.L. 128-2009, § 4 (codified at IND. CODE § 34-10-1-

with the Frivolous Claims Law.⁸⁵ It barred a court from proceeding with an inmate’s complaint or petition “[i]f an offender has filed at least three (3) civil actions in which a state court has dismissed the action or a claim under IC 34-58-1-2 . . . unless a court determines that the offender is in immediate danger of serious bodily injury.”⁸⁶ In *Smith v. Indiana Department of Correction*,⁸⁷ the Indiana Supreme Court determined that as written, the Three Strikes Law violated the open courts clause of the Indiana Constitution.⁸⁸

In *Smith*, the trial court dismissed inmate Eric Smith’s complaint regarding correctional staff use of chemical spray and pepper balls under the Three Strikes Law because he previously had three suits dismissed under the Frivolous Claims Law.⁸⁹ Smith filed suit challenging the constitutionality of the Three Strikes Law under the open courts clause of the Indiana Constitution.⁹⁰ In 2006, the Indiana Court of Appeals, in a matter of first impression,⁹¹ drew an analogy between the Three Strikes Law and a legislatively enacted statute of limitations.⁹² Just as a litigant is limited by a prescribed statute of limitations, “[a]n offender can bring as many civil actions as he wants, as long as three actions or claims have not been dismissed as being frivolous.”⁹³ If three prior actions were deemed frivolous, the inmate could “continue to bring civil actions as long as a court determines that he is in immediate danger of serious bodily injury.”⁹⁴

The Indiana Supreme Court reversed the court of appeals and concluded that the Three Strikes Law violated the open courts clause.⁹⁵ The court held that while the clause “does not prohibit all conditions on access to the courts . . . it does prevent the legislature from arbitrarily or unreasonably denying access to the courts to assert a statutory or common law cause of action that is in itself unmodified and unrestricted.”⁹⁶ Within its analysis, the opinion expressly cited six states for their statutes addressing the issue of “frequent and frivolous”⁹⁷ filers. The court reasoned that Indiana’s Three Strikes Law was

[u]nique in imposing a complete ban on filing based on the plaintiff’s prior litigation. The . . . [l]aw sweeps with a broader brush than the law

3 (2011)).

85. *Id.* § 34-58-1-2.

86. *Id.* § 34-58-2-1, *repealed by* P.L. 128-2009, § 4 (codified at IND. CODE § 34-10-1-3).

87. 883 N.E.2d 802 (Ind. 2008).

88. *Id.* at 803.

89. *Id.* at 803-04.

90. *Id.* at 804.

91. *Smith v. Ind. Dep’t of Corr.*, 853 N.E.2d 127, 133 (Ind. Ct. App. 2006), *rev’d*, 883 N.E.2d 802 (Ind. 2008).

92. *Id.* at 134.

93. *Id.*

94. *Id.*

95. *Smith*, 883 N.E.2d at 805-06.

96. *Id.* at 808.

97. *Id.*

of any other United States jurisdiction because it operates as an indiscriminate statutory ban, not merely a condition to access the courts. *The law bars claims purely on the basis of the plaintiff's prior activity without regard to the merits of the claim presented. . . . [S]uch a ban on presenting any claims at all denies a "remedy by due course of law" for obvious wrongs that are otherwise redressable in court.*⁹⁸

The court also reasoned that the law does not really help alleviate the work of the courts because courts still have to confirm that the inmate has previously had three suits dismissed and has not alleged bodily injury.⁹⁹ The opinion concluded by referring to the previously-cited states' treatment of the issue, with the suggestion that "other courts have upheld other less stringent methods [of reasonable conditions to access], such as requiring filing fees, to deter frivolous filing."¹⁰⁰

Following the *Smith* opinion in April 2008, the Indiana legislature passed an amended version of the Three Strikes Law¹⁰¹ during the 2009 summer legislative session. The amended law maintains the same language as the previous version, except that the provision now restricts indigent inmates from filing suit, absent a determination of immediate danger, if three suits have been previously dismissed as frivolous.¹⁰² When an offender files a civil suit as an indigent, he must file a statement reflecting the balance of his trust account¹⁰³ for the six months prior to filing.¹⁰⁴ The court may approve a total fee waiver due to exceptional circumstances.¹⁰⁵ Otherwise, the offender must pay a partial filing fee of 20% of the greater of "(1) the average monthly deposits to the offender's account; or (2) the average monthly balance in the offender's account; for the six (6) months immediately preceding the filing of the complaint or petition."¹⁰⁶

98. *Id.* at 809-10 (emphasis added) (internal citation omitted).

99. *Id.* at 810. The court stated, "Processing a frivolous claim, which the Constitution demands, will impose little more burden on the courts beyond those that would be required if the Three Strikes Law were upheld. If the claim is truly frivolous, the court can dismiss it under the Frivolous Claim[s] Law." *Id.*

100. *Id.*

101. IND. CODE § 34-10-1-3 (2011).

102. *Id.* Regarding indigence, Indiana law provides that courts may grant indigent status to a plaintiff or defendant upon application by the party to the court in which the action is pending. IND. CODE § 34-10-1-1.

103. An inmate's trust account is an account held by the state while the inmate is incarcerated. See IND. CODE § 4-24-6-2(a) (providing that "the superintendent or warden of an institution shall hold in trust funds deposited with the institution for the use and benefit of, or belonging to, any inmate"). A prison administrator supervises and regulates deposits and withdrawals; all funds are paid to the inmate upon his release. *Id.* § 4-24-6-3.

104. IND. CODE § 33-37-3-3(a).

105. *Id.* § 33-37-3-3(c)-(d).

106. *Id.* § 33-37-3-3(b).

III. EXAMINATION OF JURISDICTIONS CITED IN *SMITH* FOR TREATMENT OF SUIT FRIVOLITY

The majority in *Smith* cited six states, as well as federal laws, that address or place various requirements on frivolous filers.¹⁰⁷ Notably, only four of the jurisdictions cited as examples have open courts clauses with which these provisions must comport.¹⁰⁸ Additionally, none of the states highlighted by the Indiana Supreme Court outright bar an inmate from filing suit based on indigent status or number of previous suits filed. This section will review the statutes expressly cited by the Indiana Supreme Court in *Smith*, as well as other relevant statutes within each jurisdiction's framework and any challenges made under applicable open courts clauses.

A. Delaware

Delaware law provides that all complaints submitted in forma pauperis¹⁰⁹ are subject to review and dismissal if "the court finds the action is factually frivolous, malicious or, upon a court's finding that the action is legally frivolous and that even a *pro se* litigant, acting with due diligence, should have found well settled law disposing of the issue(s) raised."¹¹⁰ The statute also states that a court can require a litigant to get judicial permission before filing future claims if it determines that the litigant has abused the court system with frivolous or malicious filings.¹¹¹ If so enjoined,

any future requests to file claims must be accompanied by an affidavit certifying that: (1) [t]he claims sought to be litigated have never been raised or disposed of before in any other court; (2) [t]he facts alleged are true and correct; (3) [t]he affiant has made a diligent and good faith effort to determine what relevant case law controls the legal issues raised; (4) [t]he affiant has no reason to believe the claims are foreclosed by controlled law; and (5) [t]he affiant understands that the affidavit is made under penalty of perjury.¹¹²

Although title 10, section 8803 applies to all in forma pauperis litigants, not just inmates,¹¹³ Delaware courts have routinely used the statute to dismiss inmate

107. *Smith v. Ind. Dep't of Corr.*, 883 N.E.2d 802, 808-09 (Ind. 2008). The court cited California, Colorado, Delaware, Florida, Hawaii, and Texas statutory codes. *Id.* The court also cited federal treatment of the subject. *Id.* at 809.

108. *See supra* note 25 and accompanying text.

109. "In forma pauperis" means "in the manner of an indigent who is permitted to disregard filing fees and court costs." BLACK'S LAW DICTIONARY 794 (8th ed. 2004).

110. DEL. CODE ANN. tit. 10, § 8803(b) (West, Westlaw through 2010 Leg).

111. *Id.* § 8803(e).

112. *Id.*

113. *See, e.g., Beeghley v. Beeghley*, No. 215,200, 2000 WL 1152420, at *1 (Del. Aug. 8, 2000) (upholding a family court order that required a husband and wife to "file a contemporaneously-sworn affidavit affirming, among other things, that the latest petition raises

filings as legally or factually frivolous.¹¹⁴ Courts have required inmates who abuse the court system with excessive and repetitious filings to gain permission of the court prior to future filings, either in relation to a specific cause of action such as post-conviction relief¹¹⁵ or for any future filing.¹¹⁶ However, the Delaware Supreme Court has also reversed a case due to wrongful dismissal of an *in forma pauperis* inmate suit.¹¹⁷ In *Deputy v. Dr. Conlan*, an *in forma pauperis* inmate alleged medical negligence against a warden, doctor, and health administrator of a state correctional center.¹¹⁸ The court found “that Deputy’s complaint, both factually and legally, stated a claim of a violation of his constitutional rights sufficient to withstand summary dismissal under [Delaware Code title 10, section 8803(b)].”¹¹⁹

Delaware’s constitution contains an open courts clause,¹²⁰ but there have been no constitutional challenges to title 10, section 8803 via the open courts clause or otherwise.¹²¹

Delaware’s review of *in forma pauperis* complaints is similar to Indiana’s pre-filing review of inmate complaints under the Frivolous Claims Law.¹²²

claims that were not previously raised or disposed of by any court”); *Hall v. Yacucci*, No. 98C-05-249 SCD, 1998 WL 473008, at *1 (Del. Super. Ct. June 4, 1998) (dismissing an *in forma pauperis* complaint that alleged employment discrimination as legally and factually frivolous), *aff’d*, 723 A.2d 839 (Del. 1998).

114. *See, e.g., Smith v. State*, No. 259,2009, 2009 WL 2888258, at *1 (Del. Sept. 10, 2009), *cert. denied*, 130 S. Ct. 1508 (2010); *Miller v. State*, No. 72,2009, 2009 WL 1204622, at *1 (Del. May 5, 2009); *Biggins v. Rodweller*, No. 296,2008, 2008 WL 4455553, at *1 (Del. Oct. 3, 2008); *Epperson v. State*, No. 123,2006, 2006 WL 1547975, at *1 (Del. June 5, 2006).

115. *See, e.g., Smith*, 2009 WL 2888258, at *1-2 (enjoining an inmate who had filed twelve unsuccessful post-conviction attacks from filing any further appeals without first seeking leave of the court); *Miller*, 2009 WL 1204622, at *1 (enjoining an inmate from future filings in connection with his guilty plea without court approval).

116. *See, e.g., Epperson*, 2006 WL 1547975, at *1 (enjoining inmate Epperson from filing any claims without first seeking the court’s approval).

117. *Deputy v. Dr. Conlan*, No. 168,2007, 2007 WL 3071424, at *1 (Del. Oct. 22, 2007).

118. *Id.*

119. *Id.*

120. DEL. CONST. art. I, § 9 provides that

[a]ll courts shall be open; and every person for an injury done him or her in his or her reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense. Suits may be brought against the State, according to such regulations as shall be made by law.

121. The “Notes of Decisions” and “Additional Citing Cases” cited by Westlaw for DEL. CODE ANN. tit. 10, § 8803 were reviewed to determine that there have been no challenges as to the validity of the law. Additionally, the “Notes of Decisions” cited by Westlaw for DEL. CONST. art. I, § 9 were reviewed, and a “locate in result” search of “frivolous” and “malicious” was conducted, yielding no results.

122. IND. CODE § 34-58-1-2 (2011).

However, Delaware's pre-filing review approach is broader than Indiana's. It applies to any in forma pauperis suit¹²³ and gives greater discretion to courts in limiting frivolous filers' ability to proceed with future action without a showing of honesty and good faith.¹²⁴ Additionally, Delaware's framework does not foreclose a court's ability to process a valid claim based on the number of previous suits by the litigant deemed frivolous.¹²⁵

B. Texas

Texas has also enacted legislation that is not restricted to inmate filings. Like Delaware, a portion of Texas's statutory framework addresses in forma pauperis filings.¹²⁶ However, Texas law also provides for additional review of filings by inmates¹²⁷ and others deemed "vexatious."¹²⁸

Under Texas's vexatious litigant laws, courts can require litigants deemed as such to furnish a security¹²⁹ and subject them to future pre-filing conditions and review.¹³⁰ Courts may deem a litigant vexatious if a defendant shows that the plaintiff has no reasonable probability of prevailing.¹³¹ To be deemed vexatious, the litigant must have "commenced, prosecuted, or maintained in propria persona at least five litigations" in the last seven years that have been deemed frivolous, determined adversely, or remained pending in a pre-trial stage for at least two years.¹³² For purposes of furnishing a security, a court cannot act sua sponte to determine that a litigant is vexatious. A court can make the determination only upon a defendant's motion submitted within ninety days of the answer.¹³³ However, a court may act on its own to determine that a litigant is generally vexatious.¹³⁴ Once a court makes either determination, future actions of a vexatious litigant require review by an administrative law judge and are permissible only if that judge determines the litigation has merit and was not filed "for the purposes of harassment or delay."¹³⁵ Texas law also enables courts to dismiss any in forma pauperis or inmate action determined to be frivolous or malicious.¹³⁶

123. DEL. CODE ANN. tit. 10, § 8803(a) (West, Westlaw through 2010 Leg.).

124. *Id.* § 8803(e).

125. *Compare* DEL. CODE ANN. tit. 10, § 8803, *with* IND. CODE § 34-10-1-3.

126. TEX. CIV. PRAC. & REM. CODE ANN. § 13.001 (West, Westlaw through 2009 Reg. Sess.).

127. *Id.* § 14.003.

128. *Id.* §§ 11.051 to -.057.

129. *Id.* § 11.055.

130. *Id.* §§ 11.052 to -.054.

131. *Id.* § 11.054.

132. *Id.* § 11.054(1).

133. *Scott v. Tex. Dep't of Criminal Justice-Inst. Div.*, No. 13-07-00718-CV, 2008 WL 4938265, at *1 (Tex. App. Nov. 20, 2008).

134. TEX. CIV. PRAC. & REM. CODE ANN. § 11.101(a).

135. *Id.* § 11.102(a).

136. *Id.* § 13.001(a).

The Texas Constitution contains an open courts clause.¹³⁷ A Texas court has upheld the validity of Texas Civil Practice and Remedies Code section 13.001, which allows courts to dismiss in forma pauperis actions deemed frivolous or malicious under that clause.¹³⁸ In *Timmons v. Luce*, the court determined that

[t]here is no right to redress for claims that have no basis in law or fact. We hold that section 13.001, at least insofar as it authorizes dismissal of an action brought without payment of costs when there is no arguable basis for the action in law or fact, does not violate article I, section 13 of the Texas Constitution.¹³⁹

Additionally, prior legal analysis of Texas's treatment of vexatious litigants suggests that the state's framework would withstand scrutiny under the state's open courts clause.¹⁴⁰ Although it is possible that a court may wrongfully bar a plaintiff from filing his claim,¹⁴¹ the laws provide procedural safeguards such as enabling a court to stay the proceedings to assess the merits and purpose of the plaintiff's claim.¹⁴² Additionally, an appellate court will review a plaintiff's appeal for abuse of discretion if the trial court deemed the plaintiff vexatious.¹⁴³

C. Florida

Florida's statutory scheme contains specific provisions for suits filed by indigent prisoners,¹⁴⁴ frivolous suits filed by any inmate,¹⁴⁵ and suits filed by any litigant deemed "vexatious."¹⁴⁶ Section 57.085 of Florida's code, known as the Prison Indigency Statute,¹⁴⁷ requires indigent prisoners to pay back court costs and fees as funds become available to them.¹⁴⁸ When a court determines that a

137. TEX. CONST. art I, § 13 says, "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."

138. *Timmons v. Luce*, 840 S.W.2d 582, 583 (Tex. App. 1992).

139. *Id.* at 585.

140. Chris Colby, Comment, *There's a New Sheriff in Town: The Texas Vexatious Litigants Statute and Its Application to Frivolous and Harassing Litigation*, 31 TEX. TECH L. REV. 1291, 1343-47 (2000).

141. *Id.* at 1345.

142. *Id.* at 1346 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 11.052 (West, Westlaw through 2009 Reg. Sess.)).

143. *Id.* (citation omitted).

144. FLA. STAT. ANN. § 57.085 (West, Westlaw through 2010 2d Reg. Sess.). The Indiana Supreme Court's *Smith v. Indiana Department of Correction* opinion did not reference this portion of Florida's civil code.

145. *Id.* § 944.279(1). The Indiana Supreme Court's *Smith v. Indiana Department of Correction* opinion highlighted this portion of Florida's civil code.

146. *Id.* § 68.093(3)(a). The Indiana Supreme Court's *Smith v. Indiana Department of Correction* opinion highlighted this portion of Florida's civil code.

147. *Mitchell v. Moore*, 786 So. 2d 521, 523 (Fla. 2001).

148. FLA. STAT. ANN. § 57.085.

prisoner is indigent for purposes of filing a civil suit, the court must “order the prisoner to make monthly payments of no less than 20 percent of the balance of the prisoner’s trust account as payment of court costs and fees.”¹⁴⁹ The Department of Corrections is to “place a lien on the inmate’s trust account for the full amount of the court costs and fees, and . . . withdraw money maintained in that trust account and forward the money, when the balance exceeds \$10 . . . until the prisoner’s court costs and fees are paid in full.”¹⁵⁰

In *Kalway v. State*,¹⁵¹ the Florida District Court of Appeal upheld the statute requiring courts to use prisoners’ trust accounts for payment of court costs and fees.¹⁵² The inmate argued a constitutional separation of powers violation, but the court maintained that “[a] decision whether to subject a prisoner’s trust account to payment of court costs and fees is clearly a subjective determination appropriately made by the legislature.”¹⁵³ In *Jackson v. Florida Department of Corrections*,¹⁵⁴ the Florida Supreme Court agreed that the legislature could properly require “that inmates contribute toward the costs of their lawsuits and ultimately pay for the lawsuits in full if they subsequently become able to do so.”¹⁵⁵

Specifically addressing frivolous inmate filings, Florida’s statutory code provides that on its own or upon motion,

a court may conduct an inquiry into whether any [civil] action or appeal brought by a prisoner was brought in good faith. A prisoner who is found by a court to have brought a frivolous or malicious suit, action, claim, proceeding, or appeal . . . or who knowingly or with reckless disregard for the truth brought false information or evidence before the court, is subject to disciplinary procedures pursuant to the rules of the Department of Corrections.¹⁵⁶

If a court finds that a prisoner brought a frivolous or malicious suit, the Department of Corrections can discipline the inmate by retracting all or part of the gain-time¹⁵⁷ the inmate has acquired¹⁵⁸ after a hearing before the prison’s

149. *Id.* § 57.085(5).

150. *Id.*

151. 730 So. 2d 861 (Fla. Dist. Ct. App. 1999).

152. *Id.* at 862.

153. *Id.*

154. 790 So. 2d 381 (Fla. 2000).

155. *Id.* at 384.

156. FLA. STAT. ANN. § 944.279(1) (West, Westlaw through 2010 2d Reg. Sess.).

157. Gain-time is a reduction in an inmate’s sentence that the Department of Corrections may issue “to encourage satisfactory prisoner behavior, to provide incentive for prisoners to participate in productive activities, and to reward prisoners who perform outstanding deeds or services.” *Id.* § 944.275(1). For offenses committed after October 1, 1995, the department may grant an inmate up to ten days per month in gain-time, so long as the gain-time accrued does not reduce the inmate’s sentence to less than 85% of the original amount of time. *Id.* § 944.275(4)(b)(3).

158. *Id.* § 944.28(2)(a).

disciplinary committee and upon approval of the prison's warden.¹⁵⁹ The Department can also deny the ability to accumulate gain-time throughout the duration of the inmate's sentence based on a single instance of misconduct or an accumulation of various forms of misconduct,¹⁶⁰ including the instigation of a frivolous suit.¹⁶¹

The Florida Vexatious Litigant Law¹⁶² addresses the issue of frequent and potentially frivolous filings made by any pro se plaintiff, not limited strictly to inmates.¹⁶³ Under this statute, defendants in civil actions can move the court to require a plaintiff to furnish security based on a showing "that the plaintiff is a vexatious litigant and is not reasonably likely to prevail on the merits of the action."¹⁶⁴ Florida defines a vexatious litigant as a pro se filer who "has commenced, prosecuted, or maintained" five or more civil actions in the past five years that "have been finally and adversely determined against"¹⁶⁵ him.

Florida courts have upheld the vexatious and inmate filing statutes under challenges via the state's open courts clause.¹⁶⁶ In *Smith v. Fisher*,¹⁶⁷ an inmate filed a suit against a doctor, and upon motion, the court required the inmate to furnish a six hundred dollar security because the inmate had more than five cases determined adversely against him in the past five years.¹⁶⁸ The judge dismissed the suit upon the inmate's failure to furnish the security.¹⁶⁹ The Florida District Court of Appeal upheld the statute against the inmate's open courts clause objections, stating, "[s]ignificantly, the determination that a plaintiff is a vexatious litigant does not shut the courthouse door."¹⁷⁰ Additionally, the court noted that the Vexatious Litigant Law does not affect cases that are "likely meritorious" because before a courts requires a security, a vexatious litigant within the statutory definition has the opportunity to demonstrate the merits of his suit and "that he is 'reasonably likely to prevail on the merits.'"¹⁷¹

159. *Id.* § 944.28(2)(c).

160. *Id.* § 944.28(2)(b).

161. *Id.* § 944.28(2)(a).

162. *Id.* § 68.093.

163. *Id.* § 68.093(2)(d).

164. *Id.* § 68.093(3)(a). California, Texas, and Hawaii (in addition to Ohio) all had similar statutory provisions when Florida enacted its statute in 2000. Deborah L. Neveils, Note, *Florida's Vexatious Litigant Law: An End to the Pro Se Litigant's Courtroom Capers?*, 25 NOVA L. REV. 343, 359 (2000). Neveils notes that Florida modeled its statute after the California Vexatious Litigant Statute. *Id.*

165. FLA. STAT. ANN. § 68.093(2)(d)(1).

166. FLA. CONST. art. I, § 21 provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

167. 965 So. 2d 205 (Fla. Dist. Ct. App. 2007).

168. *Id.* at 207.

169. *Id.*

170. *Id.* at 209.

171. *Id.* (quoting FLA. STAT. ANN. § 68.093(3)(b) (West, Westlaw through 2010 2d Reg. Sess.)).

In *Spencer v. Florida Department of Corrections*,¹⁷² the Florida Supreme Court upheld the forfeiture of an inmate’s gain-time as a sanction for bringing a frivolous suit, finding the statute constitutional under the Florida open courts clause.¹⁷³ The court reasoned that the statute did not prevent inmate Spencer from accessing the courts and filing his lawsuit. Rather than restricting access, the statute merely permitted discipline if the inmate committed misconduct with a frivolous filing.¹⁷⁴ The court concluded:

While making inmates who have funds contribute toward the costs of their lawsuits is one way of encouraging inmates to be responsible for their lawsuits, if the inmate has no funds, that means of reducing frivolous lawsuits is only partially effective. Making inmates responsible by sanctioning them for their actions when they abuse the judicial system is a reasonable and practical way to discourage frivolous lawsuits when the payment provisions do not remedy the problem.¹⁷⁵

The Florida Supreme Court utilized the open courts clause of the Florida Constitution to strike a portion of section 57.085, the Prison Indigency Statute, in *Mitchell v. Moore*.¹⁷⁶ Section 57.085(7) of the Florida Code required an inmate whom the court had adjudicated as indigent twice in the past three years to request permission of the court before filing again as an indigent.¹⁷⁷ With this request, the inmate was required to “provide a complete listing of each suit, action, claim, proceeding, or appeal brought . . . or intervened in by the prisoner in any court or other adjudicatory forum in the preceding . . . [five] years” and attach copies of each, along with a record of the proceedings.¹⁷⁸

The court determined that the copy requirement was unconstitutional within the meaning of the open courts clause.¹⁷⁹ Requiring indigent inmates to attach copies of all documents and records relating to all suits filed within the past five

172. 823 So. 2d 752 (Fla. 2002).

173. *Id.* at 755. The court also rejected Spencer’s constitutionality arguments regarding federal and state freedom of speech protections. *But see* Lynn S. Branham, *Of Mice and Prisoners: The Constitutionality of Extending Prisoners’ Confinement for Filing Frivolous Lawsuits*, 75 S. CAL. L. REV. 1021, 1078 (2002) (proposing that revocation of prisoners’ good-time credits for filing frivolous lawsuits is unconstitutional for a number of reasons, including that it places a “chilling effect on the right of prisoners embedded in the First Amendment to petition courts for a redress of grievances”).

174. *Spencer*, 823 So. 2d at 756.

175. *Id.*

176. 786 So. 2d 521, 523 (Fla. 2001).

177. FLA. STAT. ANN. § 57.085(7) (West, Westlaw through 2010 2d Reg. Sess.).

178. *Id.*

179. *Mitchell*, 786 So. 2d at 527. Although the court first struck down the copy requirement in *Jackson v. Florida Department of Corrections*, 790 So. 2d 381 (Fla. 2000), the court found it “necessary to further address the copy requirement due to the importance of the constitutional issue raised.” *Mitchell*, 786 So.2d at 523.

years constituted “a door to the [c]ourt that some inmates simply cannot open.”¹⁸⁰ Using a strict scrutiny analysis, the court said the copy requirement was overbroad because it did not specifically target frivolous or malicious civil actions, which were the “targeted evil” identified by the legislature for implementing the copy requirement.¹⁸¹ The court interpreted the language of the open courts clause to “indicate that a violation occurs if the statute obstructs or infringes that right [to access the court] to any significant degree.”¹⁸² Florida’s comprehensive legislative approach to address frivolous filers—inmates and others—has withstood judicial scrutiny under the state’s open courts clause, except for the copy requirement.

D. Colorado

Colorado’s statutory framework contains a three strikes law pertaining to frivolous inmate suits.¹⁸³ The state forbids indigent inmates from filing claims regarding prison conditions if they have previously brought three civil actions “based upon prison conditions that . . . [have] been dismissed on the grounds that it was frivolous, groundless, or malicious or failed to state a claim upon which relief may be granted or sought monetary relief from a defendant who is immune from such relief.”¹⁸⁴ The provision contains an exception if imminent danger of serious physical injury is sufficiently alleged.¹⁸⁵ Colorado also requires an indigent inmate to pay his filing fee and service of process fees over time, in full, in monthly payments equaling 20% of the deposits made to his inmate account from the prior month.¹⁸⁶

Colorado has an open courts clause,¹⁸⁷ but Colorado courts have not addressed the constitutionality of section 13-17.5-102.7.¹⁸⁸ Notably, the penultimate section of article 17.5 contains a severability clause, which states:

Nothing in this article shall be construed to impede an inmate’s constitutional right of access to the courts. If any provision of this section or the application thereof to any person or circumstances is held

180. *Id.* at 525.

181. *Id.* at 528. The statute subjected all indigent inmates with more than two filings in three years to the copy requirement, not just indigent inmates whose previous suits were deemed frivolous or malicious or whose current action was potentially frivolous or malicious. *See id.*

182. *Id.* at 527.

183. COLO. REV. STAT. § 13-17.5-102.7 (2010).

184. *Id.* § 13-17.5-102.7(1).

185. *Id.* § 13-17.5-102.7(2).

186. *Id.* § 13-17.5-103. The Indiana Supreme Court did not cite this statute in *Smith v. Indiana Department of Correction*, 883 N.E.2d 802 (Ind. 2008).

187. COLO. CONST. art II, § 6 provides, “Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.”

188. There are no “Notes of Decisions” or “Additional Citing Cases” provided by Westlaw for COLO. REV. STAT. § 13-17.5-107.

invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications of this section which can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this section are declared to be severable.¹⁸⁹

This language suggests that the Colorado legislature anticipated that aspects of its statutory limitations might not comport with constitutional requirements. Still, Colorado’s restriction on prison condition actions made by indigent inmates with a history of frivolous filings¹⁹⁰ does not reach as far as Indiana’s ban of any civil suit (absent immediate danger of serious bodily harm) by an indigent inmate with three previous frivolous filings.¹⁹¹

E. California

Under California’s Vexatious Litigant Law,¹⁹² after which Florida modeled its statute,¹⁹³ a defendant may move a court for a hearing to determine that a plaintiff is a vexatious litigant.¹⁹⁴ California defines a vexatious litigant as a person who “has commenced, prosecuted, or maintained in propria persona at least five litigations” in the past seven years that have been determined adversely against the person or were pending at least two years “without having been brought to trial or hearing.”¹⁹⁵ Additionally, an in propria persona litigant may be deemed vexatious if he “repeatedly relitigates or attempts to relitigate” the validity of past determinations against the same defendant.¹⁹⁶ Finally, a court might also determine that he is vexatious if he “repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay”¹⁹⁷ or if another jurisdiction has declared him vexatious.¹⁹⁸

After a hearing, a court may order the plaintiff to furnish security if it determines “that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation.”¹⁹⁹ The statute also enables a court, on its own, to require that a vexatious litigant obtain permission from the presiding judge prior to filing any future civil actions.²⁰⁰

California’s Vexatious Litigant Law has been criticized because of judges’

189. COLO. REV. STAT. § 13-17.5-107.

190. *See id.* § 13-17.5-102.7.

191. *See* IND. CODE § 34-10-1-3 (2011).

192. CAL. CIV. PROC. CODE § 391 (2010).

193. Neveils, *supra* note 164, at 359.

194. CAL. CIV. PROC. CODE § 391.1.

195. *Id.* § 391(b)(1).

196. *Id.* § 391(b)(2).

197. *Id.* § 391(b)(3).

198. *Id.* § 391(b)(4).

199. *Id.* § 391.3.

200. *Id.* § 391.7.

“irregular application” of the law.²⁰¹ Scholar Lee Rawles has suggested that this irregularity comes from judicial unfamiliarity²⁰² or uncertainty.²⁰³ Additionally, judges may believe that the statute is too severe or harsh.²⁰⁴ This illustrates a tension felt by judges “between giving people access to the court system and limiting the use that people can make of that very system.”²⁰⁵

California’s constitution does not contain an open courts clause,²⁰⁶ but the vexatious litigant statutory framework has withstood constitutional challenges of equal protection, due process, vagueness, and other challenges under the California and federal constitutions.²⁰⁷ In *Wolfe v. George*, the Ninth Circuit held that the vexatious litigant statute did not violate equal protection because “[f]requent pro se litigants are not a suspect class.”²⁰⁸ Additionally, because the statute gives fair notice, the court determined that the statute was not unconstitutionally vague.²⁰⁹ The litigant’s First Amendment claim failed because “[j]ust as false statements are not immunized by the First Amendment right to freedom of speech[] . . . baseless litigation is not immunized by the First Amendment right to petition.”²¹⁰

F. Hawaii

Hawaii has a statutory provision similar to those of Texas, Florida, and California as to vexatious litigants.²¹¹ A defendant can move a court to order a plaintiff to furnish security upon showing “that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation.”²¹² On its own or upon motion, a court may deem a litigant vexatious and prohibit him from filing any new litigation without prior approval of the presiding judge.²¹³ A judge “shall permit the filing of litigation only if it appears, after hearing, that the litigation has merit and has not been filed for the purposes of harassment or delay” and may still require the litigant to furnish a security.²¹⁴

201. Lee W. Rawles, Note, *The California Vexatious Litigant Statute: A Viable Judicial Tool to Deny the Clever Obstructionists Access?*, 72 S. CAL. L. REV. 275, 303 (1998).

202. *Id.* at 301.

203. *Id.* at 303.

204. *Id.* at 301.

205. *Id.* (quoting Kim Boatman, *State Throws the Book at “Vexatious Litigant,”* L.A. DAILY NEWS, Feb. 25, 1996, at N18).

206. See Schuman, *supra* note 28, at 1201 n.25.

207. See, e.g., *Wolfe v. George*, 486 F.3d 1120 (9th Cir. 2007); *Taliaferro v. Hoogs*, 46 Cal. Rptr. 147 (Cal. Ct. App. 1965).

208. 486 F.3d at 1126.

209. *Id.* at 1125.

210. *Id.* (internal citations omitted).

211. Neveils, *supra* note 164, at 359.

212. HAW. REV. STAT. ANN. § 634J-2 (West, Westlaw through 2010 legislation).

213. *Id.* § 634J-7(a).

214. *Id.* § 634J-7(b).

Hawaii’s constitution does not have an open courts clause.²¹⁵ However, in *Ek v. Boggs*,²¹⁶ the Hawaii Supreme Court upheld its vexatious litigant law on federal and state procedural due process grounds.²¹⁷ Here, the court upheld the statutory framework that enabled a court to deem a litigant vexatious and required him to post a \$25,000 bond in order to continue his current suit, in addition to requiring him to “obtain [court] approval . . . prior to filing any future pleadings.”²¹⁸ Although Hawaii, like California, does not have an open courts clause, Florida has upheld the validity of a similar framework under its open courts clause, which suggests that Hawaii’s statutory scheme is also legitimate.²¹⁹

G. Federal Law

The Prison Litigation Reform Act²²⁰ places limits and guidelines on prisoner suits brought in federal courts.²²¹ Under this framework, a federal court may authorize an inmate suit “without prepayment of fees or security” upon receiving an affidavit stating that the inmate is unable to pay.²²² However, a prisoner is eventually required to pay the full filing fee, beginning with a partial payment of either 20% of his average account deposits or 20% of his average monthly balance.²²³ He is then required to pay the remainder of the filing fee in monthly installments, based on 20% of the balance of his account for the month prior (so long as the balance is greater than ten dollars).²²⁴ If a prisoner has no means to pay the initial partial filing fee, he is not prohibited from bringing the action.²²⁵

The United States Code contains a three strikes provision that precludes an inmate from bringing a civil suit in forma pauperis. The provision applies if the inmate has had three civil suits dismissed as “frivolous, malicious, or fail[ing] to state a claim upon which relief may be granted” (unless in “imminent danger of serious physical injury”).²²⁶

215. See Schuman, *supra* note 28, at 1201 n.25.

216. 75 P.3d 1180 (Haw. 2003).

217. *Id.* at 1189.

218. *Id.* at 1183.

219. See *supra* Part III.C.

220. Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321 (1996) (codified as amended at 28 U.S.C. § 1915 and in various sections of 18 U.S.C., 28 U.S.C., & 42 U.S.C.).

221. See Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You’re Out of Court—It May Be Effective, but Is It Constitutional?*, 70 TEMP. L. REV. 471 (1997).

222. 28 U.S.C. § 1915(a)(1).

223. *Id.* § 1915(b)(1).

224. *Id.* § 1915(b)(2).

225. *Id.* § 1915(b)(4).

226. *Id.* § 1915(g). According to Michael B. Mushlin, “[o]f all the provisions of the PLRA, this one poses the most risk of permanently closing the courthouse door to meritorious claims.” 3 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 17:34 (4th ed. 2009).

The United States Constitution does not contain an open courts clause,²²⁷ but the federal three strikes provision of the Prison Litigation Reform Act has withstood constitutional challenge on other grounds.²²⁸ The right of meaningful access to the courts stems from the Due Process Clause of the U.S. Constitution, which requires that “prisoners must have access to the courts to protect their fundamental rights.”²²⁹ In *Lewis v. Sullivan*,²³⁰ the United States District Court for the Western District of Wisconsin found 28 U.S.C. § 1915(g) unconstitutional to the extent that it prevented a prisoner from “raising claims of the violation of a substantial constitutional right.”²³¹ However, the Seventh Circuit reversed that decision, finding that the disputed section did not violate equal protection or a right to access the courts under due process.²³² As Judge Easterbrook noted, “[E]veryone allowed to proceed *in forma pauperis* owes the fees and must pay when able; the line drawn by § 1915(g) concerns only the *timing* of payment.”²³³ Essentially, the federal framework, unconstrained by a constitutional open courts clause, requires potential inmate litigants to pay the fees at the onset of filing as if they were not indigent.

When the Indiana legislature promulgated the amended version of the Three Strikes Law, it basically adopted the federal three strikes language precluding indigent inmates from proceeding with claims if prior suits were deemed frivolous.²³⁴ The legislature overlooked the state statutory frameworks cited by the *Smith* court as exemplary for limiting frequent and frivolous claims.²³⁵ None of the states highlighted by the Indiana Supreme Court outright bar a court from processing a suit due to a litigant’s status as an indigent inmate and number of previous frivolous suits filed.²³⁶ Generally, the highlighted states empower courts to deem certain litigants vexatious,²³⁷ but they leave the courts discretion

227. *Smith v. Ind. Dep’t of Corr.*, 883 N.E.2d 802, 809 n.5 (Ind. 2008); *see also Mitchell v. Moore*, 786 So. 2d 521, 525 (Fla. 2001).

228. *See Lewis v. Sullivan*, 279 F.3d 526, 528 (7th Cir. 2002).

229. Lukens, *supra* note 221, at 478. Lukens asserts that the federal three strikes provision does not comport with the federal Constitution under due process and equal protection grounds. *Id.* at 520.

230. 135 F. Supp. 2d 954 (W.D. Wis. 2001), *rev’d*, 279 F.3d 526 (7th Cir. 2002).

231. *Id.* at 969.

232. *Lewis*, 279 F.3d at 528 (7th Cir. 2002). As the focus of this Note is to examine these types of provisions through the separate lens of the open courts clauses found in some state constitutions, it is outside the scope of this Note to further explore the challenges made in federal courts via the Constitution against the federal Prison Litigation Reform Act.

233. *Id.* at 529.

234. Compare 28 U.S.C. § 1915(g) (2006), with IND. CODE § 34-10-1-3 (2011).

235. *See Smith v. Ind. Dep’t of Corr.*, 883 N.E.2d 802, 808-09 (Ind. 2008).

236. Colorado most closely approaches Indiana’s law by precluding indigent inmates from filing suits involving prison conditions after three prior suits regarding prison conditions have been deemed frivolous. *See COLO. REV. STAT. § 13-17.5-102.7(1)* (2010).

237. *See, e.g., FLA. STAT. ANN. § 68.093* (West, Westlaw through 2010 2d Leg. Sess.); *TEX. CIV. PRAC. & REM. CODE ANN. § 11.101* (West, Westlaw through 2009 Reg. Sess.).

on whether to allow claims to proceed after a litigant has been deemed vexatious, depending on the merits of his case.²³⁸ In terms of monetary deterrence, these states authorize courts to require a litigant to furnish a security in order to move forward with a tenuous or questionable claim.²³⁹ Alternatively, courts may hold inmate filers responsible for the entire payment of a filing fee over time²⁴⁰ rather than prior to filing their claim.²⁴¹ Frameworks such as these could be more effective and better adhere to the constitutional requirements of Indiana’s open courts clause.

IV. ANALYSIS AND RECOMMENDATIONS

A. *Effectiveness of Indiana’s Three Strikes Law*

The Office of the Indiana Attorney General maintains an online database of inmate complaints deemed frivolous.²⁴² According to the Frivolous Claims Law,²⁴³ the court clerk is to send a copy of the order to the Indiana Attorney General and Department of Correction upon the court’s determination that an inmate’s suit may not proceed.²⁴⁴ The database reflects copies of orders submitted to the Attorney General’s office by court clerks. In most entries, the database provides a link to a copy of the court’s order.

According to the database, approximately eighty-two²⁴⁵ inmate plaintiffs have had claims dismissed under the Frivolous Claims Law.²⁴⁶ Of these inmates, eight have a “screened out case count” of three or more.²⁴⁷ A “screened out” case is one that has been precluded under the Frivolous Claims Law.²⁴⁸ For example, Eric D. Smith, the inmate who successfully argued the unconstitutionality of the original Three Strikes Law, has ten entries in the database.²⁴⁹ James H. Higgason, Jr. appears to be the state’s most prolific frivolous filer, with twenty-one entries in the database.²⁵⁰

238. See, e.g., DEL. CODE ANN. tit. 10, § 8803(e) (West, Westlaw through 2010 Leg.); TEX. CIV. PRAC. & REM. CODE ANN. § 11.102.

239. See, e.g., CAL. CIV. PROC. CODE § 391.3 (2010); FLA. STAT. ANN. § 68.093(3)(a).

240. See, e.g., COLO. REV. STAT. § 13-17.5-103; FLA. STAT. ANN. § 57.085(5).

241. See IND. CODE § 34-10-1-3 (2011).

242. *Offender Litigation Screening*, *supra* note 62.

243. IND. CODE § 34-58-1-2.

244. *Id.* § 34-58-1-4.

245. The database lists eighty-four inmate plaintiffs separately, but upon examination it appears that inmates “Cole, John” and “Cole, John C.” may be the same inmate. “Wilson, Shavaughn Carlos” and “Wilson-El, Shavaughn Carlos” are also very likely the same inmate, with orders listed separately on each account.

246. *Offender Litigation Screening*, *supra* note 62.

247. *Id.*

248. See *id.*

249. *Id.*

250. *Id.*

The database illustrates that courts are actively using the Frivolous Claims Law as a tool to limit meritless inmate litigation. It also illustrates that there appear to be very few prolific frivolous filers in the state. Additionally, the database highlights shortcomings of the Three Strikes Law.

There is always the possibility of error in reporting the screened out cases. For example, there are eighty-four inmates listed in the database, but inmates “Cole, John” and “Cole, John C.” may be the same person. Each of those entries has one screened out case, but only John C. Cole has a litigation order attached to his name within the online database, so it is not clear if they are the same person. If they are the same person, then John C. Cole actually has two screened out cases, and he is one, rather than two, filings away from meeting the three strikes limit. Similarly, inmates “Wilson, Shavaughn Carlos” and “Wilson-El, Shavaughn Carlos” are very likely the same inmate.²⁵¹ “Wilson, Shavaughn Carlos” has four screened out cases, so he is subject to the Three Strikes Law.²⁵² “Wilson-El, Shavaughn Carlos” has one screened out case.²⁵³ If these separate entries stem from the same individual, then Shavaughn Carlos Wilson-El actually has a total of five filings that have been screened out.

The effectiveness of the database depends not only on the accuracy of the entries, but also on each county clerk actually submitting a screened out inmate case to the Attorney General. In the *Smith* appellate opinion, the court noted that it may be unbeknownst to a trial court if an inmate has already had more than three cases dismissed under the Frivolous Claims Law in different county courts.²⁵⁴ The 2006 appellate opinion also stated that at that time, there was no “central information system” for trial courts to check.²⁵⁵ Now that the Attorney General maintains this central information system, its accuracy depends on county clerks submitting applicable cases. Additionally, the database—and the Three Strikes Law itself—cannot be effective unless courts know to consult the database when processing an indigent inmate claim.

If the goal of the Three Strikes Law is to conserve financial and judicial resources, it is not clear that the 2009 version will do so. As the Indiana Supreme Court discussed when ruling on the constitutionality of the original Three Strikes Law, the amended law still does not seem to alleviate the work of the courts.²⁵⁶ Regardless of whether an inmate’s claim is deemed frivolous, and how many prior cases the inmate has had screened out, a court reviewing an indigent

251. In some of the litigation orders attached to the “Wilson” inmate, he is identified as “Wilson-El” in the order caption. See *Wilson-El v. Abell*, No. 77D01-0611-SC-01072 (Sullivan Super. Ct. Nov. 17, 2006), available at <http://12.186.81.50/legal/litigation/litscreen/pub/378806.1.pdf>; *Wilson-El v. Hanks*, No. 77D01-0507-SC-00563 (Sullivan Super. Ct. Aug. 3, 2005), available at <http://12.186.81.50/legal/litigation/litscreen/pub/378803.1.pdf>.

252. *Offender Litigation Screening*, *supra* note 62; IND. CODE § 34-10-1-3 (2011).

253. *Offender Litigation Screening*, *supra* note 62.

254. *Smith v. Ind. Dep’t of Corr.*, 853 N.E.2d 127, 132 (Ind. Ct. App. 2006), *rev’d*, 883 N.E.2d 802 (Ind. 2008).

255. *Id.* at 132 n.7.

256. See *Smith v. Ind. Dep’t of Corr.*, 883 N.E.2d 802, 810 (Ind. 2008).

inmate’s complaint still must use time and resources to determine whether the inmate is subject to the Three Strikes Law.²⁵⁷ The court must also determine if the inmate asserts “immediate danger of serious bodily injury.”²⁵⁸ The amended law may cause inmates to be more careful about filing suits to avoid three strikes.²⁵⁹ However, once an inmate meets the three strikes, he can still continue to barrage the court system with complaints, as an indigent or not, which requires some sort of an initial review by a court. The Frivolous Claims Law already addresses judicial economy by allowing meritless inmate claims to be dismissed without even serving the defendant with the complaint.²⁶⁰ Therefore, the amended Three Strikes Law does not preserve judicial resources in any meaningful way. All that the amended Three Strikes Law adds to the framework is that courts are forced to dismiss a case where an indigent inmate does assert a viable claim, and only because the inmate has historically asserted unviable claims.²⁶¹

In another illustrative case appealed by inmate Eric Smith, the Indiana Court of Appeals noted that Smith had filed more than one suit per month in Henry County, where the New Castle Correctional Facility is located, and he had more than fifty cases on appeal.²⁶² The court of appeals echoed the trial court’s frustration with Smith and agreed that “there is little reason to believe anything Smith says or writes.”²⁶³ Nonetheless, the court reversed the trial court’s dismissal under the Frivolous Claims Law regarding Smith’s cruel and unusual punishment claims.²⁶⁴ Since Smith stated a valid legal theory and alleged specific injuries, the screening level was too early to dismiss the claim; here, the dismissal could only be based on judicial speculation due to Smith’s identity and penchant for filing frivolous suits.²⁶⁵ The court of appeals ruled on this particular Smith suit in June 2009,²⁶⁶ the interim time period when there was no Three Strikes Law in effect.²⁶⁷ However, even if this particular claim had been subject

257. *See id.*

258. IND. CODE § 34-10-1-3 (2011).

259. *See* Lukens, *supra* note 221, at 498 (discussing that as prisoners become aware of the federal Three Strikes Law, they will have to consider whether pursuing an allegation is worth the possibility of “exhausting one of those strikes, and risking their ability to vindicate some later, and perhaps more egregious . . . treatment”).

260. *See* IND. CODE § 34-58-1-2.

261. *See id.* § 34-10-1-3; *see, e.g.*, Lukens, *supra* note 221, at 472 (discussing the federal Prison Litigation Reform Act and noting that its three strikes provision precludes meritorious claims).

262. *Smith v. Wrigley*, 908 N.E.2d 354, 359 (Ind. Ct. App. 2009).

263. *Id.*

264. *Id.* at 360.

265. *Id.*

266. *See id.*

267. The first version of the Three Strikes Law was held unconstitutional by the Indiana Supreme Court in April 2008. *See Smith v. Ind. Dep’t of Corr.*, 883 N.E.2d 802 (Ind. 2008). The amended version of the Three Strikes Law went into effect in July 2009. *See* IND. CODE § 34-10-1-

to the Three Strikes Law, Smith's allegations of staff purposely scalding him during showers and forcing him to walk with a broken ankle in shackles²⁶⁸ could arguably have fallen within the "immediate danger of serious bodily injury"²⁶⁹ exception to the Three Strikes Law.²⁷⁰ Ultimately, the truly prolific filers like Smith will continue to file claims, whether or not there are limits such as the Frivolous Claims Law and the Three Strikes Law.

Although the database does not likely reflect each and every screened out filing, the prevalence of offenders who meet or exceed the three strikes limit—seven inmates out of a population of approximately 28,000 Indiana adult offenders²⁷¹—suggests that the frivolous filers that the Three Strikes Law addresses are few and far between.²⁷² Those who are truly prolific, such as Smith and Higgason, or those who have just met or exceeded three strikes, such as Shavaughn Carlos Wilson-El, will not likely be deterred by the Three Strikes Law. Even though these inmates have at least three screened out cases, they continue to file and are not bothered by already having three strikes. They persist with claims, requiring a court to determine if the filer has had three strikes, and if so, whether an allegation of serious bodily injury enables the claim to proceed.

B. *Constitutionality of Indiana's 2009 Three Strikes Law*

Under the new version of the Three Strikes Law, if a court determines that an indigent inmate filer has already had three claims dismissed as frivolous and asserts no immediate danger of bodily injury, the court is *entirely foreclosed* from processing the claim—even if it is a meritorious and viable cause of action recognized by law.²⁷³ Under the reasoning set forth in *Smith*, the newly enacted version of the law still does not seem to comport with the open courts clause. Specifically,

“where a cause of action has been created (by constitution, statute, or

3 (2011.)

268. *Wrigley*, 908 N.E.2d at 358.

269. IND. CODE § 34-10-1-3.

270. *Cf. Lukens*, *supra* note 221, at 497 (discussing the “imminent danger of serious physical injury” requirement under the federal three strikes law and noting the difficulty of meeting this exception since “the imminence of the alleged danger likely will have dissipated” by the time the inmate files a complaint).

271. The Indiana Department of Correction reported that on December 1, 2009, there were 25,791 adult male offenders and 2411 adult female offenders incarcerated with the Department. IND. DEP'T OF CORR. DIV. OF RESEARCH & PLANNING, OFFENDER POPULATION STATISTICAL REPORT (2009) (on file with author).

272. *Cf. Lukens*, *supra* note 221, at 490 (positing that the so-called “explosion” of prisoner litigation in federal courts can be explained by the overall “explosion” of state and federal prison populations).

273. IND. CODE § 34-10-1-3; *see, e.g., Lukens*, *supra* note 221, at 472 (discussing the federal Prison Litigation Reform Act and noting that its three strikes provision precludes meritorious claims).

common law), courts must be open to provide remedy by due course of law.” Thus, although there is no right under the [o]pen [c]ourts [c]lause to any particular cause of action and the legislature may create, modify, or abolish a particular cause of action, *to the extent there is an existing cause of action, the courts must be open to entertain it.*²⁷⁴

Essentially, Indiana adopted the federal three strikes framework targeting indigent inmates filing multiple suits.²⁷⁵ Based on the *Smith* majority’s suggestion that legislative conditions on access to courts are permissible²⁷⁶ and that “other courts have upheld other less stringent methods, such as requiring filing fees, to deter frivolous filing if that is a concern,”²⁷⁷ it may seem that the new statute should withstand scrutiny under the open courts clause.²⁷⁸ However, Indiana’s new law still operates as an “indiscriminate statutory ban”²⁷⁹ against potential claims of indigent inmates. The open courts clause requires “an individualized assessment of each claim . . . and a claim cannot be dismissed on the basis of who presents it rather than whether it has merit.”²⁸⁰

The new version of the law *still* requires a court to dismiss a suit based on who presents it—an inmate filing as indigent with three previous frivolous suits—rather than its merit.²⁸¹ It prohibits a court from proceeding with an indigent inmate’s claim even if the court thinks the claim may be viable.²⁸² In this regard, the law compromises the independence of the state judiciary, which is what the open courts clause historically sought to protect.²⁸³ Even as amended, the law is still unconstitutional under the open courts clause; it serves as an indiscriminate statutory ban based on who presents the claim, and it interferes with the independence of the judiciary by forcing courts to dismiss claims that

274. *Smith v. Ind. Dep’t of Corr.*, 883 N.E.2d 802, 810 (Ind. 2008) (internal citation omitted).

275. *Compare* 28 U.S.C. § 1915(g) (2006), *with* IND. CODE § 34-10-1-3.

276. *See Smith*, 883 N.E.2d at 809.

277. *Id.* at 810.

278. Indeed, in April 2010, the Indiana Court of Appeals reviewed and upheld the constitutionality of the 2009 version of the Three Strikes Law after a Henry County trial court utilized Indiana Code section 34-10-1-3 to prevent Eric Smith from filing a claim as an indigent. *Smith v. Wrigley*, 925 N.E.2d. 747, 748 (Ind. Ct. App. 2010). The court of appeals determined that the revised statute comported with the open courts clause of the Indiana Constitution. *Id.* at 749-50. In its rationale, the court quoted the Indiana Supreme Court’s statement in *Smith v. Indiana Department of Correction* that the legislature can “impose filing fees as conditions to be met before judicial relief is available” and that federal law provides for the same exclusion based on filing frequency and filing in forma pauperis. *Smith*, 883 N.E.2d at 808. On August 27, 2010, the Indiana Supreme Court denied transfer of this case. *Wrigley*, 940 N.E.2d 822 (Ind. 2010).

279. *Smith*, 883 N.E.2d at 809.

280. *Id.* at 806.

281. *See* IND. CODE § 34-10-1-3 (2011).

282. *See id.*; *see also* Lukens, *supra* note 221, at 472 (noting that the PLRA’s three strikes provision precludes meritorious claims).

283. Hoffman, *By the Course of the Law*, *supra* note 32, at 1316.

may have otherwise been redressable by law.²⁸⁴

Other state frameworks could be more effective and more in adherence with Indiana's open courts clause. None of the state jurisdictional schemes cited as exemplary in *Smith* prohibit the filing of complaints from the onset in the same manner as Indiana.²⁸⁵ Rather, the statutes leave the ultimate discretion to the courts.²⁸⁶ For example, California requires vexatious litigants to gain permission of the court before filing future claims.²⁸⁷ Essentially, California uses a pre-filing review process similar to Indiana's Frivolous Claims Law, but not limited merely to inmate filers. Hawaii has basically the same framework as California.²⁸⁸ Delaware's analogous law, like Indiana's Frivolous Claims Law, enables a court to dismiss an action on similar grounds, but it applies to all in forma pauperis litigants, not just inmates.²⁸⁹ Like California, Delaware also requires vexatious in forma pauperis litigants to obtain judicial permission prior to filing.²⁹⁰ Texas's and Florida's laws address inmate litigation specifically, as well as the broader category of frivolous lawsuits filed by any vexatious pro se litigant.²⁹¹ Florida, like Indiana, also imposes earned-time credit reduction as a possible sanction for frivolous filing.²⁹² Additionally, Florida requires that an inmate be responsible for the entire filing fee over time,²⁹³ whereas Indiana requires an indigent inmate to pay a portion of the filing fee.²⁹⁴

C. Recommendations

Indiana should abandon its Three Strikes Law and enable courts to impose other requirements to limit and deter frivolous and multiple filers, not just indigent inmates. As a starting point, Indiana already has a pre-filing screening process for inmate claims.²⁹⁵ To address the issue of frivolous or vexatious filing generally, it would be beneficial to equip courts with broader screening and filtering devices to address all vexatious or frivolous filers. Indiana could enact a general procedure for determining whether a litigant is a frivolous or vexatious

284. See *Smith*, 883 N.E.2d at 809-10.

285. See IND. CODE § 34-10-1-3.

286. See, e.g., DEL. CODE ANN. tit. 10, § 8803(e) (West, Westlaw through 2010 Leg.); FLA. STAT. ANN. § 68.093 (West, Westlaw through 2010 2d Leg. Sess.); TEX. CIV. PRAC. & REM. CODE ANN. § 11.102 (West, Westlaw through 2009 Reg. Sess.).

287. CAL. CIV. PROC. CODE § 391.7 (2010).

288. See HAW. REV. STAT. ANN. § 634J-1 (West, Westlaw through 2010 legislation).

289. DEL. CODE ANN. tit. 10, § 8803.

290. *Id.* § 8803(e).

291. See FLA. STAT. ANN. § 68.093(3)(a); *id.* § 944.279(1); TEX. CIV. PRAC. & REM. CODE ANN. § 11.054(1); see also Neveils, *supra* note 164, at 353.

292. FLA. STAT. ANN. § 944.28.

293. *Id.* § 57.085.

294. IND. CODE § 33-37-3-3(b) (2011).

295. *Id.* § 34-58-1-2.

filer and require pre-screening of those claims.²⁹⁶ A court would have an opportunity prior to the filing to determine if the suit has merit and, if not, it could dismiss the suit as frivolous or require the plaintiff to furnish a security, as is done in Texas and Florida.²⁹⁷

To specifically deter frivolous, frequent inmate filers, Indiana could deduct the entire court filing fee from inmate accounts as available over time, not just a portion of the filing fee as Indiana law currently provides.²⁹⁸ Although Florida deducts the full fee from an inmate's account from his first suit onward,²⁹⁹ Indiana could choose to do so only after three suits have been deemed frivolous. Holding the inmate responsible for the entire filing fee over time—even if the claim is immediately screened out under the Frivolous Claims Law—should provide deterrence against the state's frequent inmate filers, who submit claim after claim as indigents and are currently only responsible for a portion of the fee.³⁰⁰ For those who are not deterred by payment provisions,³⁰¹ the Indiana Department of Correction can revoke the frivolous litigant's earned credit time as a deterrence mechanism.³⁰² After a one year hiatus from doing so, the Department's plan to reinstate the punishment of revoked earned credit time, in response to judicial pressure,³⁰³ suggests that this is an effective method to deter inmates from frivolous filings.

Repealing the current Three Strikes Law, enacting legislation to address and limit any vexatious and frivolous filers, and requiring inmates to pay for their entire filing fee over time would empower Indiana courts; they would be able to handle frivolous litigation in a manner that deters frivolous filing but still enables all litigants to have their claims reviewed. Furthermore, this approach would not infringe on a court's ability to process claims that have stated a valid cause of action or are otherwise meritorious, as is required now by the Three Strikes Law.

CONCLUSION

Indiana's amended Three Strikes Law still conflicts with the open courts clause of the Indiana Constitution. The law still denies a group of citizens—indigent inmates—court access to assert a cause of action because they have historically asserted unrecognizable claims. It impermissibly interferes with

296. See Neveils, *supra* note 164, at 357 (discussing Florida's Vexatious Litigant Law as an efficient process for disposing of frivolous suits, with sufficient safeguards to protect litigants' access to the courts); see also Colby, *supra* note 140, at 1351-52 (concluding that Texas's Vexatious Litigants Statute will reduce frivolous claims and does not unfairly restrict court access).

297. See FLA. STAT. ANN. § 68.093(3)(a); TEX. CIV. PRAC. & REM. CODE ANN. §§ 11.051 to .055 (West, Westlaw through 2009 Reg. Sess.).

298. IND. CODE § 33-37-3-3(b).

299. See FLA. STAT. ANN. § 57.085(5).

300. See IND. CODE § 33-37-3-3(b).

301. See *Spencer v. Fla. Dep't of Corr.*, 823 So. 2d 752, 756 (Fla. 2002).

302. See IND. CODE § 35-50-6-5(a)(4).

303. See E-mail from Sarah Schelle, *supra* note 80.

the independence of the judiciary by requiring Indiana courts to review and then close their doors on complaints that could assert otherwise recognizable and redressable claims. Additionally, the amended law still does not effectively help alleviate the work of the state judiciary because a court must spend time determining if an inmate has three prior strikes and has alleged immediate danger of serious bodily injury.

If the Indiana legislature truly wants to address the issue of frivolous or vexatious suits in a constitutional and effective manner, it should abandon the Three Strikes Law. The legislature should instead adopt laws that address frivolous or vexatious filers generally. Rather than strictly limiting the law to indigent inmates, the legislature should let the courts decide whether to allow future claims by any such filer to proceed. If the legislature wants to impose an additional deterrent on inmate filers that comports with the open courts clause, it should hold repeatedly frivolous inmate filers responsible for their entire filing fees over time as funds become available. The best course of action is not to preclude these litigants from filing in the first place solely because of their indigence and history of "striking out" on prior claims.