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PRIVATE PRISON INFORMATION ACT OF 2007, AND REVIEW OF THE PRISON LITIGATION REFORM ACT: A DECADE OF REFORM OR AN INCREASE IN PRISON AND ABUSES?

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

ON

H.R. 1889

NOVEMBER 8, 2007

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PRIVATE PRISON INFORMATION ACT OF 2007, AND REVIEW OF THE PRISON LITIGATION REFORM ACT: A DECADE OF REFORM OR AN INCREASE IN PRISON AND ABUSES?

THURSDAY, NOVEMBER 8, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 1:50 p.m., in Room 2141, Rayburn House Office Building, the Honorable Robert C. "Bobby" Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Scott, Johnson, Jackson Lee, Forbes, Gohmert, Coble, and Chabot.

Staff present: Bobby Vassar, Subcommittee Chief Counsel; Gregory Barnes, Majority Counsel; Rachel King, Majority Counsel; Mario Dispenza, BATFE (Fellow); Veronica Eligan, Professional Staff Member; Michael Volkov, Minority Counsel, Carolyn Lynch, Minority Counsel, Kelsey Whitlock, Staff Assistant.

Mr. SCOTT. The Subcommittee will now come to order. I am pleased to welcome you today to a hearing before the Subcommittee on Crime, Terrorism, and Homeland Security on H.R. 1889, the "Prison Information Act of 2007," and H.R. 4109, the "Prison Abuse Remedies Act of 2007." Witnesses on the second panel on that bill may also testify generally on the issue or reforming the Prison Litigation Reform Act.

We will first take up H.R. 1889. This is a simple piece of legislation that would do one thing. It would require prisons and other correctional facilities holding Federal prisoners under a contract with the Federal Government to comply with the Freedom of Information Act.

There have been incidents where members of the press and public have attempted unsuccessfully to gain information from private prisons, even in situations as serious as prison escapes or incidents of assaults in prisons. There is simply no reason why these institutions, which are serving a governmental function, should not be subject to the Freedom of Information Act. This is a good Government bill, and I hope my colleagues will support it.

I will recognize my good friend, the Ranking Member of the Subcommittee, Mr. Forbes, at this point on H.R. 1889.

[The bill, H.R. 1889, follows:]

I

110TH CONGRESS
1ST SESSION

H. R. 1889

To require prisons and other correctional facilities holding Federal prisoners under a contract with the Federal Government to make the same information available to the public that Federal prisons and correctional facilities are required to do by law.

IN THE HOUSE OF REPRESENTATIVES

APRIL 17, 2007

Mr. HOLDEN (for himself, Mr. LOBIONDO, Mr. ELLSWORTH, Mr. MURTHA, Mr. BRADY of Pennsylvania, Ms. KILPATRICK, Mrs. MCCARTHY of New York, Ms. JACKSON-LEE of Texas, Mr. MILLER of Florida, and Mr. LAHOOD) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To require prisons and other correctional facilities holding Federal prisoners under a contract with the Federal Government to make the same information available to the public that Federal prisons and correctional facilities are required to do by law.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Private Prison Infor-
5 mation Act of 2007".

SEC. 2. FREEDOM OF INFORMATION REQUIREMENT FOR CONTRACT PRISONS.

(a) IN GENERAL.—Each nongovernmental entity contracting with the Federal Government to incarcerate or detain Federal prisoners in a privately owned prison or other correctional facility shall have the same duty to release information about the operation of that prison or correctional facility as a Federal agency operating such a facility would have under the Freedom of Information Act (5 U.S.C. 552).

(b) REGULATIONS.—A Federal agency that contracts with a nongovernmental entity to incarcerate or detain Federal prisoners in a privately owned prison or other correctional facility shall promulgate regulations or guidance to ensure compliance by the nongovernmental entity with the terms of such contract.

(c) CIVIL ACTION.—Any party aggrieved by a violation of the duty established in subsection (a) may, in a civil action, obtain appropriate relief against the nongovernmental entity operating the facility or against any other proper party.

(d) DEFINITION.—In this section, the term "privately owned prison or other correctional facility" includes privately owned prisons or other correctional facilities that incarcerate or detain prisoners pursuant to a contract with—

1 (1) the Federal Bureau of Prisons;

2 (2) Immigration and Customs Enforcement; or

3 (3) any other Federal agency.

○

Mr. FORBES. Thank you, Mr. Chairman.

Mr. Chairman, in the interest of time, I will just submit my statement for the record and we can proceed with Mr. Holden's testimony.

Mr. SCOTT. Thank you.

[The prepared statement of Mr. Forbes follows:]

PREPARED STATEMENT OF THE HONORABLE J. RANDY FORBES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA, AND RANKING MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Thank you, Chairman Scott.

I want to thank you for scheduling this hearing.

While I share my colleague's commitment to prison reform, I was hoping that our first hearing on this subject would focus on efforts to ensure and improve rehabilitation of prisoners. Unfortunately, the focus of today's hearing is misguided. Instead of addressing the real and significant needs of prisoners, we are considering changes to the Prison Litigation Reform Act, which will only re-open the floodgates of frivolous litigation.

The proposed legislation will cause an explosion of frivolous prisoner litigation that will clog up the courts, waste valuable legal resources, and affect the quality of justice enjoyed by law-abiding citizens. I am further concerned that the time and money spent defending these cases could be better spent providing job training, drug treatment, education and other valuable programs to prisoners to make sure they can become productive members of society.

In 1996, Congress took appropriate steps to limit frivolous prisoner litigation by passing the Prison Litigation Reform Act or PLRA. The PLRA took common-sense steps to reduce the number of petitions filed by inmates claiming violations of their rights. Under the PLRA, inmates are 1) required to exhaust all administrative remedies before filing a case in federal court, 2) prohibited from receiving filing fee waivers if they have a history of filing frivolous or malicious lawsuits, and 3) had to demonstrate physical injury to claim monetary awards for compensatory damages.

In this bill, each one of these common-sense provisions is repealed or removed.

These provisions are removed despite the fact that evidence shows that the PLRA worked in decreasing the amount of frivolous prisoner litigation. According to records kept by the Administrative Offices of the federal courts, in 1995, the year before the PLRA was passed, over 41,000 cases were filed by federal prisoners alleging violations of their civil rights. Since that high mark, the number of cases has dropped to about 24,000 cases filed per year. This marked decrease occurred because the PLRA kept the frivolous cases off the court dockets.

Let me give you some examples of those frivolous cases. One inmate claimed $1 million in damages because the ice cream he was served melted. An inmate alleged that being forced to listen to his unit manager's country and western music constituted cruel and unusual punishment. Yet another claimed that his rights were violated because he was forced to send packages via UPS rather than U.S. mail. In perhaps the most frivolous lawsuit of them all, one inmate sued because he was served chunky instead of smooth peanut butter.

The changes called for in this bill will lead to the filing of cases just like the ones I just described. This bill is cynically aimed at pleasing an important constituency of my colleagues on the other side of the aisle—the trial lawyers. If enacted, thousands of trial lawyers will churn out frivolous case after frivolous case in the hope of securing a big payday. And that will be a payday that will come at the expense of prisoners who have legitimate claims and whose rights have actually been harmed during their incarceration. Those legitimate claims will never be heard because they will be buried under all of the paperwork generated by all of the new lawsuits.

I look forward to working with Chairman Scott on finding a way to ensure that we do not return to a time when the wheels of justice can't turn because court dockets are too clogged with frivolous lawsuits.

I also look forward to hearing from Representative Holden and learning more about his bill which would require private prisons to comply with the Freedom of Information Act requirements.

I yield back the balance of my time.

Mr. SCOTT. Without objection, all the Members may include opening statements in the record at this point.

We only have one witness on this panel. Congressman Tim Holden from Pennsylvania's 17th District. He is the chief sponsor of the bill. He is familiar with the prison system from his 7 years serving as chair of Schuylkill County for 7 years, and the time he served as a probation officer. He also serves as a member of the Congressional Correctional Officers Caucus. He is now in his eighth term in Congress and is Chairman of the Subcommittee on Conservation, Credit, Energy and Research on the Agriculture Committee.

He and his wife Gwen live in St. Clair, which is in Schuylkill County. Congressman, your written statement is already entered into the record in its entirety. You are familiar with the timing device, so we will recognize you at this time for your comments.

TESTIMONY OF THE HONORABLE TIM HOLDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. HOLDEN. Thank you, Chairman Scott and Ranking Member Forbes and Members of the Subcommittee for allowing me to testify today in support of H.R. 1889, the "Private Prison Information Act." H.R. 1889 simply seeks to require private prisons and other correction facilities holding Federal prisoners under contract with the Federal Government to make the same information available that public institutions are required by law under the Freedom of Information Act.

As the Federal Government increases its use of private for-profit facilities for incarceration of Federal prisoners, it is imperative that we ensure that information about the operation of these prisons is readily available. Roughly 25,000 Federal criminal prisoners are jailed in private facilities at any given time, yet private prisons are not required to publicly disclose information about daily operations of their correctional facilities. The veil of secrecy surrounding private facilities needs to be lifted, and H.R. 1889 will hold these institutions accountable to the American public.

Earlier this year, an inmate at the Northeast Ohio Correctional Center, a private Federal prison in Youngstown, Ohio escaped by overpowering a prison guard. The Ohio Correctional Institution Inspection Committee, comprised of members of the Ohio General Assembly, held a surprise inspection at the prison less than a year prior and reported that 44 inmate-on-inmate assaults were recorded between June, 2005 and May, 2006. Inspectors thought the number high considering that a total of 305 assaults were recorded in 2005 for Ohio's 32 other correctional facilities. However, a lack of additional information and accountability to lawmakers prevented any further action.

The facility did not respond to the media when asked if any of the assaults were severe, how they were handled or prosecuted, or how many assaults occurred from May, 2006 to the present. NOCC, like many other private Federal facilities, do not submit reports to the Federal Government.

Mr. Chairman, the problem here is quite straightforward. There was a clear lack of accountability on behalf of private prisons.

Without accountability, we have no knowledge of how taxpayer money is being spent at the facility. We do not know how many correctional officers are employed, at what levels they are staffed, and how much training they have received. We also do not know if overstaffed members are being asked to perform the dual role of correctional officers as well.

Most daunting of all, private prisons are not required to provide incident reports detailing health care oversight, rape or assault, weapons attacks, deaths, or escapes at the facility. Prior to being elected to Congress, I served 7 years as sheriff of Schuylkill County, Pennsylvania. In that capacity, I also served on the Schuylkill County Prison Board.

Based on my experience as both the sheriff and a member of the Prison Board, I strongly believe that running a corrections facility is inherently governmental, although that is not why I am here today to talk about it. I strongly believe that H.R. 1889 will put private prisons on the same playing field with the rules and regulations by which Federal prisons must abide.

Mr. Chairman, if we do not address this critical situation, we risk the safety and security of not only the prison employees, but also that of our family and friends who live in our communities. This legislation simply ensures the public's right to have access to information concerning conditions within private prisons.

Thank you, Mr. Chairman, for consideration of this bill.

[The prepared statement of Mr. Holden follows:]

PREPARED STATEMENT OF THE HONORABLE TIM HOLDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Chairman Scott, Ranking Member Forbes and members of the Subcommittee, I want to thank you for the opportunity to testify before you today in support of H.R. 1889, the Private Prison Information Act.

H.R. 1889 simply seeks to require private prisons and other correctional facilities holding federal prisoners under a contract with the federal government to make the same information available that public institutions are required to by law under the Freedom of Information Act (FOIA).

As the federal government increases its use of private, for-profit facilities for incarceration of federal prisoners, it is imperative that we ensure that information about the operation of these prisons is readily available. Roughly 25,000 federal criminal prisoners are jailed in private facilities at any given time. Yet private prisons are not required to publicly disclose information about daily operations of their correctional facilities. The veil of secrecy surrounding private facilities needs to be lifted and H.R. 1889 will hold these institutions accountable to the American public.

Earlier this year, an inmate at the Northeast Ohio Correctional Center (NOCC), a private federal prison in Youngstown, Ohio, escaped by overpowering a prison guard. The Ohio Correctional Institution Inspection Committee, comprised of members of the Ohio General Assembly, held a surprise inspection at the prison less than a year prior and reported that 44 inmate-on-inmate assaults were recorded between June 2005 and May 2006. Inspectors thought the number high, considering a total of 305 assaults were recorded in 2005 for Ohio's 32 correctional facilities; however lack of additional information and accountability to lawmakers prevented further action.

The facility did not respond to the media when asked if any of the assaults were severe, how they were handled or prosecuted and how many assaults occurred from May 2006 to the present. NOCC, like many other private federal facilities, does not send annual reports, leaving the collection of this information to inspections financed by the city and the state.

Mr. Chairman, the problem here is quite straightforward; there is a clear lack of accountability on behalf of private prisons. Without accountability we have no knowledge of how taxpayer money is being spent at the facility. We do not know how many correctional officers are employed, at what levels they are staffed, and how much training they have received. We also do not know if other staff members

are being asked to perform the dual role of correctional officers as well. Most daunting of all, private prisons are not required to provide incident reports detailing healthcare oversight, rape or assault, weapons attacks, death, or escape at the facility.

Prior to being elected to Congress, I served seven years as Sheriff of Schuylkill County, Pennsylvania. In that capacity, I also served on the Schuylkill County Prison Board. Based on my experiences as both sheriff and a member of the board, I strongly believe that running correctional facilities is inherently governmental. Although that is not what I am hear to talk about today, I also strongly believe that H.R. 1889 will put private prisons on the same playing field with the rules and regulations by which federal prisons must abide.

Mr. Chairman, if we do not address this critical situation, we risk the safety and security of not only the prison employees, but also that of our family and friends who live in our communities. This legislation simply ensures the public's right to have access to information concerning the conditions within private prisons. I thank the Subcommittee for considering this bill and urge you to report it favorably.

Mr. SCOTT. Thank you. And thank you for bringing the bill to our attention. I think you have answered any questions I have. I will ask the gentleman, the Ranking Member, Mr. Forbes, if he has any questions.

Mr. FORBES. Mr. Chairman, I don't have any questions for Congressman Holden.

Mr. SCOTT. The gentleman from Georgia?

Mr. DAVIS. I have none, Mr. Chairman.

Mr. SCOTT. Thank you.

The gentleman from Texas? Questions? Any questions of the witness?

Mr. JOHNSON. I have none.

Mr. SCOTT. The gentleman from North Carolina?

Mr. COBLE. Mr. Chairman, if I may just very briefly. Tim, Congressman, are there no requirements now that public prisons make public reports about their staffing, training or operational procedures?

Mr. HOLDEN. Mr. Coble, it is my understanding that private prisons have no reporting requirements. Of course, the public prison system has numerous rules and regulations that they must follow at our direction.

Mr. COBLE. Thank you.

Thank you, Mr. Chairman.

Mr. SCOTT. Thank you.

Thank you, Mr. Holden, for your testimony. We will be taking up the bill in regular order, and I appreciate you bringing it to our attention.

Mr. HOLDEN. Thank you, Mr. Chairman, and Members of the Subcommittee.

Mr. SCOTT. The hearing on this bill is now concluded.

The witnesses on the next panel will take your seats please. The next part of the hearing will focus on problems that have resulted from passage of the Prison Litigation Reform Act, the PLRA. While the act has succeeded in its stated goal of reducing the number of frivolous lawsuits in Federal court, some provisions of the PLRA have had the unintended consequences of preventing many legitimate cases from being brought.

Chairman Conyers and I introduced a bill last evening, H.R. 4109, the "Prison Abuse Remedies Act of 2007." Witnesses may testify on that bill or may testify generally about the Prison Litigation Reform Act and suggestions for reforms. Congress passed the

PLRA in 1996 as part of an emergency appropriations bill. At the time, Congress stated two main reasons for the act: first, to reduce frivolous lawsuits by prisoners; and second, to decrease the amount of intrusive consent decrees governing our prison conditions.

Although the PLRA effected major changes in the law and litigation, it was the subject of only one congressional hearing and only limited debate. The hastily written provisions have been the subject of six Supreme Court decisions deciding competing interpretations by the Federal courts of appeals. According to the administration Office of the U.S. Courts, the Bureau of Justice statistics, the number of lawsuits in Federal court has dramatically decreased since the passage of the PLRA from 36 cases per 1,000 prisoners prior to its passage, down to 19 cases per 1,000 prisoners 5 years after its passage.

Court monitoring has also decreased from 1995 to 2000. Court monitoring of prisons diminished significantly. The number of states with little or no court-ordered regulation of their prisons, that is those having no more than 10 percent of prisoners living in a facility under court supervision, more than doubled from 12 states to 28 states. The nearly impossible obstacles established by the PLRA and the diminished oversight by Federal administrative agencies and the judiciary, with that going on, some experts have gone so far to say that the "PLRA is undermining the rule of law in America's prisons."

A coalition called SAVE, Stop Abuse and Violence Everywhere, composed of dozens of organizations and individuals, has come together to study the impact of the PLRA and to recommend modest changes to the law. Some of the changes they perceive as most necessary are the exhaustion requirement, which bars access to Federal court unless a prisoner successfully completes the prison administrative remedies; the elimination of the physical injury requirement which forbids access to the courts for serious constitutional violations where there is no physical injury; and removing juveniles from the purview of the PLRA. Although juveniles have never been a major source of litigation in Federal courts, Congress still included them in the 1996 law.

The Commission on Safety and Abuse in America's Prisons also recommends several reforms: eliminating the physical injury requirement; eliminating the filing fee for indigent prisoners; elimination of the restrictions on attorneys' fees; lifting the requirement that correctional agencies concede liability as a prerequisite to court-supervised settlement; and a change in the exhaustion requirement.

Additionally, the American Bar Association passed a resolution urging Congress to reform aspects of the PLRA, including elimination of the physical injury requirement; amending the exhaustion requirement; repealing restrictions on Federal courts in conditions of confinement cases; restoring attorneys' fees; elimination of juveniles from the purview of the PLRA; and repealing fee provisions that treat prisoners filing claims under the PLRA differently than prisoners filing other informal claims.

It is now my privilege to recognize the Ranking Member of the Subcommittee, my colleague from Virginia, Mr. Forbes.

Mr. FORBES. Thank you, Chairman Scott. Thank you for holding this hearing.

At the outset, I would like to state that, as you mentioned Mr. Chairman, you filed this legislation last night. Much of the testimony that we have gotten we have only received recently. I am a little bit disappointed because one of the experts in this area is Congressman Lungren, who could not be here today. He helped write this legislation initially, and his input would be invaluable to us.

Mr. SCOTT. Will the gentleman yield?

Mr. FORBES. Yes.

Mr. SCOTT. We will certainly have other hearings on it.

Mr. FORBES. Well, the other thing I was going to ask the Chairman is if we can make sure this record can be held open for at least a week to allow Congressman Lungren to put his comments and information in the record.

Mr. SCOTT. I would make that commitment, plus if another hearing is requested, it would certainly be granted.

Mr. FORBES. Thank you, Mr. Chairman. I appreciate your graciousness on that.

While I share my colleagues' commitment to prison reform, I was hoping that our first hearing on this subject would focus on efforts to ensure and improve rehabilitation of prisoners. Unfortunately, the focus of today's hearing I believe is misguided. Instead of addressing the real and significant needs of prisoners, we are considering changes to the Prison Litigation Reform Act which will reopen the floodgates of frivolous litigation.

We had hoped to reach some bipartisan solutions to real abuses that we know unfortunately exist in our prisons. However, instead of offering our inmates today new hope, this legislation offers them new lawyers, dollars that we could be putting toward rehabilitation or prison security. We sin like we have in so much legislation in this Congress has done already to the trial lawyers.

I want to tell all of you who are testifying today, we appreciate what you do. We appreciate you being here. We know that there are abuses in our prisons. I have talked to many of you about our concerns. But our concerns are how we roll up our sleeves and go in and change those abuses and not go back to where we were when we are flooded with litigation that we believe many times is frivolous and has a boomerang effect that instead of getting real reforms done, creates just a political pendulum that keeps swinging back and forth, and the people lost in it are the inmates because we don't ever go in there and say, "How do we really make these changes that need to be made, instead of just opening up the doors to the courts?"

The proposed legislation will cause an explosion of frivolous prisoner litigation that will clog up the courts, waste valuable legal resources, and affect the quality of justice enjoyed by law-abiding citizens. I am further concerned that the time and money spent defending these cases could be better spent providing job training, drug treatment, education and other valuable programs to prisoners to make sure they can become productive members of society.

In 1996, Congress took appropriate steps to limit frivolous prisoner litigation by passing the Prison Litigation Reform Act, or

PLRA. The PLRA took common sense steps to reduce the number of petitions filed by inmates claiming violation of their rights. Under the PLRA, inmates are, one, required to exhaust all administrative remedies before filing a case in Federal court; two, prohibited from receiving filing fee waivers if they have a history of filing frivolous or malicious lawsuits; and three, you had to demonstrate physical injury to claim monetary awards for compensatory damages.

In this bill, each one of these common sense provisions is repealed or removed. These are not exactly modest changes, as the Chairman suggested. These provisions are removed despite the fact that evidence shows that the PLRA worked in decreasing the amount of frivolous prisoner litigation.

According to records kept by the Administrative Office of the Federal Courts, in 1995, the year before the PLRA was passed, over 41,000 cases were filed—41,000 cases—by Federal prisoners alleging violation of their civil rights. Since that high mark, the number of cases have dropped to about 24,000 cases filed per year. This marked decrease occurred because the PLRA kept the frivolous cases off the court dockets.

Let me give you some examples of those frivolous cases. One inmate claimed $1 million in damages because the ice cream he was served melted. An inmate alleged that being forced to listen to his unit manager's country and western music constituted cruel and unusual punishment. Some of you might agree with that, but it was no place to be in our courts and no reason to give attorneys' fees. Another claimed that his rights were violated because he was forced to send packages via UPS rather than U.S. mail. And perhaps the most frivolous lawsuit of them all, one inmate sued because he was served chunky instead of smooth peanut butter.

The changes called for in this bill will lead to the filing of cases just like the ones I just described. This bill is cynically aimed at pleasing important constituencies of my colleagues on the other side of the aisle, the trial lawyers. If enacted, thousands of trial lawyers will churn out frivolous case after frivolous case in the hope of securing a big payday, and that will be a payday that will come at the expense of prisoners who have legitimate claims and whose rights have actually been harmed during their incarceration.

Those legitimate claims will never be heard because they will be buried under all the paperwork generated by all the new lawsuits. But worst of all, as I mentioned earlier, all the legislation like this will have that boomerang effect that will actually keep the pendulum swinging and prevent those like me and others on this Committee who want to effectuate real change from ever being able to do that because all of us continues to be held captive by various political constituencies.

I look forward to working with Chairman Scott on finding a way to ensure that we do not return to a time when the wheels of justice can't turn because court dockets are too clogged with frivolous lawsuits.

Mr. Chairman, I yield back the balance of my time.

Mr. SCOTT. Thank you, Mr. Forbes.

We have assembled a panel of experts, both academic experts and experts whose expertise has been gained through personal ex-

perience. Our first witness on this panel will be Margo Schlanger, professor of law at Washington University in St. Louis. She is testifying not only for herself, but also on behalf of the American Bar Association, where she is currently the reporter for the Task Force on Standards Relating to the Legal Status of Prisoners. She also serves on the Commission on Safety and Abuse in America's Prisons and is a member of the expert Advisory Committee on Data Collection and Confidential Reporting for the Prison Rape Elimination Commission.

Our next witness will be David Keene, who is a distinguished attorney and chairman of the American Conservative Union. However, the experience that brings him to testify today is the he is the father of a young boy who is serving time in Federal prison. He has seen the impact of the PLRA as it operates in the real world, and we are grateful that he is willing to come and share his personal experiences today.

The next witness will be Mr. Pat Nolan, vice president of the Prison Fellowship. He is also an attorney and was a member of the California State Assembly for 15 years, four of those as the Assembly Republican Leader. During his time in office, he was prosecuted based on a campaign contribution and spent 29 months in Federal custody. There, he became very familiar with the aspects of the PLRA, and again we are fortunate that he is willing to share his personal experiences with us.

Our fourth witness will be Garrett Cunningham, a former prisoner in the Texas Department of Criminal Justice. In 2000, he was housed at the Luther Unit in Navasota, Texas. While working in the prison laundry, he was sexually harassed by a supervisor. When he told people at the prison about what was happening, he was given no assistance. After the situation, he was terrified to report the crime, so he did not comply with the PLRA's technical exhaustion requirement, which left him no remedies to sue the prison or its employees.

Our last witness is Ryan Bounds, deputy assistant attorney general for the Office of Legal Policy. He assists in the development and coordination of policies relating to civil justice reform, immigration, drugs and other subjects. Before joining the Department of Justice, he was a clerk at the U.S. Court of Appeals in the Ninth Circuit and practiced as a litigation associate at a law firm in Portland, Oregon. He is a graduate of Stanford University and Yale Law School.

Each of our witnesses' written statements will be entered into the record in its entirety. I would ask each of the witnesses to summarize his or her testimony in 5 minutes or less. To help you stay within that time period, there is a lighting device at the table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When it turns red, we would ask you to complete your testimony as quickly as possible.

Professor?

TESTIMONY OF MARGO SCHLANGER, PROFESSOR OF LAW, WASHINGTON UNIVERSITY IN ST. LOUIS, ON BEHALF OF THE AMERICAN BAR ASSOCIATION, WASHINGTON, DC

Ms. SCHLANGER. Thank you for this invitation to testify today about the urgent problems created by the Prison Litigation Reform Act. I am Margo Schlanger, professor of law at Washington University in St. Louis. I appear today both to share my own expertise in this area and also as the representative of the American Bar Association.

I want to mention as well two groups whose recommendations in this are very helpful. Both have submitted written statements: the Vera Institute's Commission on Safety and Abuse in America's Prisons and the SAVE Coalition that the Chairman already mentioned.

I have been working with the PLRA since 1996, the year of its enactment, first as a trial attorney in the U.S. Department of Justice Civil Rights Division assisting with interpretation and implementation of the then-new statute, and then as a law professor studying and writing about its provisions and effects. Over the 10 years, the PLRA's flaws have grown ever more evident.

But before I talk about those flaws, I want to agree with some things that have already been said about the salutary effects of the PLRA, which is to say its lightening of the burdens imposed on jails and prisons by frivolous litigation. Prisoner lawsuits in Federal court are numerous and often frivolous, and they do pose real management challenges for courts and correctional authorities. The PLRA has ameliorated this problem in two different ways.

First, it has drastically shrunk the number of cases filed by about 60 percent as a rate per prisoner. And second, the screening provisions which have not been mentioned yet, under which courts dispose of legally insufficient prisoner civil rights cases, without even notifying the sued officials that they have ever been sued or requiring any response from those officials. No longer under the PLRA need prison or jail officials investigate or answer complaints that are frivolous or fail to state a claim under Federal law.

These are important provisions and these are important results, and nothing in the bill that Chairman Scott has proposed would change those. I think that is very important to notice.

In addition to filing frivolous or legally insufficient lawsuits, prisoners do file serious cases, cases about sexual abuse, about religious discrimination, about physical abuse and the like. When the PLRA was passed, its supporters emphasized over and over that they did not want to prevent inmates from raising legitimate claims, and they pledged that the PLRA didn't do that. But the PLRA has failed to live up to that pledge.

If that were not true, the dramatic decline in filings should have been accompanied by an increase in success rates in cases that were filed. There are fewer cases, but more of them would be good cases and so we would see an increase in success rates. But what we have seen instead over the past 10 years is a decline in success rates. Fewer cases settle. More cases are dismissed. Fewer cases win.

The point is that there are new obstacles to successful adjudication of even constitutional meritorious cases. This is a problem be-

cause as a Nation we are committed to constitutional regulation of governmental treatment of even those who have broken society's rules. The erection of hurdles to accountability doesn't reduce the burden of litigation. It reduces accountability. It weakens the rule of law behind bars, and that is what the PLRA has done.

So I urge the Committee's Members to support Chairman Scott's bill, the Prison Abuse Remedies Act of 2007. Let me talk in my 1 minute and 30 seconds remaining about the provisions that I think are most important. I should say also that I have been able to read through very quickly the deputy assistant attorney general's testimony. I think that it gets some of the legal environment in which this bill is placed incorrect, and I would be happy to talk about that if there are any questions.

So there seem to me to be four very important things that Chairman Scott proposes to do. The others are good as well, but four are the most important. First, the PLRA's ban on awards of compensatory damages for mental or emotional injury without physical injury is a major obstacle to compensation and remediation for constitutional violations.

It does not only apply to negligent infliction of emotional distress kinds of cases. It applies to constitutional violations—violations of religious rights, violations of all kinds, where there is no physical injury. It has been held by many courts to apply to coerced sex as well, where there is not forcible rape. Occasionally, it has even been held to apply to rape itself. So it is a huge obstacle.

Second—I am not gong to get to all four—second the PLRA's provision banning Federal lawsuits by prisoners who have failed to comply with internal grievance procedures obstructs, rather than incentivizes, constitutional oversight of conditions of confinement. It encourages prison and jail authorities to come up with ever-higher procedural hurdles through their grievance procedures to immunize themselves from subsequent suits, and that is really a problem.

Third, the application of the PLRA to juveniles is just unjustified and has a really perverse effect as well.

And finally, the provision of the PLRA that many courts have read to ban enforceable injunctive settlements unless defendants confess liability for violations of Federal law undermines both the availability and effectiveness of court oversight.

So I think my time is up, and so I had better stop. Thank you very much.

[The prepared statement of Ms. Schlanger follows:]

PREPARED STATEMENT OF MARGO SCHLANGER

AMERICAN BAR ASSOCIATION

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STATEMENT
OF
MARGO SCHLANGER
PROFESSOR OF LAW,
WASHINGTON UNIVERSITY IN ST. LOUIS

ON BEHALF OF THE
AMERICAN BAR ASSOCIATION

PRESENTED TO THE
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

AT THE HEARING ENTITLED
"Review of the Prison Litigation Reform Act: A Decade of Reform or an Increase in Prison and Abuses?"

NOVEMBER 8, 2007

Chairman Scott, Congressman Forbes, and members of the Subcommittee, thank you for the invitation to testify about the urgent problems created by the Prison Litigation Reform Act, a statute enacted in 1996. I am Margo Schlanger, Professor of Law at Washington University in St. Louis and Director of the Civil Rights Litigation Clearinghouse. I appear today both to share my own expertise in this area and as the representative of the American Bar Association (ABA) at the request of its President, William Neukom. The ABA is the world's largest voluntary professional organization, with a membership of over 400,000 lawyers judges and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world.

The PLRA has successfully ameliorated the burden imposed on prisons and jails by frivolous prisoner litigation, but it has simultaneously created major obstacles to accountability and the rule of law within our nation's growing incarcerative system. I am here to urge this Committee to lift those obstacles, while leaving in place the salutary provisions of the statute. I strongly urge the members of the Subcommittee, both personally and on behalf of the ABA, to support Chairman Scott's bill, the Prison Abuse Remedies Act of 2007, legislation that will restore balance to the PLRA.

I have been working with the PLRA since the year of its enactment—first, as a trial attorney in the U.S. Department of Justice Civil Rights Division, assisting with interpretation and implementation of the new statute, and then, as a law professor, studying and writing about its provisions and effects. I have published several articles that examine at perhaps undue length the PLRA's impact on both small and large cases brought by and on behalf of prisoners, canvassing such issues as filing and success rates, the scope of injunctive remedies, and the like.[1] Over the years, the PLRA's flaws have grown ever more evident, and as a result, I have also been working recently with several groups to advocate for statutory change. I am a member of the Vera Institute's Commission on Safety and Reform in America's Prisons, a blue ribbon panel chaired by retired Court of Appeals Judge John Gibbons and former Attorney General Nicholas de B. Katzenbach, and am also a member of the American Bar Association's Corrections Committee and the Reporter for the American Bar Association's ongoing work to update its Standards governing the Legal Treatment of Prisoners. Both the Commission and the ABA have endorsed reform of the PLRA.[2] I am submitting a copy of ABA recommendations approved by its House of Delegates in February 2007 (attached) with a request that it be made part of the hearing record.

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[1] Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003); Anne Morrison Piehl & Margo Schlanger, *Determinants of Civil Rights Filings in Federal District Court by Jail and Prison Inmates*, 1 J. EMPIRICAL LEGAL STUD. 79 (2004); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006); all available at http://schlanger.wustl.edu (follow link for "publications").

[2] *See* COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS, CONFRONTING CONFINEMENT 84-87 (2006), available at http://prisoncommission.org/report.asp; American Bar Association, Resolution 102B (2007), available at http://www.abanet.org/leadership/2007/midyear/docs/SUMMARYOFRECOMMENDATIONS/hundredtwob.doc.

Quite a few proposed reforms have surfaced in recent months. In this statement, I canvass what seem to me the five most important. First, the PLRA's ban on awards of compensatory damages for "mental or emotional injury suffered while in custody without a prior showing of physical injury" has obstructed judicial remediation of religious discrimination, coerced sex, and other constitutional violations typically unaccompanied by physical injury, undermining the regulatory regime that is supposed to prevent such abuses. Second, the PLRA's provision barring federal lawsuits by inmate plaintiffs who have failed to comply with their prisons' internal grievance procedures—no matter how onerous, futile, or dangerous such compliance might be for them—obstructs rather than incentivizes constitutional oversight of conditions of confinement. It strongly encourages prison and jail authorities to come up with ever higher procedural hurdles in order to foreclose subsequent litigation. Third, the application of the PLRA's limitations to juveniles incarcerated in juvenile institutions has rendered those institutions largely immune from judicial oversight, because so many young people are not able to follow the complex requirements imposed by the statute, and compliance by their parents or guardians on their behalf has been deemed legally insufficient. Each of these three problems disrupts accountability and enforcement of constitutional compliance. And finally, a provision of the PLRA that many have read to ban enforceable injunctive settlements unless defendants confess liability for violations of federal law undermines both the availability and effectiveness of court oversight.

Below, I discuss these issues in some depth. But first it is important to mention what I see as the primary salutary effect of the PLRA—its lightening of the burdens imposed on jails and prisons by frivolous litigation. Prisoner lawsuits in federal court are numerous and often frivolous, and pose real management challenges both for courts and for correctional authorities.[3] The PLRA has ameliorated this problem in two ways. First, it has drastically shrunk the number of cases filed: prison and jail inmates filed 26 federal cases per thousand inmates in 1995; the most current statistic, for 2005, was just 11 cases per thousand inmates, a decline of nearly 60 percent.[4] So the PLRA has been extremely effective in keeping down the number of federal lawsuits by prisoners, even as prison populations rise. Even more important than these sharply declining filing rates for understanding the decreasing burden of litigation for prison and jail officials is the statute's screening provisions,[5] which require courts to dispose of legally insufficient prisoner civil rights cases without even notifying the sued officials that they have been sued or receiving any response. No longer need prison or jail officials investigate or answer complaints that are frivolous or fail to state a claim under federal law.

But in addition to filing frivolous or legally insufficient lawsuits, prisoners do, of course, file serious cases: cases involving life-threatening deliberate indifference by authorities to prisoner health and safety; sexual assaults; religious discrimination; retaliation against those who

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[3] *See* Schlanger, *Inmate Litigation*, *supra* note 1, at 1575-1627 for full discussion.

[4] *See* U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, KEY CRIME & JUSTICE FACTS AT A GLANCE: CORRECTIONAL POPULATIONS, *available at* http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm (reporting 1.6 million inmates in American jails and prisons in 1995; by 2005, that number had increased by 38 percent, to 2.2 million); ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 132 (1997) (reporting prisoner petitions in table C-2A), *available at* http://www.uscourts.gov/judicial_business/c2ascp97.pdf.

[5] 28 U.S.C. § 1915A(a).

exercise their free speech rights; and so on. When the PLRA was passed, Senator Hatch made a point that its supporters emphasized, over and over: "[We] do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised. The legislation will, however, go far in preventing inmates from abusing the Federal judicial system."[6]

Yet "prevent[ing] inmates from raising legitimate claims" is precisely what the PLRA has done in many instances. If the PLRA were successfully "reduc[ing] the quantity and improv[ing] the quality of prisoner suits,"[7] as its supporters intended, one would expect the dramatic decline in filings to be accompanied by a concomitant increase in plaintiffs' success rates in the cases that remain. The evidence is quite the contrary. The shrunken inmate docket is less successful than before the PLRA's enactment; more cases are dismissed, and fewer settle.[8] An important explanation is that constitutionally meritorious cases are now faced with new and often insurmountable obstacles. The resulting harm is not only to the claimants in the particular cases that have been dismissed notwithstanding their constitutional merit.

As a nation, we are committed to constitutional regulation of governmental treatment of even those who have broken society's rules. And accordingly most of our prisons and jails are run by committed professionals who care about prisoner welfare and constitutional compliance. Over the past ten years, it has become apparent that a number of the PLRA's provisions cast shadows of constitutional immunity, contravening our core commitment to constitutional governance. The resulting harm is not merely to the affected prisoners but to the entire system of accountability that ensures that prison and jail officials comply with constitutional mandates. The erection of hurdles to accountability should not be seen as "reducing the burden" for correctional administrators—it should be recognized as weakening the rule of law behind bars. It has, in short, become clear that the PLRA is undermining the rule of law in America's prisons, even as those prisons have grown in their importance—both because of the increasing incarcerated population[9] and the sharpening international focus on American treatment of prisoners, both domestically and abroad. Amendment is urgently needed.

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[6] 141 Cong. Rec. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) ("The crushing burden of these frivolous suits makes it difficult for the courts to consider meritorious claims."); *see also* 141 Cong. Rec. S19,114 (daily ed. Dec. 21, 1995) (statement of Sen. Kyl) ("If we achieve a 50-percent reduction in bogus Federal prisoner claims, we will free up judicial resources for claims with merit by both prisoners and nonprisoners."), 141 Cong. Rec. S18,136 (daily ed. Dec. 7, 1995) (statement of Sen. Hatch), 141 Cong. Rec. H1480 (daily ed. Feb. 9, 1995) (statement of Rep. Canady) ("These reasonable requirements will not impede meritorious claims by inmates but will greatly discourage claims that are without merit.").

[7] *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

[8] *See* Schlanger, *Inmate Litigation*, *supra* note 1, at 1644-1664.

[9] *See* U.S. DEPT. OF JUSTICE OFFICE OF JUSTICE PROGRAMS BUREAU OF JUSTICE STATISTICS, KEY CRIME & JUSTICE FACTS AT A GLANCE: CORRECTIONAL POPULATIONS http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm (reporting 1.6 million inmates in American jails and prisons in 1995; by 2005, that number had increased by 38 percent, to 2.2 million).

1) Physical injury.

The PLRA provides that inmate plaintiffs may not recover damages for "mental or emotional injury suffered while in custody without a prior showing of physical injury."[10] Given the commitment by the Act's supporters that constitutionally meritorious suits would not be constrained by its provisions, perhaps the purpose of this provision was the limited one of foreclosing tort actions claiming negligent or intentional infliction of emotional distress unless they resulted in physical injury, which might have otherwise been available to federal prisoners under the Federal Tort Claims Act. (This kind of limitation on such tort causes of action is fairly common under state law.[11])

Notwithstanding what may have been the limited intent underlying the physical injury requirement, its impact has been much more sweeping. First, many courts have held that the provision covers all personal injury, including violations of non-physical constitutional rights.[12] Proven violations of prisoners' religious rights, speech rights, and due process rights have all been held non-compensable, and thus placed largely beyond the scope of judicial oversight. For example, in *Searles v. Van Bebber*,[13] the Tenth Circuit concluded that the physical injury requirement barred a suit by a Jewish inmate who alleged a First Amendment violation based on his prison's refusal to give him kosher food. This result is particularly difficult to understand in light of Congress's notable concern for prisoners' religious freedoms. The Religious Land Use and Institutionalized Persons Act[14] passed in 2000, states that "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means."

Moreover, although the case law is far from uniform, some courts have deemed sexual assault not to constitute a "physical injury" within the meaning of the PLRA. In *Hancock v. Payne*,[15] a number of male prisoners alleged that over several hours, a corrections officer sexually assaulted them. "Plaintiffs claim that they shared contraband with [the officer] and that he made sexual suggestions; fondled their genitalia; sexually battered them by sodomy, and committed other related assaults." The plaintiffs further complained that the officer "threatened

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[10] 42 U.S.C. § 1997e(e).

[11] *See, e.g.*, Dale Joseph Gilsinger, Annotation, *Recovery Under State Law for Negligent Infliction of Emotional Distress Under Rule of Dillon v. Legg, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968), or Refinements Thereof*, 96 A.L.R.5th 107 § 6 (2002) (citing cases from 9 states).

[12] *See, e.g.*, *Thompson v. Carter*, 284 F.3d 411, 416-17 (2d Cir. 2002) (no compensation available for violation of due process rights); *Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000) (no compensation available for violation of religious rights); *Royal v. Kautzky*, 375 F.3d 720, 722-23 (8th Cir. 2004) (no compensation available for retaliation for exercise of free speech rights); *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001) (no compensation available for violation of religious rights); *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (no compensation available for violation of constitutional privacy rights). *But see Cannell v. Lightner*, 143 F.3d 1210, 1214-15 (9th Cir. 1997) (stating that PLRA "does not preclude actions for violations of First Amendment rights.").

[13] 251 F.3d at 872, 876.

[14] 42 U.S.C. § 2000cc-1(a)(1)-(2).

[15] 2006 WL 21751 (S.D. Miss.).

Plaintiffs with lockdown or physical harm should the incident be reported." The district court granted summary judgment in part to the defendants. One of the grounds for this defense victory was the physical injury requirement. The federal district court said, "the plaintiffs do not make any claim of physical injury *beyond the bare allegation of sexual assault*." In other words, in the view of this district court, not even coerced sodomy (which was alleged) constituted physical injury. Though some other courts have decided the question differently, the *Hancock* court is not alone in reaching this conclusion.[16] As with religious rights, this outcome exists in sharp tension with Congress's recent efforts to eliminate sexual violence and coercion behind bars by passing the Prison Rape Elimination Act of 2003.[17]

Finally, in case after case, courts have held even serious physical symptoms insufficient to allow the award of damages because of the PLRA's physical injury provision.[18] In one case, a plaintiff alleged that the defendant correctional officer "punch[ed] Plaintiff repeatedly in his abdominal area, pushed Plaintiff's head down and repeatedly punched Plaintiff with his right hand in the back of his head, hit Plaintiff on his left ear, placed Plaintiff's head between his legs and grabbed Plaintiff around his waist and picked the Plaintiff up off the ground and dropped Plaintiff on his head." The plaintiff further alleged that he "sustained bruises on [his] left ear, back of [his] head and swelling to the abdominal area of his body." Nonetheless, the district court held the claim insufficient under the PLRA's physical injury provision.[19] In another, burns to the plaintiff's face were deemed insufficient, because those burns had "healed well," leaving "no lasting effect."[20]

The point is that the PLRA's ban on awards of compensatory damages for "mental or emotional injury suffered while in custody without a prior showing of physical injury" has made it far more difficult for prisoners to enforce any non-physical rights—including freedom of religion and freedom of speech—and to seek compensation for any mental rather than physical harm, no matter how intentionally, even torturously, inflicted. (This aspect of the law has, in

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[16] *See Smith v. Shady*, 2006 WL 314514 at *2 (M.D. Pa. 2006) (" ... Plaintiff's allegations in the complaint concerning Officer Shady grabbing his penis and holding it in her hand do not constitute a physical injury or mental symptoms."). *See generally* DEBORAH M. GOLDEN, THE PRISON LITIGATION REFORM ACT – A PROPOSAL FOR CLOSING THE LOOPHOLE FOR RAPISTS (June 2006) *available at* www.acslaw.org/files/Golden%20-%20Rape%20and%20PLRA%20white%20paper.pdf. *But see Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) (sexual assault constitutes physical injury within the meaning of the PLRA).

[17] 42 U.S.C. § 15602 et seq.

[18] *See Jarriett v. Wilson*, 414 F.3d 634 (6th Cir. 2005) (concluding that inmate confined for twelve hours in "strip cage" in which he could not sit down did not suffer physical injury even though he testified that he had a "bad leg" that swelled "like a grapefruit" and that caused severe pain and cramps); *Myers v. Valdez*, 2005 WL 3147869 at *2 (N.D. Tex. 2005) (concluding that alleged "pain, numbness in extremities, loss of mobility, lack of sleep, extreme tension in neck and back, extreme rash and discomfort" did not satisfy PLRA physical injury requirement); *Mitchell v. Horn*, 2005 WL 1060658 at *1 (E.D. Pa. 2005) (reported symptoms including "severe stomach aches, severe headaches, severe dehydration . . . and blurred vision," suffered by inmate confined in cell allegedly "smeared with human waste and infested with flies" did not constitute physical injury for PLRA purposes).

[19] *Borroto v. McDonald*, 2006 WL 2789152 (N.D. Fla. 2006).

[20] *Brown v. Simmons*, 2007 WL 654920 (S.D. Tex. 2007).

fact, convinced at least one district court to hold it unconstitutional[21] and others to save the provision from constitutional infirmity by reading it not to bar relief.[22]) The PLRA has left the availability of compensatory damages for the constitutional violation of coerced sex an open question. It has posed an obstacle to compensation even for physical violence, if the physical component of the injury is deemed insufficiently serious. It has thereby undermined the important norms that such infringements of prisoners' rights are unacceptable. Just as it contradicts constitutional commitments, the PLRA is simultaneously obstructing Congress's recent efforts to protect prisoners' religious liberty, as well as freedom from rape.

2) Administrative Exhaustion

The PLRA's exhaustion provision states: "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 correctional facility until such administrative remedies as are available are exhausted."[23] The provision appears harmless enough. Who could object, after all, to a regime in which corrections officials are given the first opportunity to respond to and perhaps resolve prisoners' claims?

But in many jails and prisons, administrative remedies are, unfortunately, very difficult to access. Deadlines may be very short, for example, or the number of administrative appeals required very large.[24] The requisite form may be repeatedly unavailable,[25] or the prisoner may fear retaliation for use of the grievance system (which often require that prisoners get grievance forms from, or hand them to the very officer whose conduct is the subject of their complaint).[26]

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[21] *See, e.g.*, *Siggers-El v. Barlow*, 433 F.Supp.2d 811 (E.D. Mich. 2006), holding the PLRA's physical injury provision unconstitutional "to the extent it precludes First Amendment claims such as the one presented in this case" and noting:

> The Court finds the following hypothetical, set forth in Plaintiff's brief, to be persuasive:
>
> '[I]magine a sadistic prison guard who tortures inmates by carrying out fake executions-holding an unloaded gun to a prisoner's head and pulling the trigger, or staging a mock execution in a nearby cell, with shots and screams, and a body bag being taken out (within earshot and sight of the target prisoner). The emotional harm could be catastrophic but would be non-compensable. On the other hand, if a guard intentionally pushed a prisoner without cause, and broke his finger, all emotional damages proximately caused by the incident would be permitted.'
>
> *Id.* at 816 (case settled prior to decision on appeal).

[22] *Percival v. Rowley*, 2005 WL 2572034 at *2 (W.D. Mich. 2005) ("To allow section 1997e(e) to effectively foreclose a prisoner's First Amendment action would put that section on shaky constitutional ground.").

[23] 42 U.S.C. § 1997e(a).

[24] *See* Brief for Jerome N. Frank Legal Services Organization of the Yale Law School as Amicus Curiae Supporting Respondent, *Woodford v. Ngo*, 126 S. Ct. 2378 (2006) (No. 05-416) at 6-13, 2006 WL 304573 at *6-*13 and A1-A7 for a survey of prison and jail grievance policy deadlines.

[25] *See, e.g.*, *Latham v. Pate*, 2007 WL 171792 (W.D. Mich. 2007) (dismissing suit due to tardy exhaustion in case in which inmate alleged beating; inmate maintained that he had been placed in segregation and administrative segregation immediately following assault and that "officers did not provide him with the grievance forms").

[26] *See, e.g.*, *Umstead v. McKee*, 2005 WL 1189605 (W.D. Mich. 2005) ("it is highly questionable whether threats of retaliation could in any circumstances excuse the failure to exhaust administrative remedies"); *Garcia v. Glover*, 197 Fed. Appx. 866, 867 (11th Cir. 2006) (refusing to excuse non-exhaustion in case in which inmate

Sometimes, the grievance system seems not to cover the complaint the prisoner seeks to make.[27] Or a prisoner may be unable to fill out a grievance because he is in the hospital.[28] Beginning six years after the PLRA's enactment, first some of the Courts of Appeals,[29] and finally the Supreme Court,[30] held that the PLRA forever bars even meritorious claims from court if an inmate has failed to comply with all of the many technical requirements of the prison or jail grievance system.

This means that if prisoners miss deadlines that are often less than fifteen days and in some jurisdictions as short as two to five days,[31] a judge cannot consider valid claims of sexual assault, beatings, or racial or religious discrimination. Moreover, the PLRA's exhaustion requirement has been held to grant constitutional immunity to prison officials based on understandable mistakes by lay people operating under rules that are often far from clear. Wardens and sheriffs routinely refuse to engage prisoners' grievances because those prisoners commit minor technical errors, such as using the incorrect form,[32] sending the right documentation to the wrong official,[33] failing to name a relevant official in the complaint (even if prison administrators have actual knowledge of that official's role in the incident),[34] or failing to file separate forms for each issue, even if the interpretation of a single complaint as raising two separate issues is the prison administration's.[35] Each such misstep by a prisoner bars consideration of even an otherwise meritorious civil rights action.[36]

Far from encouraging correctional officials to handle the sometimes frivolous but sometimes extremely serious complaints of inmates, the PLRA's exhaustion rule actually

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alleged that he had been beaten by five guards, despite the fact that prisoner alleged that he feared he would be "killed or shipped out" if he filed an administrative grievance).

[27] *See, e.g.*, *Marshall v. Knight*, 2006 WL 3714713 (N.D. Ind. 2006) (dismissing, for failure to exhaust, plaintiff's claim that prison officials retaliated against him in classification and disciplinary decisions, even though prison policy dictated that no grievance would be allowed to challenge classification and disciplinary decisions); *Benfield v. Rushton*, 2007 WL 30287 (D.S.C. 2007) (dismissing suit by prisoner who alleged that he was repeatedly raped by other inmates, due to untimely filing of grievance; prisoner had explained that he "didn't think rape was a grievable issue").

[28] *See, e.g.*, *Washington v. Texas Department of Criminal Justice*, 2006 WL 3245741 (S.D. Tex. 2006) (dismissing plaintiff's claim for failure to file a grievance even though he was hospitalized and medically unable to file during the time allowed by state policy).

[29] *See Pozo v. McCaughtry*, 286 F.3d 1022 (7th Cir. 2002).

[30] *Woodford v. Ngo*, 126 S. Ct. 2378 (2006).

[31] *Woodford*, 126 S. Ct. at 2402 (Stevens, J., dissenting).

[32] *See, e.g.*, *Richardson v. Spurlock*, 260 F.3d 495, 499 (5th Cir. 2001).

[33] *See, e.g.*, *Keys v. Craig*, 160 Fed.Appx. 125 (3d Cir. 2005).

[34] *See, e.g.*, *Williams v. Hollibaugh*, 2006 WL 59334, at *5-*6 (M.D. Pa. 2006).

[35] *Harper v. Laufenberg*, 2005 WL 79009, at *3 (W.D. Wis. 2005).

[36] *See* Giovanna E. Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: The Supreme Court's Recent Prison Litigation Reform Act (PLRA) Cases*, 29 CARDOZO L. REV. 291 (2007), *available at* www.cardozolawreview.com/PastIssues/29_1_shay_kalb.pdf (reporting data on how many cases have been dismissed on exhaustion grounds post-*Woodford*: "In a survey of reported cases citing *Woodford*, in the cases in which the exhaustion issue was decided, the majority were dismissed entirely for failure to exhaust. All claims raised in the complaint survived the exhaustion analysis in fewer than 15% of reported cases.").

provides an incentive to administrators in the state and federal prison systems and the over 3000 county and city jail systems to fashion ever higher procedural hurdles in their grievance processes. After all, the more onerous the grievance rules, the less likely a prison or jail, or staff members, will have to pay damages or be subjected to an injunction in a subsequent lawsuit.[37] In fact, even when prison and jail administrators *want* to resolve a complaint on its merits, the PLRA discourages them from doing so, and therefore actually undermines the very interest in self-governance Congress intended to serve.[38] Can anyone reasonably expect a governmental agency to resist this kind of incentive to avoid merits consideration of grievances? The officials in question are a varied group—elected jailers and sheriffs, appointed jail superintendents, professional wardens, politically appointed commissioners. What they all have in common is an understandable interest in avoiding adverse judgments against themselves or their colleagues.

Thus by cutting off judicial review based on an inmate's failure to comply with his prison's own internal, administrative rules—regardless of the merits of the claim—the PLRA exhaustion requirement undermines external accountability. Still more perversely, it actually undermines internal accountability, as well, by encouraging prisons to come up with high procedural hurdles, and to refuse to consider the merits of serious grievances, in order to best preserve a defense of non-exhaustion.

Moreover, courts have been extremely rigorous in their application of the exhaustion requirement, refusing the kinds of exceptions that are typically available under the exhaustion doctrine in administrative law. For example, one court recently held that "The PLRA does not excuse exhaustion for prisoners who are under imminent danger of serious physical injury, much less for those who are afraid to confront their oppressors."[39] A rule requiring administrative exhaustion, and punishing failure to cross every *t* and dot every *i* by conferring constitutional immunity for civil rights violations, is simply unsuited for the circumstances of prisons and jails, where physical harm looms so large and prisoners are so ill equipped to comply with legalistic rules.

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[37] There is evidence that prisons and jails have headed in this direction. For example, in July 2002, in *Strong v. David*, 297 F.3d 646 (7th Cir. 2002), the Seventh Circuit reversed the district court's dismissal of a case for failure to exhaust; in rejecting the defendants' argument that the plaintiff's grievances were insufficiently specific, the court noted that the Illinois prison grievance rules were silent as to the requisite level of specificity. Less than six months later, the Illinois Department of Corrections proposed new regulations that provided:

> The grievance shall contain factual details regarding each aspect of the offender's complaint including what happened, when, where, and the name of each person who is the subject of or who is otherwise involved in the complaint.

ILL. ADMIN. CODE tit. 20, § 504.810(b); *see* 26 Ill. Reg. 18065, at § 504.810(b) (Dec. 27, 2002) (proposing amendment).

[38] In fact, if an agency chooses to entertain an untimely grievance that merits examination, the agency is barred from asserting a failure-to-exhaust defense at later time. *Riccardo v. Rausch*, 375 F.3d 521, 524 (7th Cir. 2004), cert. denied, 125 S. Ct. 1589 (2005).

[39] *Broom v. Rubitschun*, 2006 WL 3344997 (W.D. Mich. 2006).

Ideally, grievance systems actually improve agency responsiveness and performance, by helping corrections officials to identify and track complaints and to resolve problems.[40] But the PLRA's grievance provision instead encourages prison and jail officials to use their grievance systems in another way—not to solve problems, but to immunize themselves from future liability. Judicial oversight of prisoners' civil rights is essential to minimize violations of those rights, but the PLRA's exhaustion provision arbitrarily places constitutional violations beyond the purview of the courts.

It would be relatively simple to achieve the legitimate goal of allowing prison and jail authorities the first chance to solve their own problems, without creating the kinds of problems the PLRA has introduced. The exhaustion provision should not be eliminated, but rather amended to require that prisoners' claims be presented in some reasonable form to corrections officials prior to adjudication, even if that presentment occurs after the prisons' grievance deadline. Filed cases could be stayed for a limited period of time to allow for administrative resolution.

3) Coverage of juveniles

The PLRA applies by its plain terms to juveniles and juvenile facilities.[41] But prisoners under eighteen were not the sources of the problems the PLRA was intended to solve. Even before the PLRA, juveniles accounted for very little prisoner litigation.[42] This dearth of litigation is not surprising. As the recent investigation into alleged sexual abuse in the Texas juvenile system reminds us, although incarcerated youth are highly vulnerable to exploitation,[43] they generally are not in a position to assert their legal rights.[44] Juvenile detainees are young, often undereducated, and have very high rates of psychiatric disorders.[45] Moreover, youth

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[40] *See* LYNN S. BRANHAM, ET AL., LIMITING THE BURDENS OF PRO SE INMATE LITIGATION: A TECHNICAL-ASSISTANCE MANUAL FOR COURTS, CORRECTIONAL OFFICIALS, AND ATTORNEYS GENERAL (American Bar Association Criminal Justice Section 1997).

[41] 18 U.S.C. § 3626(g)(5) ("[T]he term 'prison' means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law.").

[42] Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F. L. REV. 675, 681 (1998) (As of 1998, "[t]here [were] less than a dozen reported opinions directly involving challenges to conditions in juvenile detention centers.").

[43] Ralph Blumenthal, *One Account of Abuse and Fear in Texas Youth Detention*, N.Y. TIMES, March 8, 2007, at A19; Ralph Blumenthal, *Investigations Multiplying in Juvenile Abuse Scandal*, N.Y. TIMES, March 4, 2007 at 1.24. *See also* HUMAN RIGHTS WATCH & AMERICAN CIVIL LIBERTIES UNION, CUSTODY AND CONTROL: CONDITIONS OF CONFINEMENT IN NEW YORK'S JUVENILE PRISONS FOR GIRLS (September 2006), *available at* http://hrw.org/reports/2006/us0906/us0906webwcover.pdf.

[44] Staci Semrad, *Texas Ranger Tells of Prosecutor's "Lack of Interest,"* N.Y. TIMES, March 9, 2007, at A20. (A sergeant in the Texas Rangers investigating abuses at the West Texas State School in Pyote told a legislative committee that he "saw kids with fear in their eyes – kids who knew they were trapped in an institution that would never respond to their cries for help." The sergeant said he was unable to convince a local prosecutor to take action.)

[45] LOURDES M. ROSADO & RIYA S. SHAH, PROTECTING YOUTH FROM SELF-INCRIMINATION WHEN UNDERGOING SCREENING, ASSESSMENT AND TREATMENT WITHIN THE JUVENILE JUSTICE SYSTEM 5 (2007) ("[S]ome large scale studies suggest that as many as 65%-75% of the youth involved in the juvenile justice system have one or more diagnosable psychiatric disorders."), *available at* www.jlc.org/file/publications/protectingyouth.pdf.

incarcerated in juvenile facilities generally do not have access to law libraries or other sources of information about the law that might enable them to sue more often. One court has even observed, "[a]s a practical matter, juveniles between the ages of twelve and nineteen, who, on average, are three years behind their expected grade level, would not benefit in any significant respect from a law library, and the provision of such would be a foolish expenditure of funds."[46]

As with unincarcerated children, when juveniles do bring lawsuits, or otherwise seek to remedy any problems they face behind bars, it is very often their parents or other caretaking adults who take the lead. It is, after all, parents' ordinary role to try to protect their children. But the PLRA's exhaustion provision stymies such parental efforts, instead holding incarcerated youth to an impossibly high standard of self-reliance. The case of *Minix v. Pazera*[47] is a leading example of the result. In *Minix*, a young man, S.Z., and his mother, Cathy Minix, filed a civil rights suit for abuse that S.Z. endured while incarcerated as a minor in 2002 and 2003 in Indiana juvenile facilities. While in custody, S.Z. was repeatedly beaten, once with "padlock-laden socks." After one beating, he suffered a seizure, but no one helped him, and he was beaten again the next day. S.Z. was raped and witnessed another child being sexually assaulted. S.Z. was afraid to report the assaults to staff—and his fear was natural enough in light of the fact that some of the staff were involved in arranging fights between juveniles, or would even "handcuff one juvenile so other juvenile detainees could beat him."

Although S.Z. feared retaliation, Mrs. Minix made what the district court termed "heroic efforts to protect her son." She spoke with staff, and wrote to the juvenile judges. She attempted to meet with the superintendent of one of the facilities, though she was prevented from doing so by staff. She contacted the Department of Corrections Director and the Governor. Ultimately, because of her efforts, S.Z. was "unexpectedly released on order from the Governor's office."

Nonetheless, the district court dismissed the Minix family's federal claims under the PLRA's exhaustion rule because S.Z. had not himself filed a grievance in the juvenile facility. At the time, the Indiana juvenile grievance policy allowed incarcerated youths only two business days to file a grievance.

Only two months after S.Z.'s suit was dismissed, the Civil Rights Division of the United States Department of Justice concluded an investigation and confirmed that one of the Indiana facilities where S.Z. had been assaulted, the South Bend Juvenile Facility, "fails to adequately protect the juveniles in its care from harm," and violated the constitutional rights of juveniles in its custody. The federal government further concluded that the grievance system that S.Z. was faulted for not using was "dysfunctional" and "contributes to the State's failure to ensure a reasonably safe environment."[48]

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[46] *Alexander S. v. Boyd*, 876 F. Supp. 773, 790 (D.S.C. 1995). *See also* Anna Rapa, *Comment: One Brick Too Many: The Prison Litigation Reform Act as a Barrier to Legitimate Juvenile Lawsuits*, 23 T.M. COOLEY L. REV. 263, 279 (2006).

[47] 2005 WL 1799538 (N.D. Ind. 2005).

[48] Letter from Bradley J. Schlozman, Acting Assistant Attorney General, to Mitch Daniels, Governor of the State of Indiana (Sept. 9, 2005), *available at*

Incarcerated children and youths do not clog the courts with lawsuits, frivolous or otherwise. Though they are often incapable of compliance with the tight deadlines and complex requirements of internal correctional grievance systems, their lack of capacity should not immunize abusive staff from the accountability that comes with court oversight. But those under eighteen do not file many lawsuits, and are not the source of any problem the PLRA is trying to solve. And they are particularly ill equipped to deal with its limits. They should be exempted from its reach.

4) Settlement without a confession of liability

Under the PLRA not only must consent decrees be narrowly tailored to address the alleged constitutional violations, but the violation must itself be the subject of a court "finding."[49] Thus either a trial or some sort of stipulation relating to liability is necessary to settle a jail or prison case with a court-enforceable decree. Unsurprisingly, defendant prison officials are not happy to agree to such stipulations, which may even subject them to damages in suits by other claimants. There are two results, both problematic. The first is wasteful litigation when a settlement would otherwise be readily at hand; the second is settlements that are unenforceable and therefore less effective.

* * *

Once again, I thank the Committee for granting me the privilege of testifying, and urge speedy reform in this important area.

http://www.usdoj.gov/crt/split/documents/split_indiana_southbend_inv_findlet_9-9-05.pdf (quotes appear on pages 2, 3, and 7).

[49] 18 U.S.C. §§ 3626(a)(1)(A); (c)(1).

ATTACHMENT 1

102B

Approved by the ABA House of Delegates,
February 12, 2007

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to ensure that prisoners are afforded meaningful access to the judicial process to vindicate their constitutional and other legal rights and are subject to procedures applicable to the general public when bringing lawsuits.

FURTHER RESOLVED, That the American Bar Association urges Congress to repeal or amend specified provisions of the Prison Litigation Reform Act (PLRA) as follows:

1. Repeal the requirement that prisoners (including committed and detained juveniles and pretrial detainees, as well as sentenced prisoners) suffer a physical injury in order to recover for mental or emotional injuries caused by their subjection to cruel and unusual punishment or other illegal conduct;

2. Amend the requirement for exhaustion of administrative remedies to require that a prisoner who has not exhausted administrative remedies at the time a lawsuit is filed be permitted to pursue the claim through an administrative- remedy process, with the lawsuit stayed for up to 90 days pending the administrative processing of the claim;

3. Repeal the restrictions on the equitable authority of federal courts in conditions-of-confinement cases;

4. Amend the PLRA to allow prisoners who prevail on civil rights claims to recover attorney's fees on the same basis as the general public in civil rights cases;

5. Repeal the provisions extending the PLRA to juveniles confined in juvenile detention and correctional facilities; and

6. Repeal the filing fee provisions that apply only to prisoners.

FURTHER RESOLVED, That the American Bar Association urges Congress to hold hearings to determine if any other provisions of the PLRA should be repealed or modified and that other legislatures having comparable provisions do the same.

1 FURTHER RESOLVED, That the American Bar Association urges Congress to hold
2 hearings to determine what other steps the federal government may take to foster the just
3 resolution of prisoner grievances in the nation's prisons, jails, and juvenile detention and
4 correctional facilities.

Mr. SCOTT. Thank you, professor.
Mr. Keene?

TESTIMONY OF DAVID A. KEENE, CHAIRMAN, AMERICAN CONSERVATIVE UNION, ALEXANDRIA, VA

Mr. KEENE. Thank you, Mr. Chairman, and I thank the rest of you for the opportunity to appear before you this afternoon.

My name is David Keene, and as Chairman Scott indicated earlier, while I am chairman of the American Conservative Union, I am here today not in that capacity, but because as the father of a young man serving in Federal prison, I have had an opportunity to see the impact of the Prison Litigation Reform Act as it operates in the real world.

As Mr. Forbes indicated in his remarks, the PLRA was enacted for the best of reasons: to prevent abuse of the legal system by prisoners with a tendency to bring frivolous lawsuits and thereby tie up the courts and the prison system itself in time-consuming, expensive and ultimately meaningless legal controversies that have little to do with furthering either the cause of justice or improving the real-world operations of the prison system.

This hearing and the attempt by the Chairman and others to come up with fixes for the PLRA is Congress' duty as it examines the way legislation invariably has some unintended consequences, and to perfect legislation and to perfect policy in a way to eliminate as many of those consequences as possible is the ongoing responsibility of those who enact our laws.

It has been a long time since I have been to law school, but from my administrative law courses, as I remember them, I understood that if a Government agency promulgates regulations and rules by which it is supposed to operate, that it is required to follow those rules. In the prison system, that is not the case.

We talk about whether or not prisoners can in all cases meet all of the requirements set by the internal rules and regulations established by one institution or another, but the fact of the matter is that in those institutions, prisoners are constantly told that those rules don't matter and don't count; that the rules are what the guards and the institution administrators say they are from day to day, often capriciously or for the convenience of those running the institution.

By the same token, we run into a problem under this act that we find in any institution and in any Government agency, and that is when the people who oversee the operations are the same people who are being overseen, problems can always come up. This isn't a condemnation of the people within the institution. It isn't a condemnation of the guards in our prison system or the administrators of the prison system. It is a fact of human nature.

What has happened in advertently is in attempting to restrict and in attempting to eliminate frivolous lawsuits, we have adopted policies which have in fact isolated these institutions and allowed them to operate without any effective oversight. A citizen dealing with any other agency who follows the rules promulgated by that agency ultimately has recourse to the courts. But as a practical matter, this often isn't the case in the prisons.

A Federal prisoner has to meet what Professor Schlanger referred to as an ever-higher standard to try and get to the courts. This has created problems for legitimate cases. It has also created problems for almost any prisoner who has a difficulty and who has a grievance because it doesn't take long for someone incarcerated in one of our prisons to learn the lesson that the prison wants to teach them, and that is that nothing matters except what those in charge say, and that there is no real value nor any reward nor any purpose for filing grievances.

In fact, one of the problems is not only that because of the technical requirements do you never get to the end that is sought, but that retaliation is the answer and is what comes to those who do file grievances. The result of that is the lesson is learned and fewer and fewer people are even willing to complain when they have legitimate reasons for doing so.

As I indicated at the outset, my son is currently incarcerated and has run into these problems first-hand. Prisoners who cite the rules and regulations inside prisons in which they are housed are told that they don't mean a thing and learn quickly that they don't mean a thing. He ultimately had to go to court. A Federal district judge ruled that he did have the right to sue. His lawyers were not allowed to visit with him by prison administrators, and eventually the attorneys for the prison indicated that even his attorneys and the judge himself had missed a technicality and sought the case to be dismissed.

The judge did dismiss it, saying he should come back and re-file it, but said he had no choice under this act, even though there were grievous violations of his constitutional rights. That is the kind of thing that has to be protected, has to be corrected, without at the same time opening the floodgates of frivolous litigation that Mr. Forbes, for example, is so concerned about.

Thank you.

[The prepared statement of Mr. Keene follows:]

PREPARED STATEMENT OF DAVID A. KEENE

My name is David Keene and while I am Chairman of the American Conservative Union, I am here today not in that capacity but because as the father of a young man serving time in a federal prison, I have had an opportunity to see the impact of the Prison Litigation Reform Act or PLRA as it operates in the real rater than conceptual world.

The PLRA was enacted for the best of reasons . . . to prevent abuse of the legal system by prisoners with a tendency to bring frivolous lawsuits and thereby tie up the courts and the prison system itself in time consuming, expensive and ultimately meaningless legal controversies that had little to do with furthering either the cause of justice or improving the real world operations of the prison system.

It's been a long time since I attended law school, but from what I remember of the Administrative Law course to which I was subjected some decades ago, an agency of the government that promulgates rules and regulations is required to follow those rules and regulations.

This simple rule is adhered to by most if not all federal agencies, but it turns out that within the various prisons administered by the Bureau of Prisons, the regulations can be and are enforced capriciously, selectively or not at all based more on the convenience of those who are supposedly required to follow them than anything else.

If a citizen dealing with any other agency of our government followed published rules and regulations only to be told that the agency isn't itself required to abide by them has recourse to the courts. A federal prisoner does not have that right under most circumstances at least until such time as he exhausts administrative remedies which require him to complain to the very same people he alleges have

wronged him and submitted to their judgment on whether or not the actions they took or failed to take were in compliance with their own rules and regulations.

In virtually every case, their judgment is final. The result is that few prisoners file grievance for the simple reason that they know it is useless to do so and, just as importantly, because they know they are likely to face retaliatory punishment if they do.

As I indicated at the outset, my son is currently incarcerated and has run into these problems first hand. Prisoners who cite the rules and regulations inside the prison in which he is housed are told that the rules as written don't mean a thing because the rules at any given time are what the guards declare them to be and anyone who asks that they comply with written guidelines is forced to simply shut up.

When a prisoner decides to complain, he must do so on approved forms which are often "unavailable" and he quickly learns that a complaint that is not properly executed on the appropriate form will be summarily dismissed.

In one instance, my son was given what turned out to be the inappropriate form, filed it and after more than a month received notice that his complaint had been dismissed and that if he wanted to appeal the dismissal or renew the complaint he had twenty days from the date of the dismissal to do so. Unfortunately, he didn't receive this information until 28 days after the date of dismissal and was, as a consequence, told that his time for appeal had run out.

In another instance, the correspondence between him and his attorney was held and opened by prison officials though it was clearly designated as "Legal Mail" from the attorney's offices. When this was raised in court, the charge against prison officials for violating their own rules and my son's constitutional rights was dismissed because he could show no "physical damage."

This is apparently typical as was the fact that when we pressed forward seeking a remedy at law, he was roughed up by prison guards who told him they were tired of prisoners hiring lawyers when al they had to do was follow "procedures."

As he put it in a letter to me after one such incident, "these delays sprinkled throughout and the additional hurdles conspire to deprive inmates' access to an administrative remedy process . . . and that, therefore, the process is broken." He concluded by writing, "It feels like I'm playing poker in a rigged game because in here the law is never your friend. The safeguards and rules are constantly flouted by the government. If laws are openly flouted by those whose duty it is to uphold them, what good are they?"

One doesn't have to believe that prison guards or those running our prisons are either corrupt or inhumane to realize that it is a bad idea in practice to allow those whose activities are being overseen to be their own overseers.

Those we incarcerate should not come away from their incarceration with the lessons they are learning in our prisons today. They are there because they didn't follow the law and are being told by the government that those in charge of our prisons don't have to do so unless they want to and that there is nothing they or anyone else can do about it.

The PLRA was passed for legitimate reasons, but as is often the case when laws written by men and women in rooms like this are put into practice under real world circumstances, it has had unintended consequences.

Those consequences are real and they need to be fixed. I urge the members of this subcommittee to make the adjustments in the law required to alleviate those consequences so that those we incarcerate can at least rely on the rules set for them and that those who abuse them or deprive them of the limited rights they have as prisoners can be brought to account.

The SAVE Coalition in testimony here today has proposed just the sorts of changes that are needed and I hope you will give their recommendations the serious consideration they deserve.

Mr. SCOTT. Thank you.

Mr. Nolan?

TESTIMONY OF PAT NOLAN, VICE PRESIDENT, PRISON FELLOWSHIP MINISTRIES, LANSDOWN, VA

Mr. NOLAN. I am Pat Nolan. As the Chairman mentioned, I was a member of the legislature for 15 years and very strongly supported efforts to curb frivolous litigation. Prior to my service in the legislature, I was an attorney with a law firm in Los Angeles—Kinkle, Rodiger and Spriggs—and we represented the counties of

Orange, San Bernardino and Riverside, and virtually every city and special district within them. I saw the ridiculous claims brought by the vexatious litigants, and saw the frustration and the wasted resources that went into defending those.

However, also as a prisoner I saw the other side of the coin, of routine interference with my ability to practice my faith, and because of the PLRA there were significant barriers to anyone getting redress from that interference. As a member of the legislature, I just assumed that prison officials would encourage religious activities. There are so many studies that show that religious inmates are less likely to be involved in disciplinary proceedings; that their behavior on the yard is better; they do better upon returning home to the community, a greater success rate.

It was a shock to me to see that prison officials often interfered with religious practices. I have cited in written testimony some of the examples—denial of kosher meals to Jews; cancellation of Christmas mass for the women's jail in Los Angeles, saying, well, we don't have the staff to handle programming, as if mass on Christmas, the day our Savior came to earth to save us, was the same as a ping-pong tournament. To see those people trying to protect their ability to practice their faith, prevented from having access to the courts is frustrating.

We just went through a significant battle with the Bureau of Prisons on the chapel library project. I think some of you are aware of the difficulties there were with their policy. Fortunately, they have a strong leader in Director Lapin and he changed that policy. But if he hadn't, do we really want the inmates that were denied access to books such as St. Augustine's works, the City of God, or access to Rick Warren's books? Would we like to deny them access to the courts? The PLRA does that.

For holy days, it is especially a problem because of the timeliness. The exhaustion of remedies provision, and this is a case in California. A fellow said he was told on Monday that he had to work on Easter Sunday. Now, the Muslims had gotten Ramadan off, but he was forced to work on Easter Sunday. When he filed his complaint, they hadn't gotten to it to even consider it by the time Easter had come and gone. The exhaustion requirement basically bars him from getting any redress of that. And that goes not just for Christians. It goes for any of the faiths that have holy days to observe.

The second class of people that I am familiar with, I am on the Prison Rape Elimination Commission and I am also on the Commission on Safety and Abuse in America's Prisons. It is heartbreaking the stories of men and women who have been raped in prison, raped either by corrections officers or by other inmates. The PLRA ends up keeping them from getting any compensation. You will hear more about it from Garrett.

But the number of inmates that have been frustrated, not only victimized first by being raped, but secondly then denied any access to any recompense in the system is truly astounding. The physical injury requirement has been interpreted by some courts as saying oral sex is no physical injury, and even that forced rape, unless there is tearing, is not a physical injury. Now, I know that isn't

what you all intended, but it is the way the courts are interpreting it, so we need to address this.

The core of the PLRA is the elimination of frivolous litigation, and that is still there. The screening that occurs at the district court level, where literally they can round-file a frivolous case. They don't need to respond to it. They don't need to serve it on anybody. It is over. You have given them authority to do that.

That has resulted in the reduction of the number of cases, but sadly we have set the screen too fine, so we are screening out people that want to protect their ability to practice their faith, and it is screening out those that have been victimized while in the custody and care of our Government.

And so we are just saying, please address these mistakes. None of us can write anything perfect, but please address these things that were unintended, but are the consequences of this, and allow access to the court for people trying to practice their faith, and people that have been victims of rape while they are inside prison.

Thank you.

[The prepared statement of Mr. Nolan follows:]

PREPARED STATEMENT OF PAT NOLAN

Mr. Chairman and members, I am grateful for this opportunity to discuss the impact of the Prison Litigation Reform Act, now that we have had a decade of experience with it. My name is Pat Nolan. I am a Vice President of Prison Fellowship, and lead their criminal justice reform arm, Justice Fellowship. I also serve as a member of the Prison Rape Elimination Commission and the Commission on Safety and Abuse in America's Prisons.

I bring a unique background to this work. I served for 15 years as a member of the California State Assembly, four of those as the Assembly Republican Leader. I was a leader on crime issues, particularly on behalf of victims' rights. I was one of the original sponsors of the Victims' Bill of Rights (Proposition 15) and was awarded the "Victims Advocate Award" by Parents of Murdered Children. I was prosecuted for a campaign contribution I accepted, which turned out to be part of an FBI sting. I pleaded guilty to one count of racketeering, and served 29 months in federal custody.

Prior to serving in the legislature, I was an attorney with Kinkle, Rodiger and Spriggs. We represented Orange, San Bernardino and Riverside counties, as well as virtually every city and special district within them. So, I am very familiar with the burden and frustration that accompanies nuisance suits against government entities.

Congress passed the Prison Litigation Reform Act to restrict the ability of prisoners with too much time on their hands from clogging the courts with ridiculous claims. And it has largely worked well to reduce the number of vexatious prison litigants. However, in the years since the PLRA became law it has become clear that two classes of prisoners are affected by PLRA that were never intended by Congress to be prevented from accessing the courts: inmates who have been prevented from practicing their religion and victims of prison rape.

First, we would assume that prison officials, even atheists would encourage prisoners to become involved in religion. An increasing number of academic studies have demonstrated, that offenders who actively practice their faith inside prison are less likely to cause trouble, and more likely to become law-abiding citizens after their release. If you were a corrections officer at work in a prison, and six inmates were walking toward you across the yard, would it make a difference if they were coming from choir practice? You bet it would.

You don't have to be a believer to acknowledge what the scientific research has shown—religion reduces recidivism, and that costs taxpayers less and makes our communities safer.

And while many prison officials encourage religious participation, there are also many who routinely interfere with religious programs in prison. This hindrance of religion is motivated not because they are against religion. Instead, it results from a more basic instinct—lethargy. Volunteers coming into the prison causes more work for the staff. If all you care about is having less work, then you would natu-

rally discourage the volunteers from coming into the prison and you would discourage inmates from participating in religious activities. However, if you care about the safety of the public after the inmates are released, you would do all you could to encourage volunteers who can mentor inmates and help them live law-abiding lives after they return home. This is the situation that religious volunteers find: there are many prison officials who are open to our work, but there are also many others who discourage it.

For instance, in some cases prison officials have denied Bibles to inmates, refused kosher meals to orthodox inmates, and rejected requests from Muslim inmates to have their Ramadan meals after sundown. In my own case, the chaplain of the California Legislature sent me an NIV Study Bible. He complied with federal regulations in every way—the Bible was sent from the publisher, shrink-wrapped and sent through the US postal service. But it was rejected and returned with a form that said it "does not comply with BOP regulations", with no explanation of how it had not met the regulations. This happened not once, but three times! Why would the mail room prevent an inmate from having a Bible? In prison, the inmates say, "Why do they do it? Because they can."

If inmates who were denied Bibles, kosher meals or Ramadan meals after dark seek help from the courts, they would be prevented from doing so, because none of these actions by the prison officials resulted in a "physical injury", a requirement of the PLRA. Prison Fellowship believes that inmates' ability to practice their faith should not hinge on being able to show that they have sustained a physical injury. And my hunch is that Congress didn't think of this when they put that requirement in the PLRA.

When a specific religious holy day is involved, another requirement of the PLRA prevents relief in the courts: the "exhaustion" of administrative remedies. If a prisoner is prevented from attending Christmas Mass, or is forced to work on Yom Kippur, it usually only a day or two ahead of time that they find out. Even if they file the grievance immediately, the holy day has come and gone before they even get a hearing n their grievance.

When the LA County Women's Jail announced that they were canceling Christmas Mass (but allowing it for the men's jail), Sister Susanne Jabro asked the Lieutenant why women's Mass had been canceled it. He told her that most of the staff wanted the day off, and therefore they would be "short-staffed" and were canceling all inmate activities in the women's jail. The jail's actions are problematic in a couple of aspects. First, the Lieutenant equated sacred Mass with other "inmate activities" such as a ping pong tournament and Toastmasters. And to accommodate the convenience of the staff, Catholic inmates were being prevented from celebrating a holy day of obligation, a day of great joy in honor of the day God sent his Son to save us. Fortunately, when Sister Susanne appealed to Sheriff Block, he reinstated Christmas Mass immediately, and reassigned the Lieutenant. However, had Sheriff Block not intervened, the administrative process would have dragged on long past Christmas and into the New Year.

In another case a California inmate was told he had to work on Easter, even though the Muslims were allowed days off of work for Ramadan. He found out on Monday that he would have to work the next Sunday, Easter. The administrative process hadn't even addressed his complaint by the time Easter arrived. So, the inmate was forced to work, and was prevented from attending Easter services. I don't think Congress intended that result when it passed the PLRA.

Of course, there is another important reason why inmates should be free to practice their faiths. The Constitution requires it, and Congress has reinforced prisoners' religious freedom by passing the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act.

However, the PLRA has served to neuter RFRA and RLUIPA by denying access to the courts for inmates who have been prevented from practicing their faith. The physical injury and exhaustion requirements have resulted in dismissal of otherwise valid claims such as:

1. Prison officials confiscated two Bibles from an inmate. The inmate properly filed grievances complaining that the bibles were missing and in one letter to the Warden, mentioned that the officials were "bordering" on a free exercise of religion violation. When the Bibles were not returned, he filed a *pro se* suit alleging that officials had unlawfully withheld religious materials. The court dismissed the suit, finding that he had failed to exhaust administrative remedies only because his grievances did not explicitly state that the deprivation of his bibles impeded his ability to practice his religion. *Dye v. Kingston,* 2005 WL 1006292 (7th Cir. Apr. 27, 2005) (Nonprecedential Disposition) (42 U.S.C. 1997e(a)).

2. A man was denied the kosher diet required by his Jewish beliefs. After a trial, the jury awarded the man damages for the denial of his right to practice his religion. But the appellate court threw out the award because forcing a man to violate his religious beliefs does not meet the PLRA's "physical injury" requirement. *Searles v. Van Bebber,* 251 F.3d 869 (10th Cir. 2001) (42 U.S.C. 1997e(e)).
3. A Christian prisoner alleged that a prison rule prohibiting outgoing funds of more than $30 impeded him from practicing his religious belief in tithing. The court dismissed his *pro se* suit for injunctive relief because he had pursued administrative remedies, but had not submitted a specific Religious Accommodation Request Form. *Timly v. Nelson,* 2001 WL 309120 (D. Kansas Feb. 16, 2001) (42 U.S.C. 1997e(a)).
4. A Jewish inmate who had been prohibited from participating in Jewish services won his suit before a jury in the district court. The court found that nonexhaustion was excusable because prison officials had effectively prevented the inmate from pursuing the grievance process. Prison officials had repeatedly told him that special "Jewish consultants" were responsible for deciding who could participate in Jewish services and holidays, not the officials who adjudicated the grievance process. Nevertheless, the court of appeals threw out the award, finding that the inmate had failed to exhaust his administrative remedies as required by the PLRA. *Lyon v. Vande Krol,* 305 F.3d 806 (8th Cir. 2002) (42 U.S.C. 1997e(a))
5. An Orthodox Jew alleged in a *pro se* complaint that prison officials refused to allow him to attend Jewish services and celebrate Passover because he was, "not Jewish enough." He had properly filed a special religious accommodation form, which subsequently went missing from his file. The court held that he had not exhausted his administrative remedies only because he did not re-file the special form that he had correctly filed in the first place. *Wallace v. Burbury,* 305 F.Supp.2d 801 (N.D. Ohio 2003). (42 U.S.C.A. 1997e(a)).

There is another type of prisoner the PLRA has inadvertently effectively blocked from access to the courts: victims of prison rape. As I mentioned earlier, I am a member of both the Prison Rape Elimination Commission and the Commission on Safety and Abuse in America's Prisons. Both commissions heard heart-rending testimony from inmates who have been savagely raped and beaten. Most were too traumatized and terrified to report it while they were in prison.

If their assailant were a correctional officer, they were at risk of retaliation. If they were attacked by another inmate, their life would be at risk for being a "snitch." Yet, the PLRA prevents them from going to court unless they have exhausted their administrative remedies. In most prisons, that means reporting the rape within 15 days; in some, it's as few as two days. Despite the physical and mental trauma of being raped, the inmate must file a report in a very narrow window of time.

The Prison Rape Elimination Commission recently heard testimony that children in the custody of the Texas Youth Commission (TYC) were repeatedly raped and molested by high TYC officials. How did they get away with it? One of the officials had a key to the complaint box and simply threw away complaints that incriminated him and his friends. The children had no chance to "exhaust" their administrative remedies because their rapist was the administrative remedy. Under the PLRA, these children would have no recourse in federal courts.

Through my work on the commissions, I have met many victims of prison rape. I'd like to tell you a little about them so you can understand how the PLRA has victimized them a second time. Keith was a securities dealer, Marilyn owned a car-repair shop with her husband, TJ was in high school, and Garrett and Hope were college students. Keith and TJ were violently raped by fellow prisoners. Marilyn, Hope and Garrett were violently raped by correctional officers. Yet, federal law prevents them from filing suit to be compensated for the trauma they endured. Why? Because they were in prison when they were raped, and they ran didn't meet either or both the physical injury or the exhaustion prerequisite.

Keith testified to the Prison Rape Elimination Commission about the practical reasons that the exhaustion requirement of the PLRA effectively barred him from court. Keith had informed his counselor that he felt threatened by another inmate. Incredibly, the counselor placed that inmate in Keith's cell, and Keith was beaten and raped by the inmate, as he had predicted. Keith told the commission why he hadn't filed a grievance:

". . . in many institutions that informal complaint is going to go to the individual you're complaining of, whether it be—in my case it was the counselor who moved the

assailant into my cubicle, knowing that I was already reporting that I felt threatened by him. But, that's the procedure that allows you to be able to even go into court for civil action.

The Prison Litigation Reform Act requires you to have exhausted your administrative remedies, which that informal complaint by policy becomes the first step. I'm not going to go to a person that I've already been threatened by to hand him an informal complaint and say, you know, I'm about to start a process against you and you're the person who's supposed to protect me now as I go through this process. It is not going to happen."

Marilyn was brutally raped at the hands of prison guard. Afterward he taunted her, "Don't even think of telling, because it's your word against mine, and you will lose." The authorities simply sloughed off her claims at the time. But Marilyn had hidden her sweatpants—with DNA evidence of the officer's attack—and took them to the FBI after her release. Even then, for three years nothing happened. Finally the case went to trial, and a jury convicted the officer of several counts of sexual assault. He is now in prison. The justice system cannot wipe away the degradation and abuse Marilyn suffered, but it at last held the contemptible guard accountable. However, the state of Texas refuses to pay for Marilyn's medical and mental health treatment, and the PLRA prevents her from going to federal court to seek justice because she didn't exhaust her remedies.

Then, we come to the requirement of physical injury. As incredible as it seems, some courts have held that forced oral sex does not meet the physical injury requirement of the PLRA, and other courts have held that sexual activity without tearing is not a physical injury. These applications of the PLRA are within the plain meaning of the statute, but they clearly deny justice to these prisoners.

I have given you just a few examples of where the PLRA has denied justice to victims of prison rape and inmates denied their religious practices. Congress never intended that such inmates be barred from court. The reforms suggested by Congressman Scott address these horrible injustices while leaving intact the screening provision of PLRA, which allows the courts to dismiss frivolous cases before the case is served on defendants or entered into the docket. The Scott amendments to PLRA will allow the to dispense with the chunky peanut butter cases without also barring the serious cases of religious interference and prison rape.

When the opponents of these reforms offer up the old chestnuts about peanut butter and cold food, please remember the children in Texas, the Christian, Jewish and Muslim inmates denied access to practice their faith, and Marilyn, Garrett, Keith, TJ, Hope and thousands of others raped in prison and denied the ability to practice their faith. The least Congress can do is give them access to justice. Thank you.

Mr. SCOTT. Thank you.

We have a vote coming up. I think, Mr. Cunningham, we can receive your testimony, and then we will have to break for a vote. We have one 15-minute vote and two subsequent votes after that, so it may be 20 minutes before we can get back. So Mr. Cunningham, we will hear from you.

TESTIMONY OF GARRETT CUNNINGHAM, FORMER PRISONER IN THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, LUTHER UNIT, NAVASOTA, TX

Mr. CUNNINGHAM. Good morning, ladies and gentlemen. I would like to thank Chairman Scott and Representative Forbes for holding this hearing about the harmful impact of the Prison Litigation Reform Act.

My name is Garrett Cunningham. As a former prisoner within the Texas Department of Criminal Justice and a victim of prison violence and abuse, I have first-hand experience with the harmful effects of the PLRA. In 2000, I was housed at the Luther Unit in Navasota, Texas. While at the Luther Unit, I worked in the prison laundry under the supervision of Corrections Officer Michael Cheney.

After just a few weeks of working with Officer Cheney, he began to touch me in a sexual manner during pat searches. At first, I thought it was an accident, but as it continued every day, I soon realized his inappropriate touching was intentional. He also stared at me when I showered and made sexual comments.

I was afraid to tell anyone about my problems with Officer Cheney, but in March, 2000 I finally went to the unit psychologist and told him about the touching and crude comments. He asked me if I thought it was an accident, and I told him that it could not be because it happened all the time. He advised me to stay away from Officer Cheney. The prison psychologist's advice did nothing to prevent the continuing sexual harassment, so a month later I decided to go to the prison administration for help.

I approached the assistant warden and the second-in-command officer and told him about Cheney's sexual comments and sexual touching during pat searches. They told me that I was exaggerating and Cheney was just doing his job. I eventually confronted Cheney and told him to stop touching me. He only got angry and continued to harass me. I tried again to get help from prison administrators, but I was told to keep my mouth shut.

Officer Cheney eventually raped me in September 2000. On that day, I had just finished my job at the prison's laundry and began walking to the back of the room in order to take a shower. Suddenly, Cheney shoved me, knocking me off-balance. I screamed and struggled to get him off me, but he was too big. Officer Cheney weighed about 300 pounds. I am 5'6" and weigh about 145 pounds. While I struggled, Cheney handcuffed both my hands. He then pulled down my boxers and forcibly penetrated me.

When I screamed from the terrible pain, Cheney told me to shut up. I tried to get away, but I could barely move under his weight. After it was over, I was dazed. He took me to the showers in handcuffs, turned the water on, put me under it. I was crying in the shower and I saw blood running down my legs.

When he took the handcuffs off me, he threatened me. He said if I ever reported him, he would have other officers write false assault cases against me, and I would be forced to serve my entire sentence or be shipped to a rougher unit where I would be raped all the time by prison gang members. He also warned me not to say anything to the officials I had complained to before because they were his friends and they would always help him out.

At first, I didn't dare tell anyone about the rape. Under the PLRA, however, I would have had to file a first prison grievance within 15 days of being raped. I had no idea at that point that I was even required to file a grievance and wanted to bring a lawsuit. Even if I had known, during those first 15 days my only thoughts were about suicide and how to get myself into a safe place like protective custody so I would not be raped again.

In October of 2000, I was so afraid of being raped again that I told the unit psychologist that Cheney had raped me. He moved me to another job with a different supervisor and told me that if anyone asked why my job was changed, I should say I wanted a change of scenery. A few days later, I was given a new position in the laundry right next door to where Cheney worked. I continued

to see him regularly, and he continued to touch me in appropriately.

I wrote the internal affairs department two times about Cheney's inappropriate touching. They never addressed my concerns and failed to take precautions to protect me. I was too scared to file a written complaint against Cheney because I feared retaliation from prison officials. Instead, I requested a private meeting with an internal affairs investigator. Internal affairs failed to take my concerns seriously until I contacted the ACLU, and even then Cheney was never punished for assaulting me.

Officer Cheney went on to sexually harass and assault other prisoners. A year later, Nathan Essery began working under Cheney's supervision in the same laundry where I had previously been assigned. On several occasions, Nathan was forced to perform sexual acts on Cheney.

Fortunately for Nathan, he was able to collect Cheney's semen during two of the attacks and the DNA positively linked the samples to Cheney. Cheney finally resigned from the Luther Unit in January of 2002 when he was indicted for his crimes against Nathan Essery. He was later convicted of inappropriate contact with an incarcerated person, but he was never required to serve any time.

For me, I found no justice. When I was in prison, the fear of retaliation by staff or other prisoners haunted me and prevented me from reporting the rape right away. My fear led to suicide just to escape the pain of my situation, because my previous complaints to prison officials resulted in sharp rebukes and the prison psychologist's assistance was limited. I felt hopeless.

I will sum it up. My time is up. My hope is that Congress will acknowledge the realities of prison life, which makes exhausting administrative remedies under the PLRA impossible at times. It is time to fix the PLRA so that prisoners can bring their constitutional claims to Federal court. Chairman Scott's bill, which he just introduced, would do that, and I support it.

I thank you for your time and attention and look forward to your questions.

[The prepared statement of Mr. Cunningham follows:]

PREPARED STATEMENT OF GARRETT CUNNINGHAM

Testimony of Garrett Cunningham about the Prison Litigation Reform Act before the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security
November 8, 2007

Good afternoon ladies and gentlemen: I would like to thank Chairman Scott and Representative Forbes for holding this hearing about the harmful impact of the Prison Litigation Reform Act. My name is Garrett Cunningham, and as a former prisoner within the Texas Department of Criminal Justice, and a victim of prison violence and abuse, I have firsthand experience with the harmful effects of the PLRA.

In 2000, I was housed at the Luther Unit in Navasota, Texas. While at the Luther Unit, I worked in the prison's laundry under the supervision of corrections officer Michael Chaney. After just a few weeks of working with Officer Chaney, he began to touch me in a sexual manner during pat searches. At first, I thought it was an accident, but as it continued every day I soon realized his inappropriate touching was intentional. He also stared at me when I showered and made sexual comments.

I was afraid to tell anyone about my problems with Officer Chaney, but in March 2000, I finally went to the unit's psychologist and told him about the touching and crude comments. He asked me if I thought it was an accident and I told him that it could not be because it happened all the time. He advised me to stay away from Officer Chaney.

The prison psychologist's advice did nothing to prevent the continuing sexual harassment, so a month later I decided to go to the prison's administration for help. I approached the assistant warden and his second-in-command officer and told them about Chaney's sexual comments and sexual touching during pat searches. They told me that I was exaggerating and that Chaney was just doing his job.

I eventually confronted Chaney and told him to stop touching me. He only got angry and continued to harass me. I tried again to get help from prison administrators but I was told to keep my mouth shut.

Officer Chaney eventually raped me in September 2000. On that day, I had just finished my job at the prison's laundry and began walking to the back of the room in order to take a shower. Suddenly, Chaney shoved me, knocking me off balance. I screamed and struggled to get him off me, but he was too big. Officer Chaney weighed about 300 pounds. I am 5 feet 6 inches tall and weigh 145 pounds.

While I struggled, Chaney handcuffed both my hands. He then pulled down my boxers and forcefully penetrated me. When I screamed from the terrible pain, Chaney told me to shut up. I tried to get away, but I could barely move under his weight. After it was over, I was dazed. He took me to the showers in handcuffs, turned on the water and put me under it. I was crying under the shower and I saw blood running down my legs.

When he took the handcuffs off me, he threatened me. He said if I ever reported him he would have other officers write false assault cases against me and I would be forced to serve my entire sentence, or be shipped to a rougher unit where I would be raped all the time by prison gang members. He also warned me not to say anything to the officials I had complained to before, because they were his friends and they would always help him out.

At first, I didn't dare tell anyone about the rape. Under the PLRA, however, I would have had to file a first prison grievance within 15 days of being raped. I had no idea, at the point, that I was even required to file a grievance in order to bring a lawsuit. Even if I had known, during those first

15 days, my only thoughts were about suicide and about how to get myself into a safe place, like protective custody, so I would not be raped again.

But, in October 2000, I was so afraid of being raped again that I told the unit's psychologist that Chaney had raped me. He moved me to
another job with a different supervisor and told me that if anyone asked why my job was changed, I should say that I wanted "a change of scenery." A few days later, I was given a new position in the laundry, next door to where Chaney worked. I continued to see him regularly and he continued to touch me inappropriately.

I wrote the Internal Affairs Department two times about Chaney's inappropriate touching. They never addressed my concerns and failed to take precautions to protect me. I was too scared to file a written complaint against Chaney because I feared retaliation from prison officials. Instead, I requested a private meeting with an Internal Affairs investigator. Internal Affairs failed to take my concerns seriously until I contacted the ACLU and even then, Chaney was never punished for assaulting me.

Officer Chaney went on to sexually harass and assault other prisoners. One year later, Nathan Essary began working under Chaney's supervision in the same laundry where I had previously been assigned. On several occasions, Nathan was forced to perform sex acts on Chaney. Fortunately for Nathan, he was able to collect Chaney's semen during two of the attacks and DNA testing positively linked the samples to Chaney. Chaney finally resigned from the Luther Unit in January 2002 when he was indicted for his crimes against Nathan Essary. He was later convicted of inappropriate contact with an incarcerated person, but was never required to serve any time.

For me, I have found no justice. While I was in prison, the fear of retaliation by staff or other prisoners haunted me and prevented me from reporting the rape right away. My fear led me to attempt suicide just to escape the pain of my situation. Because my previous complaints to prison officials resulted in sharp rebukes, and the prison psychologist's assistance was limited, I felt hopeless. I believe that filing grievances against Chaney would have led to
retaliation from staff. They could write disciplinary cases to keep me in prison for years beyond my expected release date. They could ship me to a rougher unit where I would be guaranteed to face additional abuse. Because I didn't file a grievance with the friends of Officer Chaney within 15 days of being raped by him, I was forever barred from filing a lawsuit about it in federal court.

Many men and women in prison experience sexual abuse at the hands of officers and other prisoners but their pleas for help go unanswered by administrators and staff. Prisoners
who file a complaint encounter a complicated grievance system that few prisoners can navigate, but you are shut out of court forever if you cannot figure out how to get your grievance properly filed within a few days of the rape. Because I was transferred several times to different units, when I did file grievances, the responses would not come to my new unit before the deadline passed to appeal them. Furthermore, victims of rape are usually too upset to figure out
what they have to do to file a lawsuit; they are not thinking about lawsuits, they are thinking about how to get protection, since prison officials do not want to listen to them. These factors result in very low rates of filing such lawsuits, and therefore, abuse continues.

Victims of rape and abuse in prisons should not be stopped from filing lawsuits in federal court if they do not "exhaust their administrative remedies," under the PLRA. Making victims of rape and abuse report their abusers to prison officials often puts prisoners in more danger and results in a prisoners silence.

My hope is that Congress will acknowledge the realities of the prison life, which makes "exhausting administrative remedies" under the PLRA impossible at times. It is time to fix the PLRA so that prisoners can bring their constitutional claims to the federal court.

I thank you for your time and attention and look forward to your questions.

Mr. SCOTT. Thank you.

We just have a few minutes to get to the floor, so we will come back as soon as we can, but will probably be at least 10 or 15 minutes.

[Recess.]

Mr. SCOTT. The Subcommittee will come to order.

Mr. Bounds?

TESTIMONY OF RYAN W. BOUNDS, DEPUTY ASSISTANT ATTORNEY GENERAL AND CHIEF OF STAFF, OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. BOUNDS. Thank you, Mr. Chairman, Mr. Ranking Member, and Members of the Subcommittee for including the department in this hearing on proposals to address denials of prisoners' constitutional and Federal rights. This is a critical subject and the Administration and the Department of Justice are dedicated to working with the Congress on these and other proposals.

I want to note at the outset that the Department of Justice obviously comes at this issue in particular, prison litigation, from both sides because not only do we defend cases that are brought against the Bureau of Prisons, which are under the Department of Justice, but also the Civil Rights Division seeks to vindicate the Federal and constitutional rights of prisoners both in state prisons as well as in other institutions through the Civil Rights Division. So the Department of Justice takes this issue very seriously. It is obviously critical to our mission, and I appreciate being allowed to testify before the Committee today.

I also want to say at the outset that we just reviewed recently a draft text of the Prison Abuse Remedies Act, which is the formal subject of this particular hearing. We haven't had a chance yet to review it in detail. The department is looking forward to doing so, however, but hasn't taken a position on the bill. That said, we look forward to reviewing the bill and we look forward to working with the Subcommittee on that proposal and other proposals as they come before the Subcommittee.

The Chairman and the Ranking minority Member and several members of this panel have fairly characterized the motivation to reduce the filing of frivolous lawsuits that motivated the enactment of the Prison Litigation Reform Act in 1996. I won't rehearse the particular characterization of the provisions of the act that work to reduce the filing of frivolous claims here.

I did want to take just a moment, however, to reflect on the ways that the act works to advance the cause of expediting the effective remediation of meritorious claims that are brought by prisoners. For instance, it is not just the case of the exhaustion requirement works to screen out claims, it also works to make sure that prisoners, to the extent that they are able, bring their claims to the attention of the proper prison authorities so that those prison authorities who are on the frontlines can effectively remedy the violations that are afoot in their facilities.

If it works, it is the most expeditious way to address denials of rights that prisoners are experiencing in facilities. So that exhaustion requirement does bear an important role in ensuring in the first instance that prisoners' rights are restored to them.

The other aspect of the exhaustion requirement that is important for ultimately vindicating the rights of prisoners in both state and Federal institutions is that it narrows the dispute to a more readily adjudicable issue and allows the creation of a more confident record for the ultimate adjudication of the case if it is filed and proceeds to trial. So the exhaustion requirement does screen out cases, but it also facilitates the adjudication of meritorious claims that may get to the courts, or the more ready resolution of claims by the prison officials themselves.

Another provision of the act that enhances the resolution of meritorious claims is the frequent filer provision that bars the filing of lawsuits in Federal courts by prisoners without paying the filing fees if they have already filed three nonmeritorious claims that have been dismissed from the courts, either because they are frivolous or malicious or fail to state a claim. That provision allows the courts to focus on cases that are brought by people who do not have a history of being overly litigious and bringing nonmeritorious claims in the courts.

As I am sure that many Members of the Committee and many people in this room can imagine, some people are just more prone to filling lawsuits than others, and oftentimes those sorts of people may bring less meritorious cases on average than the typical filer. So to the extent that this provision allows those people to proceed with their meritorious claims, it requires them to pay their fees up front, you will deter unnecessary litigation or at least unjustified litigation and allow the courts to focus on the more meritorious litigation.

Another provision that I wanted to highlight are the deadlines for reconsidering and the tailoring requirements that apply to consent decrees and other prospective litigation that the courts impose as a result of civil rights litigation on behalf of prisoners. First, it is important to note that the Civil Rights Division, which brings a lot of cases for prospective relief on behalf of state and local inmates, believes that this provision does not meaningfully deter the effective relief that the department often seeks not only through consent decrees, but also through settlements and memoranda of understanding.

But also it is important to note that these deadlines and the tailoring requirements that apply to prospective relief deter the courts from continuing consent decrees long past the effective remediation of a violation of a Federal right and allows prison officials to know there is an end game, the opportunity to get out from under an onerous consent decree by actually remedying the violation that was the subject of the decree.

So it restores the positive incentives to actually come into compliance with the constitutional obligations of the administration of the facility, and as a result expedites the effective redress of the prisoner's claims.

Overall, reducing nonmeritorious claims through these and other mechanisms allow courts to focus on the well-founded claims that prisoners no doubt have and that is the objective of the bill. I would like to close with an observation that the chief justice made just earlier this year in a case that was interpreting the Prison Litigation Reform Act. He said, quite rightly I think, "The chal-

lenge lies in ensuring that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit."

With that, I will conclude. Thank you very much.

[The prepared statement of Mr. Bounds follows:]

PREPARED STATEMENT OF RYAN W. BOUNDS

Department of Justice

STATEMENT

OF

RYAN W. BOUNDS

DEPUTY ASSISTANT ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

"REVIEW OF THE PRISON LITIGATION REFORM ACT:
A DECADE OF REFORM OR AN INCREASE IN PRISON ABUSES?"

PRESENTED ON

NOVEMBER 8, 2007

Mr. Chairman and Members of the Subcommittee:

Thank you for giving me the opportunity to appear before you today to discuss the current operation of the Prison Litigation Reform Act and the proposed Prison Abuse Remedies Act. The Department recently obtained a copy of the text of the proposed Prison Abuse Remedies Act and has not yet had an opportunity to review it. As a result, I will not be able to address any specific proposals or provisions in that bill at this time.

The Prison Litigation Reform Act, which Congress enacted on a bipartisan basis and with the support of the Clinton Administration in 1996, represents an important accomplishment. All of the provisions of that law were designed to establish a balance between the rights of prisoners to seek effective judicial redress for constitutional violations arising from conditions of their confinement and society's interest in decreasing the quantity of meritless lawsuits purportedly premised on those rights.

The law has worked to accomplish this goal. In 1994, about 25% of the civil cases filed in federal court were prisoner suits. That is, the total number of lawsuits that were filed by the approximately 1.5 million prisoners in state and federal facilities amounted to more than a third as many cases as were filed that year by the remaining 300,000,000 Americans—along with corporations and other private institutions—combined. The overwhelming majority of these cases were dismissed for lack of merit, but not without consuming an inordinate amount of judicial and administrative resources and inevitably delaying the resolution of legitimate civil suits.

Prisoners, who did not contend with the common deterrents against litigation that ordinary Americans faced, "often brought [cases] for purposes of harassment or

recreation."[1] This state of affairs benefited no one: It did not help rehabilitate prisoners, rarely resulted in uncovering actual constitutional violations, distracted prison officials from the efficient operation of facilities, and delayed justice for other civil litigants.

In addition, at the time that the PLRA was enacted, federal litigation sometimes produced open-ended consent decrees that would lead the courts to exercise significant and long-term administrative operational control over prison facilities. Therefore, Congress, with the active support of the Clinton Administration, supported the PLRA's intent "to place limits on judicial oversight of prisons through the establishment of specific statutory standards for the entry and maintenance of judicial relief in prison conditions cases."[2]

The PLRA contains a number of provisions geared to balance prisoner rights and effective administration of the nation's prisons and courts. For instance, to eliminate frivolous claims based on mere offended sensibilities, the legislation requires prisoners who seek compensation for mental or emotional injury to demonstrate an accompanying physical injury as well. Such evidence is normally required under well-settled principles of common law as well as for civil rights claims brought outside the context of prisoner suits. It is important to bear in mind that this requirement does not prevent prisoners from seeking judicial recourse when they suffer constitutional injuries without physical harm.[3] Such injuries may not be physical, but they are serious, and the PLRA permits recovery for them.

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[1] Testimony of Associate Attorney General John Schmidt, "Overhauling Our Nation's Prisons." Senate Judiciary Committee, July 27, 1995 at 6.
[2] Testimony of Associate Attorney General Schmidt, "Implementation of the Prison Litigation Reform Act," Senate Judiciary Committee, Sept. 25, 1996 at 3.
[3] *See, e.g., Hughes v. Lott*, 350 F.3d 1157, 1162 (11th Cir. 2003)(prisoners can recover nominal damages under PLRA for a constitutional injury absent a physical injury); *Calhoun v. DeTella*, 319 F.3d 936, 941 (7th Cir. 2003)(same); *Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002)(prisoner can recover

Similarly, Congress imposed a requirement in the PLRA that prisoners exhaust administrative remedies before filing suit. This is one of the most important provisions of the Act, and it was designed to advance several objectives. As the Supreme Court has ruled, PLRA's exhaustion requirement "gives prisoners an effective incentive to make full use of the prison grievance process and accordingly provides prisons with a fair opportunity to correct their own errors."[4] The Court has noted that the exhaustion requirement was enacted "to reduce the quantity and improve the quality of prisoner suits. . . . [T]he internal review might filter out some frivolous claims. And for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy."[5] The last point reflects the fact that the exhaustion requirement is not designed to impair inmates' ability to succeed in court but rather to improve the quality of inmate complaints that eventually make their way to court and thus to facilitate the likelihood that prisoners with meritorious claims will prevail.

The existing administrative process is a legitimate avenue for prisoners to redress grievances in a timely manner. Prisoners need not fear retaliation from prison staff for filing grievances.

The governing Bureau of Prisons regulations provide confidentiality to the nearly 200,000 inmates in the federal prison system who choose to avail themselves of the process.[6]

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compensatory damages for constitutional non-physical injuries). Courts have also allowed prisoner lawsuits under civil rights laws that do not require physical injury. *See, e.g., Jackson v. District of Columbia*, 254 F.3d 262, 266 (D.C. Cir. 2001)(RFRA); *DeHart v. Horn*, 390 F.3d 262, 272 (3d Cir. 2004)(RLUIPA).

[4] *Woodford v. Ngo*, 126 S. Ct. 2378, 2387 (2006).

[5] *Porter v. Nussle*, 534 U.S. 516, 524-35 (2002).

[6] *See* 28 C.F.R. Part 542.

Congress also sought to reduce frivolous prisoner suits by ensuring that prisoners begin to consider common economic disincentives to bringing litigation. The absence of those disincentives significantly fueled the large number of frivolous prisoner cases that were brought before passage of the PLRA. Most civil litigants pay a portion of the costs of the court's adjudication of their case through filing fees. Before the PLRA was enacted, however, inmates were routinely granted *in forma pauperis* status and were able to file numerous cases at no cost whatsoever. The PLRA ended this practice and required inmates to pay filing fees in the federal courts, just as other plaintiffs must. Recognizing that inmates often have limited financial means, the PLRA balances this requirement by allowing inmates to pay their filing fees over time, a privilege not afforded to other plaintiffs in the federal courts.

Moreover, the PLRA provides that prisoners who egregiously abuse their access to the federal courts by filing three cases that are dismissed as malicious or frivolous or for failing to state a claim cannot ordinarily file additional cases without paying their filing fees in full. Obviously, this provision discourages the filing of frivolous lawsuits. Equally obvious is the fact that removing this barrier for frequent filers will generate *more* frivolous claims. Under current law, prisoners face the same sanctions as non-prisoner civil litigants who may be prohibited from filing if a court determines that a litigant has filed an excessive number of non-meritorious lawsuits. Again, however, balance is maintained under present law.

Despite this provision, prisoners can file additional cases if they pay the filing fee, and they can even file without prepayment of the entire fee if they seek remediation for a legal violation that poses an imminent danger.

In fact, the Supreme Court of the United States has characterized the three-strikes provision as the most successful part of the PLRA in reducing frivolous lawsuits.[7] Despite a reduction in prisoner lawsuits from 41,679 in 1995 (before enactment) to 25,504 in 2000 (after enactment), "prisoner civil rights and prison conditions cases still account for an outsized share of filings: From 2000 through 2005, such cases represented between 8.3% and 9.8% of the new filings in the federal district courts, or an average of about one new prisoner case every other week for each of the nearly 1000 active and senior district judges across the country."[8] The fact that thousands of prisoner cases continue to be brought each year demonstrates that the federal courthouses are still wide open to prisoner lawsuits.

These thousands of lawsuits are brought notwithstanding the caps on attorneys' fees associated with such cases. Some of these suits are brought by attorneys *pro bono* or funded by charitable organizations. It is true that the 150% cap on fees means that, in cases in which prisoners recover $1 in damages, their attorneys recover only $1.50 from the defendant. Few if any litigants in normal circumstances would actually file a lawsuit where the damages suffered were worth only $1, however, and it is appropriate to ask what the societal benefit from such a suit would be. Further, it is an open question why compensation for attorneys who bring such suits should be raised, when such a reform would serve only to increase the volume of such litigation. Preserving the opportunity for the filing of meritorious lawsuits has no obvious relation to the volume of lawsuits for nominal damages.

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[7] *Woodford v. Ngo*, 126 S. Ct. at 2388 n.4.
[8] *Id.*and *id.* at 2400 (Stevens, J., dissenting).

There is a more subtle means by which the PLRA increases the likelihood that judicial relief will be provided in prisoner cases that actually have merit. When 25% of a court's civil docket consists of claims brought by prisoners who have relatively large amounts of free time but have not exhausted administrative remedies, the predictable result is the one that obtained before 1996: large numbers of lawsuits—well-founded and meritless alike—reviewed by a weary and increasingly unenthusiastic judiciary. In such circumstances, judicial consideration of even potentially meritorious cases will receive a jaundiced eye. Justice Robert Jackson's remark with respect to a similar category of prisoner cases more than half a century ago applies as well to prisoner civil rights cases before enactment of the PLRA: "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."[9] Legitimate prisoner lawsuits must receive the judicial solicitude that they are due. The PLRA as enacted, in part by reducing the number of frivolous cases, has strengthened the quality of the prisoner cases that proceed to consideration on the merits, and has inevitably increased the chances that valid claims will succeed.

As previously noted, the PLRA was also enacted in part "to eliminate unwarranted federal-court interference with the administration of prisons."[10] The law contains a number of provisions designed to advance this objective. For example, consent decrees establishing judicially enforceable prospective relief in prison condition cases are required to contain an admission of the violation of a federal right. It is one thing for the federal courts to maintain a supervisory role over prisons when established

[9] *Brown v. Allen*, 344 U.S. 443, 532, 537 (1953)(Jackson, J., concurring).
[10] *Woodford v.* Ngo, 126 S. Ct. at 2387 (citation omitted).

civil rights have been violated. It is another matter entirely when federal courts impose administrative requirements on prisons that are not based on any actual violation of federal law. Too often in the past, state officials would agree to consent decrees that did not purport to rest on any actual violations of federal law. This permitted those officials to deflect responsibility for prison conditions by blaming federal courts for onerous administrative rulings. The state officials who succeeded those who had entered into open-ended decrees frequently found that courts were unwilling to reopen the decrees even if no violations of federal law were occurring. Such a state of affairs is not consistent with either the appropriate judicial role or with constitutional principles of federalism.

It bears emphasizing that the PLRA does not discourage settlements in prison conditions litigation but narrows only the scope of consent decrees and other court-ordered relief. Settlements, as opposed to consent decrees, are not affected by the PLRA, and the Department has often obtained the relief that it seeks by entering into memoranda of understanding rather than consent decrees. Requiring courts to reconsider the continuing need for longstanding consent decrees and other court-ordered relief—as opposed to voluntary settlements—vindicates principles of accountability and federalism. Moreover, in the Department's experience, deadlines actually serve the goal of state compliance with consent decrees, as state officials discover that such compliance will actually lead to the termination of those decrees. In the past, whether prison officials came into compliance with consent decrees often had little or no effect on whether courts would terminate them. In those circumstances, prison officials had no incentive to comply sooner rather than later. And since enactment of the PLRA, the Department has

construed the deadlines in a way to permit consent decrees to continue while courts and prison officials take reasonable steps to meet the deadlines for reviewing the decrees. Once again, both as drafted and in practice, the PLRA works to secure prisoner rights. It also provides autonomy for prison officials to manage their facilities efficiently without judicial micromanagement unrelated to any actual violation of federal law.

Mr. Chairman, every law deserves congressional assessment of its operation and Congress's consideration of potential improvements. The PLRA, however, represents a well-considered congressional response to real problems that achieved its goals while taking care not to create new perils. Because it established a careful balance that the Department of Justice and the Supreme Court have taken care to maintain, the Act has reduced frivolous lawsuits and the unnecessary intrusion of the judiciary in the day-to-day operation of the nation's prisons while preserving the legal rights of inmates and their ability to obtain judicial redress for actual violations. The law should not be changed so as again to encourage the filing of the sort of frivolous lawsuits that the PLRA appropriately ended, with their negative effects on other civil litigants, prison officials, and judges, and their consumption of resources to no good end. It is simply not the case that all prisoner lawsuits uncover and remedy violations that would otherwise go unremedied or that more prisoner lawsuits are necessarily better than fewer. In fact, the history of such lawsuits before and after the enactment of the PLRA is just the opposite: Congress's reasonable restriction of these lawsuits has preserved the ability of legitimately harmed inmates to gain access to the courts and prevented the negative effects of frivolous cases in ever greater numbers.

Thank you, Mr. Chairman, for allowing me to appear before you today. I will be happy to answer any questions that you might have.

Mr. SCOTT. Thank you very much.

I want to thank all of our witnesses for their testimony. I will now have questions for the panel. I recognize myself first for 5 minutes.

Mr. Bounds, it is presently a requirement that there be a physical injury, and it appears to be interpreted that physical injury means an injury with documented medical expenses. Is it true that some courts have ruled that a rape without medical expenses is not a physical injury?

Mr. BOUNDS. Thank you, Mr. Chairman. I have to admit, I am not familiar with the medical expense rule. Obviously, the statute on its face does not require that.

Mr. SCOTT. Well, have some courts ruled that a rape does not constitute a physical injury?

Mr. BOUNDS. I have seen representations to that effect. I know that courts have held the opposite. My belief is that no circuit court of appeals, which generally will finally resolve these legal issues, has held that sexual abuse alone is not physical injury for purposes of the act. I don't believe that that is the Department of Justice's——

Mr. SCOTT. Say that again?

Mr. BOUNDS. I don't believe that a United States Court of Appeals has held that sexual abuse does not rise to the level of physical injury itself for purposes of the act. And I don't believe that the department has taken that position.

Mr. SCOTT. Professor, what is the highest court that has ruled that a rape is not a physical injury? Thank you.

Ms. SCHLANGER. I believe that the adjudication of this issue has all been in the district courts. So no court of appeals that I am aware of has opined either way on the issue. These cases tend to be pro se. They tend not to be appealed. So the action is in the district courts in large part, and the district courts have been split on that question. But there are a number of district courts that have held that rape without more, and particularly coerced sex without more, sex under threat, does not constitute a physical injury.

Mr. SCOTT. Can you say a word about why the exhaustion of administrative remedies is a problem in these cases?

Ms. SCHLANGER. The basic problem—and there are a number of reasons that exhaustion is particularly hard—I would say that the basic problem is several-fold. One is that there are a number of kinds of problems that occur in prisons, like the ones that Mr. Cunningham was talking about, where people are not in a position to exhaust in the way that the prison has set as timely. So they are not yet in a safe space from which they can complain.

And yet, prison remedies don't make exceptions like that. So some of it is that they are not in a mental space from which they can complain. Sometimes, you will actually have cases in which a prisoner is in the hospital because of an assault, and the prison administrative remedies won't exempt that prisoner from the filing timelines. So that is one reason. It has to do with timing and the way that people——

Mr. SCOTT. And then the exhaustion now denies you any remedy at all, if you haven't gone through the steps. Is that right?

Ms. SCHLANGER. That is correct.

Mr. SCOTT. Mr. Bounds, what is wrong with allowing the case to go forward and stayed while some administrative process, some administrative review goes forward?

Mr. BOUNDS. As I say, I cannot speak to any provisions of the bill. I understand there is a presentment requirement that tweaks the exhaustion requirement in the current law. I can't speak to the merits of that proposal because the department hasn't reviewed it in detail.

As far as a general limitation on the exhaustion requirement, I would note that it is usually the case when you sue a Government agency that you have an opportunity to make your claim against in the first instance that you have to exhaust that. Usually, it is a jurisdictional bar. The difficulty with exhausting in certain circumstances does not go unnoticed, obviously, but it is just a normal standard requirement where you have an opportunity to raise your claim.

Mr. SCOTT. But you will acknowledge that in these cases, it presents in some cases an unreasonable barrier, in some cases?

Mr. BOUNDS. I certainly can't deny that there could be cases in which it would be an unreasonable barrier. I do think that prisons and other incarcerating facilities should have systems where you can make a claim to someone who is not immediately involved with the person who may be the subject of the claim.

Mr. SCOTT. You mean the perpetrator of the violation?

Mr. BOUNDS. Right. So for instance, the Bureau of Prisons regulations make it very clear that you can circumvent the people with whom you interact and about whom you have been making a claim in order to get redress from the agency before you go to court.

Mr. SCOTT. Okay. On the injunctions, if I understand the present law, if you have an injunction after 2 years you either have to retry it or the injunction is automatically dissolved.

Mr. BOUNDS. Effectively, that has to be on the notion that in some way it is sua sponte from the court, but that is the standard. The court has to find once the motion for termination of the prospective relief has been filed, that there is still a federally constitutionally cognizable basis for continuing that prospective relief.

Mr. SCOTT. And who has the burden of showing that?

Mr. BOUNDS. The plaintiff, the petitioner.

Mr. SCOTT. And you can imagine that if the violation were ongoing and you had the injunction to stop the violation filed by a prisoner who is no longer in that prison, there is no one to carry that burden.

Mr. BOUNDS. Well, I think that the expectation is that once a state or local facility, if they are the ones who are subject to this prospective relief, this injunction, or this consent decree, has been found to have violated the constitutional obligations, that they are going to be somewhat more careful in future about doing it.

To the extent that they revert right back to the violations that they were previously committing before that consent decree or injunction was entered, it seems fairly clear that you would have to prove that they are doing it, but that is what you have to do in any legal context. If someone is violating a right, you have to prove they are doing it. Even if there is a consent decree, you have to go

back to court and say they are violating the terms of the consent decree and that requires producing evidence that they are doing so.

Mr. SCOTT. Mr. Forbes?

Mr. FORBES. Thank you, Mr. Chairman.

Mr. Bounds, first of all, we must apologize. We know this legislation was just filed last night and you haven't had time to really analyze it. We look forward to your comments as you have been able to do that.

Mr. Keene, I can sympathize with you having a son in there. I do not have a son in the prison system, but I have a lot people I care about and love in there. The incidents that we hear are not exceptional incidents. We know they are going on through the prison system and we have to do something to try to remedy them. I just don't think this is the right course to do that, but I understand we need to do it.

Professor, I thank you for your work on this and for coming in. You only have 5 minutes here. It is a short period of time, but I know you have written a law review article on this.

Mr. Chairman, I would just like to ask unanimous consent to put in the record a law review article from your alumni, Harvard Law Review, that deals with Mrs. Schlanger's research. Let me just quote a couple of the things that it says. It says, "The manifest strength of Professor Schlanger's article is its unprecedented empirical foundation. The wealth of data that she assembled seems to lend apolitical credibility to her criticisms of the PLRA.

"But a closer examination of the data reveals that many of Professor Schlanger's major conclusions cannot stand without the support of controversial political assumptions that the proponents of the PLRA would be unlikely to accept. To political allies of Professor Schlanger, this criticism may do nothing to diminish the persuasiveness of her analysis. To readers with less faith in Professor Schlanger's political assumptions, however, it is important to disentangle the empirical from the political. Thus, with great respect for Professor Schlanger's extensive research, this note attempts to show that from an empirical perspective, her data proved neither the failure nor the success of the PLRA."

In turn, can I just ask that that be submitted for the record?

Mr. SCOTT. I would not object. I would point out that I graduated from Boston College Law School.

Mr. FORBES. Oh, I am sorry. Okay. [Laughter.]

Your undergraduate was Harvard. That is what I was thinking. [Laughter.]

But I think you would still understand this is a fairly good law school, so we will put it in.

Mr. SCOTT. Without objection, so ordered.

Mr. FORBES. Mr. Cunningham, again we just really sympathize with your situation. It is not a rarity. We have guards that are terrible guards. We have some guards that are good guards. We understand that situation. The question I ask for you, though, is this. The act that was committed against you was a criminal act. What makes you feel, because the PLRA only deals with civil situation, that from an evidentiary point of view, you would have been able to prove in a civil action what apparently hasn't happened in a criminal action that you brought forward?

Mr. CUNNINGHAM. That is a good question. I think it would be kind of hard to answer. A lot of it would be a strong focus on one's behavior patterns while he was in there. My complaints could have been brought up in court. There is documentation in my file, in my psychological file when I was complaining against this officer.

Mr. FORBES. I don't want to cut you off, but I want to just point out this. I understand the evidence you would use, but how would that be different in a criminal action which you could have brought, that the PLRA had nothing to do with, and between a civil action? In reality, it would be very little difference.

The real essence of your problem is that we put guards in positions where they are able to do these kinds of things with very little ability for us to hold them accountable because of evidentiary problems. That is something we have to get at the heart of or we are never going to correct this problem because you have a right to bring a criminal action, and apparently you didn't bring that criminal action.

I am trying to find the answer. I don't have a predisposition on that. What is your take on that? Why do think you would have been more successful with the PLRA than you would have with a criminal action against this guard?

Mr. CUNNINGHAM. I don't really have an answer for that one.

Mr. FORBES. Okay.

Pat, I want to ask you another question. I understand the religious freedom issues. And you know, I support everything you guys do. I think you do wonderful work. I want you to continue to do that. But why does pulling the caps off of attorneys' fees going to help with this?

Mr. NOLAN. Yes, I haven't addressed that.

Mr. FORBES. But that is part of this. The devil is in the details for us, and conceptually when you come in here, we agree. I mean, we know these problems are going, but why pull the caps off of attorneys' fees? Because what it is going to do is drive attorneys to be looking for frivolous cases and it is going to clog the system down for the legitimate ones like Mr. Cunningham's, which are never going to get heard.

Mr. NOLAN. I came in here really to address the religious freedom and the prison rights, because I am on the Prison Rape Commission. I would say, though, that attorneys won't chase frivolous cases because to get fees you have to win. If it really is frivolous——

Mr. FORBES. Let me tell you, then you haven't ever watched the ambulance chasers that I have watched because they would rather put 20 of them out there. The more hooks they have in the water, the more opportunity they have for——

Mr. NOLAN. But one of them has to win. One of them has to not——

Mr. FORBES. But they have a better chance with 20 of them out there than they do with one or two.

Mr. NOLAN. I am really not an expert on what people have—I would like to address your question to Mr. Cunningham, because number one, I don't think an individual can pursue a criminal case. Much of the testimony we have had before the Prison Rape Elimination Committee is the refusal of local prosecutors to bring cases

even when the prison has asked that they be prosecuted. They say, well, you know, they are in prison; what do you expect. I mean, there are lots of excuses, but one of the main focuses of the Prison Rape Elimination Commission is to address the lack of prosecution of proven cases.

Secondly, the standard of proof Mr. Cunningham would have to have had in a civil case is much less than the criminal.

Mr. FORBES. I understand that. The evidentiary problem is the tough one that he would have.

My time is up, Pat, but let me just tell you this. I understand. I agree with the problems that you are raising. I just hope that we can roll up our sleeves and get real fixes to those problems instead of just having this pendulum swing back and forth where we really never get at the point.

And the only thing I will tell Mr. Cunningham, the toughest thing you have is you are put in a position where there is no evidence that you can bring against these situations, whether it is a civil case or a criminal case. That is an unfair position to be in. We have to find a way to break through that in some way.

Mr. NOLAN. Mr. Forbes, can I bring up the case of a lady in Texas? Marilyn Shirley was in prison, was raped by a guard who, as he was raping her said, "and don't bother to report this because who are they going to believe—a criminal like you or a fine upstanding officer of the law?"

She saved her sweat pants. It was evidence. She hid it. They shook down her cell repeatedly, trying to find the evidence. They didn't find it. On the day she was released, she went to the prison officials and said, "Here are the sweatpants with his semen in it." And they proved it. That man is in prison, but she is barred from getting any medical or mental health coverage. Here she is a victim of a brutal rape and she is barred? That is the problem. She had the evidence and she still can't get any help financially for what she endured and continues to endure with the nightmares.

Mr. SCOTT. Mr. Johnson?

Mr. JOHNSON. Thank you.

One of the things that has held us in great stead as a Nation throughout our history has been our adherence to the constitutional principles upon which the country was founded. One of the bedrock processes was the judicial process. It was part of the "equal branches of Government." You had the executive branch, the legislative branch, and then you had the judicial branch.

One of the things that the judicial branch has always been held in high esteem for is affording individuals their rights to take their disputes to trial. The judge or the jury, whoever the fact-finder might be, would be the one to make the ultimate decision, if you get to that point. You may not get to the point based on the procedural rules that have to be adhered to.

But the bottom line is that whole process is what makes us a civilized Nation, an ability to go to court to have your issues addressed. And so the Prison Litigation Reform Act was a way of cutting down or eliminating the ability of a certain class of individuals to go to court and have their claims heard. It was prisoners, and prisoners are not thought of as human beings with rights, apparently, by some of those of us in the legislative branch. We don't re-

spect the ability of judges to be able to procedurally deal with frivolous claims.

So what we did was we, under the guise of trying to eliminate frivolous claims, we eliminated a whole lot of opportunities for prisoners to go to court and sue for damages. Now, you have that criminal process and you have that civil process. The civil process is where the person who has been aggrieved can go to court and force changes and receive compensation for the harm that has been done to them.

It is very important that we preserve that right and protect that right. I believe that the Prison Litigation Reform Act was an affront to our Constitution and it has set us up to where we have a lot of things happening in places that we will never know about.

Mr. Cunningham, things that you have experienced, and I really appreciate you coming to this hearing today. You displayed a lot of courage in telling us about your experience. That is real and this is something that is not isolated. It happens more than we would like to think it does. The only way to keep it from happening more is the ability to bring it to court, for litigants to be able to bring it to court, sue, establish what happened by the rules of evidence, and then penalize those who would tolerate such conditions that lead to that kind of problem, punish them by getting in their pocketbooks.

That is what the civil process is all about, so people don't pay attention until you get in their pocketbook. That is what lawyers do, trial lawyers. They serve as a powerful deterrent to wrongdoing by corporations and institutions such as Government. If we don't have lawyers watching out for what governments do, government runs amok. You are a prime example of being a victim of Government that has run amok.

So I appreciate the attempt here by Chairman Scott with this legislation to mitigate some of the harsh impact of the hastily approved Prison Litigation Reform Act, and bring some balance back into the system so that we can once again be proud of the fact that all people have rights in this country, including those who have been convicted, sentenced and are serving their time, but they are still human beings.

Thank you.

Mr. SCOTT. Thank you, Mr. Johnson.

Let me just make a comment on the fact that the bill was introduced last night. There was no intention to run this through and count this as the hearing on that bill. It is just one example of how it could be dealt with. We will be having a hearing on the bill so that people will have a fair opportunity to comment.

The gentleman from Texas?

Mr. GOHMERT. Thank you, and I do appreciate everybody being here today. I appreciate everybody's perspective. Is my time up already? Okay. All right. [Laughter.]

Mr. GOHMERT. I know you wanted to cut me off, but gee. [Laughter.]

But I do appreciate your being here. I understand everyone's perspective.

Mr. Keene, I know here you are with the American Conservative Union and yet, as a father, all our hearts would go out, I would

hope as yours has. And Pat, with what you have been through. There is nobody up here who would want anybody to be raped. Although, I tell you, I am tempted to say it ought to be a possible punishment for guards that do that to people entrusted to their care. I mean, that is how strongly I feel about it.

But the other side also is, and we don't have any wardens here and we don't have any guards of the thousands and thousands who do a good job, and who are sued all the time. Judges, guards, wardens—all the time. And I know, Pat, in your statement you mentioned, you know, don't come back at me about peanut butter and stuff.

Well, one of the cases I dealt with involved a lawsuit because an inmate felt it was his constitutional right when he is standing in the mail room waiting, hoping desperately that maybe he has a message from home, to have to endure the smell of flatulence from all the other inmates standing around him, and that he ought to have a right not to have to endure that.

Now, I recognize that is a problem none of us would want to endure, but those are lawsuits that have been filed. That is one of the things that PLRA tried to deal with. I am a conservative Republican, but I am often bothered when other conservatives throw out the term "frivolous" to describe a lawsuit that they barely won, the jury was out for hours, and it was not frivolous. It just happened they won, because I don't consider that frivolous. I call that a close case.

But I am telling you, there are thousands and thousands and thousands of good, honest, honorable people trying to do a job, and then to be held up in court. And I can also tell you my personal experience from seeing lawsuits involving our state institutions being sued in Federal court on what really were frivolous claims. It took around an average of about a year to get out from under a truly frivolous claim in Federal court, and that is when you have a legitimate motion to dismiss for summary judgment.

So what happens if these good, honest, honorable, decent people are allowed by our own doing here in this Committee to be held up for a year while they are trying to buy a house or do things? Oh, you are involved in this lawsuit. It comes up on the claims. You are allowing inmates who have committed crimes to hold up good, honorable, decent people to this kind of harassment and that was the direction of the PLRA.

Now, to the end of the religious violations—and I am doing more talking than asking questions, obviously because I don't think this has adequately been heard by witnesses, and I am really more of a witness in this thing as a former judge—but when good, honest, honorable, decent people are allowed to be subjected to this kind of harassment by people who are true criminals—you know, maybe they did or didn't take a check and put it in a different account or something—then we have failed.

The remedy it seems to me is fix the administrative remedies. Don't allow a complaint box that can be opened by guards or by anybody. Allow them to file electronically with someone outside of that institution. Because Mr. Chairman, if you allow a stay for a year or 2 years or whatever how long the administrative procedure takes, there are going to be many, many more thousands of people

who are unjustly held up in court when they shouldn't be than those who are actually approached.

So when Mr. Johnson—and I respect your position—but when you said some of us don't respect the ability of judges to deal with frivolous claims, that is not my position. My position is we need to protect the judges from having to deal with those frivolous claims. As a judge who often worked into the wee hours—and I finished reviewing all of your testimony about two or three this morning—most people don't work that late. As a judge, I never made a jury or anybody work past 2:30 a.m. myself, and that was only a rare occasion. Most judges can't physically work like I did to deal with the caseload. We owe the judges better than to open the floodgate to litigation.

Let's fix the administrative remedies so we can directly hold people accountable when they are raped. Get them to the health facility where we gather evidence when somebody is raped so they can prove civil and criminal. And then on the religious violations, let them get outside that, exhaust the remedies, and so they can go to court if the administrative remedy fails. But I would say the administrative remedy is the key. Get that remedy outside the prison where the abuse occurred, to people that can respond and actually build legitimate cases.

Thank you.

Mr. SCOTT. Will the gentleman yield?

Mr. GOHMERT. Well, my time is up. I am glad to. You are the Chairman.

Mr. SCOTT. One of the problems we have in frivolous cases is you don't know it is frivolous until you have had some sort of screening.

Mr. GOHMERT. Exactly. And that is my point. Let us do this with your administrative remedy first instead of allowing them to go to court, file a claim, stay it, and send it back to the administrative remedy. The guy's name is in there in the pleading, and all that time you are going back and staying it. Dismiss it. If you want to do something, at least——

Mr. SCOTT. If the gentleman would yield again?

Mr. GOHMERT. Sure.

Mr. SCOTT. The problem with some of the administrative processes is that you would have to complain to the person who is the subject of your complaint.

Mr. GOHMERT. That is my point. We fix that to where you will file electronic complaints that go outside the prison so that guard you are complaining against, like Mr. Cunningham, he never sees it until it goes to the head over the prison that is not even in the prison. That is what I am suggesting. That is definitely a problem. You are right.

Mr. SCOTT. Until you have such a process, you are barred from bringing a bona fide claim because you didn't exhaust the remedies that are there now. If we can fix the process where you can actually have a reasonable opportunity to file a complaint administratively, that would be different, but that is not where we are right now.

Mr. GOHMERT. Could I offer one other observation from Mr. Nolan's statement? That is, Pat, you mentioned that it has become clear there are two classes of prisoners affected by PLRA that were

never intended by Congress to be prevented, and that is inmates with religious violations and victims of prison rape.

I would submit fix those two areas, then, because those are legitimate points. Make it more easy so that we don't have the circuit court saying that a sexual abuse claim is not a physical injury. I agree. I have never seen a circuit case that said that, but we could eliminate that and allow religious complaints and address those without opening the flatulence claims that just don't pass the smell test, so to speak.

Thank you. [Laughter.]

Mr. SCOTT. The gentlelady from Texas?

Ms. JACKSON LEE. Let me thank the Chairman for this hearing, and at least give credit to a Committee that is willing to oversee and investigate unpopular issues, frankly. Certainly, it is unpopular to talk about enhanced, or what might be perceived to be enhanced rights for prisoners. But I am delighted of the witnesses, and forgive me for being delayed at another meeting, but particularly Mr. Nolan, I believe, who spoke about the religious concerns and some others.

So let me lay just a premise to say that in my own state of Texas, Harris County Jail, for example, has seen the loss of life, which probably started with some physical injury, of about 101 prisoners. Of course, some died for health reasons, so I am not categorizing all of them in the category of violence, but certainly health reasons or mishandling generated really a very high census on death.

So what I perceive of this reform underlying bill, which I have not had a chance to completely study, is to really be preventive in nature. I think it is valuable to have some constraints on what one would call "frivolous." Citing materials that we have here, since the passage of the PLRA we have seen some 37 cases per 1,000 prisoners generate into 19 cases per 1,000 prisoners. But my concern is that among that decline are serious issues.

For example, in the state of Texas we have a food problem, a soy food problem that I was getting hundreds—let me says tens of tens—of calls from families about their inmates getting sick. I might imagine that a number of those cases being filed under the underlying legislation would be categorized as frivolous. But yet people were getting sick and we ultimately found now a scandal of the quality of the food, the wrong direction to have gone.

I take the Jena Six case. I use that widely, but it has some relevance to it, because as we discovered, some of the treatment of Michael Bell, the youngster that is sort of the eye of the case, a great degree of intimidation, name-calling, and other uncomfortableness because he was a teenager in an adult jail.

The underlying bill excludes juveniles from the PLRA. And then, of course, the question of physical injury. That is so harsh a definition, and the reason, of course, is because any medical treatment is within, I assume, the prison system, if any. And of course, how can you account for medical expenses, though I think if we tried hard we could.

So professor, let me raise this question with you, and I am going to get to Mr. Bounds as well, and I understand that you have not studied the legislation, but we appreciate your presence here.

Respond to those examples, and in particular respond to the examples of men raped and sodomized; a child prisoner raped and repeatedly assaulted with the knowledge of a corrections officer; a man whose confidential HIV status was announced to other prisoners by corrections officers who illegally opened his sealed medical records; a female prisoner strip-searched by male corrections officers who attempted suicide allegedly as a result of the trauma of the search; and the definition of "physical injury," which is presently underlying the current law and the need to change that in order to give nonfrivolous suits a chance to be heard.

Ms. SCHLANGER. The thing about both the bill and other proposals for reform is that none of them would open up the floodgates to frivolous cases because every reform proposal preserves the idea that the first thing that happens when a case comes in is that a judge will say, "If this is frivolous, it is out of here." Not it is stayed or it might be out of here, but it is out of here. So I don't think there is any fear of opening up any floodgates.

So I think the answer to your question is that the statute, which was very hastily written, did not define "physical injury" in any way whatsoever except in contrast to mental or emotional injury. What that has meant is that constitutional injuries and mental injuries both have been deemed to not be physical injuries, and have been excluded. And so the obvious fix, it seems to me, if there is a concern about frivolous kinds of emotional claims, is to say something like "no negligent infliction of emotional distress claims in prison," something along those lines. But not to have this idea that constitutional claims and claims that are founded in the very, I have to say, very onerous burdens of constitutional law. It is not as if a prisoner raises a claim so easily. If a prisoner actually makes out a claim, then it is going to be serious. So all of those claims, regardless of whether they affected the prisoner's mental health or whether they affected the prisoner's property or whether they affected the prisoner's physical well being, all those claims, if they raise a constitutional claim ought to be compensable in court, it seems to me. And we don't have to worry about frivolous cases because of the screening provision.

Ms. JACKSON LEE. You make a good point. I would like Mr. Bounds to be able to answer the question that I would just lead in, Mr. Bounds. In essence, the professor says that we are demonizing these other cases because of the present current law. Can you not see the need to define what I have just listed, if you were listening, as physical injury? Or to reform the legislation?

Mr. BOUNDS. It seemed that several of the examples at least that you listed related to sexual violence. As we were discussing earlier, it is an open question, at least at the circuit court level, whether as a matter of law those cases would not involve physical injury for purposes of bringing suit for money damages under the act. I think it is certainly easily arguable that those sorts of sexual abuse cases would be compensable under the act. It has not been resolved at the circuit court level.

Ms. JACKSON LEE. Under the underlying law, you are saying?

Mr. BOUNDS. Yes. Because the statute on its face does require physical injury, but it does not purport to speak to sexual abuse per se.

Ms. JACKSON LEE. But I think there is confusion on the district courts. Wouldn't you be happier if you had clarification so that people who are violated violently like this in a prison would be able to have an address of their grievances or religious violations in the court? The professor has already said the judges would be able to distinguish if it was a frivolous case.

Mr. BOUNDS. What I would say—without speaking to any specific proposals, although the department obviously would be happy to work with the Committee on specific proposals or fashion language that would get at the sort of cases you are talking about—is that it is an open question whether the act, without any amendment, would be correctly construed to prevent money damage cases for the sexual abuse cases that you are talking about.

Now, it appears to be true that some district courts have read it to exclude it. Other district courts have read it not to exclude such claims. Usually, before Congress acts, it waits just by the dint of delay in legislation for courts of appeals to resolve these legal issues.

For religious claims in particular, the point was made I think by Mr. Nolan that one of the problems with exhaustion in the religious claims, and it goes also to the lack of money damages, is that you have already missed your holiday celebration or whatever the immediate deprivation of religious rights may be, under certain provisions of the act. But that doesn't mean that you can't remedy ongoing violations of your first amendment rights by seeking prospective relief in the courts. There is no provision of this bill that prevents seeking injunctions for ongoing violations of religious liberties. None.

Ms. JACKSON LEE. Let me just conclude, Mr. Chairman, by saying I beg to differ. It is a difficult place to be in a prison. Anything complex that doesn't go to the heart of the issue and is not immediate is going to be very difficult to pursue. I think the witnesses are talking about the ability to immediately pursue an injury that is prevented by the underlying law.

I thank you and yield back.

Mr. SCOTT. Thank you.

The gentleman from North Carolina?

Mr. COBLE. Thank you, Mr. Chairman.

I have been here, there and yonder. I missed a good portion of the hearing. I apologize for that.

Thank you all for being with us.

Mr. Keene, do you feel that your son's experiences were resolved, of the let-down of the legal system or the failure of the prison officials to respond as they should, or both?

Mr. KEENE. I think, Mr. Coble, that the problems that he experienced were the same kinds of problems that anyone would experience in a closed situation where the people who are responsible for enforcing the laws or the rules in this case are the same people who might be charged for breaking them. I think that is the real difficulty.

The judge indicated earlier that it would be better if this could be handled administratively. I agree with that. The problem is that the administrative bar and the way it is manipulated against peo-

ple bringing charges is the difficulty. The fact is that there are a whole series of technical things.

If you are a prisoner and you want to file a grievance and they can't find the right form, then it is dismissed because you didn't use the right form. In his case, it comes back and you have 15 days to appeal, but they date it 20 days before it comes back so that your appeal right is gone, and it is gone forever.

So those kinds of things is the way it works. The question is, and I think that this Committee and I think Mr. Forbes and Mr. Scott both acknowledge the problem, and what the Chairman has done has put this on the table. I don't know what the solution is, necessarily, but the problem is a serious one that needs to be solved.

In Mr. Forbes's opening comments, he talked about how we should be rehabilitating prisoners. My son makes the point to me that here we lock people up because they break our rules, our laws, and then when they get there the lesson they learn is that none of the rules matter because the rules change on a daily basis. He says, "What kind of a lesson is that to the people once they are released?"

Mr. COBLE. And that is where hypocrisy comes into play.

Mr. KEENE. Let me add one other thing. There are the bars of the technicalities and the not turning over the forms and doing all that. There is also the fear of retaliation on the part of prisoners who bring these grievances. In Mr. Bounds' prepared testimony, he said, "Prisoners need not fear retaliation from prison officials for bringing grievances." That is easy to say for someone who has not been there or doesn't have any experience with people who have been.

This doesn't mean they drag the prisoner off and beat him. In my son's case, they have denied him access to prescription medicine. They will hold up his mail for weeks. They will transfer cells, do searches. There are all kinds of things in any environment, in any work environment where you can harass people who do things you don't like. And in a prison, it is very, very serious because they have control, obviously, of everything that the prisoner does and the way he lives.

So I think the question is how do you solve that? I don't claim to have the answer, but I think it is a serious problem.

Mr. COBLE. Well, it is my belief that probably two of the most pressing problems are corruption within the system, A, and prison overcrowding. Do you agree with that, Mr. Cunningham?

Mr. CUNNINGHAM. Yes, sir.

Mr. COBLE. Mr. Nolan?

Mr. NOLAN. Absolutely.

Mr. COBLE. Mr. Bounds, let me put this question to you. With respect to the Prison Litigation Reform Act, concerns have been raised about whether Federal contracts with private detention companies are subject to adequate transparency and accountability. Could you explain what kind of oversight the Justice Department performs on these contracts? You may not be able to do that today. If you can, I would like to hear from you. If not, we would appreciate hearing from you subsequently.

Mr. BOUNDS. It is an interesting question. I am sorry that I don't have any background information on that, but I would be happy to

take the question back to the department and get an answer from the Bureau of Prisons.

Mr. COBLE. I thank you for that.

Finally, Mr. Chairman, let me ask a very general question. Is legal counsel available to prisoners as a practical matter? I think your smile, Mr. Nolan, has answered my question.

Mr. NOLAN. In fact, I have a specific example. My attorney arranged—my legal mail was always opened even though that is flatly illegal. It was always opened. I had a phone call with my attorney scheduled. You had to be in the counselor's office. My counselor said, "I am too doggone busy doing my work. I am not going to leave. If you want to call, you call, but I am going to sit right here." So I had no ability to have a private conversation with my attorney.

Mr. COBLE. My time has expired, but if the Chairman will permit you to respond, Mr. Keene.

Mr. KEENE. I would like to comment on that also, if I may. Most prisoners obviously can't afford a lawyer and don't have access to one. In our case, and in any prison there are good employees and bad employees. My son got a lawyer, had me get him one, because one of the guards took him aside and said you are going to have to do this. We got an attorney because a guard actually advised us. But his legal mail was opened. That was found not to be something that caused any real injury by the court, so he couldn't do it. That is a violation of their rules, as well as constitutional rights.

You would have—and here I am paying for the lawyer. The lawyers would be scheduled to meet with him. They would arrive at the prison for an appointment. The prison would refuse to let him see them. At one point where he had the right to amend the complaint with a deadline obviously imposed by the court, they wouldn't let the lawyers in to let him sign it. At that point, the Federal judge said they had gone too far.

But the fact is, as he made the point to me, most prisoners don't have access to a lawyer and couldn't afford one. He is lucky, and I am not, but he is lucky that I was able to pay for one.

Mr. COBLE. Was this a private facility, Mr. Keene?

Mr. KEENE. No, no. He is in a Federal facility.

Mr. COBLE. Okay. Thank you all for being here.

Thank you, Mr. Chairman.

Mr. SCOTT. Thank you.

Mr. Bounds, I just had one other quick question. Is there any reason to have juveniles covered by the PLRA?

Mr. BOUNDS. I believe that the reasoning that applies to juvenile litigants is the same that applies to adult litigants. There are obviously large numbers of juveniles in state and local facilities across the country. I don't know the extent to which—I know it has been represented that they weren't the source of a great deal of Federal filings before the PLRA. I don't know the extent to which that would obtain if they were excluded from the PLRA now. I know that is something that is considered in this proposal. As I mentioned, the department would be happy to comment on the proposal, but I haven't——

Mr. SCOTT. And if you could get information on that, whether or not they have been filing any cases, whether or not there is any

reason to believe that they would start filing frivolous cases, and whether or not they ought to be precluded, if a juvenile doesn't get through the administrative process, whether or not even a clear constitutional violation ought to be precluded from court review because the juvenile didn't go through the administrative process just right.

Mr. BOUNDS. I will be happy to take those questions back. But predicting what the behavior of potential litigants who are juveniles and incarcerated around the country would be is going to be very difficult. They are overwhelmingly not in Federal facilities, so that is another level of complexity. They are not going to be in our custody. But I will look into that.

Mr. SCOTT. The PLRA covers people in state facilities, too.

Mr. BOUNDS. Of course, but since they are not in Federal custody, the Bureau of Prisons wouldn't have any information about what they have been filing against Bureau of Prisons, so we only know it in so far as we saw it. Our relationship to juvenile inmates is vindicated in the rights of the plaintiff on their behalf against state facilities.

Mr. SCOTT. Okay.

Other questions? The gentleman from Texas.

Mr. GOHMERT. Thanks. I don't need 5 minutes.

But something that nobody has mentioned so far, and it is in this bill, like most bills, claims by prisoners cost nothing to file. They file a pauper's oath. They have lots of time. They have a free law library, and that is why you get so many frivolous claims is because there are then no consequences. And there still is nothing that I find, and Mr. Keene I understand your position, and each of you. But I see nothing in this bill that will prevent retaliation or allow a prisoner to gather evidence to make the case. What I see is the floodgates opening up.

And when I hear people say, you know, "look, let the judge decide," it tells me that people have no respect for the kind of time that the judges I know spend—and there are some exceptions that don't work hard at all—but the vast majority don't have time. And the clerical staff, and they are overworked, and there are not enough of them. And all that is involved in frivolous claims.

And I am telling you, I don't use that word lightly, but there have got to be consequences for those people, and the PLRA has the three strikes. You file three——

Mr. SCOTT. Would the gentleman yield?

Mr. GOHMERT. Sure.

Mr. SCOTT. Mr. Bounds, can you tell me what the present law has for filing fees for prisoners?

Mr. BOUNDS. I would defer to Professor Schlanger. I don't actually know.

Mr. SCOTT. Okay. Professor?

Ms. SCHLANGER. The current law is $350, either up front or over time, depending on how much money the prisoner has.

Mr. SCOTT. Can that be waived?

Ms. SCHLANGER. No. No, it cannot. It is $450 for appeals, $350 for district court filings.

Mr. GOHMERT. I know in Texas, they can't get away with that without allowing a pauper's oath if you just don't have the money.

Mr. SCOTT. Wait a minute.

Ms. SCHLANGER. The PLRA amended the Federal in forma pauperis statute to require that all prisoners pay the fees regardless of indigence. So prisoners are not similarly situated to other indigent litigants. They have to pay the fee.

Mr. GOHMERT. So you support no financial consequences?

Ms. SCHLANGER. No, no, no. Not at all. The proposal that Chairman Scott has put forward is to retain that provision when the filings are frivolous. So if you file a case that does not make it past pre-screening, which is a screening for frivolousness, then you still have to pay the fee. Only if your case is deemed to have some initial merit would the fee be waived, and in that case only if you are also indigent.

So the point is that the PLRA imposed—let me just say that when the PLRA was passed, when it was considered, the fee was $75. When it was passed, it was $95. In recent years, it has gone up to $350, which in prison is a lot of money. So the fees are quite significant for indigent prisoners, and this bill would not change that except for those people who actually file cases that make it past the equivalent of a 12(b)(6) motion, a motion for failure to state a claim.

Mr. GOHMERT. I still go back to my point. I don't see anything remedied here that allows an inmate to secure evidence or to prevent retaliation during that long process. I think that is where we could really help if we worked together on some administrative remedies. And for goodness sake, if you are raped, then you ought to have the ability to go to a health clinic there in the hospital. Evidence could be gathered, that kind of thing, and you would know right away.

Anyway, there are things that can be done without clogging the courts back up so the truly legitimate claims get lost in the shuffle. So thank you for your indulgence.

Ms. JACKSON LEE. Mr. Chairman?

Mr. SCOTT. Mr. Cunningham, do you want to respond?

Mr. CUNNINGHAM. Yes. I just wanted to make a quick comment about the procedure. There is that 15-day time limit from the day of the incident. That is unrealistic. I mean, even out here, 15 days in society is unrealistic for anybody to file a claim. When you are in a controlled environment like that, and you have 15 days to file a step-one grievance, and to say that retaliation is not a big factor in there.

Mr. GOHMERT. I didn't say it wasn't a big factor. Retaliation is a huge factor. So I didn't want you to misquote me. I am not saying it is not a big factor. I am saying it is a problem that this doesn't address. And you are right. You mentioned the 15 days in your statement that I read earlier this morning.

Mr. CUNNINGHAM. Yes. I mean not just from my standpoint, but I have heard people that worked with—and the DLC testified also. They also agreed that retaliation is a factor for prisoners when they are filing grievances.

Mr. GOHMERT. And normally the way we deal with that in most sexual abuse cases, most laws, that is what is called, as you may be aware, evidence of outcry. Most laws would allow evidence of outcry, and then the fact-finder would determine whether or not

there was a good excuse for not doing it timely, rather than making it, as you are suggesting, lets not make it a prohibition to bringing the claim later because you could be under the guy's thumb for 15 days, and that wouldn't be appropriate.

So you make a good point, and that is something we could and should address, and I appreciate you bringing it forward.

Mr. CUNNINGHAM. Thank you.

Mr. SCOTT. Let me ask, Mr. Cunningham, you said 15 days. That is at the facility you were at. Is that right?

Mr. CUNNINGHAM. Yes, that is statewide in Texas.

Mr. SCOTT. Mr. Nolan, you wanted to make a comment. Could you comment on whether or not 15 days is——

Mr. NOLAN. In some states, it is as few as 2 days. If you haven't filed within 2 days, you are cut off. I might say the lady Marilyn Shirley who kept her sweatpants didn't report it at all, and that is why she is barred from claims because this guy laughed at her and said, "don't bother to report it; who are they going to believe?" So they ignored her.

But Mr. Gohmert, so many things you have brought up are very important. The Prison Rape Elimination Commission is working on the standards to deal with them systemically. Do you have an 800 number? Who is there to follow through? Who will watch the watchers? These are all serious things that we are trying to address through standards.

But in addition to that, the personal—Marilyn Shirley was injured personally. It is not enough for her to say, "Gee, we are going to try to fix it in the future so this doesn't happen." What does she do to get her medical bills paid? That is the situation.

Mr. GOHMERT. You understand, I am agreeing that the arbitrary short time limit is a problem, and normally the way the law outside of prison deals with it is that it can be evidence that maybe it is a fabricated claim.

Mr. NOLAN. I really like that idea of——

Mr. GOHMERT. Well, that is the way we normally handle it.

Mr. NOLAN. Yes.

Mr. GOHMERT. Thank you.

Mr. SCOTT. The gentlelady from Texas?

Ms. JACKSON LEE. I would like to thank you, Mr. Chairman. I would like to clear up first of all, Mr. Nolan, that is a horrific case. It is just an abomination. So I think we should emphasize the point, and I hear my good friend, the former judge in Texas, Judge Gohmert, talk about clogging the courts. But I think the point is well taken that the courts now are sensitized to frivolous cases.

I think that if that case, of that violation of that woman, and she had been able to file a case, there certainly would have been no confusion about her having to be addressed. Just from the facts that you know, do you think that that would be caught up in a frivolous definition?

Mr. NOLAN. No. I think if she could have gotten into court, her claim would have been taken seriously and there would have been damages. Instead, she is just barred. She is out in the cold.

Ms. JACKSON LEE. And let me tell you what else the underlying bill does.

Mr. NOLAN. I should say, in there, it is the exhaustion requirement, not the physical injury. It is the exhaustion requirement.

Ms. JACKSON LEE. All remedies. But let me tell you what else it does, and there are wonderful, committed, dedicated public servants that work in our prison system, but anytime someone gets information can misconstrue it. That can be a chilling effect against the prisoners by those prison guards who make the point there is no use to doing anything anyhow, they won't take frivolous cases. Is there something to that, Mr. Nolan and professor—the chilling effect?

If you would answer that question and the question of my concern for two things: one, the mental and emotional injury is not attended to, and that can be as dangerous as a physical injury; and the other one is, can you point out why juveniles absolutely should not be under this particular underlying bill? Mr. Nolan, is there some chilling effect when you caretakers are making the point that everything is frivolous, based on their understanding of the law?

Mr. NOLAN. Not just frivolous, but who is anybody going to believe. Also, you know, inside prison, you don't want it known that you have been raped because you are punked or you are turned out. That, in the perverse prison culture, says you are subject to more rapes by everybody because you have already been turned out. That is the sad thing inside prison. So you don't want it known. You don't want your medical records made public and known to everybody for any tests you have or anything. And all this happens frequently.

So yes, there is the chilling effect. The Prison Rape Elimination Commission is trying to deal with that. How do we get medical help for these people? How do we get the crime scene set up for evidence to take place? A crime has occurred. Why isn't there a rape kit? Why isn't there the collection of evidence at the time, contemporaneous with it?

And then oftentimes, the victim gets put in solitary confinement, not the attacker. They are cut off from visitation from their family, from phone calls. So we have turned the system on its head, and the Prison Rape Elimination Commission is trying to deal with that.

But just the intimidation—in Texas, for instance, the guy that had the key to the complaint box was the guy who was doing the raping. And he had buddies in the central office at the Texas Youth Commission that were, if any complaint got through, his buddies in the state office were round-filing them. The Texas Rangers did a great job of investigating, and that was sidetracked until the parent of a child spoke out.

Ms. JACKSON LEE. I am glad you put that on the record. It was sidetracked.

If I could have the professor answer the question about the juveniles. I would like to work with you because the TYC is the poster child for this question.

Ms. SCHLANGER. I would like that, Congresswoman. I think the first point about retaliation is that the basic approach for making retaliation less of a problem in prison is to allow prisoners a longer period of time before they have to bring their problem to the atten-

tion of the authorities, because that allows them to reach a safe space before they have to complain.

So there is a reason why this Congress has made the statute of limitations in most kinds of complaints a year or 2 years, rather than 10 days. That reason is because what that means is that people who have problems can get to a place from which it is safe for them to raise those issues. So getting rid of administrative exhaustion as a pre-filing component of litigation deals with retaliation in that way. It allows people to have enough time that they can get to a place from which it is safe to complain.

The point about juveniles, juveniles hardly ever litigate. Juveniles also hardly ever file grievances. What happens to kids who are being mistreated in prison is that their parents complain for them where their parents are in a situation that they can do that. Most juvenile systems deem complaints by parents not to be sufficient to exhaust remedies and so those complaints by parents—I say "most"—I don't actually know that.

Mr. GOHMERT. I was going to say, my experience is juveniles complain a lot.

Ms. SCHLANGER. But they don't complain filing forms labeled, you know, "T-376." I mean, I have kids. They complain a lot, too, but they don't write it down. They don't file administrative grievances. So I think that there are two issues. One, juveniles don't sue very often. And two, they are not very able to exhaust administrative remedies.

The third point that you asked me to address was: Aren't mental and emotional injuries serious? I think the answer to that is if the underlying cause of action is a constitutional cause of action, then as a matter of constitutional law those injuries are serious. If the underlying cause of action is that somebody is complaining about having to smell flatulence in the mail room, then it is not serious. Right? But that case doesn't raise a constitutional complaint.

Mr. GOHMERT. It depends on the flatulence, of course, but——

Ms. SCHLANGER. Fair enough. So I think the point is that of course, before there can be a remedy, there has to be a good cause of action in Federal court. That means a constitutional cause of action. So if what you experience when you are deprived of the ability to practice your religion is deemed mental or emotional harm, yes, it is very serious.

I don't mean to malign the good corrections professionals in our country, of whom I have met hundreds and hundreds, but if somebody does in fact do some act of mental abuse, then if it rises to a constitutional level, then by definition it is serious. The Constitution does not acknowledge trivial injuries. So yes, it is quite serious.

There was one other point that you asked me to address. No, that was retaliation, and I already did it. I am sorry. I don't mean to filibuster. I just forgot. Excuse me.

Ms. JACKSON LEE. Thank you. Some of these are demonized, and I think this bill opens our eyes about how we stop demonizing people who have real issues in the prisons.

Thank you.

Mr. SCOTT. The gentlelady yields back.

The gentleman from Texas?

Mr. GOHMERT. Yes, one issue raised by the professor. I don't recall where you went to law school.

Ms. SCHLANGER. At Yale.

Mr. GOHMERT. Yale. I think even at Yale, they talk about exhaustion of administrative remedies as being kind of the gatekeeper function for getting to Federal court. I want the record to reflect for those who have not been trained at Yale, to know this is not a new doctrine. It is not a new concept. This has traditionally been the gatekeeper for getting into Federal court. You exhaust your administrative remedies before you are allowed to come to Federal court. Correct?

Ms. SCHLANGER. Not in constitutional law, congressman. It is an innovation. The law was very clear prior to the PLRA.

Mr. GOHMERT. You made the point with that regard, but here again, I think people that have never been to law school, they are hearing you talk about this, and heard all the talk about the unfairness.

Ms. SCHLANGER. Right.

Mr. GOHMERT. But the fact is, anybody watching C-SPAN, those that didn't go to law school, need to know, and by your reaction I am afraid they will still get the wrong impression, this is a regular concept for how you go about getting into Federal court. Isn't that correct?

Ms. SCHLANGER. Well, I know you want me to say "yes," but I want to——

Mr. GOHMERT. Okay. Well, then if you can't say yes, then let me say "yes" for you. Yes, this is a common way that we get to Federal court.

Now, on constitutional issues, we have an exception, but the doctrine is there—exhaustion of administrative remedies. It is taught, and if I had to go back and get a Yale law book, I am sure it would approach it from here is the doctrine, this is the principal doctrine. Now, there are exceptions like constitutional. Could you agree with that even?

Ms. SCHLANGER. Well, let me say that in administrative law exhaustion, there are a bunch of acknowledged exemptions as well, for futility and for various kinds of issues that cannot be remedied before the administrative agencies, and those are acknowledged.

Mr. GOHMERT. If I were a judge, I would still want you to answer the question.

Ms. SCHLANGER. I am trying, Congressman.

Mr. GOHMERT. Isn't that the basic concept, that first you normally have to exhaust your administrative——

Ms. SCHLANGER. Those exceptions do not apply under the PLRA. It is not ordinary administrative law exhaustion.

Mr. GOHMERT. I understand that.

Ms. SCHLANGER. The courts have been very clear about that.

Mr. GOHMERT. But I am going back to my original question. Isn't that normally the basic doctrine toward getting into Federal court that you must first exhaust your administrative remedy?

Ms. SCHLANGER. Only when you are suing Federal agencies under the Administrative Procedures Act.

Mr. GOHMERT. Okay. Well, I don't have time to go into the exceptions to show that that is not entirely accurate. I wish you would

have answered the question. You go into a court saying Federal courts, it is not normally the requirement that you exhaust administrative remedies—I just think we have issues. I wish you would answer the question, and then we could have agreed on the different exceptions. But thank you.

Mr. KEENE. Congressman, could I say something about that?

Mr. SCOTT. Very briefly.

Mr. KEENE. I would answer that "yes." The problem with the exhaustion of administrative procedures in the prison context is that often your ability to exhaust those procedures is dependent upon the very people that have control, that they won't give you the form. And that is a problem. Okay.

Mr. SCOTT. Thank you.

I would like to thank the witnesses for their testimony today. Members may have additional questions which we will forward to you and ask that you answer as quickly as possible so that the answers can be made part of the record. We have received numerous written statements on this issue, approximately a dozen, which without objection will become part of this hearing record.

Without objection, the hearing record will remain open for 1 week for the submission of additional materials.

Without objection, the Committee stands adjourned.

[Whereupon, at 4:20 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

The Prison Litigation Reform Act, enacted effective April 1996, changed the landscape of prisoners rights litigation. While proponents of the legislation pitched their rhetoric toward the reduction of frivolous litigation by jailhouse lawyers, the PLRA swept beyond litigation by individual prisoners and into the authority of the federal courts and U.S. Department of Justice to fashion remedies in broad based prison litigation.

The Act made major procedural and substantive changes in prison conditions of confinement cases and in the federal rights of both state and federal prisoners to litigate about prison conditions. The Act also curtailed the authority of the federal courts to remedy prison conditions and requires that any prospective relief be limited in duration and drawn as narrowly as possible to accomplish its purpose.

Evidence produced by advocacy groups in the decade since its enactment indicate that some of the so-called reforms under the Act may have worsened prison condition by narrowing the scope of federal review.

Dating back to 1996, advocacy groups like Human Rights Watch documented pervasive sexual harassment, sexual assault and privacy violations by guards and other corrections department employees in several large states, including the state of Michigan. The reports exposed the twofold failure of the states to conduct impartial investigation and to protect complainants from retaliation. In a 1998 follow-up report, the prison abuse issues in Michigan were found illustrative of corrections departments across the nation.

After gaining access to state women's prisons facilities, a 1995 Justice Department investigation in Michigan detailed pervasive sexual abuse and found that nearly every woman interviewed reported sexually aggressive acts by prison guards.

The DOJ investigations also found that women at the Scott and Crane facilities had been raped, sexually assaulted, subjected to groping and fondling during patfrisks and subjected to improper visual surveillance by guards (male) when they had a reasonable expectation of privacy.

While DOJ negotiated a consent decree with the Michigan Department of Corrections concerning the violations detailed in their 1995 report, the agreement was roundly criticized by the advocacy community in my district as too narrow in scope and limited in duration to correct what had been deemed systemic problems. There was wide agreement between the witnesses at my district hearing on the issue that PLRA's limitations on the federal court's authority to grant relief and DOJ's ability to litigate under CRIPA were the cause of the weak consent decree.

The Prison condition and reform issue represents an important opportunity to elevate the humanity of the disproportionately incarcerated minority community. Against the backdrop of my experience with the Michigan prison cases, I believe that it is appropriate that we hold this hearing to explore the kinds of reforms necessary to eliminate limitations on federal authority to remedy abusive conditions. Almost from the beginning it was clear that the pendulum had swung too far against prisoner advocacy. I look forward to the testimony of the witnesses.

PREPARED STATEMENT OF THE HONORABLE DANIEL E. LUNGREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Thank you Mr. Chairman for this opportunity to present my views to the Crime Subcommittee of the House Judiciary Committee on "Review of the Prison Litigation Reform Act (PLRA). A Decade of Reform or an increase in Prison Abuses." In my capacity as the former Attorney General of the State of California and the Chair of the Criminal Law Committee of the National Association of Attorneys General, my office worked with the Office of then Governor Tom Ridge of Pennsylvania, and Senators Spencer Abraham of Michigan , Harry Reid of Nevada, and Jon Kyl of Arizona in crafting the PLRA. I appreciate this opportunity to discuss the circumstances surrounding the enactment of this important legislation. It is from this vantage point as a former state official, I have concerns that any significant departure from the PLRA could reverse the progress we have made in reducing frivolous prisoner lawsuits.

THE BURDEN OF FRIVOLOUS INMATE LITIGATION

The issue of prisoner lawsuits presented the California Department of Justice with a burdensome challenge. In order to be able to respond to this litigation we staffed our correctional law section with 57 attorneys, 23 paralegals, and 5 graduate legal assistants. The cost to California taxpayers in fiscal year 1995–96 reached $10.3 million. However, the burden imposed by this devotion of resources to prisoner lawsuits could not be measured solely in terms of the costs incurred by the Correctional Law Section itself. Equally important were the opportunity costs related to attorneys and support staff not available for criminal cases, environmental cases, anti-trust cases and the like.

While I was, and remain, committed to the interests of fairness in each prisoner litigation case, seldom was that the issue. In fact, a study by the Ninth Circuit Court of Appeals found that 99 percent of these cases filed by prisoners were ultimately won by the state. Allowing the Federal courts to be used for recreational purposes by prisoners with little else to do served to undermine both the purpose of incarceration and the larger public interest. I will take this opportunity to share the facts in a small sampling of these inmate lawsuits to illustrate this very point:

1. **Lawrence Bittaker** filed over three dozen suits against my state. In one such case he complained because his meal was allegedly in poor condition. He claimed his sandwich was soggy and his cookie was broken.
2. **Kevin Howard** alleged that prison officials implanted an electronic device in his brain which controlled his thoughts. Those thoughts were then allegedly broadcast over the prison P.A. system. I should add that the Department of Corrections in its defense had to prove that it did not perform surgery on Mr. Howard. A Sergeant with the D.O.C. drafted a declaration stating that the prison did not have the technological capability to transmit thoughts through a P.A. system.
3. **Ronald Adams** claimed he suffered cruel and unusual punishment when, during a lockdown, he was served two cold sack lunches and one hot meal, rather than the usual two hot meals and one cold meal.
4. **Rodney Alcala** claimed that his rights were violated because he had to send packages using UPS rather than the U.S. Mail. He also sued for the inability to make "800" calls.
5. **Carlos Garcia** claimed that his constitutional rights were violated because he did not get five free stamped envelopes from prison officials. The judge appointed a private legal firm to represent the case which went to a jury trial. The state won the case.
6. **Lee Max Barnett** claimed his rights were violated because his mail was stamped with a notation that it was sent from prison. This death row inmate previously sent harassing and offensive mail to the parents of a witness who testified against him. The card he mailed stated how happy Barnett was that the witness had recently died in an accident.
7. **Russell Newman** claimed his photocopy costs were illegally raised by 5 cents per copy and filed suit for $1.45 refund and thousands of dollars in general damages.
8. **Ronald Golden** claimed that his constitutional rights were violated because he believed a correctional officer had placed a cricket in his cup.

It goes without saying that such abuses of the civil justice system were no longer tolerable. A bipartisan group of Members in this and the other Body sought to put an end to the notion of prisoner litigation as sport through the adoption of the PLRA. An article penned by Senator Reid captured well the reaction to similar abuses in other states. Senator Reid painted the following picture:

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

Well, folks, that's the best part. This assistance plan is absolutely free. All you have to do to qualify is to commit a crime, get caught and go to the pen.

While as Attorney General of California, I had to frame the issue somewhat differently in our legal proceedings. However, Senator Reid's comments reflected a common sense understanding that those who have been sentenced to serve time in our penal institutions are there to pay their debt to society. The idea that a prisoner could use their status as a basis for their own entertainment at the expense of the People of California or the People of the State of Nevada defies the moral logic of punishment. Those who have lost their liberty because of the harm that they have inflicted on others must not be empowered by the laws of our nation to use that status as a vehicle of retribution against those institutions entrusted with the responsibility carrying out justice on behalf of the people.

THE DELICATE BALANCE OF FEDERALISM

There is another underlying aspect of the PLRA which, in my estimation, deserves our attention. The actions of the Congress in crafting the parameters of prisoner civil litigation have a direct impact on the states and the operation of their prison systems. This relationship of dual sovereigns entailed by our nation's system of federalism should be reflected in legislation affecting state run penal institutions. Such deference is of particular importance in light of the fact that about 95 percent of criminal prosecutions occur at the state and local levels of government. The punishment of those convicted of committing crimes within the jurisdiction of the states is an integral aspect of the exercise of the responsibility borne by them to protect the safety of their citizens. A proper understanding of federalism entails a respect for this aspect of the exercise of the police power.

In the period prior to the enactment of the PLRA, Congressional acquiescence to the use of the federal courts by prisoners as a means of disrupting the operation of their prison systems reflected a disregard for the constitutional role of state governance.

Deputy Assistant Attorney General Ryan Bounds provides one such example in his testimony relating to consent decrees. He points out that "It is one thing for the federal courts to maintain a supervisory role over prisons when established civil rights have been violated. It is another matter entirely when federal courts impose administrative requirements on prisons that are not based on any actual violation of federal law." It was for that reason that the PLRA provided that judicially enforceable prospective relief in prison condition cases must involve the violation of a federal right. In another example, the statute makes explicit reference to a "respect for the principles of comity" in relationship to preliminary injunctive relief, and the need for prospective relief to extend "no further than necessary to correct the violation of the Federal right, and that prospective relief is narrowly drawn and the least intrusive means to correct the violation." The PLRA thus embodies an appropriate balance between the need to protect the civil rights of prisoners and an appropriate respect for the role of the states in a system of government based upon the principle of federalism.

THE PLRA AND THE INTERESTS OF JUSTICE

In the end the interests of justice are also ill served by a prison litigation system which lacks adequate parameters to constrain frivolous and malicious prisoner litigation. The magnitude of the quantity of cases brought before the federal courts can adversely impact the quality and the depth of the scrutiny each of these cases receives. The PLRA has successfully accomplished its objective of reducing inmate litigation. According to the Bureau of Justice Statistics, in 1995 there were 41,679 prisoner lawsuits filed. This inundation of the federal docket threatened to diminish the integrity of the review process—most notably as it related to the review of meritorious claims which might be filed. In Brown v Allen, Justice Jackson's concurring opinion in the context of habeas corpus litigation has relevance here. He noted that "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."

In this regard, the success of the PLRA should perhaps not be viewed exclusively through a quantitative prism concerning the decline in the number of inmate lawsuits to 24,614 petitions within ten years It is perhaps arguable that the Act has improved the quality of the adjudication process as well as its efficiency through mechanisms such as:

- The screening provisions of the Act which serve to filter out frivolous cases.
- The requirement of a physical injury in cases involving claims of mental or emotional injury.
- The exhaustion requirement requiring that prisoners use the prison grievance procedure process before entering the courthouse door.
- The filing fee requirement to ensure a level of seriousness as evidenced by a financial commitment—which may be spread out over a period of time.
- A limit on frivolous and abusive filers.

These and other provisions of the PLRA have played an important role in reigning in frivolous and abusive inmate lawsuits. Over the last twelve years of its application, the Act has played a vital role in restoring the penal function of incarceration, the integrity of the judicial process and the proper functioning of federalism. As the former Attorney General of my State and as a Member of Congress, it is my view that any departure from the PLRA which would undermine the underlying purpose and function of the Act would be a serious error that threatens to return us to the widely documented failures of the pre-PLRA era.

This is not to suggest that issues raised during our hearing such as sexual assaults within our nation's prisons or any misinterpretation of the Act relating to the exercise of religion within correctional facilities should not be addressed. Rather, it is my belief that any effort to do so can be done so with a specificity which preserves the intent of the Prison Litigation Reform Act.

Mr. Chairman, I would once again like to thank you again for this opportunity to share my views with you and the subcommittee. I look forward to working with you and our colleagues on this issue which is of such great importance to our criminal justice system.

I

110TH CONGRESS
1ST SESSION

H. R. 4109

To provide for the redress of prison abuses, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 7, 2007

Mr. SCOTT of Virginia (for himself and Mr. CONYERS) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To provide for the redress of prison abuses, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Prison Abuse Remedies Act of 2007".

SEC. 2. SHOWING OF PHYSICAL INJURY NOT MANDATORY FOR CLAIMS.

(a) CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT.—Section 7 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e) is amended by striking subsection (e).

(b) TITLE 28.—Section 1346(b) of title 28, United States Code, is amended by striking paragraph (2).

SEC. 3. STAYING OF NONFRIVOLOUS CIVIL ACTIONS TO PERMIT RESOLUTION THROUGH ADMINISTRATIVE PROCESSES.

Subsection (a) of section 7 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e(a)) is amended to read as follows:

"(a) ADMINISTRATIVE REMEDIES.—

"(1) PRESENTATION.—No claim with respect to prison conditions under section 1979 of the Revised statutes (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility shall be adjudicated except under section 1915A(b) of title 28, United States Code, until the claim has been presented for consideration to officials of the facility in which the claim arose. Such presentation satisfies the requirement of this paragraph if it provides prison officials of the facility in which the claim arose with reasonable notice of the prisoner's claim, and if it occurs within the generally applicable limitations period for filing suit.

"(2) STAY.—If a claim included in a complaint has not been presented as required by paragraph

(1), and the court does not dismiss the claim under section 1915A(b) of title 28, United States Code, the court shall stay the action for a period not to exceed 90 days and shall direct prison officials to consider the relevant claim or claims through such administrative process as they deem appropriate. However, the court shall not stay the action if the court determines that the prisoner is in danger of immediate harm.

"(3) PROCEEDING.—Upon the expiration of the stay under paragraph (2), the court shall proceed with the action except to the extent the court is notified by the parties that it has been resolved.".

SEC. 4. EXEMPTION OF JUVENILES FROM PRISON LITIGATION REFORM ACT.

(a) TITLE 18.—

(1) JUVENILE PROCEEDINGS.—Section 3626(g) of title 18, United States Code, is amended—

(A) in paragraph (3) by striking "or adjudicated delinquent for,"; and

(B) so that paragraph (5) reads as follows:

"(5) the term 'prison' means any Federal, State, or local facility that incarcerates or detains prisoners;".

(2) ADULT CONVICTIONS.—Section 3626 of title 18, United States Code, is amended by adding at the end the following:

"(h) EXCLUSION OF CHILD PRISONERS.—This section does not apply with respect to a prisoner who has not attained the age of 18 years.".

(b) CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT.—

(1) Section 7(h) of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e(h)), is amended by striking "or adjudicated delinquent for,".

(2) Section 7 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e) is amended by adding at the end the following:

"(i) EXCLUSION OF CHILD PRISONERS.—This section does not apply with respect to a prisoner who has not attained the age of 18 years.".

(c) TITLE 28.—Title 28, United States Code, is amended—

(1) in section 1915(h)—

(A) by inserting "who has attained the age of 18 years" after "means any person"; and

(B) by striking "or adjudicated delinquent for,"; and

(2) in section 1915A(c)—

(A) by inserting "who has attained the age of 18 years" after "means any person"; and

(B) by striking "or adjudicated delinquent for,".

SEC. 5. MODIFICATION OF BAN ON MULTIPLE IN FORMA PAUPERIS CLAIMS.

Section 1915(g) of title 28, United States Code, is amended—

(1) by inserting "within the preceding 5 years" after "3 or more occasions"; and

(2) by striking ", malicious, or fails to state a claim upon which relief may be granted" and inserting "or malicious".

SEC. 6. JUDICIAL DISCRETION IN CRAFTING PRISON ABUSE REMEDIES.

Section 3626 of title 18, United States Code, is amended—

(1) in subsection (a)(1), by striking subparagraphs (A) and (B);

(2) in subsection (a)(2)—

(A) by striking "and shall respect the principles of comity set out in paragraph (1)(B)"; and

(B) by striking the final sentence;

(3) in subsection (b)(1)(A), by inserting "if that party demonstrates that it has eliminated the violation of the Federal right that gave rise to the prospective relief and that the violation is reasonably unlikely to recur" after "intervenor";

(4) in subsection (b)(1)(B), by adding at the end the following: "Nothing in this section shall prevent the court from extending any of the time periods set out in subparagraph (A), if the court finds, at the time of granting or approval of the prospective relief, that correcting the violation will take longer than those time periods.";

(5) by striking paragraphs (2) and (3) of subsection (b);

(6) in subsection (b)(4), by striking "or (2)";

(7) by striking paragraph (1) of subsection (c); and

(8) by striking paragraphs (2), (3), and (4) of subsection (e).

SEC. 7. RESTORE ATTORNEYS FEES FOR PRISON LITIGATION REFORM ACT CLAIMS.

Section 7 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e) is amended by striking subsection (d).

SEC. 8. FILING FEES IN FORMA PAUPERIS.

Section 1915(b)(1) of title 28, United States Code, is amended—

(1) by striking "or files an appeal"; and

(2) by inserting "and the action is dismissed at initial screening pursuant to subsection (e)(2) of this section, section 1915A of this title, or section 7(c)(1) of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e(c)(1))," after "in forma pauperis,".

SEC. 9. TECHNICAL AMENDMENT TO RESOLVE AMBIGUITY.

Section 1915(a)1) of title 28, United States Code, is amended by striking "that includes a statement of all assets such prisoner possesses" and inserting "(including a statement of assets such person possesses)".

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 1, 2008

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Please find enclosed a response to questions arising from the appearance of Deputy Assistant Attorney General Ryan Bounds before the Subcommittee on Crime, Terrorism, and Homeland Security on November 8, 2007, at a hearing entitled "H.R. 1889, the Private Prison Information Act of 2007".

We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Cc: The Honorable Lamar S. Smith
Ranking Member

"H.R. 1889, the Private Prison Information Act of 2007"

November 8, 2007

Questions for the Hearing Record
for
Ryan Bounds
Deputy Assistant Attorney General and Chief of Staff
Office of Legal Policy
United States Department of Justice

QUESTION FROM CONGRESSMAN COBLE:

1. **In testimony at a recent Congressional hearing on H.R. 1889, the Private Prison Information Act, questions were raised about whether companies that have federal contracts to operate correctional and detention facilities are subject to adequate transparency and accountability. Could you describe what kind of oversight the Justice Department exercises on these contracts and whether it has adequate access to information about the facilities and their operations?**

RESPONSE:

The Department of Justice ensures appropriate oversight of the contracts the Bureau of Prisons (BOP) awards for the operation of correctional institutions through adherence to and the use of provisions in the Federal Acquisition Regulation, detailed Statements of Work, and the use of contract monitors and contracting officers stationed at each contract facility.

Personnel from the BOP are on site at these contract facilities to conduct regular and ad-hoc reviews in order to monitor and ensure contract compliance. On-site BOP staff monitor the contractor's performance and document any noncompliance. Formal action can be taken against the contractor for unsatisfactory performance by reducing the contractor's invoice or withholding payment when the contractor fails to perform any of the required services. The BOP staff that are on site meet with a contractor's representative on a regular basis to provide a management-level review and assessment of the contractor's performance and to discuss and resolve problems. The contract may be terminated for default based on inadequate performance of services, even if payment was previously withheld for an inadequate performance.

In addition, teams of BOP subject matter experts in various disciplines conduct periodic reviews of each contract facility to ensure the contractor is performing in accordance with the contract. These reviews provide a mechanism for inspecting performance, testing adequacy of the internal quality controls, and for assessing risks for all program and administrative areas of contract performance. Contractors are required to submit a complete Quality Control Plan that addresses all areas of contract performance. The review guidelines are based on the contractor's Quality Control Plan, the Statement of Work, professional guidelines referenced by the Statement of Work, applicable BOP policy, and other appropriate measures within the contract's scope of work. The BOP reserves the right to develop and implement new inspection techniques and instructions at any time during contract performance without notice to the contractor.

Oversight of BOP contracts for private facilities is further accomplished through a Government Quality Assurance Program. The Quality Assurance Program is based on the premise that the contractor is responsible for the management and quality control actions necessary to meet the terms of the contract (it is not a substitute for the quality control by the contractor).

Contracts to operate correctional institutions are fixed-price contracts governed by the Federal Acquisition Regulation (FAR). Under the FAR, the Government has the right to inspect and test all services called for by the contract, to the extent possible, at all times during the term of the contract. Each phase of services rendered under the contract is subject to the BOP's inspection both during the contractor's operations and after completion of the tasks. When the contractor is advised of any unsatisfactory condition(s), the contractor will submit a written report to the contracting officer addressing any corrective or preventive actions taken. If any of the services do not conform to the contract requirements, the contractor may be required to perform the services again at no increase in contract amount. When the services cannot be corrected by new performance, the Government may require the contractor to either take necessary action to ensure future performance conforms to contract requirements or reduce the contract price to reflect the reduced value of the services performed. If the contractor fails to take the necessary corrective action, the Government can either perform the services and charge the contractor any costs that are incurred or terminate the contract for default.

Washington University in St. Louis
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November 15, 2007

Hon. Robert C. Scott
Chairman
Subcommittee on Crime, Terrorism, and Homeland Security
House Judiciary Committee
U.S. Congress
Washington, DC 20515

Dear Chairman Scott,

Thank you once again for the opportunity to testify at last week's hearing on "Review of the Prison Litigation Reform Act: A Decade of Reform or an Increase in Prison Abuses?" I particularly appreciate the opportunity you offered to supplement the written record before the committee.

I have written three law review articles that examine the provisions and effects of the Prison Litigation Reform Act. They are: Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003); Anne Morrison Piehl & Margo Schlanger, *Determinants of Civil Rights Filings in Federal District Court by Jail and Prison Inmates*, 1 J. EMPIRICAL LEGAL STUD. 79 (2004); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006). Each of these articles is available at http://schlanger.wustl.edu (follow link for "publications"), and of course I would be pleased to provide copies to the committee.

At the hearing, ranking minority member Forbes read into the record some of a critique of the first of these three articles, the one that appeared in the 2003 *Harvard Law Review*. He entered the remainder of that critique into the written record. The piece from which he read—*The Indeterminacy of Inmate Litigation: A Response to Professor Schlanger*, 117 HARV. L. REV. 1661 (2004), was a student-written note; it appeared anonymously, and I do not know its author's name. I was, when the piece appeared, in some degree flattered by the attention embodied by the twenty-page published response. But the note was, in total, an extremely misleading, ill-informed, and I think unprincipled attack on my ethics and my work, and I feel compelled to counter its rather serious accusations against me and my scholarship, which have now become part of this committee's written record.

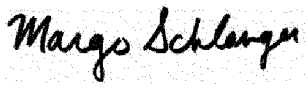
Of course the best counter is my work itself; I believe the original article in question, entitled *Inmate Litigation*, can stand against the flimsy logic and overheated rhetoric of the unnamed student's response. But the article was over 150 pages long, and only some of those pages are even relevant to the matters before the committee. Accordingly, I am providing the committee with a rebuttal I published in 2004. It appeared as Margo Schlanger, *Correspondence: The Politics of Inmate Litigation*, 117 HARV. L. REV. 2799 (2004). It includes substantive discussion which I think demonstrates at least the more important errors in the student note. I ask that it be made a part of the written record. Perhaps two framing paragraphs from that rebuttal would be useful to quote:

> "[W]hatever one's politics, I believe that there is something to be said for fair and careful use of data. . . . Unfortunately, these qualities are nowhere to be found in the Note. Instead, its author engages both in egregious misreading of my piece — mischaracterizing both my arguments and the data on which they rest — and in illogical argumentation that hides rather than clarifies the meaning and effects of statutory provisions. These failings are particularly unfortunate because they obstruct serious policy debate, which is what my piece attempted to promote. . . .
>
> "I am confident that my Article (like every intellectual project) has flaws. But I am equally confident that I did not commit — either consciously or unconsciously — the kind of ideologically driven sleight-of-hand that the Note simultaneously imputes to me and itself exemplifies. By my lights, aspirations to fairness and care are not mere prattle, covering for rawer politics, but are (or ought to be) real constraints on scholarship and policy alike. Unfortunately, these appear not to be aspirations the Note shares, and the result is to impede rather than advance both legal and policy analysis."

I take the ethics of scholarship extremely seriously, and would never slant data to support one side of an argument or attempt to disguise a normative disagreement within empirical results. I cherish my reputation for careful and balanced research and analysis, and I am not aware of any member of the community of scholars—including both those who agree and disagree with my politics—who has ever echoed the student note's attack on that reputation.

Thank you once again for the opportunity to be helpful in any way I can to the committee as it undertakes the important task of improving the regulatory regime governing prison litigation.

Yours,



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CORRESPONDENCE

THE POLITICS OF *INMATE LITIGATION*

Margo Schlanger[*]

I feel compelled to respond to a recent student-written Note[1] that critiques my Article, *Inmate Litigation*,[2] published last year in the *Review*. The Note aims to expose my work as an ("at least . . . unconscious"[3]) exercise in left-leaning political argumentation in the guise of technocratic, quantitative data-crunching. The accusation of covert politics is puzzling. My piece employed careful quantitative and qualitative empirical techniques to evaluate a statute, the Prison Litigation Reform Act (PLRA),[4] that restricts the legal rights of some of the most disempowered and vulnerable people in this country. The politics of that inquiry are clear, and I made no attempt to hide them: I think that the outcome of such systematic investigation matters — that it is wrong to curtail litigation rights, even of inmates, if the effect is to deny redress to victims of unconstitutional misconduct or if the policy change is based on false factual arguments. Unlike the Note, that is, I would hold Congress accountable for both the premises on which it rested inmate litigation reform and the results of that reform. The anonymous Note author's (shocked, *shocked!*) discovery that my piece was driven by such an agenda, hidden in plain sight, hardly requires much analytic insight.

But whatever one's politics, I believe that there is something to be said for fair and careful use of data, as well. Unfortunately, these qualities are nowhere to be found in the Note. Instead, its author engages both in egregious misreading of my piece — mischaracterizing both my arguments and the data on which they rest — and in illogical argumentation that hides rather than clarifies the meaning and effects of statutory provisions. These failings are particularly unfortunate because they obstruct serious policy debate, which is what my piece attempted to promote.

The problem begins with the Note's frame, which asserts that I attempted but failed to establish that the PLRA's proponents would, if only

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[*] Assistant Professor, Harvard Law School.

[1] Note, *The Indeterminacy of* Inmate Litigation: *A Response to Professor Schlanger*, 117 HARV. L. REV. 1661 (2004).

[2] Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003).

[3] Note, *supra* note 1, at 1679.

[4] Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321–66 to -77 (1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; and 42 U.S.C. §§ 1997–1997h).

they had all the evidence, view the statute as unsuccessful. But that (silly) project was not mine. Neither I nor the readers of the *Review* need a demonstration that the most conservative members of the House and Senate would embrace a statute that has shrunk the inmate litigation docket by over forty percent, regardless of that statute's impact on constitutionally meritorious cases. My Article's goals did include an evaluation — against "the terms [the PLRA's] supporters *used*"[5] — of both the problem that the PLRA purported to solve and its success in achieving that solution. The difference between my actual project and the straw version created by the Note is crucial: mine takes seriously the policy justifications and aspirations that the PLRA's authors and supporters offered the median voter. In that context, the PLRA's proponents supported the statute's passage with calibrated claims about the prevalence of litigation abuse by inmates and the prospect of stemming that abuse without introducing obstacles to legitimate lawsuits.[6] Whatever the statute's most ardent supporters actually believed in their hearts of hearts — and I underlined that "the constraint [that meritorious cases by inmates should remain viable] may have been entirely rhetorical"[7] — the politicians who wrote and enacted the PLRA carefully chose the arguments they used in support of their proposal. In suggesting that abusive (as opposed to unsuccessful) lawsuits were less common than the PLRA's proponents claimed, and that the statute has failed to achieve the promised targeted litigation reform, instead making even constitutionally meritorious cases harder both to bring and to win, my Article — unlike the Note — took that rhetoric seriously.

Indeed, the Note's failure to own up to the rhetoric used to sell the PLRA is pervasive, particularly in its extended discussion of the concept of frivolous litigation. I contended that the PLRA's supporters were incorrect when they suggested that inmate litigation has typically, not only occasionally, been not just legally insufficient, indeed "not just legally frivolous[,] but actually laughable."[8] The Note claims that my piece is simply barking up the wrong tree in this regard; indeed, it argues, the "rock-bottom political issue"[9] at the core of my piece is my thus-demonstrated deep misunderstanding of that omnipresent term "frivolous." But it is the Note that garbles the concept of legal frivolousness, misconstruing its use both in general legal parlance and by the PLRA's supporters. Readers with even a

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[5] Schlanger, *supra* note 2, at 1634 (emphasis added).
[6] *See id.* at 1634 & n.270.
[7] *Id.* at 1634.
[8] *Id.* at 1692.
[9] Note, *supra* note 1, at 1680.

passing familiarity with typical legal definitions of "frivolous"[10] (and the well-understood difference between frivolousness and mere legal insufficiency[11]) will be startled by the Note's assertion that the term, as used by the PLRA's proponents, embraced any "cases that 'would not stand on [their] own merits.'"[12] The Note's internal quotation is from the 1994 House Republicans' *Contract with America* — but that source uses simple lack of merit not to *define* frivolousness but to describe one (obvious) feature of frivolous cases. In any event, as my Article explained, the PLRA's proponents repeatedly invoked not the Note's idiosyncratic definition of frivolousness but the ordinary one, resting very heavy weight, rhetorically, on their characterization of inmate litigation as not merely legally meritless but utterly self-evidently so, unworthy of serious examination and therefore a complete waste of the time of prison officials and federal courts.[13] But the Note first misdescribes the pro-PLRA rhetoric (at one point mentioning, for example, a singular list of "top-ten" frivolous inmate cases[14] rather than the twenty-four such lists that dominated discussion of the proposed statute[15]), and then dismisses that rhetoric as professedly hyperbolic. This misreading of the statute's legislative history impedes serious policy evaluation.

Not only does the Note blatantly mischaracterize the rhetoric employed by the PLRA's proponents, it also fails to grapple with the real obstacles the statute has placed in the way of even legitimate cases. This failure is exemplified by the Note's complete misunderstanding of the effect of the PLRA's new exhaustion requirement. As I explained in my Article, an exhaustion rule will probably have a negative impact on the "quality" of the inmate docket: "The proportion of successful cases will likely decrease as courts dismiss cases for failure to exhaust."[16] The Note asserts that it is equally possible that the provision's effect is "merit-blind, leading to a similar level of disqualification in frivolous cases."[17] Nice try, but what

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[10] *See, e.g.*, Neitzke v. Williams, 490 U.S. 319, 325 (1989) (defining "frivolous" under 28 U.S.C. § 1915(d) as "lack[ing] an arguable basis either in law or in fact" . . . and as "embrac[ing] the inarguable legal conclusion . . . [and] the fanciful factual allegation").

[11] *See, e.g.*, *id.* at 329 (citing numerous cases in diverse contexts that distinguish frivolousness from mere absence of merit, thus marking a general "understanding that not all unsuccessful claims are frivolous").

[12] Note, *supra* note 1, at 1665 (alteration in original) (quoting CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 145 (Ed Gillespie & Bob Schellhas eds., 1994)).

[13] I adduced a good deal of evidence, mostly from a literature review, to support my contention that the PLRA supporters' characterizations did not represent the typical civil rights cases brought by inmates. *See* Schlanger, *supra* note 2, at 1570–73, 1692 & n.458.

[14] *See* Note, *supra* note 1, at 1665.

[15] *See* Schlanger, *supra* note 2, at 1568–69.

[16] *Id.* at 1654.

[17] Note, *supra* note 1, at 1675.

the Note forgets is that the exhaustion requirement operates alongside all the other applicable legal requirements — which include that frivolous cases be dismissed. As with any new obstacle to success on the merits, an exhaustion rule inevitably has more traction against meritorious cases than others because the others would have failed already.

More broadly, the Note argues that the now-declining settlement rate of the inmate docket — which I presented as confirmation that the PLRA has, indeed, made legitimate cases harder to win — may actually be evidence that the statute has simply reduced nuisance settlements,[18] a less problematic effect. The Note nowhere mentions my treatment of this issue. Indeed, a reader of the Note might be forgiven for thinking that I am such a pro-plaintiff ideologue that I simply disregard the concept of nuisance value. In fact, I actually set out at some length my finding that the inmate litigation docket differs from other groups of cases in which, I expressly acknowledged, "cases frequently settle for low, 'nuisance value' amounts."[19] In inmate cases, I explained, nuisance value settlements are rare, because of the imbalance of information between plaintiffs and defendants, because inmate litigation is comparatively inexpensive, because settlement imposes large costs on defendants (who need to avoid developing reputations as pushovers), and because of the antagonism between officials and convicts endemic to the corrections milieu.[20] My inquiry into this topic was concrete rather than hypothetical; it was based on interviews and published discussions of the topic by repeat noninmate participants, many of whom supported the PLRA's passage. For example, I cited state corrections heads who denied ever settling cases for nuisance value and judges who bemoaned the scarcity of settlements even in meritorious cases brought by inmates. Now, I may have gotten this point wrong; perhaps the statements of correctional administrators and federal judges were lies or exaggerations. But I don't think so — and the Note does not provide any evidence whatsoever to refute my claims.

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[18] *Id.* at 1672–79. Even in its recitation of my factual conclusion that the inmate docket has seen a decline in the rate of both settlements and litigated victories, the Note reveals an inability to grapple with real numbers and real law, and a tendency toward the slam by innuendo. For example, the Note reports that I "surmised" that inmates "'fare proportionately worse' after the PLRA than they did before the PLRA." *Id.* at 1677 (quoting Schlanger, *supra* note 2, at 1658). But I didn't *surmise* this conclusion; I established it. Taking the success rate as the sum of the rate of settlements and of pro-plaintiff litigated outcomes, it is indisputable that inmate lawsuits have been less successful since the PLRA's passage in 1996. My Article included five detailed figures that presented the relevant data. *See* Schlanger, *supra* note 2, at 1660–63. The Note never actually argues otherwise; it merely leaves the reader with the impression that my claim was unsupported.

[19] Schlanger, *supra* note 2, at 1615.

[20] *See id.* at 1614–21.

I could continue, but I think the point is made. I am confident that my Article (like every intellectual project) has flaws. But I am equally confident that I did not commit — either consciously or unconsciously — the kind of ideologically driven sleight-of-hand that the Note simultaneously imputes to me and itself exemplifies. By my lights, aspirations to fairness and care are not mere prattle, covering for rawer politics, but are (or ought to be) real constraints on scholarship and policy alike. Unfortunately, these appear not to be aspirations the Note shares, and the result is to impede rather than advance both legal and policy analysis.

Testimony of Elizabeth Alexander
National Prison Project of the American Civil Liberties Union Foundation
before the Sub-Committee on Crime, Terrorism and Homeland Security
"Review of the Prison Litigation Reform Act: A Decade of Reform or an Increase in Prisons and Abuses?"
November 8, 2007

As the Director of the National Prison Project of the American Civil Liberties Union Foundation, I have litigated prison, jail, and juvenile conditions of confinement cases in federal courts since 1975. The American Civil Liberties Union is a nation-wide, non-partisan organization with more than 400,000 members, dedicated to the principles of liberty and equality embodied in our Constitution and our civil rights laws. Consistent with that mission, the ACLU established the National Prison Project of the ACLU Foundation in 1972 to protect and promote the civil and constitutional rights of prisoners. The National Prison Project is the only program in the United States that litigates conditions of confinement cases on a national basis; at any given time we have cases pending in twenty to twenty-five states.

We believe that the United States Constitution is grounded in significant part on a profound insight into human behavior. Although government is absolutely necessary to protect human society, governmental authority must be carefully cabined to avoid an inevitable temptation to trample on the rights of the governed. The genius of our Constitution is its careful provision of checks and balances, and safeguards for individual liberty, to assure that those entrusted with the powers of the state remain the servants of the public and not their masters.

Why Do Prisons Require Special Oversight?

Because the powers of government are at their height when the state imprisons someone, prisons provide a test case for the potential for abusive use of power by the state. As the famous "Stanford Experiment" of Prof. Philip G. Zimbardo demonstrated, extraordinary abuse is very easy to engender in the closed environment of a prison. In that experiment, Prof. Zimbardo used as subjects college undergraduates who had been screened to assure their psychological health. Nine of the subjects were randomly assigned to play guards, and the other nine as prisoners at a simulated prison on the Stanford University campus. The "guards " were told that they should do whatever was necessary to maintain law and order. As the experiment progressed, the guards quickly began to use their power to inflict serious psychological abuse on the prisoners. In fact, the experiment had to be stopped after six days because four of the prisoners had suffered emotional breakdowns and the guards were escalating their abuse of the prisoners in the middle of the night when they thought no one was watching.[1]

The message from the Stanford Prison Experiment is a chilling one. As the Abu Ghraib scandal has reminded us, prisons by their nature present an ever-present threat of abuse. Of necessity prison officials are given enormous power over the lives and well-being of prisoners.

In order to prevent abuse of that power, prisons need an effective form of oversight with the resources and commitment to maintaining the rule of law. In this country, the federal courts have traditionally provided the most effective form of oversight over prison conditions. Indeed, prior to the intervention of the federal courts, too many prisons were soul-destroying dungeons that betrayed American ideals of innate human dignity, as the examples below, from five prison systems in different sections of the country, demonstrate:

Arkansas Prison System

> The inmates slept together in large, 100-man barracks and some convicts, known as "creepers," would slip from their beds to crawl along the floor, stalking their sleeping enemies. . . . [R]ape was so common and uncontrolled that some potential victims dared not sleep; instead, they would leave their beds and spend the night clinging to the guards' station.
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> ***
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> Most of the guards were simply inmates who had been issued guns. . . . Inmates could obtain access to medical treatment only if they bribed the trusty [inmate guard] in charge of sick call. . . . [I]t was within the power of a trusty guard to murder another inmate with practical impunity[.]
>
> Confinement in punitive isolation was for an indefinite period of time. An average of 4, and sometimes as many as 10 or 11, prisoners were crowded into windowless 8' X 10' cells containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell. . . . Although some prisoners suffered from infectious diseases like hepatitis and venereal disease, mattresses were removed and jumbled together each morning, then returned to the cells at random in the evening. Prisoners in isolation received less than 1,000 calories per day; their meals consisted mainly of 4-inch squares of "grue."[2]

Menard Correctional Institution in Illinois

> The general housekeeping level and sanitation conditions in segregation have always been extremely poor[.] Open sewage, standing water, flies, roaches, dried food on galleries, adherent

> dirt and food residues and decaying garbage are all persistent problems[.]
>
> Photographs . . . show numerous cells with toilets missing and uncapped waste lines.
>
> ***
>
> The mattresses are dirty, torn, badly stained. Linen is old and filthy and infrequently changed. The sanitation of beds and linens is grossly deficient[.]
>
> ***
>
> The control cells . . . were, however, cut-off from the rest of the gallery by a concrete block enclosure with a solid door which was normally kept locked. . . . [T]he only visibility into these cells was through plexiglass enclosures. These enclosures allowed for no ventilation into the control cell area, and very little light. Several fires were started in the control cells . . . which [by clouding the plexiglass] made visibility into the cells extremely limited. Individuals with a chronic health care problem, including epileptics, [asthmatics and] psychiatrically disturbed inmates, were placed in control cells. . . . Without observation, an inmate could become ill and die within minutes in these cells.
>
> ***
>
> Due to inadequate physician coverage. . . numerous medical tasks were performed by unlicensed and unqualified medical technicians, nurses or inmates. This included prescribing and administering controlled medication without authorization from or consultation with a physician.[3]

Alabama Prison System

> [S]ome inmates have been allowed to assume positions of authority and control over other inmates, creating opportunities for blackmail, bribery and extortion. Some prisoners are used as "strikers" to guard other inmates on farm duty and as "cell flunkies" to maintain order and perform tasks for prison staff.

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> [T]he rampant violence and jungle atmosphere existing throughout Alabama's penal institutions are no surprise. . . . There are too few guards to prevent outbreaks of violence or even to stop those which occur.

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> One 20-year-old inmate, after relating that he had been told by medical experts that he has the mind of a five year old, testified that he was raped by a group of inmates on the first night that he spent in an Alabama prison. On the second night he was almost strangled by two other inmates who decided instead that they could use him to make a profit, selling his body to other inmates.[4]

Colorado State Prison ("Old Max")

> Leaking pipes and defective plumbing cause sewage to accumulate in cells and service areas or to drain into adjacent or lower cells, resulting in innumerable health and safety problems which, when combined with the temperature and ventilation problems, make the main living areas particularly unfit for human habitation.
>
> In addition, the evidence also shows an extensive problem with rodent and insect infestation in the cellhouses.

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> The bedding used by inmates is heavily stained and soiled, and is not changed when a new inmate is assigned to a cell.

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> The violence and fear that permeated the prison population of Old Max in past years continues to exist. The efforts of many inmates are directed at merely staying alive while they serve their sentences.[5]

New Hampshire State Prison

> The kitchen area is infested with rodents, cockroaches, and other insects. Broken windows and inadequate screening augment the basic insect problem[.]
>
> ***
>
> Inmates placed in solitary confinement are stripped to their underwear or left naked if they wear none. No beds are provided and only a canvas mattress and, sometimes, a blanket are issued to the occupant. One inmate testified that he was stripped and denied both a blanket and a canvas mattress. He spent several nights tossing and turning on the freezing concrete trying to keep warm. Others did not receive blankets. . . . When it was too hot, the heat "baked in the dirt on your feet," and, when it was too cold, sleep was impossible[.]
>
> Five layers of steel and a considerable distance separate an occupant from the rest of the prison. No guard or any other person is posted in or near the area, and the cells are not checked regularly. Only the guard who brings the meals is a sure visitor, and were an inmate to scream for help at any other time, no one would hear.
>
> In the face of the professed orientation of the program and severe understaffing, it is not surprising that plaintiffs' experts found mental health treatment at NHSP basically nonexistent. The program is reactive and crisis oriented, and, while there is some diagnostic work done, there is little or no capacity to follow through with treatment.[6]

This is but the tiniest sample of the cases in which a federal court condemned dangerous and disgusting prison and jail conditions; any number of additional cases could have been cited.[7] As a result of this generation of cases from the 1970s and 1980s, prison administration in the United States changed fundamentally and corrections took major steps towards becoming a recognized profession.[8]

Why was PLRA Enacted?

By the mid-1990's, some began to argue that prison litigation had become as much a

problem as a solution, by producing too many frivolous lawsuits that took up the time of the courts and correctional officials. Congress responded to these concerns by passing the Prison Litigation Reform Act of 1995 as part of an appropriations bill and PLRA became law on April 26, 1996.[9] In passing PLRA, however, it was never the intention of Congress to prevent the federal courts from addressing the serious violations of the law and common decency that were the subject of the cases cited above. Indeed, both the House and Senate sponsors of the bills that became PLRA noted that the Act was not intended to interfere with meritorious conditions of confinement litigation. Representative Canady stated that PLRA's provisions "will not impede meritorious claims by inmates but will greatly discourage claims that are without merit."[10] Similarly, Senator Hatch, in introducing an amendment "virtually identical" to the provisions of PLRA, said that he did not want "to prevent inmates from raising legitimate claims.[11]

How Well Has PLRA Worked?

Now that we have more than ten years of experience with the effects of the PLRA, it is apparent that the Act has been quite effective in reducing the burden of frivolous prisoner litigation. The year before PLRA was enacted, prisoners and jail detainees filed federal cases at a rate of 26 per thousand prisoners; a decade later, the rate had decreased to eleven per thousand.[12] At the same time, however, PLRA has had a disastrous effect on the ability of prisoners, particularly prisoners without access to counsel, to have their meritorious cases adjudicated on the merits. Congress should address these unintended consequences of PLRA by amending the Act to preserve the provisions that reduce the burden of frivolous lawsuits but preserve the ability of prisoners to challenge conditions of confinement that violate their constitutional rights.

What are the Unintended Consequences of PLRA that Should be Fixed?

A. The "Physical Injury" Requirement (42 U.S.C. § 1997e(e))

The first of the critical reforms needed in PLRA involves what is referred to as the "physical injury" requirement (42 U.S.C. § 1997e(e)). The "physical injury" requirement epitomizes the unintended consequences of certain provisions of the Act. This provision requires that, in order to sue for compensatory damages in a civil rights case in federal court, the prisoner must first demonstrate a physical injury before he or she can win damages for mental or emotional injuries.[13] Much of the unintended consequences flow from the fact that most federal courts have applied this provision to bar damages claims involving all constitutional violations that intrinsically do not involve a physical injury.[14] Thus, for example, most federal courts bar prisoners from seeking recompense when officials deny them religious rights guaranteed by the Constitution and protected by Congress in the Religious Land Use and Institutionalized Persons Act.[15]

In addition to barring actions for invasions of religious rights, this provision has led to the dismissal of large numbers of cases seeking to hold prison staff accountable for gross violations of human dignity. Notoriously, some courts have applied this provision to bar actions

challenging sexual assault including forcible sodomy in the absence of other physical injury.[16] These cases are, however, just the tip of the iceberg of the cases alleging outrageous conduct that have been dismissed under this provision. This provision has also led to dismissal of cases challenging a prisoner's false arrest and illegal detention,[17] failure to protect a prisoner from repeated beatings that resulted in cuts and bruises,[18] placement in a filthy cell and exposure to the deranged behavior of psychiatric patients,[19] causing a prisoner to experience pain and depression when he was denied his psychiatric medications,[20] and deliberate unauthorized disclosure of a prisoner's HIV-positive status.[21]

Cases of sexual abuse or unjustified gross invasions of bodily privacy that fall short of a sexual assault, regardless of how outrageous the claimed conduct is, are subject to the physical injury requirement. Thus, for example, a claim that a prisoner was punished for refusing to give up his religion by being subjected to abusive strip searches was dismissed under this provision.[22] Indeed, if one calls to mind the iconic photographs from Abu Ghraib, every single image – the mock execution, the forced nudity, the simulated sex acts, the use of dogs to terrify – portrays conduct for which the perpetrators in U.S. prisons would receive immunity from compensatory damages under PLRA. This provision has even been interpreted to bar compensation for physical injury resulting from emotional harm,[23] so a prisoner who suffered a heart attack or a mental breakdown as a result of outrageous conduct, such as a mock execution, would be denied damages for the resulting physical injuries. Surely Congress did not intend this result, which removes a deterrent to staff sadistic behavior and sexual misconduct. The ACLU urges Congress to repeal this provision.

B. Exhaustion of Administrative Remedies (42 U.S.C. § 1997e(a))

Of all of the provisions of PLRA, the one that has caused by far the most damage to the ability of prisoners to present meritorious claims of violations of their rights is the exhaustion provision. Prisoners, as a general matter, are not known for their high levels of literacy. As a result, the requirement of exhaustion has proven to be a trap for the unwary in which the great majority of potentially meritorious claims are lost.[24] First, the deadlines are very short in many grievances systems, almost always a month or less, and not infrequently five days or less.[25] Nonetheless, these deadlines, many measured in hours or days rather than week, operate as a statute of limitations for federal civil rights claims.

Moreover, a typical system does not have just one deadline that could lead to forfeiture of a claim; it may have three or more such deadlines as prisoners must appeal to various levels of the grievance system. The California Department of Corrections grievance system is typical, except that its deadlines are a bit longer than most. Before a prisoner can file a grievance, he or she must fill out a form and attempt informal resolution through discussion with the appropriate staff member. Then the staff member is supposed to complete another portion of the form the prisoner filled out. If the prisoner is dissatisfied with the results of the informal resolution process, he or she can now complete another section of the form, then submit the form with other documents to the first level of appeal within fifteen working days. After the prisoner receives a

denial at this level, the prisoner may appeal to the warden, again within fifteen working days, by filling out another section of the same form. If the warden denies the second-level of appeal, the prisoner fills out yet another section of the form and mails it to the Director of the Department of Corrections, again within fifteen working days.[26]

This procedure raises a number of questions that in practice can lead to a prisoner losing the right to sue. What if the staff member that the prisoner must speak to informally is the same person who sexually or physically assaulted or harassed the prisoner? What if the staff member at the informal review level simply does not sign and return the form that the prisoner needs to appeal to the next level? If the prisoner does not receive a response from one of the appeals levels, how should the prisoner proceed without the required form or the required decision at lower levels of the grievance system? Thousands of prisoners lose their right to sue because they guess wrong about questions like these or they simply give up because they do not know what to do.

Further, in the case in which the United States Supreme Court held that a prisoner had lost the right to sue because of a failure to exhaust the California grievance system properly, the prisoner had attempted to grieve a continuing restriction on his religious rights. He had not grieved about the restriction within fifteen working days of its imposition, however, and so the grievance system had failed to decide the grievance because it considered it untimely. The prisoner then pursued all of his available appeals within the grievance system. Does this mean that the prisoner for the rest of his sentence lost the right to grieve restrictions on his religious rights even if what he is really complaining about is the continuation of the restrictions?

Other obstacles arise all the time that lead to prisoners being denied their right to sue. The rules may require that grievances be submitted only on approved forms, and the forms may not be available.[27] The forms may be available, but only from the staff member who is responsible for the action the prisoner wishes to challenge.[28] Many grievance system rules give administrators discretion not to process grievances if the prisoner has filed too many; some systems also require that only one subject be raised on each grievance submitted.[29] Further, it is a routine practice for grievances not to be given responses by staff in a timely manner, whether or not the system rules indicate a deadline for staff responses. There may be ambiguity about what issues are grievable, or a difference between what the rules say and actual practice by administrators. Even a highly educated prisoner, or the rare prisoner with access to legal advice, will be unsure how to proceed when there is no literal way to comply with the rules in circumstances like these.[30]

Further, too often, there is an inverse relationship between the responsiveness of the grievance system and the importance of the issue. Even if routine complaints are handled reasonably well, grievances that prison staff view as likely to lead to litigation, such as complaints about serious injuries, are the most likely to be subject to a strict interpretation of the system's rules, because of the likelihood that a decision that the prisoner failed to exhaust according to the grievance system's rule will immunize the potential defendants from both

damages and injunctive relief.[31]

Another problem with the current exhaustion requirement of PLRA is the insurmountable obstacle it creates for the prisoner with a meritorious claim who needs immediate injunctive relief.[32] As currently written, PLRA requires that a prisoner go through all the levels of the grievance system until the system provides a final decision, even though a particular system may require three to six months to fully exhaust. In such cases, the PLRA exhaustion requirement completely prevents litigation of the claim for relief.

While Congress' intention to require prisoners to present their legal claims to the internal grievance system before those claims are adjudicated in court makes sense, that objective can be fully accomplished without the wholesale exclusion of claims that the current exhaustion requirement produces. All that is needed to assure that correctional agencies are afforded a real opportunity to review the prisoner's complaint before a federal court hears it is to provide that, if a prisoner attempts to file suit without exhausting the applicable grievance system, the case will be stayed to allow the agency to consider the complaint. With such a provision, Congress could be assured that correctional agencies continue to receive an opportunity to resolve problems internally prior to court consideration, but without the massive cost to meritorious civil rights claims that the existing requirement of exhaustion entails.

C. Juveniles (42 U.S.C. § 1997e(h) et al.)

One provision that is particularly unrelated to the goal of Congress to reduce frivolous litigation is the inclusion of juveniles within the definition of those subjected to its special rules limiting access to courts. In fact, it would be extremely difficult for anyone to identify a single problem with the filing of frivolous lawsuits by juveniles, even before or after the passage of PLRA. At the same time, juveniles are particularly vulnerable to abuse in institutions, and so the potential for court oversight if abuse occurs is particularly important. Unfortunately, in recent years, that potential has too often been realized. The wide-spread sexual abuse scandal within the Texas juvenile system, in which boys and girls were sexually and physically abused by staff, and faced retaliation, including being thrown into an isolation cell in shackles if they complained, has been widely reported by the national news media.[33] Unfortunately, the Texas scandal is not an isolated event; staff sexual and physical abuse and harassment of youth in custody has been an issue from New York to Hawaii.[34] Because youth in custody are uniquely at risk for abuse and because confined youth have never been a source of frivolous litigation, none of the restrictions in PLRA should apply to these youth.

D. Restrictions on Prospective Relief (18 U.S.C. § 3626)

PLRA contains a number of restrictions on the powers of federal courts to issue effective relief in prison conditions of confinement litigation. It is important to understand exactly how these restrictions work to make it more difficult to eliminate dangerous and degrading conditions in our nation's prisons. PLRA provides a set of standards that are supposed to limit the power of

federal courts to issue injunctions in prison conditions cases. These provisions, however, simply reflect the standards for injunctive relief previously developed in the federal courts and so these provisions do not by themselves change the law applicable to injunctive relief in prison cases.[35]

The harm from these restrictions on the powers of federal courts comes from the provisions that allow prison officials to repeatedly challenge the injunctions, and require the complete termination of injunctions if the court fails to find a constitutional violation at the time of retrial. Under PLRA, the court is required to retry, at the defendants' request, any award of injunctive relief two years after the relief was first granted, and yearly thereafter. In addition, the court must terminate injunctive relief unless there is a "current and ongoing" constitutional violation. In other words, the only injunction that a federal court is authorized to continue after such a retrial is an injunction that has not worked to eliminate the constitutional violation. If the injunction has worked, but the constitutional violation is highly likely to return in the absence of the injunction, that injunction must terminate. This limitation on the power of the courts to prevent constitutional violations applies even if the defendants intend to begin violating the law just as soon as the injunction is lifted.[36]

Another unjustified limit on the powers of the federal courts is the provision of PLRA that bars public officials from entering into consent decrees unless they admit a violation of law.[37] Such officials are thus forced to make a Hobson's Choice when they know that conditions are in fact dangerous and disgusting: they can engage in expensive and time-consuming litigation that they expect to lose, or they can make a judicial admission of liability that is likely to haunt them in any damages actions growing out of the conditions. PLRA, which was intended to reduce the burden of prison litigation, should not add to that burden, as this provision does.

Two other restrictions on federal power should also be removed. PLRA limits all preliminary injunctions in conditions of confinement cases to ninety days.[38] As a result, even if a court finds that prisoners face an imminent threat of physical harm, its preliminary injunction may expire before the court can hold a full trial and decide whether final injunctive relief is warranted. Similarly, the automatic stay provision of PLRA provides that the mere act of filing a motion to terminate an existing injunction will result in suspending that injunction unless the court reaches a final decision on the termination motion in 30 to 90 days. This means that, even if the court is completely unable to reach a final decision on whether the defendants are still violating the Constitution because of the complexity of the issues or congestion in the court's docket, the injunction is suspended and the adjudicated constitutional violations may resume.[39] Neither restriction is justified; prisoners should not be denied the protections all other persons receive under our laws because the courts simply run out of time.

E. Restrictions on Attorneys' Fees (42 U.S.C. 1997e(d))

Recovery of attorneys' fees by the rare lawyer who is willing to handle a civil rights claim regarding conditions of confinement is severely restricted by the PLRA, both by imposing an hourly cap on the rate that lawyers may recover in successful cases, and by limiting recoverable

fees to 150% of any damages awarded to the plaintiff. These are restrictions imposed in no other civil rights cases, and have nothing to do with the purpose of PLRA; by definition, cases in which the prisoner proves a violation of the Constitution or federal statutory law are not frivolous. While a few major law firms have done heroic work in this area by undertaking *pro bono* litigation,[40] many small civil law offices that specialize in general civil rights cases have stopped taking prisoner cases.[41] The fees provisions of PLRA, which are of substantially more concern to lawyers in solo practice or in small firms than to practitioners in large firms, have thus contributed to a substantial decline in the number of lawyers who will consider taking a prisoners' rights case, a trend exacerbated by the ban on representation of prisoners imposed on the Legal Services Corporation.[42]

Because prisoners are uniquely at risk of abuse, it is particularly dangerous to make it difficult for prisoners to obtain lawyers. Accordingly, it is critically important that the few lawyers willing to handle such cases have the incentives that are provided in other civil rights cases to assure that constitutional protections remain a reality in practice as well as theory. Since removing the current disincentives to these cases cannot undermine the goal of discouraging prisoner frivolous litigation, this provision should be repealed.

F. Filing Fees and the "Three Strikes" Provision (28 U.S.C. § 1915)

Indigent prisoners, unlike any other category of indigent litigants in the federal courts, must pay the entire filing fee of $350 in the district court. At the time of filing, a percentage of the prisoner's available funds must be paid, with the remainder subtracted from his or her institutional account over time.[43] Given that most prisons provide wages for prisoners allowed to work of a few dollars a day at best, this provision enormously penalizes prisoners, including those who file meritorious claims. We support an amendment to PLRA that will allow prisoners who file *non-frivolous* lawsuits to be treated like all other indigent litigants. Adopting this amendment will not detract from the purposes of PLRA, since prisoners who file lawsuits dismissed as frivolous during their initial screening will still be required to pay the entire $350 fee over time.

A second feature of the PLRA screening provision that should be modified to prevent injustice is the "three strikes" requirement. A prisoner who has three complaints or appeals dismissed as frivolous or malicious, or for failure to state a claim, is forever barred from using the indigency provisions of the law at all (unless the prisoner is experiencing "imminent danger of serious physical injury).[44] Since few prisoners have $350 at their disposal, this provision bars such prisoners from the federal courts in most circumstances.

While no one wants to encourage the filing of frivolous actions, the penalties should not be so severe as to bar claims such as racial discrimination, sexual abuse, and religious discrimination because the prisoner made three mistakes in filing a case. First, it is particularly difficult for prisoners to know if a particular complaint is frivolous or does not state a claim because they currently have few sources of accurate advice or information. In 1996, in *Lewis v.*

Casey, the Supreme Court substantially cut back on the scope of the constitutional right of prisoners to assistance in filing complaints. As a result, many prison systems discarded their law books and shut down programs to assist prisoners in filing meaningful legal papers.

Further, it is frequently not easy for anyone to determine whether a particular complaint is frivolous or fails to state a claim. In one of the cases that the National Prison Project handled in the Supreme Court, *Farmer v. Brennan,*[45] the district court denied leave to appeal on the ground that the appeal was frivolous and the court of appeals subsequently also denied leave to appeal,[46] meaning that it agreed with the district court's assessment that any appeal was frivolous. The Supreme Court, reversing, held that the prisoner had stated a claim for relief. The case involved a pre-operative transsexual who was feminine in appearance, and had been transferred to an all-male prison, where she alleged that she had immediately been raped because of a failure to protect her from the foreseeable risk to her safety. *Farmer* has become the leading case on the standard that prisoners must meet to show a violation of their Eighth Amendment rights. But for the Supreme Court decision to grant certiorari and reverse the lower courts, this case would have counted as one of the three strikes necessary to bar the prisoner plaintiff permanently from the federal courts.

The purposes of PLRA in discouraging frivolous litigation can be satisfied by satisfied by limiting the "three strikes" rule to prisoners who file malicious lawsuits, particularly because the amendment of the statute would not prevent federal courts from applying appropriate sanctions, on an individual basis, to prisoners who abuse the indigency provisions.[47]

Conclusion

The National Prison Project supports measured modifications of PLRA that, without undermining the goal of preventing frivolous litigation, assure that prisoners are not barred from litigating meritorious claims by the many obstacles that PLRA places in the way of meaningful access to the federal courts. Absent such access, we risk the return, on a massive scale, of brutal and disgusting prison conditions that have no place in our scheme of justice.

End Notes

1. For a readily accessible introduction to the Stanford Prison Experiment, *see Stanford Prison Experiment* at http://www.prisonexp.org/.

2. *Hutto v. Finney,* 437 U.S. 678, 681 n.3, 682 & n.6, 683 (1979) (citations and internal quotation marks omitted).

3. *Lightfoot v. Walker,* 486 F. Supp. 504, 510-11, 515 (S.D. Ill. 1980).

4. *Pugh v. Locke,* 406 F. Supp. 318, 325 (M.D. Ala. 1976).

5. *Ramos v. Lamm,* 639 F.2d 559, 569-70, 573 (10th Cir. 1980) (citations omitted).

6. *Laaman v. Helgemoe,* 437 F. Supp. 269, 278-79, 290 (D.N.H. 1977).

7. For a sample of other cases noting similar findings, *see, e.g., Burks v. Teasdale,* 603 F.2d 59 (8th Cir. 1979); *Todaro v. Ward,* 565 F.2d 48 (2d Cir. 1977); *Battle v. Anderson,* 564 F.2d 388 (10th Cir. 1977); *Williams v. Edwards,* 547 F.2d 1206 (5th Cir. 1977); *Gates v. Collier,* 501 F.2d 1291 (5th Cir. 1974); *Ruiz v. Estelle,* 503 F. Supp. 1265 (S.D. Tex. 1980); *Feliciano v. Barcelo,* 497 F. Supp. 14 (D.P.R. 1979); *Capps v. Atiyeh,* 495 F. Supp. 802 (D. Ore. 1980); *Johnson v. Levine,* 450 F. Supp. 648 (D. Md. 1978); *Palmigiano v. Garrahy,* 443 F. Supp. 956 (D.R.I. 1977); *Anderson v. Redman,* 429 F. Supp. 1105 (D. Del. 1977); *Barnes v. Government of the Virgin Islands,* 415 F. Supp. 1218 (D.V.I. 1976); *Costello v. Wainwright,* 397 F. Supp. 20 (M.D. Fla. 1975).

8. In the wake of federal lawsuits, state corrections departments realized that only professionalization of prison staff would cure the violations of law found by the courts. The American Correctional Association, the leading association of correctional professionals, responded by developing prison standards and a mechanism for prison accreditation by the organization. Even today, the American Correctional Association touts accreditation as a defense against litigation. American Correctional Association, *Standards & Accreditation,* available at http://www.aca.org/standards/benefits.asp.

9. Pub. L. 104-134 (Apr. 26, 1996).

10. 141 Cong. Rec. H1480 (daily ed. Feb. 9, 1995)

11. 141 Cong. Rec. S14,611; *see also* 141 Cong. Rec. S14,627 (daily ed. Sept. 29, 1995) ("The crushing burden of these frivolous suits makes it difficult for the courts to consider meritorious claims.") (statement of Sen. Hatch).

12. U.S. Dep't of Justice Office of Justice Programs Bureau of Justice Statistics, http://www..uscourts.gov/judicial_business/c2 asep97.pdf; Margo Schlanger & Giovanna Shay, American Const. Soc'y, Preserving the Rule of Law in America's Prisons: The Case for Amending the Prison Litigation Reform Act 2 (2007), available at http://www/acslaw.org/files/Shlanger%20Shay%20PLRA%20Paper%203-28-07.pdf.

13. Some courts have held that the "physical injury" requirement bars compensatory damages but not nominal or punitive damages. *See, e.g., Thompson v. Carter,* 284 F.3d 411, 418 (2d Cir. 2002); *but see Smith v. Allen,* __F.3d __. 2007 WL 2826759 (11th Cir. Oct.7, 2007); *Davis v. District of Columbia,* 158 F.3d 1342, 1348 (D.C. Cir. 1998).

14. *See, e.g., Royal v. Kautzky,* 375 F.3d 720 (8th Cir. 2004) (damages are not available based on retaliation for exercise of First Amendment rights); *Thompson v. Carter,* 284 F.3d 411 (2d Cir. 2002) (damages are not available for violation of due process rights); *Searles v. Van Bebber,* 251 F.3d 869 (10th Cir. 2001) (no damages for violation of religious rights); *Allah v. Al-Hafeez,* 226 F.3d 247 (3d Cir. 2000) (damages are not available for violation of religious rights); *Davis v. District of Columbia,* 158 F.3d 1342 (D.C. Cir. 1998) (damages are not available for invasion of

privacy violating the Constitution); *but see Rowe v. Shake,* 196 F.3d 778 (7th Cir. 1999) (damages are available for violation of First Amendment rights if prisoner is not seeking compensation for mental or emotional injury); *Cannell v. Lightner,* 143 F.3d 1210 (9th Cir. 1997) (allowing damages for violations of religious rights).

15. 42 U.S.C. § 2000cc-(1)-(2) (2007). For examples of cases denying compensatory damages for violations of religious rights, *see Searles v. Van Bebber,* 251 F.3d 869 (10th Cir. 2001) (no damages for violation of religious rights); *Allah v. Al-Hafeez,* 226 F.3d 247 (3d Cir. 2000) (damages are not available for violation of religious rights); *but see* (*Cannell v. Lightner,* 143 F.3d 1210 (9th Cir. 1997) (allowing damages for violations of religious rights).

16. *See Hancock v. Payne,* 2006 WL 21751 at *1, 3 (S.D. Miss. Jan. 4, 2006) (complaints that officers forcibly sodomized prisoners barred by provision); *Smith v. Shady,* 2006 WL 314514 at *2 (M.D. Pa. Feb. 3, 2006) (complaint that correctional officer grabbed penis barred by provision).

17. *Young v. Knight,* 113 F.3d 1248, 1997 WL 297692 (10th Cir. June 5, 1997); *see also Colby v. Sarpy Co.,* 2006 WL 519396 (D. Neb. March 1, 2006) (dismissal of a claim of wrongful confinement for four months).

18. *Luong v. Hatt,* 979 F. Supp. 481 (N.D. Tex. 1997).

19. *Harper v. Showers,* 174 F.3d 716 (5th Cir. 1999).

20. *Weatherspoon v. Valdez,* 2005 WL 1201118 (N.D. Tex. May 17, 2005).

21. *Davis v. District of Columbia,* 158 F.3d 1342 (D.C. Cir. 1998).

22. *Adams v. Rockafellow,* 66 Fed. Appx. 584, 2003 WL 21259701 (6th Cir. May 28, 2003); *see also Seaver v. Manduco,* 178 F. Supp. 2d 30 (D. Mass. 2002) (challenge to retaliatory strip and body cavity searches as well as verbal harassment); *Adnan v. Santa Clara Dep't of Corrections,* 2002 WL 32058464 at *3 (N.D. Cal. Aug. 15, 2002) (challenge to body cavity strip searches); *Ashrann Ra v. Virginia,* 112 F. Supp. 2d 559, 566 (E.D. Va. 2000) (routine viewing in the nude by correctional officers of the opposite sex); *Moya v. City of Albuquerque,* No. 96-1257 DJS/RLP, Mem. Op. & Order (D.N.M. Nov. 17, 1997) (strip search of two female detainees by male correctional officers, resulting in an attempted suicide by one of the prisoners, dismissed under this provision).

23. *Davis v. District of Columbia,* 158 F.3d 1342 (D.C. Cir. 1998).

24. *See* Giovanna E. Shay & Joanna Kalb, *More Stories of Jurisdiction Stripping and Executive Power: The Supreme Court's Recent Prison Litigation Reform Act (PLRA),* 29 Cardozo Law Review 291, 321(2007) (reporting that in a study of cases in which an exhaustion issue was raised after the Supreme Court decision in *Woodford v. Ngo,* 126 S. Ct. 2378 (2006), all claims survived exhaustion in fewer than 15% of reported cases).

25. *See Woodford v. Ngo,* 126 S. Ct. 2378, 2402 (Stevens, J., dissenting) (noting that most grievance systems have deadlines of 15 days or less, and that the grievance systems of nine states have deadlines of between two to five days).

26. *See Woodford v. Ngo,* 126 S. Ct. 2378, 2383 (2006) (describing the California Department of Corrections grievance system).

27. *See, e.g., Spaulding v. Oakland Co. Jail Medical Staff,* 2007 WL 2336216 at *2 (E.D. Mich. Aug. 15, 2007) (lawsuit dismissed despite prisoner's claim that he was unable to obtain required grievance form).

28. *See, e.g. Richardson v. Spurlock,* 260 F.3d 495, 499 (5th Cir. 2001) (prisoner failed to exhaust because grievance system refused to consider grievance submitted on wrong form).

29. See, *e.g., Harper v. Laufenberg,* No. 04-C-699-C, 2005 WL 79009 at *3 (W.D. Wis. Jan. 6, 2005) (prisoner failed to exhaust because grievance system refused to consider grievance that it considered to raise two complaints rather than one).

30. These are all problems that staff at the National Prison Project encounter routinely as we attempt to advise prisoners on how to avoid losing their rights to sue.

31. *See Woodford v. Ngo,* 126 S. Ct. 2378 (2006) (prisoner who has not complied with rules of the grievance system has failed to exhaust, so lawsuit must be dismissed).

32. *See, e.g., Williams v. CDCR,* 2007 WL 2384510 at *4 (E.D. Cal., Aug. 17, 2007) (claim of suffering from food poisoning); *Ford v. Smith,* 2007 WL 1192298 at *2 (E.D. Tex., Apr. 23, 2007) (claim of threat to personal safety); *Aburomi v. United States,* 2006 WL 2990362 at *1 (D.N.J., Oct. 17, 2006) (claim of cancer recurrence needing immediate treatment).

33. *See* Gregg Jones, et al., *TYC Facilities Ruled by Fear,* Dallas Morning News, March 18, 2007, available at http://www.dallasnews.com/sharedcontent/dws/dn/latestnes/stories/031807dnprotycretalii...

34. *See, e.g.,* Stop Prisoner Rape, The Sexual Abuse of Female Inmates in Ohio (Dec. 2003), available at http://www.spr.org/pdf/sexabuseohio.pdf (including discussion of sexual assaults by staff in juvenile wing of facility); American Civil Liberties Union of Hawai'i, "Hawai'i Youth Correctional Facility to Pay over Half a Million Dollars for 'Relentless Campaign of Harassment of Gay and Transgender Youth" (June 15, 2006) (threats of violence and physical and sexual assault), available at http://www.acluhawaii.org/news.php?id=24; letter from Deval Patrick, Civil Rights Division of U.S. Department of Justice to Louisiana Governor Mike Foster, July 15, 2006, available at http://www.usdoj.gov/crt/split/documents/lajuvfind3.htm (describing physical and sexual assaults on youth held in secure juvenile facilities in Louisiana); American Civil Liberties Union & Human Rights Watch, Custody and Control: Conditions of Confinement in New York's Juvenile Prisons for Girls 44-56, 63-71 (2006).

35. *See Gilmore v. California,* 220 F.3d 987, 1006 (9th Cir. 2000) (except for the limitations on consent decrees, the prospective relief provisions of PLRA reflect "essentially the same" limits on federal injunction as does the general law because no injunction should require more than is necessary to correct the underlying constitutional violation); *Smith v. Ark. Dep't of Correction,* 103 F.3d 637, 647 (8th Cir. 1996) (PLRA merely codifies existing law and does not change the standards for whether to issue an injunction).

36. *See Para-Prof'l Law Clinic at SCI-Graterford v. Beard,* 334 F.3d 301, 304 n.1, 306 (3d Cir. 2003) (PLRA requires termination of injunctive relief even though defendants have announced plans that are likely to lead to a return of the constitutional violation); *see also Castillo v. Cameron County*, 238 F.3d 339, 353 (5th Cir. 2001); *Cason v. Seckinger,* 231 F.3d 777, 784 (11th Cir. 2000).

37. 18 U.S.C. § 3626(c) (2007) prohibits federal courts from approving consent decrees that omit findings that the relief is necessary to correct a violation of the Constitution or other federal law by subjecting consent decrees to the same jurisdictional limits that apply to contested orders pursuant to 18 U.S.C. § 3626(a) (2007).

38. 18 U.S.C. § 3626(a)(2) (2007).

39. 18 U.S.C. § 3626(e) (2007).

40. Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. Law Rev. 550, 601 (2006) (noting that there has been an increase in pro bono litigation by large firms).

41. This statement is based on the experience of staff of the National Prison Project in providing advice and support to private lawyers litigating conditions of confinement claims in the eleven years since PLRA; *but see* Schlanger, *supra* note 40 (finding insufficient evidence to express an overall conclusion on the effect on private litigators of the restrictions in PLRA).

42. *See* Omnibus Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(15), 110 Stat. 1321, 1321-55.

43. *See* 28 U.S.C. § 1915(a,b) (2007).

44. *See* 28 U.S.C. § 1915(g) (2007).

45. 511 U.S. 825 (1994).

46. *Farmer v. Brennan,* 11 F.3d 668 (7th Cir. 1992).

47. *See, e.g., Olivares v. Marshall,* 59 F.3d 109 (9th Cir. 1995) (in a case pre-dating PLRA, holding that district judge was entitled to impose partial filing fee on indigent prisoner who appeared to be manipulating indigency status).

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FACULTY OFFICES

November 6, 2007

Attn: Ms. Rachel King
House Judiciary Committee
Rachel.King@mail.house.gov

Written Testimony of Asst. Professor Giovanna Shay
Regarding Proposed Revisions to Prison Litigation Reform Act

Dear Members of the House Judiciary Committee:

My name is Giovanna Shay, and I am an Assistant Professor at Western New England College School of Law. I am submitting this written testimony in support of the SAVE coalition's proposed revisions to the Prison Litigation Reform Act (PLRA).

For a number of years, I have been involved in both scholarly legal research and litigation regarding the PLRA. I have published articles on how the PLRA undermines court access and the rule of law. These include an American Constitution Society (ACS) issue brief with Prof. Margo Schlanger entitled *Preserving the Rule of Law in America's Prisons and Jails: The Case for Amending the Prison Litigation Reform Act* (March 2007),[1] and a full-length law review article with Johanna Kalb which is appearing this month in the Cardozo Law Review—*More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act*, 29 CARDOZO L. REV. 291 (October 2007).[2] I served as counsel for *amicus curiae* the Jerome N. Frank Legal Services Organization of the Yale Law School, which filed a brief in *Woodford v. Ngo*, 126 S.Ct. 2378 (2006) (interpreting the PLRA exhaustion provision to encompass a procedural default component). I also contributed research to the *amicus* brief filed on behalf of a number of organizations by the American Civil Liberties Union National Prison Project in *Jones v. Bock*, 127 S.Ct. 910 (2007), another Supreme Court case involving PLRA exhaustion issues.[3]

Based on my research and experience in this area, I support all of the proposed SAVE reforms to the PLRA. In particular, I urge you to modify the exhaustion

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[1] *available at* www.acslaw.org/node/4587.
[2] *available at* www.Cardozolawreview.com/PastIssues/29.1_shay_kalb.pdf.
[3] The views that I express in this testimony are mine alone; they do not necessarily represent the views of my current institution, Western New England College School of Law, or any other entity or person.

requirement, eliminate the physical injury requirement, and limit the PLRA so that it does not apply to juveniles. However, I want to focus this written testimony on the exhaustion requirement, which has been a particular subject of my research.

As the Committee probably is aware, the current PLRA exhaustion requirement has been interpreted by the Supreme Court in *Woodford v. Ngo*, 126 S.Ct. 2378, to include a procedural default component. This means that prisoners are not only required to exhaust--to present their grievances first to prison and jail officials before filing in court--but also that they are forever barred from filing their claim in court if they fail to comply with any of the steps in the grievance procedure. This is a very arduous requirement, because prison and jail grievance systems often have several deadlines, and they can be as short as only a few days. Thus, if a prisoner's case is dismissed because of a technical flaw in the exhaustion process, the prisoner most likely will have missed a short deadline in the grievance procedure and will be unable to seek relief in court. (And missing a deadline itself counts as a procedural flaw).

For the brief that I filed on behalf of *amicus curiae* the Jerome N. Frank Legal Services Organization of the Yale Law School in *Woodford*, we conducted a survey of prison and jail grievance policies. Because it is sometimes difficult to obtain prison and jail grievance policies, we could *not* guarantee that the policy that we obtained from each jurisdiction was the most up-to-date as of the filing of our brief in February, 2006. (Certainly, new policies may have been issued subsequently.)[4] However, we were able to obtain at least one illustrative policy from each jurisdiction. I attach to this testimony the chart that we developed that sets out the deadlines.

As you can see from the chart, prison and jail grievance policies often require several levels of review, with filing deadlines at each stage as little as a few days. Here is how we summarized our conclusions in our *Woodford* brief:

> About a dozen of the department of corrections policies summarized in the chart provide for periods shorter than fourteen days for the filing of the first official grievance. A number of those filing deadlines are significantly shorter than fourteen days—between three and ten days.[5] To

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[4] For example, the Indiana Department of Corrections (DOC) issued a new policy effective December 1, 2005 (No. 00-02-301).

[5] *See* Arizona Dept. of Corrections Dept. Order 802.09, 1.1.2 (Mar. 3, 2000)(ten days); Arkansas Dept. of Corrections Admin. Dir. 04-01(IV)(E)(7)(Feb. 1, 2004)(three working days); Georgia Dept. of Corrections Standard Operating Procedures (SOP) IIB05-0001(VI)(C)(2)(June 1, 2004)(five business days); Indiana Dept. of Corrections Policy No. 00-02-301 XVIII (C)(May 1, 2000)(two working days); Kentucky Dept. of Corrections Policy No. 14.6 II (J)(2)(Jan. 4, 2005)(five working days); Massachusetts Dept. of Correction, 103 CMR 491.08(4)(Jan. 5, 2001)(ten working days); Michigan Dept. of Corrections Policy 03.02.130 (X)(Dec. 19, 2003)(five business days); Missouri Dept. of Corrections Institutional Services Policy and Procedure Manual, Procedure No. IS8-2.1 III(I)(3)(Jan. 15, 1992)(five working days); Montana State Prison Policy No.

further complicate matters, more than thirty of the departments of corrections that we surveyed require a prisoner to at least attempt informal resolution—talking with a staff member or submitting a request form—before filing a grievance.[6] Some of these policies set out deadlines for the informal resolution process that are quite short—as short as two days.

3.3.3 V (F)(1)(Apr. 1, 1997)(three working days); Nevada Dept. of Corrections Admin. Reg. 740.02, § 1.5.1 (Jan. 5, 2004)(five days); Rhode Island Code of Regulations 06.070.002(E)(10)(Jan. 7, 1980)(three days); Tennessee Dept. of Corrections Index No. 501.01 VI (C)(1)(May 1, 2004)(seven calendar days); Utah Dept. of Corrections Institutional Operations Division Manual, FDr02/03.03(C)(July 1, 2003)(five working days).

[6] *See* United States Bureau of Prisons Directive 1330.13, § 542.13 (Aug. 13, 2002); Alaska Dept. of Corrections Policy Index No. 808.03 (B)(1)(May 23, 2002); Arizona Dept. of Corrections Dept. Order 802.01, 1.1.3 (Mar. 3, 2000); Arkansas Admin. Dir. 04-01 (IV)(E)(1)(Feb. 1, 2004); California Dept. of Corrections, tit. 15, Calif. Code of Reg. § 3084.2(b) (2005); Connecticut Dept. of Corrections Admin. Dir. 9.6 (9)(Mar. 5, 2003); Delaware Bureau of Prisons Proc. No. 4.4 at 5 (May 15, 1998); District of Columbia Dept. of Corrections D.O. 4030.1D VII (F)(1)(May 4, 1992); Rules of the Florida Dept. of Corrections, Ch. 33-103.005-(1)(Oct. 9, 2005); Georgia Dept. of Corrections, SOP Ref. No. IIB05-0001 (VI)(B)(1)(June 1, 2004); Hawaii Dept. of Corrections, Policy No. 493.12.03(4.0)(10)(b)(Apr. 3, 1992); Idaho Dept. of Corrections Dir. No. 316.02.01.001, 05.02.01 (Sept. 16, 2004); Illinois Dept. of Corrections, 20 Ill. Adm. Code § 504.810 (a) (2005); Indiana Dept. of Corrections, Policy No. 001-02-301, XIV (May 1, 2000); Iowa Dept. of Corrections, Policy No. IN-V-46 V(A)(January 2005); Kansas Dept. of Corrections, Article 15—Grievance Procedure for Inmates, § 44-15-101(b); Maine Dept. of Corrections, Policy and Procedures Manual subsection 29.1 VI(B)(1); Michigan Dept. of Corrections Policy No. 03.02.130(x)(Dec. 19, 2003); Minnesota Dept. of Corrections Policy No. 303.100(A)(1)(a)(2)(May 1, 2005); Missouri Dept. of Corrections, Institutional Services Policy and Procedure Manual Procedure No. IS 8-2.1 III(H)(1)(Jan. 15, 1992); Montana State Prison Policy No. 3.3.3 V(E)(Apr. 1, 1997); Nebraska Dept. of Correctional Services, Policy No. 217.02, referencing Nebraska Admin. Code, tit. 68, ch.2, § 003.02; Nevada Dept. of Corrections, Admin. Reg. 740, § 1.4.1.1 (Jan. 5, 2004); New Hampshire Dept. of Corrections, Statement No. 1.16 IV (A)(1)(Oct. 1, 2002); New Mexico Corrections Dept., CD-150501(A)(1)(June 22, 2005); North Carolina Dept. of Corrections, Rules and Policies Inmate Booklet, § 20(6)(a)(March 2002); North Dakota Dept. of Corrections Policies and Procedures Manual, Inmate Rights, VI(H)(1)(May 5, 2005); Ohio Admin. Code § 5120-9(J)(1)-31; Oklahoma Dept. of Corrections, OP-090124 IV(A)(Oct. 11, 2005); Oregon Admin. Rules 291-109-0140(1)(a); South Carolina Dept. of Corrections Policy No. GA-01.12 (13.1)(Nov. 1, 2004); Texas Dept. of Criminal Justice, Offender Orientation Handbook VI(B)(November 2004); Utah Dept. of Corrections, Institutional Operations Division Manual, FDr02/03.03(A)(July 1, 2003); Virginia Dept. of Corrections Procedure No. DOP 866-7.13 (Nov. 20, 1998); Washington Dept. of Corrections, No. DOC 550.100 (Mar. 1, 2005); Wyoming Dept. of Corrections, Admin. Reg. No. 2.501, Appendix A (C)(1)(a)(Dec. 11, 1998).

See, e.g., Indiana Dept. of Correction Policy No. 00-02-301 XVIII (A)(May 1, 2000)(forty-eight hours); Michigan Dept. of Corrections Policy No. 03.02.130 (R)(Dec. 19, 2003)(two business days).[7] A number of policies require a prisoner to attempt informal resolution *within* the time for filing the first official grievance. *See, e.g.*, Connecticut Dept. of Correction, Admin. Dir. 9.6 (9) (Mar. 5, 2003); District of Columbia Dept. of Corrections, D.O. 4030.1D VII (F)(1) and (3)(May 4, 1992). Some policies allow prison officials a number of days in which to respond to the informal complaint before the prisoner may go on to file the formal one. *See, e.g.*, Connecticut Dept. of Correction, Admin. Dir. 9.6 (9), (10)(G) (Mar. 5, 2003)(requiring informal resolution and permitting staff fifteen days to respond to informal request, but requiring that formal grievance be filed within thirty days of incident).

All of the department of corrections policies that we reviewed required an inmate to pursue at least one level of review of the initial response to a formal grievance in order to complete administrative exhaustion. Many mandate two or more levels of review. Of the corrections department policies that we collected, a significant number required an administrative appeal in fewer than fourteen days; deadlines were as short as three to five days in many instances.[8] The Alaska and Indiana policies that we

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[7] *See also* Arizona Dept. of Corrections, Dept. Order 802.08 (Mar. 3, 2000)(ten working days); Delaware Bureau of Prisons, Proc. No. 4.4 (May 15, 1998)(seven calendar days); Georgia Dept. of Corrections, SOP Ref. No. IIB05-0001 (VI)(B)(5)(June 1, 2004)(ten calendar days); Montana State Prison Policy No. MSP 3.3.3. V (E)(1)(Apr. 1, 1997)(five working days); Nebraska Department of Correctional Services, Policy No. 217.02, referencing Nebraska Admin. Code, tit. 68, ch.2, § 004.01 (three calendar days); New Mexico Corrections Dept., CD-150500 (June 22, 2005)(five calendar days); North Dakota Dept. of Corrections Policies and Procedures Manual, Inmate Rights VI (H) (May 5, 2005)(five calendar days); Oklahoma Dept. of Corrections, OP-090124 IV(A) and (B)(Oct. 11, 2005)(three days for attempt at verbal resolution, seven days for written attempt at resolution); Utah Dept. of Corrections, Institutional Operations Division Manual, FDr02/03.03 (July 1, 2003)(seven working days); Wyoming Dept. of Corrections, Admin. Reg. No. 2.501, Appendix A(C)(1)(Dec. 11, 1998) (seven calendar days).

[8] *See* Alaska Dept. of Corrections, Index No. 808.03 (B)(4)(May 23, 2002)(two working days); Arizona Dept. of Corrections, Dept. Order 802.09, 1.3 (Mar. 3, 2000)(ten calendar days); Arkansas Dept. of Corrections, Admin. Dir. 04-01 IV (G) (Feb. 1, 2004)(five working days); Colorado Dept. of Corrections, Reg. No. 850-04 IV (D)(1)(c)(Dec. 15, 2005)(five calendar days); Connecticut Dept. of Correction, Admin. Dir. 9.6(16)(Mar. 5, 2003)(five calendar days); Delaware Bureau of Prisons, Pro. No. 4.4, IGP Resolution Levels: Appeals (May 15, 1998)(three days); District of Columbia Dept. of Corrections, D.O. 4030.1D VII(G)(3)(May 4, 1992)(five days); Georgia Dept. of Corrections, SOP II B05-0001 (VI)(D)(2)(1)(five business days); Hawaii Dept. of Public Safety, Policy No. 493.12.03, 4.15 (a) and (f)(Apr. 3, 1992)(five days); Idaho Dept. of Correction, Dir. No.

reviewed allow only two working days for appeals.[9] The Delaware and Kansas policies that we obtained permit three calendar days for appeals.[10] Several departments of corrections permit only three working days for appeals.[11] The New York State Department of Correctional Services

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316.02.01.001, 05.03.00 (Sept. 16, 2004)(ten days); Indiana Dept. of Corrections, Policy No. 00-02-301 XVIII (C) (May 1, 2000)(two business days); Kansas Dept. of Corrections, Article 15—Grievance Procedure for Inmates, § 44-15-102(b) and (c)(1)(three days); Kentucky Dept. of Corrections, Policy No. 14.6 II (J)(2)(j) and (3)(c) (Jan. 4, 2005)(three working days); Louisiana, La. Admin. Code, tit. 22 pt. I, § 325(G)(2)(a)(five days); Maine Dept. of Corrections, Policy and Procedures Manual subsection 29.1IV(D)(1) and (E)(1)(ten days); Maryland Dept. of Public Safety and Correctional Services (Division of Correction), Directive No. 185-101 III(G)(1)(April 1, 1993) (ten calendar days), Massachusetts Dept. of Correction 103 CMR 491.12(1)(ten working days); Michigan Dept. of Corrections Policy Directive No. 03.02.130 (DD) and (HH)(Dec. 19, 2003)(five business days and ten business days); Missouri Dept. of Corrections Institutional Services Policy and Procedure Manual III(K)(January 15, 1992)(five working days and ten working days); Montana State Prison Policies and Procedures, Policy No. 3.3.3 V(I)(1)(a)(Apr. 1, 1997)(three working days); Nebraska Department of Correctional Services, Policy No. 217.02, referencing Nebraska Admin. Code, tit. 68, ch.2, § 004.05 (ten days); Nevada Dept. of Corrections, Admin. Reg. 740.02, 1.3.4 (Jan. 5, 2004)(five days); New Jersey Dept. of Corrections IMM.RRP.003 IV(H)(August 1, 2003)(ten working days); New Mexico Corrections Dept., CD-150501(D)(1)(June 22, 2005)(seven days); New York State Dept. of Correctional Services, N.Y. Comp. Codes R. & Regs., tit. 7, § 701.7(b)(1)(four working days); North Dakota Dept. of Corrections Policies and Procedures Manual, Inmate Rights, VI (I)(3)(a)(May 5, 2005)(five days); Pennsylvania Dept. of Corrections, Policy No. DC–ADM 804 VI(C)(1)(b)(Jan. 3, 2005)(ten working days); Rhode Island Code of Rules 06 070 002 (C)(1), (D)(1), and (E)(2) (three working days); South Carolina Dept. of Corrections Policy No. GA-01.12(13.5)(Nov. 1, 2004)(five calendar days); Tennessee Dept. of Corrections, Index No. 501.01 VI (C)(2) and (3)(May 1, 2004) (five days); Utah Dept. of Corrections, Policy Manual, FDe02/03.031(C)(July 1, 2003)(five working days); Virginia Dept. of Corrections, Pro. No. DOP 866-7.16(5)(Nov. 20, 1998)(five days); West Virginia Division of Corrections, W.Va. Code of State Rules § 90-9-3.1.10, 3.2.1 (five working days); Wisconsin Dept. of Corrections, Wisconsin Admin Code § DOC 310.13(1)(2005)(ten days); Wyoming Dept. of Corrections, Admin. Reg. No. 2.501, Appendix A(G)(2)(Dec. 11, 1998)(ten days).

[9] Alaska Dept. of Corrections Index No. 808.03 (B)(4)(May 23, 2002); Indiana Dept. of Corrections, Policy No. 00-02-301 XVIII (E), (G), and (I)(May 1, 2000).

[10] Delaware Bureau of Prisons Policy, No. 4.4, IGP Resolution Levels: Appeals (May 15, 1998); Kansas Dept. of Corrections, Art. 15, Policy No. 44-15-102 (c)(1).

[11] Kentucky Dept. of Corrections Policy No. 14.6 II (J)(2)(j) and (3)(c)(Jan. 4, 2005); Maryland Dept. of Public Safety and Correctional Services (Division of Pretrial Detention and Services), Dir. No. 180-1 V (C)(1)(Nov. 30, 2000); Montana State Prison

policy permits only four working days for appeals. N.Y. Comp. Codes R. & Regs., tit. 7, § 701.7 (2004). Ten of the policies that we collected (including the policy of the Connecticut Department of Correction) allow five calendar days to appeal.[12] An additional six state corrections policies permit five working days to appeal.[13]

The PLRA applies not only to state corrections agencies, but also to local jails and detention centers. As a practical matter, the smaller and more local the facility, the more difficult it is to obtain a copy of its grievance policy. However, we have included in our chart two county sheriffs' policies covering jails, and the deadlines in these policies are also quite short. The policy in the Glenn County (California) Jail provides five working days for the formal grievance and five working days for the appeal.[14] The Clark County (Washington) Sheriff's Office permits seven calendar days for the grievance and forty-eight hours for the appeal.[15]

Policy No. 3.3.3 V(I)(1)(a) and (K)(1)(Apr. 1, 1997); Rhode Island Dept. of Corrections, R.I. Code R. 06.070.002 (C)(1), (D)(1), and (E)(2)(Jan. 7, 1980).

[12] *See* Colorado Dept. of Corrections Admin. Reg. 850-04 IV (D)(1)(c)(Dec. 15, 2005); Connecticut Dept. of Corrections, Admin. Dir. 9.6 (16)(Mar. 5, 2003); District of Columbia Dept. of Corrections, D.O. 4030.1D VII (G)(3) and (4)(Apr. 4, 1992); Hawaii Dept. of Public Safety, Policy No. 493.12.03(15)(a)(F)(Apr. 3, 1992); Louisiana, La. Admin. Code, tit. 22, pt. I, § 325(G)(2)(a)(2005); Nevada Dept. of Corrections, Admin. Reg. 740.02, § 1.6.1 (Jan. 5, 2004); North Dakota Dept. of Corrections Policies and Procedures Manual, Inmate Rights, VI (I)(2)(a) and (3)(a)(May 5, 2005); South Carolina Dept. of Corrections, Policy No. GA-01.12(13.5)(Nov. 1, 2004); Tennessee Dept. of Corrections, Index No. 501.01 VI (C)(2) and (3)(May 1, 2004); Virginia Dept. of Corrections, Proc. No. DOP 866-7.16(5)(Nov. 20, 1998).

[13] *See* Arkansas Dept. of Correction, Admin. Dir. 04-01 IV (G)(Feb. 1, 2004); Georgia Dept. of Corrections, SOP Ref. No. IIB05-0001 VI (D)(2)(June 1, 2004); Michigan Dept. of Corrections, No. 03.02.130 (DD)(Dec. 19, 2003); Missouri Dept. of Corrections Institutional Services Policy and Procedure Manual, Procedure No. IS8-2.1 III(K)(Jan. 15, 1992); Utah Dept. of Corrections, Institutional Operations Division Manual, FDr02/03.04(B)(July 1, 2003); and West Virginia Division of Corrections, W. Va. Code St. R. § 90-9-3 (2005).

[14] *See* Glenn County Jail Handbook, *available at* http://www.countyofglenn.net/Jail (last visited Jan. 24, 2006).

[15] *See* Clark County Sheriff's Office, Inmate Handbook, *available at* http://www.co.clark.wa.us/sheriff/custody/handbook.pdf (last visited Jan. 24, 2006).

> Case law to date concludes that PLRA exhaustion requirements apply to juvenile facilities,[16] which sometimes provide as few as one to two days for filing grievances. *See, e.g.*, North Carolina Department of Juvenile Justice and Delinquency Prevention Policy No. YD/DC 8.0 (providing that grievances must be appealed to Facility Director within twenty-four hours); *Minix v. Pazera et. al.*, 2005 WL 1799538 at *3-4 (N.D. Ind. July 27, 2005) (discussing two-business-day deadline in Indiana juvenile facility).

Brief for the Jerome N. Frank Legal Services Organization of the Yale Law School as Amici Curiae Supporting Respondent, Woodford v. Ngo, 126 S. Ct. 2378 (2006) (No. 05-416), 2006 WL 304573, at *6-13.

The Supreme Court's 2006 decision in *Woodford* concluded that prisoners must comply with all of these requirements of prison and jail grievance procedures in order to file their claims in court. *Ngo*, 126 S.Ct. at 2378. This result deprives courts of the ability to address even meritorious claims. It abdicates to prison authorities the power to control whether federal claims ever see the light of day. It also gives correctional authorities every reason to deny claims on procedural (as opposed to merits) grounds, because procedural denials are basically unreviewable. And it creates incentives for prison and jail officials to create more complex grievance rules, because procedural denials protect them from potential civil liability. *See generally* Schlanger & Shay, *Preserving the Rule of Law in America's Prisons* at 8; Kermit Roosevelt, *Exhaustion Under the Prison Litigation Reform Act: The Consequences of Procedural Error*, 52 EMORY L.J. 1771, 1776 (2003).

The procedural default rule adopted in *Woodford* has harsh effects. In our article appearing in the Cardozo Law Review this month, Johanna Kalb and I surveyed cases citing *Woodford* from the day it was announced through January 2007. This is how we described our results:

> In a survey of reported cases citing *Woodford* in the first seven months after it was decided, the majority were dismissed entirely for failure to exhaust.[17] All

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[16] *See Alexander S. v. Boyd*, 113 F.3d 1373, 1385 (4th Cir. 1997), *abrogated on other grounds*, *Martin v. Hadix*, 527 U.S. 343 (1999); *Minix v. Pazera et al.*, 2005 WL 1799538 (N.D. Ind. July 27, 2005); *Moore v. Louisiana Dept. of Public Safety and Corrections*, 2002 WL 1791996 (E.D. La. Aug. 5, 2002); *Doe v. Cook County Juvenile Detention Center*, 1999 WL 1069244 (N.D. Ill. Nov. 22, 1999).

[17] A Westlaw search conducted on January 26, 2007 produced a list of 405 cases citing *Woodford*. After removing Supreme Court, state, and duplicate federal cases, we were left with a sample set of 392 cases. These included decisions by appellate and district courts, and recommendations by magistrate judges. In 76 of these cases, the exhaustion issue was not resolved, leaving a pool of 316 cases in which the exhaustion issue was raised, briefed, and decided by a court. In approximately 70% of those cases, or 224 cases, all claims were dismissed for failure to exhaust. Some claims survived the

> claims raised in the complaint survived the exhaustion analysis in fewer than fifteen percent of reported cases.[18] And in most of those cases, the claims survived not because the prisoner had properly exhausted, but rather because the court found that the administrative remedy was "unavailable."[19]

Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act*, 29 CARDOZO L. REV. 291, 321 (2007).

A recent example from the Eastern District of Michigan illustrates the harsh effects of the rule. In *Bonds v. Piper*, a *pro se* prisoner who was "paralyzed from the chest down" had claimed denial of adequate medical care, including being "required to reuse unsanitary disposable items that led to his acquiring an infection.[20] The prisoner had filed a grievance on September 6, 2006. There were three steps to the grievance process, and the complaint was resolved at the first step, with a resolution that the prisoner was to receive medical supplies on a weekly basis.[21] The prisoner claimed that on November 1, 2006, prison authorities had violated the "detail resolving the September grievance," by failing to supply him with the necessary supplies.[22] However, he did not file a separate grievance after this November 1st incident.[23] Michigan Department of Corrections policies required an attempt at informal resolution within two days, and an official grievance within five.[24] The prisoner did attempt to file a "Step III" grievance,

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exhaustion analysis in 45 cases. All claims survived exhaustion in only 47 cases.

[18] The fact that the claims survived the initial exhaustion challenge does not necessarily mean that they are decided on the merits. Claims that survive a motion to dismiss for non-exhaustion may still be dismissed at that stage for another reason, on summary judgment, or for some other procedural reason before trial.

[19] *See, e.g.*, Holcomb v. Dir. of Corr., No. C-03-02765 RMW, 2006 WL 3302436, at *7 (N.D. Cal. Nov. 14, 2006) (holding that plaintiff's failure to timely appeal was excused because the delay was caused by physical injuries and other circumstances beyond his control); Cahill v. Arpaio, No. CV 05-0741-PHX-MHM (JCG), 2006 WL 3201018, at *3 (D. Ariz. Nov. 2, 2006) (holding that plaintiff's failure to appeal was excused because the Hearing Officer informed the plaintiff that no further appeal was necessary); Coleman v. Butler, No. 4:05cv147-RH/WCS, 2006 WL 2054355, at *3 (N.D. Fla. July 20, 2006) (plaintiff's failure to grieve was excused because he was told by the Department of Corrections that the subject of his complaint "was inappropriate for the grievance procedure"); Wallace v. Williams, No. CV405-140, 2006 WL 3091435, at *3 (S.D. Ga. Oct. 30, 2006) (plaintiff's failure to grieve was excused because his three requests for a grievance form were ignored).

[20] 2007 WL 3038036 at *1 (E.D. Mich. 2007).

[21] *Id.* at *2.

[22] *Id.* at *3.

[23] *Id.*

[24] *Id.* at *3 and note 2.

following up on the September grievance, in April 2007, but this was deemed inadequate, because the September complaint had been resolved at "Step I" and so the prisoner had not done "Step II."[25] The court concluded that, "plaintiff did not timely follow the grievance procedures under MDOC's rules over the alleged November 2006 wrongdoing," and that "[h]e no longer can properly exhaust his administrative remedies with respect to these claims as would be required by the Supreme Court's *Woodford* decision," because the deadline had passed."[26] The case was dismissed for failure to exhaust, even though prison officials had agreed that the paralyzed prisoner needed the self-care medical supplies that he had requested.[27]

The PLRA as it is currently interpreted undermines courts' ability to enforce the rule of law in the nation's prisons and jails. The *Woodford* rule is also arbitrary because, as Justices Stevens, Souter, and Ginsburg wrote in their *Woodford* dissent, it "bars litigation at random, irrespective of whether a claim is meritorious or frivolous," based solely on technical missteps in the prison grievance process. *Ngo*, 126 S.Ct. at 2401 (Stevens, J., dissenting).

The amendment to the PLRA advocated by the SAVE coalition will eliminate the excesses of the current exhaustion requirement while still meeting its goals. Prisoners will be required to present claims to grievance officials before filing them in court. But a failure to comply with all of the technical requirements of a prison or jail grievance system will not automatically bar a court from considering a claim. And a judge can stay a case for 90 days to allow an attempt at administrative resolution of an unexhausted claim.

In conclusion, I urge the Committee to adopt legislation that includes the SAVE coalition's recommendations. I thank the Committee for its attention to these important issues, and for the opportunity to submit this testimony.

Sincerely,

Giovanna Shay
Assistant Professor
gshay@law.wnec.edu

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[25] *Id.* at *3.
[26] *Id.* at *4.
[27] *Id.*

APPENDIX

Agency or Jurisdiction	Policy or Other Source[1]	Informal Resolution Required?	Time for Filing First Official Grievance	First Appeal	Second Appeal	Third Appeal
United States Bureau of Prisons	Directive 1330.13 Effective 8/13/02	Yes	20 days	20 days	30 days	N/A
Alabama[2]						
Alaska Department of Corrections	Index No. 808.03 Effective 5/23/02	Yes	30 days	2 days*	30 days	N/A
Arizona Department of Corrections	Department Order 800 Effective 3/3/00	Yes 10 days*	10 days†	10 days	10 days	N/A
Arkansas Department of Corrections	Admin. Directive 04-01 Effective 2/1/04	Yes 15 days	3 days*†	5 days*	N/A	N/A
California Department of Corrections	Title 15 California Code of Regulations §§ 3084.2(b), 3084.5, 3084.6(c) (2004)	Yes	15 days*[3]	15 days*	15 days*	N/A
Glenn County, California Division of the Sheriff	Glenn County Jail Handbook § II	No	5 days*[4]	5 days*	N/A	N/A
Colorado Department of Corrections	Regulation No. 850-04 Effective 12/15/05	No‡	30 days	5 days	5 days	N/A
Connecticut Department of Correction[5]	Admin. Directive 9.6 Effective 3/5/03	Yes	30 days[6]	5 days	5 days[7]	N/A
Delaware Bureau of Prisons	Procedure No. 4.4 Revised 5/15/98	Yes[8] 7 days	Automatic[9]	3 days[10]	N/A	N/A
District of Columbia Department of Corrections	D.O. 4030.1D Effective 5/4/92	Yes	15 days	5 days	5 days	N/A
Florida Dept. of Corrections	Chapter 33-103 of the Rules of the Dept. of Corrections Effective 10/9/05	Yes[11]	15 days†[12]	15 days	N/A	N/A

* indicates working or business days. Otherwise, "days" are calendar days.

† indicates that first formal grievance deadline is measured from the response to an informal resolution attempt. Otherwise, day for filing the first official grievance are counted from the day of the incident.

‡ indicates that informal resolution is encouraged or preferred, but not mandated.

All appeal deadlines generally run from the date of the response at the preceding grievance level.

Agency or Jurisdiction	Policy or Other Source[1]	Informal Resolution Required?	Time for Filing First Official Grievance	First Appeal	Second Appeal	Third Appeal
Georgia Department of Corrections	Standard Operating Procedures Ref. No. IIB05-0001 Effective 6/1/04	Yes 10 days	5 days*†	5 days*	N/A	N/A
Hawaii Department of Public Safety	Policy No. 493.12.03 Effective 4/3/92	Yes	14 days	5 days	5 days	N/A
Idaho Department of Correction	Directive No. 316.02.01.001 Revised 9/16/04	Yes	15 days	10 days	N/A	N/A
Illinois Department of Corrections	20 Ill. Admin. Code §§ 504.810, 504.850	Yes	60 days	30 days	N/A	N/A
Indiana Department of Correction	Admin. Procedure No. 00-02-301 Effective 5/1/00	Yes 48 hours	2 days*†	2 days*	2 days*	2 days*
Iowa Department of Corrections	Policy No. IN-V-46 Revised January 2005	Yes	30 days	15 days	15 days	N/A
Kansas Department of Corrections	44-15-101 14-15-102	Yes	15 days*[13]	3 days	N/A	N/A
Kentucky Department of Corrections	Policy No. 14.6 Effective 1/4/05	No[14]	5 days*	3 days*	3 days*	N/A
Louisiana Department of Public Safety and Corrections	La. Admin. Code, tit 22, pt. I, § 325	No‡	90 days[15]	5 days	N/A	N/A
Maine Department of Corrections	Policy and Procedures Manual Subsection 29.1	Yes	15 days	10 days	10 days	N/A
Maryland Department of Public Safety and Correctional Services	Directive No. 185-001 Effective 2/1/01 Code of Maryland Regulations 12.07.01.01 *et seq.*	No‡	15 days	10 days	30 days[16]	N/A
Maryland Department of Public Safety and Correctional Services, Division of Pretrial Detention and Services[17]	Directive No. 180-1 Issued 11/30/00	No	30 days	Not specified[18]	3 days*	3 days*

* indicates working or business days. Otherwise, "days" are calendar days.

† indicates that first formal grievance deadline is measured from the response to an informal resolution attempt. Otherwise, days for filing the first official grievance are counted from the day of the incident.

‡ indicates that informal resolution is encouraged or preferred, but not mandated.

All appeal deadlines generally run from the date of the response at the preceding grievance level.

Agency or Jurisdiction	Policy or Other Source[1]	Informal Resolution Required?	Time for Filing First Official Grievance	First Appeal	Second Appeal	Third Appeal
Massachusetts Department of Correction	103 CMR 491.00 Effective 1/5/01	No‡	10 days*	10 days*	Automatic[20]	N/A
UMass Correctional Health (UMCH) Massachusetts Department of Correction	Policy and Procedures Manual No. 12 Approved 4/5/04	No‡	10 days*	10 days*	Not specified[20]	N/A
Michigan Department of Corrections	Policy Directive No. 03.02.130 Effective 12/19/03	Yes 2 days*	5 days*†	5 days*	10 days*	N/A
Minnesota Department of Corrections	Policy No. 303.100 Effective 5/1/05	Yes	Not specified[21]	15 days*	N/A	N/A
Mississippi Department of Corrections	Inmate Handbook, Chapter VIII	No‡	30 days	Not specified[22]	Not specified	N/A
Missouri Department of Corrections	Institutional Services Policy and Procedure Manual Procedure No. IS8-2.1 Effective 1/15/92	Yes 15 days	5 days*†	5 days*	10 days*	N/A
Montana State Prison Policies and Procedures	Policy No. 3.3.3 Effective 4/1/97	Yes 5 days*	3 days*†	3 days*	3 days*	N/A
Nebraska Department of Correctional Services	No. 217.02 Effective 12/19/85 References tit. 68, ch. 2 Nebraska Admin. Code	Yes 3 days	15 days†[23]	10 days	N/A	N/A
Nevada Department of Corrections	Admin. Regulation 740 Effective 1/5/04	Yes[24] 6 months[25]	5 days†	5 days	N/A	N/A
New Hampshire Department of Corrections	Statement No. 1.16 Effective 10/01/02	Yes 30 days	30 days†	30 days	N/A	N/A
New Jersey Department of Corrections	Internal Management Procedure IMM.RRP.003 IMM.002.001 Revised 8/1/03	No‡	Not specified	10 days*	N/A	N/A

* indicates working or business days. Otherwise, "days" are calendar days.

† indicates that first formal grievance deadline is measured from the response to an informal resolution attempt. Otherwise, days for filing the first official grievance are counted from the day of the incident.

‡ indicates that informal resolution is encouraged or preferred, but not mandated.

All appeal deadlines generally run from the date of the response at the preceding grievance level.

Agency or Jurisdiction	Policy or Other Source[1]	Informal Resolution Required?	Time for Filing First Official Grievance	First Appeal	Second Appeal	Third Appeal
New Mexico Corrections Department	CD-150500 and 150501 Revised 6/22/05	Yes 5 days	20 days[26]	7 days	N/A	N/A
New York Department of Correctional Services	N.Y. Comp. Codes R. and Regs. Tit. 7, § 701.7 2005	No‡[27]	14 days	4 days*	4 days*	N/A
City of New York Department of Correction	Directive No. 3375R Effective 3/4/85	Not specified[28]	Not specified	Not specified[29]	Not specified	Not specified
North Carolina Department of Correction	Rules and Policies Inmate Booklet March 2002	Yes	1 year	Not specified[30]	Not specified	N/A
North Carolina Department of Juvenile Justice and Delinquency Prevention	Policy No. YD/DC 8.0 Effective 11/19/04	Yes	24 hours[31]	24 hours	24 hours	N/A
North Dakota Department of Corrections	Policies and Procedures Manual Revised 5/5/05	Yes 5 days	15 days	5 days[32]	5 days	N/A
Ohio Department of Corrections	Ohio Admin. Code § 5120-9-31	Yes 14 days	14 days†	14 days	N/A	N/A
Oklahoma Department of Corrections	OP-090124 Effective 10/11/05	Yes 3 days[33]	15 days[34]	15 days[35]	N/A	N/A
Oregon Department of Corrections	291-109-0100 *et seq.*	Yes[36]	30 days	14 days	14 days	N/A
Pennsylvania Department of Corrections	Policy No. DC-ADM 804 Effective 1/3/05	No‡	15 days*	10 days*	15 days*	N/A
Rhode Island Department of Corrections	R.I. Code R. 06 070 002 Effective 1/7/80	No	3 days	3 days*	3 days*	3 days*
South Carolina Department of Corrections	GA-01.12 Issued 11/1/04	Yes	15 days	5 days	30 days[37]	N/A

* indicates working or business days. Otherwise, "days" are calendar days.

† indicates that first formal grievance deadline is measured from the response to an informal resolution attempt. Otherwise, days for filing the first official grievance are counted from the day of the incident.

‡ indicates that informal resolution is encouraged or preferred, but not mandated.

All appeal deadlines generally run from the date of the response at the preceding grievance level.

Agency or Jurisdiction	Policy or Other Source[1]	Informal Resolution Required?	Time for Filing First Official Grievance	First Appeal	Second Appeal	Third Appeal
South Dakota Department of Corrections	Admin. Remedy for Inmates Policy No. 1.3.E.2 8/22/05	Yes 30 days	5*†	10 days[58]	N/A	N/A
Tennessee Department of Corrections	Index No. 501.01 Effective 5/1/04	No	7 days[59]	5 days	5 days	N/A
Texas Department of Criminal Justice	Offender Orientation Handbook November 2004	Yes	15 days	15 days	N/A	N/A
Utah Department of Corrections	Institutional Operations Division Manual Revised 7/1/03	Yes 7 days*[60]	5 days*†	5 days*	N/A	N/A
Vermont Department of Corrections	Directive 320.01 320.01.01, 320.01.02 Effective 9/1/00	No[61]	Not specified	Not specified	N/A	N/A
Virginia Department of Corrections	Procedure No. DOP 866 Effective 11/20/98	Yes	30 days	5 days	5 days	N/A
Washington Department of Corrections	No. DOC 550.100 Effective 3/1/05	Yes	Not specified	Not specified[62]	Not specified	N/A
Clark County Sheriff's Office, Washington	Inmate Handbook	Yes	7 days	48 hours	48 hours	N/A
West Virginia Division of Corrections	W. Va. Code of State Rules § 90-9-3	No	15 days	5 days*	5 days*	N/A
Wisconsin Department of Corrections	Wisconsin Admin. Code § DOC 310.09 *et seq.*	No‡[63]	14 days	10 days	N/A	N/A
Wyoming Department of Corrections	Admin. Reg. No. 2.501 Revised 12/11/98	Yes 7 days	30 days	10 days	N/A	N/A

* indicates working or business days. Otherwise, "days" are calendar days.

† indicates that first formal grievance deadline is measured from the response to an informal resolution attempt. Otherwise, days for filing the first official grievance are counted from the day of the incident.

‡ indicates that informal resolution is encouraged or preferred, but not mandated.

All appeal deadlines generally run from the date of the response at the preceding grievance level.

[1] Because prison and jail grievance policies sometimes are not published in a readily available form, and because in some jurisdictions they may be revised frequently, these policies should be considered illustrative only. Amicus does not represent that these policies are the most current. The policies and materials that we relied on in compiling the chart are available on the LSO web site at www.law.yale.edu/Woodford.

[2] According to the Alabama Department of Corrections (DOC), the Alabama DOC grievance procedure is currently under review. *See* www.doc.state.al.us/adminregs.asp, last checked 1/24/06.

[3] The policy states, "[a]n appellant must submit the appeal within 15 working days of the event or decision being appealed, or of receiving an unacceptable lower level appeal decision." Calif. Code of Regs., tit. 15, § 3804.6(c) (2004).

[4] The Inmate Handbook states that grievances may be resolved at 5 levels – Food Manager, Correctional Officer, Correctional Corporal, Jail Division Command, and Under-Sheriff. The Under-Sheriff level is also characterized as an appeal. Glenn County Jail Handbook at 15-16, available at www.countyofglenn.net/Jail, last checked 1/24/06.

[5] The Connecticut Department of Correction policy applies both to jails and to prisons in Connecticut.

[6] An exception is provided for grievances regarding property, which must be filed within one year of discovery or three years of the occurrence. Connecticut Dept. of Correction Admin. Dir. 9.6(10)(G).

[7] Level 3 review is restricted to grievances which: 1) challenge department level policy; 2) are emergency and cannot be acted upon at subordinate level; 3) challenge integrity of the grievance process; or 4) did not receive a timely Level 2 response. Connecticut Dept. of Correction Admin. Dir. 9.6(17).

[8] The "Informal Resolution" stage of the process is also described as Level I of the process and requires the filing of a form within 7 calendar days of the incident. Delaware Bureau of Prisons Procedure No. 4.4, IGP Resolution Levels, revised 5/15/98.

[9] Grievances that are not resolved informally are automatically referred to the Resident Grievance Committee, which makes a recommendation to the Warden ("Level II"). Delaware Bureau of Prisons Procedure No. 4.4, IGP Resolution Levels, revised 5/15/98.

[10] The Warden's decision may be appealed to the Bureau's Grievance Officer ("Level III"). Delaware Bureau of Prisons Procedure No. 4.4, IGP Resolution Levels, revised 5/15/98.

[11] Informal resolution must be attempted within a "reasonable time." Rules of the Florida Dept. of Corrections, Ch. 33-103.011(1)(a), effective 10/9/05.

[12] Policy states that, "the specified time frame shall commence on the day following the date of the incident or response to the grievance at the previous level." Rules of the Florida Dept. of Corrections, Ch. 33-103.011, effective 10/9/05.

[13] Policy states that, "grievances shall be filed within 15 days from the date of the discovery of the event giving rise to the grievance, excluding Saturdays, Sundays, and holidays." Kansas Dept. of Corrections, Article 15 – Grievance Procedure for Inmates § 44-15-101b. The first step of the grievance process is that the inmate must seek informal, documented resolution through unit team. If no response within 10 days, may file grievance report directly with the warden; if unsatisfactory response to informal resolution, must file grievance within 3 calendar days of response to informal resolution request. Kansas Dept. of Corrections, Article 15 – Grievance Procedure for Inmates, § 44-15-102(a)(2) and (b).

[14] Informal resolution shall be attempted by staff after grievance is filed. If grievant is not satisfied with informal resolution, he must make a written request to Grievance Committee within 5 days of notice. Kentucky Dept. of Corrections, Policy No. 14.6II (J)(1)(b)(1) and (8), effective January 4, 2005.

[15] First letter to warden must be written within 90 days of the incident, but the policy also states that a grievance may be screened out if "initial request" is made more than 30 days from the event. Apparently, the policy was amended in September 2002 to lengthen the deadline for filing a grievance from 30 to 90 days; however, one provision states that a grievance may still be rejected if "there has been a time lapse of more than 30 days between the event and the initial request." *Compare* La. Admin. Code, tit. 22, pt. 1, § 325 (A)(2) and (G)(1)(A), amended LR 28:1993 (September 2002), *with* (F)(1)(a)(x).

[16] Appeal to Inmate Grievance Office. The Inmate Grievance Office may dismiss a grievance or refer for a hearing before an administrative law judge (ALJ). Code of Md. Regs. 12.07.01.07-08. The ALJ can either deny relief, or, if the ALJ determines that the prisoner's complaint is meritorious, submit a recommendation for relief to the Secretary. Code of Md. Regs. 12.07.01.10.

[17] This Maryland policy applies to pretrial detainees; the previous entry applies to sentenced prisoners.

[18] First appeal is to Inmate Grievance Procedure Committee, and deadline is not specified. Subsequent appeals to Warden and Commissioner must be made within 3 working days. Maryland Dept. of Public Safety and Correctional Services Division of Pretrial Detention and Services, Policy No. 180-1 V (B)(1), (C)(1), (D)(1), issued November 30, 2000.

[19] Appeal to Superintendent must be made in 10 working days. Central office reviews denials of relief by the Superintendent automatically. 103 CMR §§ 491.12(1) and 491.13.

[20] Appeal to UMCH Medical Director must be made in 10 business days. Timeframe for second appeal, to DOC Health Services Division, is not specified. Univ. of Massachusetts Correctional Health, Massachusetts Dept. of Correction, Policy & Procedures Manual, No. 12, Procedure 3(b) and 5(a), effective 4/5/04.

[21] Inmate must have at least 40 days until release to file a grievance. Minnesota Dept. of Corrections Policy No. 303.100, Procedures (A)(1), effective 5/1/05.

[22] Mississippi Department of Corrections Inmate Handbook refers to "Steps Two and Three" of the grievance procedure, but does not specify timelines. Mississippi Dept. of Corrections Inmate Handbook, Chapter VIII.

[illegible]

[illegible] First formal grievance must be filed within 15 calendar days of response to request for informal resolution, or, if no response is received, within 20 days of the incident. Nebraska Admin. Code, tit. 68, ch.2, § 004.02.

[illegible] This required first step is actually quite formal, requiring the inmate to submit a written "request slip," detailing his allegations; the complaint is not termed a "grievance," however, until it is filed with the Warden. New Hampshire Dept. of Corrections Policy and Procedure Directive No. 1.16 IV, reviewed 10/01/03.

[illegible] Informal resolution must be attempted within 6 months for personal property damage or loss, personal injury, medical claims, other tort claims, or civil rights claims. For all other issues, it must be attempted within 10 calendar days. Nevada Dept. of Corrections, Admin. Reg. 740, 1.4.1.1, effective 1/5/04.

[illegible] Policy states that formal grievance must be filed within 20 days of the date of the Inmate Informal Complaint. New Mexico Corrections Dept., CD-150-501 (A)(1), revised 6/22/05.

[illegible] Informal resolution is not a condition of filing a grievance, but policy states that an inmate's failure to attempt informal resolution may result in dismissal of grievance. N.Y. Comp. Codes R. & Regs., tit. 7, § 701.3(a)(2005).

[illegible] Inmate files a grievance with committee. If it is not informally resolved, inmate may request a formal hearing. City of New York Dept. of Correction, Classification No. 3375R III (B)(1) and (2), effective 3/4/85.

[illegible] Three appeals – to Warden, Central Office Review Committee, and the Board of Correction/Commissioner – are available. However, policy specifies no deadlines. City of New York Dept. of Correction, Classification No. 3375R III (B)(3)-(5), effective 3/4/85.

[illegible] Two levels of appeal are provided – to Region Director/Institution Head and to Grievance Examiner/Secretary of Correction. However, Inmate Rules and Policies Booklet specifies no deadlines for these appeals. North Carolina Dept. of Corrections Rules and Policies § 20 (6) (March 2002)

[illegible] North Carolina Department of Juvenile Justice and Delinquency Prevention Policy No. YD/DC 8.0 does not specify a timeframe for the first official grievance to Human Services Coordinator. North Carolina Dept. of Juvenile Justice and Delinquency Prevention, Policy No. YD/DC 8.0, effective 11/19/04. However, the Nondisciplinary Grievance Report Form states, "If you have a complaint or grievance, fill out this form and give it to the human services coordinator within 24-hours of the incident."

[illegible] Policy states both "5 working days" and "5 days." *Compare* North Dakota Dept. of Corrections Inmate Grievance Procedure VI (I)(1)(g) with VI (I)(2)(a) and (3)(a), revised 5/5/05.

[illegible] Inmate must speak with staff within 3 days of incident. If complaint not resolved, inmate must submit "Request to Staff" within 7 calendar days of incident. Oklahoma Dept. of Corrections, OP-090124 IV (A) and (B), effective 10/11/05.

[illegible] Inmate must submit formal grievance within 15 calendar days of incident or date of the response to the "Request to Staff" form, whichever is later. Oklahoma Dept. of Corrections, OP-090124 V(A)(1), effective 10/11/05.

[illegible] Appeal allowed only if new evidence is uncovered or probable error. Oklahoma Dept. of Corrections, OP-090124 VII, effective 10/11/05.

[illegible] Inmate must attempt both verbal and written informal resolution. Oregon Admin. Rules 291-109-0140 (1)(a).

[illegible] First appeal is to Division Director of Operations. Some issues may then be appealed to. South Carolina Administrative Law Judge Division (ALJ). South Carolina Dept. of Corrections Policy No. GA-01.12 (13.4)-(13.6), issued 11/1/04.

[illegible] Warden's response may only be appealed to the Secretary of Corrections if complaint concerns a major disciplinary action – a classification action, or a decision regarding the restoration of good time credits. South Dakota Dept. of Corrections Admin. Remedy for Inmates, Policy No. 1.3.E.2, Appeals to the Secretary of Corrections (Aug. 22, 2005).

[illegible] There is an exception for Title VI complaints, which must be filed within 180 days of the occurrence of the alleged discriminatory act. Tennessee Dept. of Corrections, Admin. Policies & Procedures, Index No. 501.01 VI (C)(1), effective 5/1/04.

[illegible] "Level One" of the process is described as "Informal." Utah Dept. of Corrections, Institutional Operations Division Manual, FDr02/03.03(A), revised 7/1/03. The Manual also requires inmates to document reasonable attempts to resolve complaints informally. *Id.* at FDr02/02.08(A)(1).

[illegible] Vermont Dept. of Corrections Procedure No. 320.01.01(4)(I), effective 9/1/00, states, "[s]taff at all levels will make every effort to resolve issues before they escalate to grievances. However, if the offender desires to formally grieve an issue, staff will provide the offender with grievance form #1."

[illegible] The policy refers to two levels of appeal, but no timelines are specified. Washington Dept. of Corrections, No. DOC 550.100 IV, effective 3/1/05.

[illegible] The policy states that prior to accepting a complaint, grievance officials may direct the inmate to attempt to resolve the issue. Wis. Admin. Code § 310.09 (4) (2005).

Testimony of Stop Prisoner Rape
For the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, November 8, 2007

Stop Prisoner Rape (SPR) thanks the Subcommittee on Crime, Terrorism and Homeland Security for holding a hearing to review the impact of the Prison Litigation Reform Act (PLRA) 10 years after its enactment. We were proud to work with Representatives from both sides of the aisle to secure the unanimous passage of the Prison Rape Elimination Act (PREA) of 2003, and are pleased to provide this testimony to illustrate how the PLRA has often rendered the judicial system powerless to provide redress to the scores of men, women and children who have been sexually abused while behind bars.

SPR is an international human rights organization whose mission is to combat sexual violence in all forms of detention. Through our policy efforts and direct interaction with prisoner rape survivors, we have seen how the PLRA has shielded government officials from accountability for the sexual violence in their facilities and has denied victims of this form of abuse the ability to seek outside protection and legal recourse. We believe that reforms are urgently needed to ensure that the courts are able to address prisoner rape and other serious constitutional violations.

I. Experiences of Prisoner Rape Survivors Barred from Obtaining Judicial Relief Because of the PLRA

Many of the PLRA's provisions have created insurmountable legal barriers to inmates seeking legal redress for serious civil and human rights abuses, such as sexual abuse in detention. Every day, SPR receives letters from prisoner rape survivors around the country, recounting their ordeals and requesting assistance. Many survivors have tried to access the legal system, but their claims were dismissed under the PLRA before they could be substantively reviewed by a judge. Others never attempted to use the judicial process, aware of the extensive barriers posed and the significant costs to attempting litigation.

- Garrett Cunningham was sexually harassed and raped in a Texas corrections facility by the officer who supervised his work in the laundry facility. He

reported the abuse to a prison psychologist and to the facility's internal affairs unit but, because the officer threatened retaliation, Garrett did not file a formal grievance. Despite his efforts to resolve the matter at the prison level, Garrett had not met the exhaustion requirement and consequently had no legal recourse. (Garrett has provided his own testimony to the Subcommittees.)

- Keith DeBlasio was repeatedly raped by a gang member while housed in a dormitory at a federal prison, and contracted HIV from these attacks. Although he had told prison officials of his assailant's threats, nothing was done to protect him. Keith timely filed his initial grievance with prison officials but, because he was transferred to solitary confinement, he was unable to meet the short deadlines of the facility's appeal process. In hopes of obtaining injunctive relief that would protect him for the remainder of his sentence, Keith contacted numerous lawyers. All of the attorneys refused to take his case, citing their inability to recover the extensive costs of litigation per the PLRA's attorney's fees restrictions.
- "Jane Doe"[1] is currently incarcerated in a California women's prison. While in the receiving area, she was sexually assaulted by the officer assigned to her housing area. Fearful of his threats, the prospect of being isolated in segregation, and the retaliation that comes with being known as a snitch, Jane did not report the assault. Jane initially tried to bring a lawsuit, but gave up because she could not afford an attorney.
- "Lance Jacobs" was 20 years old when he was sent to a federal prison for political protesting. Shortly after arriving at the facility, a corrections officer subjected Lance to a sexually abusive and humiliating strip search. He was forced to masturbate in front of the officer, who also fondled Lance's genitals. Humiliated and traumatized by this experience, Lance did not report it or tell anyone what happened for nearly two years. In addition to failing to exhaust administrative remedies, in many jurisdictions, Lance

[1] Several of the accounts provided are from survivors who remain fearful for their safety or otherwise wish to remain anonymous. In these instances, a pseudonym has been used, and is indicated by quotation marks around the name.

would not be considered to have suffered a physical injury, as required to seek compensatory damages.

- "John Smith" was serving a drug sentence in a Minnesota prison when he was forced to perform sex acts on an inmate who had threatened him with physical violence. After promptly informing an officer about what had happened, John was taken to the hospital and then questioned by several corrections officials. Several days later, an officer told him that, because he complied with the perpetrators' demands, John had engaged in consensual sexual activity, a violation of prison rules. John was then pressured into signing a confession and was placed in segregation for 15 days, making it both pointless and impossible for him to use the internal grievance system.
- "Samantha Taylor" worked as a porter in the segregation unit of the Colorado prison where she was incarcerated. The sergeant who supervised her work forced her to have sex with him, from which she contracted gonorrhea. Although she attempted to report what had happened, Samantha's medical records were lost and the investigation delayed. The sergeant remained at the facility with Samantha until he was convicted of sexually assaulting two other inmates. Samantha never received any redress for the rapes.
- "Howard Scott" was raped by a fellow inmate in a North Carolina prison. He told several officials about his assault. While aware of the risk that he faced, they did nothing to protect him. To comply with the facility's procedures and meet the PLRA's exhaustion requirements, Howard had to file his grievance with one of the officers whom he had named in the grievance for refusing to protect him.
- T.J. Parsell was 17 years old when he was sent to an adult prison in Michigan. A few weeks into his sentence, T.J. was drugged, gang-raped, and "sold" to another prisoner, who protected T.J. from other inmates in exchange for sex. Young, traumatized, and new to the prison setting, T.J. was too afraid to report the abuse, and therefore could never seek judicial relief.

- "James Hughes" was forced to perform oral sex on a corrections official at the Louisiana prison where he was incarcerated. James tried to use the internal grievance process to obtain a transfer and otherwise request protection from future assaults, but his requests were all denied. He contacted an attorney to seek relief from the courts, but was told that he would have to pay the full filing fee before bringing a lawsuit.

II. Recommendations for PLRA Reform

Intended to limit the number of frivolous lawsuits filed by inmates, the PLRA has instead greatly undermined the crucial oversight role played by courts in addressing sexual assault and other constitutional violations in corrections facilities. SPR believes that Congress must amend the PLRA as a matter of urgency.

Repeal the Physical Injury Requirement (42 U.S.C. § 1997e(e)): The PLRA precludes inmates from receiving monetary damages unless they can prove a "physical harm." Sadly, sexual abuse is not always considered a physical injury on its own. For example, in *Hancock v. Payne*, 2006 U.S. Dist. LEXIS 1648 (Jan. 4, 2006), a Mississippi district judge found that the plaintiffs' allegations that the defendant-officer made sexually suggestive comments, fondled their genitalia, and sodomized them did not establish a physical injury. Several courts have relied on injuries accompanying a sexual assault to find a physical injury, thereby inferring that the assault itself was not sufficient. *See, e.g., Kemner v. Hemphill*, 199 F. Supp. 2d 1264 (N.D. Fla. 2002) (relying on cuts, bruises, abrasions, shock, and vomiting to find that a plaintiff who alleged that he was forced to perform oral sex had suffered a physical injury); *see also* Deborah M. Golden, The Prison Litigation Reform Act – A Proposal for Closing the Loophole for Rapists, American Constitution Society for Law and Policy (June 2006). In light of these precedents, inmates like Lance Jacobs, who was fondled by an officer, and James Hughes, who was forced to perform oral sex on an officer, may be unable to hold their abusers accountable. A repeal of the physical injury requirement would allow all inmates who have been sexually abused to seek compensation.

Amend the Exhaustion Requirement (42 U.S.C. § 1997e(a)): The PLRA's exhaustion provision precludes any judicial consideration of even the most meritorious

claim if a prisoner makes the slightest misstep in the facility's informal grievance process. The short deadlines to file a grievance – often a matter of days – require prisoner rape survivors to navigate a Byzantine maze of procedural rules while still in trauma from the assault. As Keith DeBlasio learned, even if the first deadline is met, fully exhausting the facility's internal procedures requires meeting numerous additional deadlines, without regard for the limitations posed by transfers, placement in segregation, and hospitalization. For survivors like Garrett Cunningham and Jane Doe, threats of retaliation make the decision to report even more difficult, and make it nearly impossible to adequately weigh the risks of filing within the time permitted. The risks of reporting are heightened for prisoners like Howard Scott who, in order to comply with procedures, must file the report with an officer who participated or acquiesced in the assault. To strike a better balance between encouraging complaints to be resolved administratively and ensuring judicial review of serious abuse that is not addressed at the facility level, the exhaustion provision should be amended to authorize judges to provide a 90-day stay for administrative consideration after which, if the complaint remains unresolved, a judge will provide substantive review.

Exempt Juveniles from the PLRA (18 U.S.C. § 3626(g); 28 U.S.C. §§ 1915(h), 1915A(c); 42 U.S.C. § 1997e(h)): As Congress noted in the Prison Rape Elimination Act (PREA), "[y]oung first time offenders are at increased risk of sexual victimization." 42 U.S.C. § 15601(4). Like T.J. Parsell, most children are too afraid to report their sexual abuse. Children also are less prone than adults to file lawsuits and generally lack the sophistication needed to understand the processes associated with litigation. Youth in juvenile facilities do not have access to legal materials, making it even more difficult for them to prepare adequate pleadings. SPR believes that the PLRA should be limited to the inmates it was intended to target – adults in adult facilities who file frivolous lawsuits.

Lessen the Financial Burden for Poor Inmates (28 U.S.C. § 1915 (a), (b), (g)): Survivors often tell SPR about the insurmountable financial barriers to seeking relief in court, including the expensive filing fees. While many survivors are unable to work because of the trauma they have experienced, even those with prison jobs rarely earn more than a few dollars per month. Requiring poor inmates to pay the full filing fee

(often $350-450) ensures that most prisoner rape survivors who seek judicial redress will be in financial debt throughout their incarceration.

Survivors who make missteps in court pleadings may have particularly onerous filing costs. In accordance with the "three strikes provision," prisoners who have had three lawsuits dismissed as frivolous, malicious, or failing to state of claim for relies are required to pay the entire filing fee up front. As a result, survivors who have been repeatedly abused and do not develop proper pleadings will be forever barred from judicial relief.

SPR recommends that Congress amend the filing fee provision so that inmates whose cases are found to state a valid claim at the preliminary screening stage pay only a partial filing fee and that the three strikes provision be limited to inmates who have had three lawsuits or appeals dismissed as malicious within the past five years.

Allow Successful Attorneys to Recover Fees as They Would in Other Civil Rights Cases (42 U.S.C. § 1997e(d)): Survivors who seek legal representation are generally unable to find an attorney who can bear the costs required for successful prisoner rape litigation. Without an attorney, the vast majority of survivors are ill-equipped to develop the legal arguments required in courtroom pleadings and to navigate the complex procedural rules of civil rights litigation. As a result, courts bear a greater burden in processing *pro se* cases. SPR urges Congress to allow inmates who prevail in prisoner rape litigation to recover reasonable attorney's fees.

Provide Judges with the Full Range of Remedies Available in Other Civil Rights Cases (18 U.S.C. § 3626): Sexual violence in detention is a systemic problem that plagues facilities across the country. To ensure that officials make their prisons and jails safer, judges need to have the full range of options available, including on-going injunctive relief and the ability to encourage settlements. The prospective relief provision of the PLRA prohibits a judge from using these remedies. SPR believes that Congress should repeal the prospective relief provision and restore judicial discretion in providing relief.

III. Conclusion

The stigma and safety concerns that come with reporting a sexual assault make it a notoriously underreported crime both in prison and in the community at large. When inmates are brave enough to report prisoner rape, the PLRA often bars them from any judicial protection or relief.

The procedural hurdles of the PLRA that prisoner rape survivors must overcome to seek judicial redress are at direct odds with the Prison Rape Elimination Act (PREA) of 2003. With PREA, the stated intent of Congress was to "make the prevention of prison rape a top priority in each prison system" and to "increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape." 42 U.S.C. § 15602 (2), (6). Because of the PLRA, however, many prisoners who have endured sexual abuse are barred from seeking judicial relief.

SPR calls on Congress to amend the PLRA so that inmates who have been sexually assaulted behind bars or experienced other egregious constitutional violations can seek protection, and so that officials who allow such abuse to occur on their watch are held accountable.

PREPARED STATEMENT OF ANGUS LOVE, ESQ., EXECUTIVE DIRECTOR, PENNSYLVANIA INSTITUTIONAL LAW PROJECT

REGARDING THE NEED TO AMEND THE PRISONER LITIGATION REFORM ACT

The Pennsylvania Institutional Law Project [PILP] provides free civil legal assistance to over 100,000 institutionalized persons in the Commonwealth of Pennsylvania. We have been providing this service for 25 years. Accordingly we have considerable experience litigating civil rights cases on behalf of incarcerated persons before and after the passage of the Prisoner Litigation Reform Act [PLRA] in 1996.

While we agree and respect the goal of reducing frivolous litigation in these and any other area of the law, the PLRA has had some unintended consequences that need be addressed by Congress. With the passage of time, we now have a better grasp of the PLRA's impact and can correct the flaws in this important legislation. The PILP concurs with the American Bar Association's Resolution calling for amendments to the physical injury requirement and the exhaustion provisions. The Report of the Commission on Safety and Abuse in America's Prisons,'Confronting Confinement' also argues for amendments to these two key sections of the PLRA.

The exhaustion of grievances section, 42 U.S.C. 1997e[a] looks to the regulations of the prison in which the incident that gave rise to the litigation for guidance and interputation. This is a wise course of action as the local prison administrators are the best source of information about their regulations. The problems lie in the often tight deadlines for registering a grievance after an incident. In Pennsylvania, the Department of Corrections gives inmates 15 days to file a grievance. Strict adherence to this provision as suggested by Justice Alito in Woodford v.Ngo decision reduces the statute of limitations which is normally two years to 15 days. Inmates, untrained in law and often illiterate, face major barriers trying to comply with this provision. I have seen several meritorious claims fall because of the failure to comply with the exhaustion requirement as currently written. In my opinion, this allows an often meaningless technicality to prevent a review on the merits on an individual's claim. Cases should succeed or fail or the merits and not on overly stringent procedural barriers.

The requirement of a physical injury at first glance seems like a reasonable way to reduce frivolous litigation but fails in its application as the section was poorly written and left the courts with an impossible task of putting a round peg in a square hole. Much of prison litigation and the rights still retained by prisoners are not about excessive use of force. Religious rights, unreasonable searches and seizures, equal treatment under the law, inhumane physical conditions, various forms of torture, sexual humiliation and abuse will not produce a physical injury but are violations on inmate's civil rights. The courts have wrestled with these provisions and adopted various legal fictions to try and comply with this seemingly impossible requirement. The best course of action is an amendment. When the Abu Ghraib scandal broke, I was struck by the thought that many of the degrading practices at that facility would not be actionable because of this provision of the PLRA. I have also read that Supreme Court interputations of the PLRA were used by former Attorney General Gonzales in crafting his much disputed analysis of the legal definition of torture.

The efforts to require inmates to pay the filing fee is another well meaning provision that should be revisited in light of significant increase in the filing fees for docketing a complaint and for taking an appeal. Currently the fee of $350 for a district court filing and $450 for an appeal impose a significant financial hardship to inmate who are lucky if the make more than 20 cents per hour in Pennsylvania's system. As is often the case, in practice these theoretical ideas hurt the most vulnerable and fragile persons while violation of rights are not so discriminating. For these reasons, I urge Congress to reexamine the PLRA.

STATE CORRECTIONAL OFFICERS CHAPTER
OF THE FLORIDA POLICE BENEVOLENT ASSOCIATION, INC.
The Voice of Florida's State Correctional Officers
Post Office Box 11239 ◆ Tallahassee, Florida 32302

November 7, 2007

Members of the Judiciary Subcommittee on
Crime, Terrorism and Homeland Security
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative:

On behalf of the 17,000 State Correctional Officers from the State of Florida, I urge you to support H.R. 1889, the Private Prison Information Act of 2007.

H.R. 1889 is a good bill that deals with **public safety** and will bring much needed accountability to America's private prisons. This bill levels the playing field between public and private facilities while increasing public safety with no additional cost to tax payers. Unlike public facilities, private prisons are not required to comply with the Freedom of Information Act (FOIA). This means that too often taxpayers and our elected leaders, like members of Congress, are left in the dark concerning matters of public safety, including the number of correctional officers that are hired by facilities, how much training they received, and the rate of staff turnover.

Private prisons companies have argued that such information is proprietary but we believe that the public interest trumps corporate secrecy where public safety is concerned. The incarceration of human beings, the depriving a person of their liberty, is perhaps the most severe function of Government. You and the public have a right to know what is going on in the private facilities as they do at public prisons.

What are private prison vendors hiding? Please support H.R. 1889, the Private Prison Information Act of 2007.

Sincerely yours,

James T. Baiardi
President

JTB/lcs

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Testimony of the Stop Abuse and Violence Everywhere (SAVE) Coalition For the House Judiciary Subcommittees on Crime, Terrorism and Homeland Security and Constitution, Civil Rights and Civil Liberties
November 8, 2007
By the Coalition to Stop Abuse and Violence Everywhere (SAVE)

The SAVE (Stop Abuse and Violence Everywhere) Coalition is a broad, bi-partisan group of organizations and individuals dedicated to protecting the U.S. prison and jail population--a group that is increasingly vulnerable to violence and abuse since the 1996 enactment of the Prison Litigation Reform Act (PLRA). The SAVE Coalition includes faith-based organizations; legal organizations; advocacy organizations for rape victims, children, and the mentally ill; and others. Members of the SAVE Coalition have studied the impact of the PLRA and developed proposed reforms to the law that do not interfere with its stated purpose: to reduce frivolous litigation by prisoners. The SAVE Coalition's proposed reforms, which are described below, seek to preserve the rule of law in America's jails and prisons and better protect prisoners from rape, assault, denials of religious freedom, and other constitutional violations by fixing the unintended consequences of the PLRA. We would like to thank the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security and the Subcommittee on the Constitution, Civil Rights, and Civil Liberties for holding a hearing on this important issue that requires Congress's attention. In addition to our recommended changes to the PLRA, we have included as an attachment a list of members of the SAVE Coalition, as well as a list of ten cases in which prisoners' constitutional rights were not protected because of the PLRA.

Under the PLRA, prisoners are required to prove a physical injury, regardless of any mental or emotional injury, in order to obtain compensatory damages in federal court. As a result, prisoners can be raped and sexually assaulted but be barred from filing a civil rights action against those responsible because some courts say they've suffered no "physical injury." Other forms of abuse, such as disgusting, unsanitary conditions and degrading treatment, also do not meet the "physical injury" requirement of the PLRA. Many other constitutional violations do not result in physical injuries. As a result of the PLRA's "physical injury" requirement, many courts deny prisoners remedies for

violations of their First Amendment rights to freedom of religion. **The SAVE Coalition recommends that Congress repeal this provision prohibiting prisoners from bringing lawsuits for mental or emotional injury without demonstrating a "physical injury." (Repeal 42 U.S.C. § 1997e(e).)**

The PLRA's exhaustion provisions require courts to dismiss prisoners' suits if they have failed to exhaust their facilities' grievance process, no matter how meritorious the claims, and many prisoners who are ill, hospitalized, intimidated, traumatized, or otherwise incapacitated have meritorious cases dismissed for missing those short deadlines. In addition, prisoners are forced to use internal grievance systems to exhaust administrative remedies regardless of whether use of those systems can even resolve the issue being grieved. While it is essential that prison officials have an opportunity to resolve issues before they are brought to court, exhaustion requirements are an enormous barrier for prisoners because prison and jail grievance systems have created a baffling maze in which a barely literate, mentally ill, physically incapacitated, or juvenile prisoner's procedural misstep in a facility's informal grievance system forever bars even the most meritorious constitutional claims. These grievance systems often have many levels for appeals and grievance deadlines are often a matter of days, with rare exceptions. Exhaustion is especially problematic for the most vulnerable prisoners, who are the least likely to be aware of exhaustion requirements and grievance procedures, even though they are frequently the victims of sexual abuse and other violations. **For these reasons the SAVE Coalition calls on Congress to amend the requirement for exhaustion of administrative remedies to require prisoners to present their claims to responsible prison officials before filing suit, and, if they fail to do so, require the court to stay the case for up to 90 days and return it to prison officials to provide them the opportunity to resolve the complaint administratively. (Amend 42 U.S.C. § 1997e(a).)**

The power imbalance inherent in prison leaves incarcerated people, and especially children, concerned about experiencing retaliation if they file grievances. This means that many prisoners, including youth, will not take part in the grievance system because they fear its consequences. For example, children detained by the Texas Youth Commission were subject to sexual abuse by staff for years and could not safely

complain. In one facility, a supervisor who forced children to perform sexual acts on him also held the key to the complaint box, leaving children with no where to go for help and the courts powerless to intervene. Once the scandal broke and the Texas legislature stepped in, detained children and their parents were able to come forward and over 1,000 complaints of sexual abuse have now been alleged. But such atrocities should never have happened. Because of the PLRA, federal courts frequently cannot protect incarcerated children from rape and other forms of abuse. **Therefore, children must be exempted from the PLRA. (Amend 18 U.S.C. § 3626(g), 42 U.S.C. § 1997e(h), 28 U.S.C. § 1915(h), 28 U.S.C. § 1915A(c).)**

The PLRA's "three strikes" provision, intended to prevent prisoners from filing more than three frivolous cases in a lifetime, bars not only cases that are frivolous or malicious, but also those filed by prisoners who make mistakes in their legal documents due to their lack of access to counsel or legal training. **The SAVE Coalition calls on Congress to amend the "three-strikes provision" (which requires certain indigent prisoners who have previously had three cases dismissed to pay the full filing fee up front) by limiting it to prisoners who have had 3 lawsuits or appeals dismissed as malicious within the past 5 years. (Amend 28 U.S.C. § 1915(g).)**

Courts must be able to decide on the best remedies for constitutional violations, and their authority to ensure that violations do not recur should not be curtailed when hearing cases brought by prisoners. Although the purpose of the PLRA was to lessen the burden of prisoner suits on the courts, many of its provisions actually increase that litigation burden. For example, the PLRA requires defendants to admit that they violated the Constitution in order to enter into a settlement agreement. Because defendants are understandably reluctant to admit such liability, even the strongest cases rarely settle. As a result, parties often find themselves going to trial where they would preferably have settled the case prior to the implementation of the PLRA. **Congress should restore judicial discretion to grant the same range of remedies in prisoners' civil rights actions that they possess in other civil rights cases. (Repeal 18 U.S.C. § 3626.)**

The PLRA's attorney's fee restrictions make it cost-prohibitive for attorneys to represent prisoners. Ironically, this places greater burdens on courts to process cases in which prisoners, who are not conversant with the law and court rules, must represent

themselves. **The PLRA needs to be fixed to allow prisoners who prevail on civil rights claims to recover reasonable attorney's fees to the same extent as others whose civil rights have been violated. (Repeal 42 U.S.C. § 1997e(d).)**

The PLRA's filing-fee provisions may deter indigent prisoners whose constitutional rights have been violated from seeking the legal redress to which they are entitled. On average, prisoners who are given the opportunity work while in prison make less than $1-$2/day. **Congress should change the PLRA to allow indigent prisoners whose cases are found to state a valid claim at the preliminary screening stage to pay a partial filing fee rather than the full filing fee, now $350 in district courts and $450 in appellate courts. (Amend 28 U.S.C. § 1915(a), (b).)**

The screening provision of the PLRA allows the courts to dismiss a case that appears to be frivolous before the case is served on defendants or entered into the docket. This provision is the core of the law and these recommended reforms will leave the core unchanged. With the screening provision in place, and the adoption of amendments we have recommended, the PLRA will still serve its purpose and not open the flood gates to frivolous litigation. Instead, our recommendations, if adopted, will allow meritorious constitutional claims to be heard while continuing to protect the courts from frivolous litigation.

SAVE: Coalition to Stop Abuse and Violence Everywhere

Reform The Prison Litigation Reform Act:

Top 10 Harmful PLRA Results

1. A court found that several men who were raped and sodomized by a corrections officer could not seek damages for their abuse because their allegations of sexual assault did not constitute the "physical injury" required by the PLRA is such cases.

2. Corrections staff allowed the rape and repeated assault of a child detainee. The boy's lawsuit was thrown out of court because he did not file a formal grievance, even though he feared further abuse if he reported the incidents, and even though his mother repeatedly contacted prison and juvenile court officials to try to get them to stop the abuse. To satisfy the PLRA's exhaustion requirement, the boy would have had to file his formal grievance within 48 hours of any incident he complained about.

3. Jail staff beat a man who asked for formal grievance forms. The staff not only inflicted new injuries, but also extremely aggravated the man's preexisting skull fracture. Although the facility did not deny that the man then participated in an internal investigation against one of the staff members, after which the staff member was punished, the court found that he had failed to exhaust his formal administrative grievances and threw out his lawsuit. Under the PLRA, he had to go through every level of appeal available in the formal grievance process and do so perfectly before he could bring a lawsuit.

4. A corrections officer opened the sealed medical records of an HIV-positive man and announced this confidential information to other prisoners. The court threw out his lawsuit for lack of "physical injury" under the PLRA.

5. Two meu were housed in a bare, squalid isolation cell, where they had to defecate into a clogged floor drain. They had no means to wash and were forced to sleep on the bare cell floor, which was covered with sewage and vomit. The court concluded that any harm they suffered as a result of these unconscionable conditions, which were not denied by the jail, was trivial and did not constitute "physical injury," which the PLRA requires.

6. A man was forced to stand in a two-and-a half foot square cage for twelve hours, during ten of which he was naked. He was in a tremendous amount of pain due to leg injuries from a previous motorcycle accident that were exacerbated from the prolonged standing. His leg was visibly swollen and he repeatedly asked to see a doctor, but his requests were all denied. The court ruled that his suffering was not serious enough for a lawsuit under the PLRA's "physical injury" requirement.

7. A man filed formal grievances after being harassed by fellow inmates. In response, the prison officers sprayed his cell with gas, punched him twice in the face, and later contaminated his food with feces. The man's lawsuit was thrown out of court because the only "visible" physical injury was an abrasion on his head and that was not enough to go forward under the PLRA.

8. A court threw out a suit by women challenging their strip-searches by male corrections officers. One of the women had subsequently attempted suicide allegedly as a result of the trauma of the strip search. The court decided that the women had shown no "physical injuries" and that they had failed to exhaust the grievance system, even though they had given written complaints about the searches to prison officials. Under the PLRA, the court had no choice but to throw out the lawsuit.

9. A jury found that corrections officers trumped up disciplinary charges in order to keep a man in "supermax" confinement in extreme isolation for over a year in retaliation for his First Amendment-protected complaints about prison conditions. The court affirmed the judge's decision to not allow any monetary damages to the man, because he did not have a PLRA "physical injury."

10. A man was denied a kosher diet in accordance with his Jewish beliefs. After a trial, the jury fouud that the defendant was responsible and awarded the man damages for the denial of his right to practice his religion. The appellate court threw out the award, because forcing a mau to violate his religious beliefs is not a "physical injury" within the requirement of the PLRA.

For More Information, Contact Jody Kent, (202)548-6617

REFERENCES

1. *Hancock v. Payne*, 2006 U.S. Dist. LEXIS 1648 (S.D. Miss. Jan. 4, 2006) (42 U.S.C. § 1997e(e)). This case was decided at summary judgment, which means that all facts are assumed in favor of the plaintiffs, but there were no findings of fact because the suit was dismissed prior to trial.

2. *Minix v. Pazera*, 2005 WL 1799538, 2005 U.S. Dist. LEXIS 10913 (N.D. Ind. July 27, 2005) (42 U.S.C. § 1997e(a)). This case was decided at summary judgment, which means that all facts are assumed in favor of the plaintiff, but there were no findings of fact because the suit was dismissed prior to trial.

3. *Panaro v. City of North Las Vegas*, 432 F.3d 949 (9th Cir. 2005) (42 U.S.C. § 1997e(a)). This case was decided at summary judgment, which means that all facts are assumed in favor of the plaintiff, but there were no findings of fact because the suit was dismissed prior to trial.

4. *Davis v. District of Columbia, 158 F.3d 1342 (D.C. Cir. 1998)* (42 U.S.C. § 1997e(e)). This case was decided at summary judgment, which means that all facts are assumed in favor of the plaintiff, but there were no findings of fact because the suit was dismissed prior to trial.

5. *Alexander v. Tippah County*, 351 F.3d 626 (5th Cir. 2003) (42 U.S.C. § 1997e(e)). This case was decided at summary judgment, which means that all facts are assumed in favor of the plaintiffs, but there are no findings of fact because the suit was dismissed prior to trial.

6. *Jarriet v. Wilson*, 2005 U.S. App. LEXIS 13661 (6th Cir. July 7, 2005) (42 U.S.C. § 1997e (e)).This case was decided at summary judgment, which means that all facts are assumed in favor of the plaintiff, but there are no findings of fact because the suit was dismissed prior to trial.

7. *Trevino v. Johnson*, 2005 WL 3360252 (E.D. Tex., Dec. 8, 2005) (42 U.S.C. § 1997e(e)). This case was decided after a preliminary evidentiary hearing.

8. *Moya v. City of Albuquerque*, No. 96-1257 DJS/RLP, Mem. Op. and Order (D.N.M. Nov. 17, 1997) (42 U.S.C. § 1997e(e)). This case was decided after all evidence was presented at trial and the judge entered a judgment as a matter of law.

9. *Pearson v. Welborn*, 471 F.3d 732 (7th Cir. 2006) (42 U.S.C. § 1997e(e)). These facts were decided by a jury, after trial.

10. *Searles v. Van Bebber*, 251 F.3d 869 (10th Cir. 2001). These facts were decided by a jury, after a trial.

Organizations supporting written testimony by the Coalition to Stop Abuse and Violence Everywhere (SAVE):

ACLU
Center for Children's Law and Policy
Church of the Brethren Witness/Washington Office
Church of Scientology Washington, DC
Criminon New Life DC
D.C. Prisoners' Project, Washington Lawyers' Committee for Civil Rights and Urban Affairs
Human Rights Watch
International CURE
Justice Policy Institute
Juvenile Law Center
Legal Aid Society of New York
National Juvenile Justice Network
Penal Reform International
Pennsylvania Institutional Law Project
Prison Legal News
Public Justice Center
Sentencing Project
Stop Prisoner Rape
United Methodist Church, General Board of Church and Society

CENTER FOR Children's Law and Policy

TESTIMONY OF MARK SOLER, EXECUTIVE DIRECTOR,
CENTER FOR CHILDREN'S LAW AND POLICY
FOR THE HOUSE JUDICIARY SUBCOMMITTEES ON
CRIME, TERRORISM AND HOMELAND SECURITY AND
CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES

NOVEMBER 8, 2007

I am the Executive Director of the Center for Children's Law and Policy (CCLP), a nonprofit public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in such systems. I urge the Committees to amend the Prison Litigation Reform Act to remove "juveniles" and facilities that incarcerate or detain juveniles from its coverage.

By way of background, my organization works throughout the country to promote juvenile justice and other reforms through a range of activities including research, writing, public education, media advocacy, training, technical assistance, administrative and legislative advocacy, and litigation. Based in in Washington, DC, CCLP works in DC, Maryland, and Virginia, as well as in other states and on national juvenile justice improvement efforts such as the John D. and Catherine T. MacArthur Foundation's Models for Change and the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative. From 1978 until February, 2006, I was Senior Staff Attorney, Executive Director, then President of the Youth Law Center, a national public interest law firm. At the Youth Law Center, my colleagues and I worked in more than 40 states to improve juvenile justice, child welfare, health, mental health, and education, and litigated

successfully in 16 states on behalf of children whose rights had been violated in juvenile justice and child welfare systems. I was lead counsel in many of those cases.[1] I have written more than 20 articles and book chapters on civil rights issues, the rights of children, and juvenile justice issues, and I have taught at Boston College Law School, the Washington College of Law at American University, Boston University School of Law, the University of Nebraska Law School, and San Francisco State University. I have received awards for my work from the American Psychological Association, American Bar Association, Alliance for Juvenile Justice, and Office of Juvenile Justice and Delinquency Prevention. I have been cited as a juvenile justice expert in federal court[2] and I have testified several times on juvenile justice and conditions for children in adult jails and juvenile facilities before Congressional committees[3], including on the Prison Litigation Reform Act. I received my B.A. degree from Yale University in 1968 and my law degree from Yale Law School in 1973.

The following testimony is based on my 30 years experience representing children in civil rights class action litigation throughout the country.

The PLRA as currently written covers "any Federal, State, or local facility that incarcerates or detains juveniles [or adults] accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law" (18 U.S.C. §3626(g)). The term "prisoner" includes "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." (18 U.S.C. §3626(g), 42 U.S.C. §1997e((h), 28 U.S.C. §28 U.S.C. §1915A(c)).

Congress should amend these statutory provisions to remove references to juveniles and to delinquency. There are several reasons for this needed change. First, a

major concern that prompted enactment of the PLRA is not relevant to children. Second, experience over the last ten years provides some idea of the extraordinary extent of abuse inside juvenile facilities, and the problems in bringing such abuse to light. Third, the provisions of the PLRA that make it difficult for prison inmates to file civil rights litigation over conditions of their confinement work special hardships for incarcerated children.

Children Don't File "Frivolous Lawsuits." When Congress enacted the PLRA, among its main concerns were allegations that prison inmates filed numerous "frivolous lawsuits" over conditions of their confinement. Supporters of the legislation cited a "Top Ten List of Frivolous Prisoner Lawsuits." The factual basis for some of these allegations was doubtful. For example, Chief Judge Jon O. Newman of the United States Court of Appeals for the Second Circuit found that the some of the allegations of frivolous lawsuits were misleading and in some cases simply false.[4]

However, even if some adult prisoners filed some frivolous lawsuits, supporters of the legislation did not claim that incarcerated children had filed such litigation. That is hardly surprising. Most prisoner lawsuits are filed pro se,[5] but children rarely file lawsuits over the conditions of their confinement. They do not understand that they have rights when they are incarcerated, and they certainly do not understand that they can seek remedies for mistreatment through the courts. Even when conditions, policies, and practices are abusive, incarcerated children are more likely to believe that such conditions are part of their punishment, or that they are getting what they "deserve" for breaking the law, and in any event that there is nothing they can do to bring about change. Moreover, in contrast to the many adult inmates in prisons and jails who bring litigation and assist others in doing so, there are no adolescent "jailhouse lawyers" in juvenile facilities in this

country. Many youth who find themselves involved in the juvenile justice system are unable to read and write, and few if any have sufficient understanding of the court system to file pro se litigation.

There is Extensive Abuse of Children in Juvenile Facilities. The amount of abuse that young people suffer in state and local facilities is extensive and deeply troubling. In Texas, there were more than 2,000 allegations of staff abuse of children incarcerated in Texas Youth Commission facilities between January 2003, and December 2006.[6] At the South Dakota State Training School in 2000, staff regularly chained children to the four corners of their beds by their wrists and ankles, sprayed them with pepper spray (Oleoresin Capiscum), and locked them in their rooms for days and weeks at a time.[7] At the Scioto Juvenile Correctional Facility in Ohio in 2004, several staff members were indicted after investigations revealed that male staff sexually abused incarcerated girls.[8] At the Marion Juvenile Correctional Facility in Ohio, staff were found to have encouraged fights between boys, toothaches went untreated, and youth with severe mental illnesses faced "extreme behavior management options" such as restraints and forced medication.[9]

Abusive conditions for children exist all over the country. The Swan Valley Youth Academy in Montana was closed in 2006 after a state Department of Public Health and Human Services investigation found numerous violations, including neglect and failure to report child abuse and an attempted suicide.[10] In Florida, state audits found that juvenile facilities in the northeast part of the state had "deplorable" conditions and provided inadequate treatment, including no prenatal care for pregnant girls.[11] In Maryland, a 17-year-old youth died in the Bowling Brook facility earlier this year after being held in restraint for three hours by staff. An investigation by the Maryland

Department of Juvenile Services, which contracted with the program to house delinquent youth, found a pattern of abusive restraints.[12] In Tennessee, a boy died this year at the Chad Youth Development Center after staff restrained him. An investigation found another death of an adolescent, in 2005, and complaints of excessive use of force by staff.[13] In New York City, children in the juvenile justice system have gotten inadequate medical care.[14] In Chicago, according to the *Chicago Tribune*, the Cook County Juvenile Temporary Detention Center is "out of control. Children languish there like warehoused animals…Kids live in filthy surroundings…Children face 'an alarming risk of suicide and inadequate mental health services' and 'a climate of fear and violence.'"[15]

Some systemic abuses have been documented by the U.S. Department of Justice. In Louisiana's notorious Tallulah Youth Facility, the Justice Department found horrendous restraint, isolation, and use of force practices.[16] In Mississippi, according to the Department of Justice, staff "hog-tied" youth, shackled girls to a pole, kept girls in the "Dark Room" for days, and forced youth to eat their own vomit.[17]

Many of these abuses only came to light after extensive complaints or after tragedies occurred. The scope of these abuses demonstrates the need for readily available legal remedies for victimized children.

Restrictions on Legal Remedies Work Special Hardships for Incarcerated Children. The exhaustion requirements of the PLRA are especially difficult for children to meet. To exhaust their administrative remedies, children must utilize the facility grievance system. But for many incarcerated children, the grievance process is difficult to access or totally unavailable. In one of the Texas facilities, a supervisor who coerced children into performing sex acts on him also held the key to the complaint box – leaving the children no way to file grievances or to seek legal redress. In the Scioto and Marion

juvenile facilities in Ohio, an investigation specifically found that grievance procedures made it difficult for youth to report illegal abuse.[18] In addition, security measures in juvenile facilities frequently make access to grievance forms and writing implements very difficult.

Many children in juvenile facilities fear retaliation if they file a complaint against a staff member. Combined with their lack of knowledge of their legal rights, this leaves children vulnerable to predatory staff or other incarcerated youth, with no means for bringing the abuse to the attention of authorities.

Yet if children fail to follow official grievance procedures, they get kicked out of court. For example, in one case in Indiana, a boy named Steven was incarcerated in the South Bend juvenile facility for theft. He was repeatedly beaten by other youth in the facility, but staff did not protect him. For a period of time he was placed on suicide watch. He was assaulted in one room with four camera monitors. He was raped, and beaten with "padlock-laden socks." Staff photographed his injuries but did not stop the abuse. He did not report the incidents to staff for fear of being labeled a "snitch." Some staff encouraged the beatings and arranged for juveniles to fight. Some handcuffed one juvenile so that others could beat him, a practice called "jumping." He was transferred to two other Indiana juvenile facilities, and suffered physical abuse at both of them. Steven's mother did report the beatings to the staff at the South Bend facility, and they told her that they were doing everything possible to ensure his safety. Steven's mother also wrote to two juvenile court judges, one of whom advised Indiana Governor Frank O'Bannon about concerns for Steven's safety.

Steven's mother filed suit against the Indiana Department of Corrections on his behalf. The federal court held that, despite the "heroic efforts" of his mother to protect

her son, under the Prison Litigation Reform Act the suit must be dismissed for failure to exhaust administrative remedies.[19]

As this information has come to light about abuses of incarcerated children in the years since the passage of the PLRA, now is the time for Congress to take action to amend the statute to protect children from abuse and make full legal remedies available. I thank the Chairmen and members of the Committees for the opportunity to present this information to you.

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[2] Hendrickson v. Branstad, 740 F. Supp. 636, 644 (N.D. Iowa 1990), aff'd in part and rev'd in part on other grounds and remanded, 934 F.2d 158 (8th Cir. 1991).
[3] E.g., Hearing before the Subcommittee on Juvenile Justice of the Committee of the Judiciary, U.S. Senate, 98th Cong., 1st Sess. , Serial No. J-98-9 (Feb. 24, 1983), pp. 6-25.
[4] Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOKLYN L. REV. 519, 520-521 (Summer 1996).
[5] *Id.*
[6] "Feds knew about TYC abuse cases," The Dallas Morning News (August 7, 2007).
[7] See Christina A. v. Bloomberg, 167 F.Supp. 2d 1094 (D.S.D. 2001).
[8] U.S. Department of Justice Findings Letter, http://www/usdoj/gov/crt/split/documents/scioto_findlet_5-9-07.pdf.
[9] "Abuse remains to youth prisons," The Cincinnati Enquirer (June 21, 2007).
[10] "Firm's leaders linked to problems," The Dallas Morning News (July 29, 2007).
[11] "Juvenile facilities rated among state's worst," The Florida Times-Union (June 9, 2007).
[12] "Bowling Brook's growing pains," The Baltimore Sun (March 18, 2007). The agency subsequently pulled all of its youth out of the program, and Bowling Brook eventually closed.
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[19] Minix v. Pazera, 2005 WL 1799538 (N.D. Ind. July 27, 2005)(not reported in F.Supp. 2d)

Testimony of Human Rights Watch

For the House Judiciary Subcommittees on Crime, Terrorism, and Homeland Security and the Constitution, Civil Rights, and Civil Liberties

Regarding proposed revisions to the Prison Litigation Reform Act (PLRA)

November 8, 2007

Human Rights Watch welcomes this opportunity to present to the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security and the Subcommittee on the Constitution, Civil Rights, and Civil Liberties our concerns about several misguided provisions in the Prison Litigation Reform Act of 1996 and to urge you to support long overdue reforms.

Introduction

Human Rights Watch is the largest human rights organization based in the United States. Our researchers conduct fact-finding investigations into human rights abuses in all regions of the world. Human Rights Watch has been investigating and reporting on prison conditions and the treatment of incarcerated people in the United States for over twenty years. Our reports on US prison conditions include *Prison Conditions in the United States* (1991); *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (1996); *Cold Storage: Super-Maximum Security Confinement in Indiana* (1997); *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons* (1998); *No Escape: Male Rape in U.S. Prisons* (2001); *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* (2003); and *Cruel and Degrading: The Use of Dogs for Cell Extractions in U.S. Prisons* (2006). In recognition of Human Rights Watch's expertise on US prison conditions, a senior Human Rights Watch staff member has been appointed as a Commissioner of the National Prison Rape Elimination Commission, established by the Prison Rape Elimination Act of 2003 (PREA).[1]

Human Rights Watch's research both before and after the PLRA was passed has convinced us that this legislation undermines both the public interest and US human rights obligations. It is a serious obstacle to holding prison officials accountable when they fail to provide humane treatment and decent living conditions; to securing appropriate remedies for incarcerated adults and youth when their civil and human rights are violated; and to promoting the public interest in well-managed, safe and productive prisons.

In the United States constitutional framework of checks and balances, the courts ensure that public officials cannot violate their legal obligations with impunity, and that

[1] 42 U.S.C. § 15601, et seq.

individuals -- however disfavored politically or socially-- have the opportunity to seek vindication of their rights and redress for violations of those rights.[2]

Under international law, prisoners possess the same panoply of fundamental human rights as everyone else, subject only to the restrictions that are unavoidable in a closed environment.[3] In particular they possess rights that govern their treatment while detained or incarcerated, including the right to be treated with "humanity and with respect for the inherent dignity of the human person."[4] Among the rights all persons possess is the right to an accessible and effective remedy. The International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, provides that an "effective remedy" must be available to all persons whose internationally recognized rights have been violated.[5] The UN Human Rights Committee has emphasized that remedies should include measures to prevent a recurrence of the violation as well as appropriate compensation.[6] Accordingly prisoners, like all other persons, have the right to an accessible and effective remedy when their rights are violated.

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[2] As early as 1803, the US Supreme Court noted that "it is a settled and invariable principle…that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

[3] See the UN Committee on Human Rights, General Comment No. 21, Article 10, Humane Treatment of Prisoners Deprived of their Liberty, at paragraph 3 (1994). The UN Committee provides authoritative interpretation and guidance on the scope and nature of obligations under the International Covenant on Civil and Political Rights (ICCPR) to which the United States is a party (see below). Several other international documents also affirm the tenet that prisoners retain fundamental human rights while incarcerated, including the United Nations Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the Basic Principles for the Treatment of Prisoners. The Basic Principles, adopted by the General Assembly in 1990, state:

> Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.

Art. 5, Basic Principles for the Treatment of Prisoners, adopted and proclaimed by General Assembly Resolution 45/111 of 14 December 1990.

[4] Art. 10(1), International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc.A/6316 (1966), 999 UNTS 171, entered into force March 23, 1976, ratified by the U.S. on June 8, 1992.

[5] ICCPR, Art. 2(3).

[6] "Article 2, paragraph 3 [of the ICCPR] requires that States parties make reparation to individuals whose Covenant rights have been violated…In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation." Human Rights Committee, General Comment 31[80], Nature of the General legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), par.16. In addition to compensation, the Committee also emphasizes that remedies include taking "measures to prevent a recurrence of a violation of the Covenant," "guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations." Ibid.

Congress enacted the PLRA in 1996 to curb what it believed was a deluge of frivolous prisoner lawsuits abusing the judicial system. The legislation's chief sponsor, Senator Orrin Hatch, emphasized at the time that his purpose was not "to prevent inmates from raising legitimate claims." Yet a decade of experience with the PLRA reveals that the legislation has had precisely that unintended effect.

The PLRA places severe limitations on the ability of incarcerated adults and youth to challenge and obtain remedies for abusive prison conditions through litigation. It prevents countless serious claims by prisoners from reaching federal courts – including claims of physical and sexual abuse, gross mistreatment of confined juveniles, medical mistreatment, and lack of mental health treatment. It unfairly limits the damages incarcerated persons can receive for violations of their rights. And it permits unconstitutional prison conditions to fester, because it prevents courts from ensuring solutions to the problem when corrections officials are unwilling or unable to do so. The restrictions and limitations imposed by the PLRA cannot be squared with US international human rights obligations. They operate to deny prisoners access to effective remedies that will end and compensate them for violations of their rights.

PLRA and Prison Sexual Violence

We believe the impact of the PLRA can best be appreciated if we illustrate how it frustrates Congress's goal of eliminating sexual abuse in US prisons. In 2003, shocked by the extent of sexual abuse in prison, its devastating consequences, and the lack of response by prison officials, Congress enacted the Prison Rape Elimination Act (PREA). The legislation inaugurated a national effort to eliminate prison rape by staff or inmates. The ability of prisoners to obtain the assistance of the courts when prison officials fail to protect them from sexual abuse is critical to the success of this effort. But absent reform, the PLRA severely limits that ability.

1) <u>The exhaustion requirement</u>

The PLRA requires courts to dismiss prisoners' cases if they have not satisfied all internal complaint procedures, including meeting tight deadlines for filing the initial grievance and making administrative appeals. It is entirely reasonable to ensure that prison officials have an opportunity to respond to and resolve prisoners' grievances before a court steps in. It is not reasonable, however, for prison officials to escape accountability for unlawful conduct simply because a prisoner fails to dot an "i" or cross a "t" in following internal grievance procedures – for example, because the prisoner fails to submit a grievance within 48 hours of the incident of abuse, as many prison systems require.

Although complying with grievance procedures can be difficult for any prisoner, it may be particularly difficult for prisoners who have endured sexual abuse at the hands of staff or other inmates. The trauma of sexual violence may leave them emotionally incapable of filing a complaint within a short time period – particularly when a prisoner abused by staff must first informally "complain" to the very officer who abused her as the first step

in the grievance process.[7] Prisoners are also reluctant to grieve against officers who have abused them because the lack of confidentiality that often surrounds grievances exposes them to retaliation by the officer or other staff and because prisoners are aware that those who come forward with allegations of staff sexual abuse are often intimidated or even punished for doing so.

Fear of retaliation also deters prisoners from complaining about inmate-on-inmate rape. They fear being attacked and injured by the perpetrator of the abuse because prison officials often fail to take adequate steps to protect them and because the perpetrators are rarely effectively punished. As a prisoner explained to Human Rights Watch,

> The first time [I was raped] I told on my attackers. All [the authorities] did was moved me from one facility to another. And I saw my attacker again not too long after I tolded on him. Then I paid for it. Because I tolded on him, he got even with me. So after that, I would not, did not tell again.[8]

They also know that they risk assault from other prisoners if they are known to have "snitched" on another inmate. One prisoner who was repeatedly raped by his cellmate wrote to Human Rights Watch, "I never went to the authorities, as I was too fearful of the consequences from any other inmate. I already had enough problems, so didn't want to add to them by taking on the prison identity as a 'rat' or 'snitch.' I already feared for my life. I didn't want to make it worse…"[9] Prisoners who have been raped by other prisoners may also fail to meet grievance deadlines because they feel complaining is futile; they believe prison officials are disdainful and indifferent about sexual abuse and will not do anything about it. As one prisoner told Human Rights Watch, "I told my complaint and Mrs. P said that I was never raped that I just gave it up."[10]

A class action lawsuit pending in New York illustrates the particular difficulty the PLRA exhaustion requirement poses for prisoners alleging staff sexual abuse. Fifteen female prisoners in four different New York prisons alleged that male guards sexually abused them from 2001 to 2003. The alleged abuse included sexual assault, harassment, forcible rape, sexual intercourse, anal intercourse, oral sexual acts, sexual touching, voyeurism, invasion of personal privacy, demeaning sexual comments, and intimidation to deter women prisoners from reporting sexual misconduct.[11] The women also alleged that the prisons' system for reporting and investigating complaints of sexual misconduct was inadequate and contributed to the persistence of staff sexual abuse.[12] They allege that complaints of sexual abuse are not treated confidentially, and that "the persons to whom

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[7] In many prison systems, grievance procedures require a prisoner to confront informally the implicated officer as a first step before filing a formal grievance, even while the officer is still in a contact position with the prisoner. Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (1996), at 5.
[8] Human Rights Watch, *No Escape: Male Rape in U.S. Prisons* (2001) (hereinafter "*No Escape*"), at 132.
[9] *No Escape*, at 212.
[10] *No Escape*, at 152.
[11] *Amador v. Andrews, et al.*, No. 03 Civ. 0650 (KTD) (S.D.N.Y.), First Amended Class Action Complaint, September 5, 2003, at 2.
[12] Ibid., ¶ 26.

such complaints are to be made are colleagues of the perpetrator(s) of the abuse, putting the victim at risk of retaliation."[13] The lawsuit also states that the system deters women from reporting sexual misconduct by providing ambiguous and incomplete information about how to complain; punishing women for admitting to sexual relations with staff; failing to protect complainants against retaliation; failing to adequately investigate complaints; and failing to take appropriate action against perpetrators if and when women do come forward.[14]

In 2005, the state moved to have the suit dismissed, because some of the plaintiffs in the class action lawsuit had failed to exhaust administrative remedies as required by the PLRA. The judge has yet to rule on the motion. The state is thus insisting, bizarrely, that all the plaintiffs must exhaust the administrative system that they are challenging as useless and counterproductive. The state's motion to dismiss on PLRA grounds and the judge's failure to rule on it have delayed by years the ability of the plaintiffs to vindicate their right to be free of staff sexual abuse.

Recommendation: The PLRA should be amended so that if prisoners have not presented their claims to responsible prison officials before filing suit, the court may stay the case for a sufficient time to give prison officials the opportunity to resolve the complaint administratively.

2) The physical injury requirement

With the Prison Rape Elimination Act, Congress has sought to eliminate not only violent rape, but also such sexual misconduct as fondling prisoners' breasts or genitals, subjecting them to unnecessary strip searches, making lewd remarks, or peeping at them while they shower or use the toilet. Yet the PLRA bars prisoners from recovering damages for such sexual degradation and humiliation. Under the PLRA a prisoner may not obtain damages for unlawful or unconstitutional conduct that has caused mental or emotional suffering unless the prisoner has also suffered a more than minor physical injury.[15]

There are numerous examples of prisoners denied judicial relief for alleged sexual abuse because they did not claim physical injury. Because of the physical injury requirement, courts have dismissed complaints by:

- two female prisoners who alleged that they were strip-searched by male guards. After the incident, one woman began to suffer migraine headaches, while the other attempted suicide by drug overdose. The court ruled that the women had not satisfied the PLRA's physical injury requirement; "a few hours of lassitude and nausea and the discomfort of having her stomach pumped is no more than a

[13] Ibid., ¶ 27.
[14] Ibid., ¶¶ 29, 32, 35-39.
[15] The PLRA states that "No Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e).

de minimis physical injury."[16]

- a prisoner who alleged that a female corrections officer had grabbed his penis and held it in her hand.[17]

- a prisoner who alleged that a prison employee reached between his legs and rubbed his genitals.[18]

- a prisoner who claimed to be routinely viewed in the nude by opposite-sex staff. The court dismissed the action despite finding that the complaint alleged a violation of clearly established constitutional rights.[19]

At least one court has held that even an allegation of sexual assault, without further statement of physical injury, did not satisfy the physical injury requirement of the PLRA. Although the prisoners' complaint asserted that officers had fondled their genitals and "sexually battered them by sodomy" the court dismissed their case because "the plaintiffs do not make any claim of physical injury beyond the bare allegation of sexual assault."[20]

Congress no doubt thought that the physical injury requirement would help protect prison officials from having to respond to frivolous lawsuits. But the provision is not necessary. Even without it, the courts have the authority needed to screen out cases that allege staff conduct that does not raise constitutional concerns. Congress certainly did not intend the PLRA to allow prison staff to sexually abuse and humiliate prisoners with impunity.

Recommendation: The physical injury requirement should be repealed.

3) Other constraints on prisoner litigation

The PLRA contains several other provisions that limit the ability of prisoners to challenge and remedy abusive prison conditions through litigation. None of these provisions is necessary to deter or prevent frivolous prisoner litigation. All of them restrict litigation that raises serious claims involving, for example, sexual or physical abuse. And all of them impose unique limitations and restrictions on prisoner litigation that do not exist in other civil rights cases.

•The PLRA severely restricts the amount of attorney fees that can be recovered in successful cases brought by prisoners, hindering the ability of prisoners to find legal representation, even in the most meritorious cases. For example, the PLRA caps the fee award at 150 percent of the judgment no matter how much time or expense a lawyer has invested in a prisoner's case. If, for example, a jury awards a prisoner

[16] *Moya v. City of Albuquerque*, Civil No. 96-1257 DJS/RLP (D.N.M., Memorandum Opinion and Order, Nov. 17, 1997), at 3-4.
[17] *Smith v. Shady*, 2006 U.S. Dist. LEXIS 24754 (M.D. Pa., Feb. 8, 2006), at *5-6.
[18] *Cobb v. Kelly*, 2007 WL 2159315 (N.D. Miss., July 26, 2007).
[19] *Ashann Ra v. Commonwealth of Virginia*, 112 F. Supp. 2d 559, 565-66 (W.D. Va. 2000).
[20] *Hancock v. Payne*, 2006 U.S. Dist. LEXIS 1648 (S.D. Miss., Jan. 4, 2006), at *10.

$5,000 because staff failed to protect him and he was raped, the lawyer can receive no more than $7,500 in attorney fees, even if the actual legal costs were many times that much. Unable to find lawyers to take on their cases, prisoners all too often are forced to represent themselves, dooming most of their cases to failure, whatever the true merits of their claims.

•The PLRA requires that up to 25% of the damages prisoners are awarded in a successful case be applied to the attorney fees the court orders prison officials to pay. This unfairly deprives inmates of the compensation to which they would otherwise be entitled and provides an unconscionable windfall for officials by reducing their costs for violating the law.

•The PLRA requires automatic termination of court orders regarding prison conditions after two years unless the prisoners prove ongoing constitutional violations, i.e., unless they successfully re-litigate the merits of the case.[21] Meaningful reform of abusive prison conditions pursuant to court orders often takes time; institutional inertia, bureaucratic obstacles, lack of funding or even disagreement with the court can slow the pace of change. The public interest in well-run prisons is better served when courts are not hamstrung in their ability to ensure full compliance with their orders.

Recommendation: The PLRA should be amended to remove limitations on attorney fees and the courts' power to provide relief that do not exist in non-prison civil rights cases.

4) Application of the PLRA to Juveniles

It is unclear why the PLRA applies to juveniles. Far from being likely to submit frivolous claims, young people in custody are far less likely than adults to seek relief even from abusive detention conditions. Indeed, because youth may be even more likely than adults to confront unchecked violence and sexual assault in detention, their access to the courts should be encouraged, not discouraged.

In one recent case, a youth was repeatedly assaulted and once even raped by other residents while he was held in state juvenile facilities. Staff were allegedly aware of the beatings and the boy's mother made what the court called "heroic" efforts to protect her son by notifying numerous authorities about the problem. The court nonetheless dismissed the boy's civil rights complaint because he had never filed any formal grievances about any of the incidents of abuse he endured and the staff's failure to protect him. If he had sought to comply with the specified grievance process, he would have had to file grievances within 48 hours of any incident of abuse.[22]

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[21] By contrast, in civil rights cases that do not involve prisoners, the burden is on defendants seeking to terminate a court order to prove that they are operating and will continue to operate according to constitutional requirements.

[22] *Minix v. Pazera*, 2005 U.S. Dist. LEXIS 44824 (N.D. Ind., July 27, 2005).

Recommendation: The PLRA should be amended to exempt from its provisions children under the age of 18.

5) Filing Fees and other Bars to Prisoner Civil Rights Cases

Indigent persons are typically exempted from having to pay the steep federal court filing fees in civil rights cases. Yet the PLRA requires poor prisoners to pay at least a partial filing fee at the outset of the case and to pay the entire fee—currently a hefty $350—over time. And a prisoner who has had three complaints or appeals dismissed – even if solely on technical grounds, and even if the dismissals happened years ago – is *permanently* barred from ever filing another case without first paying the entire $350 up front, something few prisoners can do. Congress has recognized that poverty should not be a barrier to judicial relief from unlawful conduct by public officials and it has authorized the waiver of judicial filing fees for indigent civil rights plaintiffs. It should not treat poor prisoners any differently.

Recommendation: The PLRA should be amended to ensure that prisoners in civil rights cases are not subject to filing fee provisions more ouerous than those that apply to any other person bringing a civil rights case.

Dear Member of Congress,

We write in support of amending the Prison Litigation Reform Act (PLRA), which was signed into law in 1996. The original intent of the PLRA was to reduce frivolous litigation by prisoners, and it has been quite successful at accomplishing this. We continue to support the core element of the PLRA, which is the screening provision that has proven effective at identifying and throwing out frivolous claims. But after 11 years it is also evident that unintended consequences of the law have left prisoners with little judicial protection against actual incidents of sexual abuse, religious discrimination, and other rights violations.

The time has come for Congress to take another look at this law in order to fix the problems that have resulted in countless horror stories to which we cannot turn a blind eye.

One of the unintended consequences was caused by the "exhaustion" provision, which basically states that prisoners must exhaust all recourse options available to them in the grievance systems in prison before gaining the ability to file a lawsuit in federal court. On its face, this is a good provision – assuming there is a sound grievance process in place and it is followed by prison officials, we believe prisoners must first try to solve their problems there. In reality, however, the grievance processes in many prisons are too convoluted to be workable for a majority of inmates, many of whom are illiterate and/or mentally ill. Further, there are documented incidents where corrections officers have manipulated the process to intentionally prevent inmates from exhausting their options. And many incarcerated individuals, including rape victims, fear for their safety if they file a complaint with prison officials. The result: many prisoners are not able to exhaust their options in prison, and are thus unable to gain access to the federal courts.

Another unintended consequence has been that federal courts are too often powerless to protect incarcerated juveniles, who were never the source of frivolous lawsuits in the first place. Because the PLRA applies to juveniles, its exhaustion provision frequently prevents federal courts from intervening to protect children from abuse and rape in detention. Recently, a state-wide scandal in Texas revealed that for years children detained by the Texas Youth Commission were subject to sexual abuse by staff. But because one of the supervisors, who is blamed for forcing children to perform sexual acts on him also held the key to the complaint box, the children had nowhere to go for help, and the courts were powerless to intervene. Once the scandal broke and the Texas legislature stepped in, detained children and their parents were able to come forward and over one thousand complaints of sexual abuse have now been alleged.

A third consequence has been that victims of religious rights violations, sexual harassment, and even victims of coerced sex are often denied access to appropriate judicial remedies because of the PLRA's "physical injury" provision, which requires a person to prove he or she suffered a physical injury in order to obtain compensatory damages, regardless of whether any mental or emotional injury was incurred. A prisoner who is repeatedly denied the right to practice his or her religion –attend services, meet

with a chaplain, or obtain a bible, Koran, or Torah – cannot prove a physical injury. Likewise, a female prisoner who has her breasts fondled by a male guard may not be able to prove she suffered physical injury. And a child in detention, who is told by a guard that he may not have visits with his mother unless he performs sexual favors for the guard, likely cannot prove a physical injury under the PLRA. These abuses cause suffering that cannot be overlooked simply because they are not physical in nature.

We believe justice and morality require that incarcerated children be exempted from the PLRA, and that the exhaustion and physical injury provisions be fixed.

We must not turn our heads away from abuses such as rape and religious rights violations simply because they occur behind prison walls. We have a moral obligation to protect the rights of those who are most vulnerable in our society. As leaders in the faith community, we urge Congress to determine what fixes need to be made to ensure that the fundamental rights of prisoners are protected, and amend the PLRA.

Sincerely,

Church of the Brethren Witness/Washington Office

Church of Scientology

Friends Committee on National Legislation

Institute on Religion and Public Policy

International CURE

Mennonite Central Committee, Washington Office

National Advocacy Center of the Sisters of the Good Shepherd

National Alliance for Faith and Justice

National Association of Evangelicals

Presbyterian Church (USA), Washington Office

Sojourners

United Church of Christ, Justice and Witness Ministries

United Methodist Church, General Board of Church and Society

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November 5, 2007

House Committee on the Judiciary
U.S House of Representatives
United States Congress
2138 Rayburn House Office Building
Washington, DC 20515

RE: Letter in Support of SAVE Coalition re PLRA Reform Bill

Dear Committee Members:

Prison Legal News (PLN) is a non-profit monthly publication that primarily covers prison, jail and corrections-related civil litigation. We have approximately 7,000 subscribers, of whom 65% are incarcerated, and have been publishing since 1990. We report on the precise type of litigation that is most affected by the Prison Litigation Reform Act.

The Prison Litigation Reform Act (PLRA) was enacted by Congress in 1996 for the specific purpose of discouraging and restricting frivolous litigation by prisoners. While the PLRA has been successful in achieving this goal, it has done so at the expense of barring meritorious lawsuits that prisoners have been unable to file or pursue due to PLRA provisions that limit all prison litigation, whether frivolous or not.

Since the PLRA was enacted, PLN has reported on meritorious prisoner lawsuits on a broad range of issues – from sexual abuse of prisoners and grossly inadequate medical care to conditions of confinement and physical abuse by prison and jail guards – that have been restricted or barred by PLRA provisions. These provisions, among others, include a requirement that prisoners must show physical injury before raising claims of emotional or mental injuries; limits on attorney fees for prisoners who prevail in lawsuits; and administrative exhaustion that is sometimes difficult for prisoners to meet.

Concerning the PLRA's physical injury requirement (42 U.S.C. § 1997e(e)), in a Tenth Circuit case the court vacated a jury award of more than $46,000 to a Kansas prisoner who was denied a religious kosher diet in violation of the First Amendment, holding that

First Amendment claims absent a physical injury were barred by the PLRA. The case was *Searles v. Van Bebber*, 251 F.3d 869 (10th Cir. 2001). In another lawsuit, a U.S. District Court held that injuries including bruises, abrasions, cuts and a bloody nose did not constitute "physical injury" within the meaning of the PLRA. See: *Luong v. Hatt*, 979 F.Supp. 481 (ND TX 1997). And In one particularly egregious case, a Colorado prisoner was brutally assaulted by prison guards, and five guards were subsequently indicted for federal civil rights violations. When the prisoner sued due to the beating and malicious prosecution, the District Court dismissed several of the malicious prosecution claims based on the PLRA's physical injury requirement, since no physical injury was involved in those claims even though they clearly raised legitimate civil rights violations. See: *Turner v. Schultz*, 130 F.Supp.2d 1216 (D.Colo. 2001).

In regard to the PLRA's cap on attorney fees, in one case a prisoner prevailed at trial and was awarded $1.00 in nominal damages by a federal jury. Based on the PLRA's attorney fee cap provisions under 42 U.S.C. § 1997e(d)(2), the attorney received a fee award of $1.50, which was upheld on appeal. The case is *Foulk v. Charrier*, 262 F.3d 687 (8th Cir. 2001). Further, the PLRA's attorney fee cap was criticized by a federal judge in Michigan, who noted it does not further Congress' goal of reducing frivolous prisoner lawsuits. See: *Sallier v. Scott*, 151 F.Supp.2d 836 (E.D. Mich. 2001). Indeed, if a prisoner prevails at trial, that necessarily means the suit was not frivolous, and the fee cap dissuades civil rights attorneys from taking meritorious prison cases.

In terms of exhaustion of administrative remedies (42 U.S.C. § 1997e(a)), in one federal case a prisoner who severely injured his hand and required reconstructive surgery was unable to file a timely grievance because he was unable to write. The U.S. District Court dismissed his suit for failure to exhaust the grievance process. The case was reversed on appeal; however, not all prisoners are able to appeal adverse court rulings due to the expensive appellate filing fee ($450). This case illustrates the problems with the PLRA's administrative exhaustion requirement, which provides no exceptions for prisoners who have physical disabilities, or who are illiterate, mentally ill or precluded by prison staff from filing grievances. The case was *Days v. Johnson*, 322 F.3d 863 (5th Cir. 2003). In another 5th Circuit case, the court held that a nearly blind prisoner was still required to exhaust administrative remedies, and affirmed the dismissal of his suit for failure to do so. See: *Ferrington v. Louisiana Dept. of Corrections*, 315 F.3d 529 (5th Cir. 2002).

Based on the above examples, as well as many other non-frivolous prisoner-related cases, PLN supports reform of the PLRA as advocated by the SAVE Coalition. To the extent that the PLRA precludes or restricts meritorious lawsuits filed by prisoners, and unfairly limits the fees earned by the attorneys who represent them, such provisions should be repealed. Prisoners' civil rights should not be held to a lower standard than those of non-incarcerated citizens – the Constitution does not distinguish between the rights of prisoners and non-prisoners, and neither should Congress.

Sincerely,

Alex Friedmann
Associate Editor, PLN

Testimony of Juvenile Law Center, Youth Law Center, National Center for Youth Law, and Center for Children's Law and Policy for the Honse Judiciary Subcommittees on Crime, Terrorism and Homeland Security and Constitution, Civil Rights and Civil Liberties November 8, 2007

Prepared by Jessica Feierman, Juvenile Law Center[1]

Juvenile Law Center, Youth Law Center, National Center for Youth Law and Center for Children's Law and Policy work to ensure that the child welfare, juvenile justice and other public systems provide vulnerable children with the protection and services they need to become happy, healthy and productive adults. We are particularly concerned that the juvenile justice system be used only when necessary, that it fulfill its promise of rehabilitation, and that children who are served by it receive adequate education as well as physical and mental health care. Juvenile Law Center, et al. would like to thank the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security and the Subcommittee on the Constitution, Civil Rights, and Civil Liberties for holding a hearing on the Prison Litigation Reform Act (PLRA). We urge you to exempt juveniles from the Act.

Applying the PLRA to juveniles serves neither the goals of the Act nor the welfare of our country's children for a number of reasons: (1) children's conditions cases are extremely rare, regardless of the PLRA; (2) federal law already protects the courts from frivolous litigation by incarcerated youth; (3) the unique characteristics of incarcerated youth mean that many of the PLRA's provisions serve as a complete bar to court; (4) the PLRA undermines the rehabilitation at the core of the juvenile justice system; and (5) applying the PLRA to children reduces public safety.

The PLRA was designed to reduce the number of frivolous prisoner lawsuits reaching the courts. Juveniles do not file frivolous lawsuits. Indeed, there was no legislative history when the Act was passed to suggest that children file frivolous lawsuits. Even before the PLRA was enacted, juveniles engaged in very little inmate

[1] For more information or questions, call 215-625-0551 or email jfeierman@jlc.org.

litigation.[2] A few key characteristics of incarcerated children explain this reality. First, children lack exposure to the legal system. Incarcerated youth generally do not have access to law libraries, legal materials, or jailhouse lawyers. Even when faced with a legitimate legal problem such as physical or sexual abuse by correctional officers, many children do not recognize litigation as an option. This problem is exacerbated by the low literacy levels of incarcerated youth, with many reading years behind grade level.[3]

More importantly, a pre-existing mechanism protects the courts from a flood of frivolous litigation by incarcerated youth: persons under age 18 cannot file civil lawsuits on their own. Federal Rule 17(c) requires that a guardian, "next friend" or guardian ad litem represent a minor in any civil lawsuit.[4] The Rule is constructed to ensure that an adult with the minor's best interest in mind participate in any legal action on the child's behalf. Such an adult will not proceed with a frivolous lawsuit—the Federal Rules of Civil Procedure provide for sanctions against lawyers who file frivolous suits, and our experience is clear that parents do not bring suits on their children's behalf without going to lawyers first. Thus, the Federal Rules already provide a system for filtering out frivolous lawsuits in those rare cases where a child wants to initiate a lawsuit on his or her own behalf.

While the PLRA as a whole is inappropriate for children, certain provisions of the Act are particularly inapt as applied to youth. For example, the requirement that prisoners exhaust administrative remedies before filing suit in federal court, **28 U.S.C. § 1997e(a)**, fails to recognize the unique status of incarcerated juveniles. Again, Federal Rule 17(c) is instructive. While the Rule recognizes that children *cannot* proceed to civil court on their own because the law deems them incapable of the requisite legal knowledge and decision-making capacity, the PLRA exhaustion provision *requires* children to initiate litigation on their own by exhausting administrative remedies. Indeed,

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[2] Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F.L. Rev. 675, 681 (1998).
[3] For example, in *Alexander v. Boyd*, 876 F. supp. 773, 790 (D.S.C. 1995), the court acknowledged that it would make no sense to provide children, on average three years behind their expected grade level, with a law library.
[4] Fed. R. Civ. P. 17(c)

courts have explicitly held that a parent's attempt to resolve a child's problem within a correctional system does not satisfy the PLRA's exhaustion requirement.[5]

The exhaustion provision of the PLRA also particularly burdens youth because of their lower literacy levels, lack of legal information, and lack of assistance from other inmates. In most facilities, prisoners must exhaust administrative remedies by filing written complaints in the prison grievance system. Grievance systems often require prisoners to follow complicated procedures and complete all complaints and appeals within short timeframes. Such systems are often completely inaccessible to children. In *Brock v. Kenton County, KY*, 93 Fed. Appx. 793 (6th Cir. 2004), for example, a child filed suit alleging that staff physically abused him. The child explained that he had not known that there was a grievance system, that other children in the facility did not know of the system, and that the grievance system had *never* been used by a child incarcerated in that facility. Nonetheless, the court dismissed his suit for failure to exhaust administrative remedies. The exhaustion provision creates a significant barrier to court for children, particularly the large numbers of functionally illiterate youth in the juvenile justice system.

In addition, youth are more deferential than adults to authority figures.[6] They are less likely to pursue internal grievance procedures that require them to question authority. This is particularly so when it is the authority figures themselves who are abusing them. The scandal in the Texas Youth Commission is a recent case in point—youth were abused by corrections officers and administrators over a period of several years.[7] When youth are abused by their caregivers, they are unlikely to file grievances against them.

PLRA provisions limiting attorney's fees, **28 U.S.C. 1997e(d)**, have a particularly chilling effect on access to the courts for young people. Even more than adults, children need the assistance of an attorney. Indeed, they *cannot* represent themselves in court.[8]

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[5] In *Minix v. Pazera*, 2005 WL 1799538 (N.D. Ind. 2005), the district court dismissed for failure to exhaust administrative remedies the claim of a boy who had suffered severe physical and sexual abuse even though his mother had attempted to resolve the problem with staff members at the juvenile facility and with the juvenile judge.

[6] "Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants," Grisso, et al. (Law and Human Behavior, Vol. 27, No. 4, August 2003).

[7] See, e.g., Moreno, "In Texas, Scandals Rock Juvenile Justice System: Hundreds to Be Released as State Looks at Abuse Allegations and Sentencing Policies," (Washington Post, April 5, 2007, A03).

[8] Federal Rule Civ. Pro. 17(c).

When attorneys are discouraged from helping incarcerated children, meritorious claims simply don't reach the courts.

The core principle of the juvenile justice system is that youth, to be held accountable in developmentally appropriate ways, deserve not blame, but rehabilitation, and high quality care that increases the chances that they will become productive, law-abiding adults.[9] The PLRA requirement that plaintiffs may not recover damages for "mental or emotional injury suffered while in custody without a prior showing of physical injury," **42 U.S.C. § 1997e(e)**, works against this very notion. As with adults, the provision undermines the rights of incarcerated youth to protect their religious rights, free speech rights and due process rights. For children, the provision also jeopardizes the right to education, counseling and other rehabilitative programming that form the core of the juvenile justice system.

The PLRA provision requiring even prisoners with no savings or income to repay the court for their filing fees through monthly payments **28 U.S.C. 1915(a), (b)**, also particularly burdens youth. While adult prisoners often have no income while incarcerated, youth suffer the additional obstacle of not having worked before placement, and generally returning to school but not work after their release. Indeed, by burdening children who engage in litigation with financial debt, these provisions may deter youth from continuing their education and rehabilitation after their release. Thus, incurring debt to redress legitimate grievances will be counterproductive.

Indeed, applying the PLRA to youth is likely to reduce public safety for several reasons. First, the literature is clear that there is a strong relationship between child maltreatment and anti-social conduct. It is in the public's interest that institutions for youth be safe, or society will be undermining its own goals when it places youth in institutions designed to help them.[10] When youth institutions are not safe, they increase crime, rather than reduce it.

In addition, youth have a profound sense of fairness. Recent research shows that "legal socialization" increases pro-social behavior. That is, youth who believe that legal

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[9] *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971). Justice White's concurrence, *id. at* 552, further explains the goals of the juvenile system.

[10] See, e.g., Child Maltreatment and Juvenile Delinquency: Raising the Level of Awareness, Child Welfare League of America (Tuell, ed.).

institutions are fair are more likely to obey the law than those who don't.[11] The PLRA is an obstacle to legal socialization. When youth believe that their adult caretakers can harm them with impunity, they are more likely to become lawless themselves.

The PLRA was not designed to address the particular characteristics of incarcerated youth. Applying the PLRA to children does not reduce the burden on the courts. It does not benefit the welfare of children. We urge you to exempt children from the Prison Litigation Reform Act by amending **18 U.S.C. § 3626(g), 42 U.S.C. 1997e(h), 28 U.S.C. 1915(h), and 28 U.S.C. 1915A(c).**

[11] See, e.g., Fagan and Tyler, "Legal Socialization of Children and Adolescents," Columbia Public Law Research Paper No. 05-94 (Social Justice Research, Vol. 18, No. 3, September 2005).

Testimony of John Boston, Project Director, Prisoners' Rights Project of the New York City Legal Aid Society before the Sub-Committees on Crime and on the Constitution and Civil Rights of the House Committee on the Judiciary

I am the Project Director of the Prisoners' Rights Project of the New York City Legal Aid Society, which represents New York State and City prisoners in class action and test case litigation, advocates for them with prison and jail agencies, and advises them of their legal rights. I am also co-author of the *Prisoners' Self-Help Litigation Manual*, which advises prisoners on their legal rights and on how to enforce those rights correctly in court if they must proceed without counsel (*pro se*). I am generally familiar with the field of prison litigation. I have taken a particular interest in the Prison Litigation Reform Act (PLRA) since its enactment in 1996, and have written and spoken about it in various forums,[1] have appeared as counsel for prisoners or for *amici curiae* in a number of significant PLRA cases,[2] and regularly advise other prison law practitioners locally and nationally concerning PLRA-related problems. I appreciate this opportunity to comment on the need for reform of the PLRA.

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[1] *See* John Boston, *The Prison Litigation Reform Act*, in Columbia Human Rights L.Rev., A JAILHOUSE LAWYERS MANUAL, ch. 13 (2007); Boston, *The Prison Litigation Reform Act: The New Face of Court-Stripping*, 67 Brooklyn L.Rev. 429 (2001); Boston, *The Prison Litigation Reform Act*, available on Westlaw at 640 PLI/Lit 687 (Practising Law Institute, October 2000). I have continued to update and expand the latter item for training programs and Continuing Legal Education seminars, including the staff attorney training program of the United States Court of Appeals for the Second Circuit, most recently in October 2007. It comprises the most comprehensive guide to the PLRA and its judicial application that I am aware of.

[2] *See Jones v. Bock*, ___ U.S. ___, 127 Ct. 910, 923 (2007); *Woodford v. Ngo*, ___ U.S. ___, 126 S.Ct. 2378 (2006) (both involving PLRA administrative exhaustion requirement; appeared with others as *amicus curiae*); *Ortiz v. McBride*, 380 F.3d 649 (2d Cir. 2004); *Mojias v. Johnson*, 351 F.3d 606, 608-10 (2d Cir. 2003) (both involving interpretation of the PLRA administrative exhaustion requirement); *Benjamin v. Fraser*, 343 F.3d 35 (2d Cir. 2003) (addressing the application of the PLRA's restrictions on prospective relief and special masters).

The PLRA's Purpose—and Its Effects

In enacting the PLRA, Congress sought to curb what was perceived to be an overwhelming number of frivolous prisoner lawsuits. There certainly are frivolous lawsuits that have been kept out of federal court by the PLRA. But after a decade of experience under the legislation, it is clear that the PLRA is also keeping countless serious claims from reaching the courts—including claims of physical and sexual abuse, indifference to inmate on inmate rape, gross mistreatment of confined juveniles, and markedly deficient medical and mental health treatment. The result is effectively to prevent courts from exercising their role of protecting constitutional rights.

What Works in the PLRA

The core of the PLRA is its preliminary screening requirement. Prisoner cases that are frivolous or malicious, that fail to state a claim on which relief can be granted, or that seek damages from a defendant who is immune from them, are to be dismissed out of hand, without service of process on the defendants and without requiring prison officials to respond.[3] As a result of this pre-service screening, correctional administrators no longer see a large proportion of prisoner cases, and courts only must deal with those insubstantial cases once, at the outset. These provisions directly address the problem of frivolous prisoner litigation that prompted the PLRA, and they have substantially reduced its burden to courts and prison officials. They should remain the law.

[3] 28 U.S.C. § 1915(e)(2); 28 U.S.C. § 1915A; 42 U.S.C. § 1997e(c)(1). Former law authorized the dismissal of any case filed *in forma pauperis* (as are the vast majority of prisoner cases) if it was frivolous or malicious. Collectively, these PLRA provisions expand the grounds for dismissal of cases filed *in forma pauperis* to include those that fail to state a claim or that seek to recover damages from an immune defendant as well as those that are frivolous or malicious, and they extend the initial screening process applying those criteria to all prisoner cases, including those where a fee has been paid.

Needed Reforms to the PLRA

1. Repeal the physical injury requirement of 42 U.S.C. § 1997e(e).

The PLRA prohibits prisoners from bringing actions "for mental or emotional injury" without physical injury.[4] This provision, while intended to facilitate dismissal of frivolous claims, has been applied by most courts to virtually any violation of intangible constitutional rights, including deprivation of religious freedom,[5] wrongful imprisonment,[6] and protracted punitive confinement without due process or in retaliation

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[4] Courts have generally interpreted this statute as a prohibition on the recovery of compensatory damages for mental or emotional injury. *See Thompson v. Carter*, 284 F.3d 411, 417 (2d Cir. 2002). While injunctive relief may be pursued in theory, in my observation the large majority of prisoner suits involve allegations of already completed instances of abusive treatment for which injunctive relief is not available or helpful. Some courts have held that punitive damages may be recovered notwithstanding this provision. *Thompson*, 284 .3d at 418. Others, however, have held that punitive damages are barred absent physical injury. *Smith v. Allen*, ___ F.3d ___, 2007 WL 2826759 at *11-12 (11th Cir. 2007); *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998). In any case, punitive damages are not a substitute for compensatory damages, the usual remedy for violations of personal (including constitutional) rights. The threshold for punitive damages is demanding, *see Smith v. Wade*, 461 U.S. 30, 46-52 (1983), and in my observation they are rarely awarded in prison cases.

Cases presenting an "imminent risk of serious physical harm" are exempted from this section, but there are many serious constitutional violations that either do not threaten serious *physical* harm, such as violation of religious freedom or other First Amendment rights. Further, cases seemingly presenting such a risk are nonetheless dismissed under this provision. *See, e.g., Watley v. Collins*, 2006 WL 3422996 (S.D.Ohio, Nov. 28, 2006) (holding a prisoner did not meet the "imminent danger" standard even though he alleged that he has mental illness and has been placed in "supermax" conditions, which in turn aggravates his mental illness and therefore worsens his misbehavior; he has attempted suicide and engages in deranged behavior disturbing other inmates, resulting in confrontations and their throwing urine and feces at him; he has been maced to control him).

[5] *Allah v. al-Hafeez*, 226 F.3d 247 (3d Cir. 2000) ("Allah seeks substantial damages for the harm he suffered as a result of defendants' alleged violation of his First Amendment right to free exercise of religion. As we read his complaint, the only actual injury that could form the basis for the award he seeks would be mental and/or emotional injury."); *accord, Massingill v. Livingston*, 2006 WL 2571366 at *2-3 (E.D.Tex., Sept. 1, 2006) (holding claims asserting various religious restrictions were subject to mental/emotional injury provision); *Daniels v. Waller*, 2006 WL 763115 at *2 (S.D.Miss., Mar. 24, 2006) (holding claim of refusal to acknowledge Muslim name was one for mental or emotional injury).

[6] *Layne v. McDonough*, 2007 WL 2254959 at *4 (N.D.Fla., Aug. 6, 2007) (claim of 25 days' wrongful incarceration); *Scott v. Belin*, 2007 WL 2390383 at *4 (W.D.Ark., Aug. 2, 2007) (detention for 76 days without being brought before a court), *report and recommendation adopted*, 2007 WL 2416408 (W.D.Ark., Aug. 20, 2007).

for constitutionally protected speech.[7] Thus, in one recent case a jury found that an Illinois prisoner had been subjected to a year's confinement under the oppressive and restrictive conditions of a "supermax" prison in retaliation for his First Amendment-protected complaints about prison conditions. However, the court refused to allow the jury to consider an award of compensatory damages for that unconstitutional treatment, holding that under the PLRA he was entitled only to $1.00 in nominal damages, and a federal appeals court agreed.[8]

Courts have held similarly in cases involving confinement under inhumane and disgusting, but not physically injurious, conditions. Thus, another federal appeals court held that a prisoner could who alleged that he had been repeatedly placed in filthy cells formerly occupied by psychiatric patients, and surrounded by such patients and subjected to their deranged behavior which made sleep impossible, could not pursue damages for confinement under those conditions.[9] In addition, courts have held that physical injury must be "more than *de minimis*" to pass muster under this provision, and have dismissed some cases reflecting significant physical abuse on that ground.[10] Some courts have held

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[7] *Royal v. Kautzky*, 375 F.3d 720, 724 (8th Cir. 2004) (declining to award a prisoner who spent 60 days in segregation "some indescribable and indefinite damage allegedly arising from a violation of his constitutional rights"), *cert. denied*, 544 U.S. 1061 (2005).

[8] *Pearson v. Welborn*, 471 F.3d 732, 745 (7th Cir. 2006).

[9] *Harper v. Showers*, 174 F.3d 716, 719-20 (5th Cir. 1999); *see Lopez v. S.C.D.C.*, 2007 WL 2021875 at *3 (D.S.C., July 6, 2007) (dismissing allegations of week-long confinement without a toilet, sink, bed, mattress, soap, toothbrush, hot or cold running water, or opportunity to shower, with nowhere to urinate or defecate except the floor, Styrofoam serving trays, or cups); *Vega v. Hill*, 2005 WL 3147862 at *3 (N.D.Tex., Oct. 14, 2005) (holding allegations of "exposure to mold, mildew, dead bugs, dirty showers, and spoiled food" failed to establish required physical injury); *Starnes v. Gillespie*, 2004 WL 1003358 at *7-8 (D.Kan., Mar. 29, 2004) (holding allegation that segregated prisoner was denied showers, drinking water, and water for cleaning and personal hygiene and prevented from communicating with lawyer and family, was barred by § 1997e(e)).

[10] *Rawls v. Payne*, 2006 WL 2844563 at *5 (S.D.Miss. Sep 11, 2006) (dismissing the claim of a prisoner who alleged that he suffered "scratches, bruises, a busted lip, and a sprained ankle" in an assault, asserting injuries were *de minimis*); *Wallace v. Brazil*, 2005 WL 4813518 at *1 (N.D.Tex., Oct. 10, 2005)

that sexual abuse is no more than "mental or emotional injury," or is *de minimis*, under this statute.[11]

It is fair to say that many of the degradations imposed at Abu Ghraib—those which were merely painful and humiliating but did not cause physical damage—would be treated as mere "mental or emotional injury" under this statute, and their victims could not be compensated for their abusive treatment. Thus, in one recent case, a prisoner complained that he was forced to stand in a two-and-a-half-foot square cage for about 13 hours, naked for the first eight to ten hours, unable to sit for more than 30 or 40 minutes of the total time, in acute pain, with clear, visible swelling in a portion of his leg that had previously been injured, during which time he repeatedly asked to see a doctor.[12] A federal appellate court affirmed the dismissal of his case on summary judgment, without trial, stating the injury was *de minimis*.[13]

Another example of this statute's application is the case of a prisoner held in Santa Clara County, California, who complained that he was kept in solitary

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(dismissing a claim that an officer hit the prisoner in the head with an iron bar, punched his back, and twisted his neck; asserting a soft knot on his head and an abrasion on his leg were *de minimis*).

[11] *See Hancock v. Payne*, 2006 WL 21751 at *1, 3 (S.D.Miss., Jan. 4, 2006) (holding plaintiffs' allegations of abuse including that a staff member "sexually battered them by sodomy," were barred by § 1997e(e)); *see also Cobb v. Kelly*, 2007 WL 2159315 at *1 (N.D.Miss., July 26, 2007) (holding allegation that staff member reached between prisoner's legs and rubbed his genitals did not meet physical injury requirement). While some courts have reached the opposite conclusion, *see Kemner v. Hemphill*, 199 F.Supp.2d 1264, 1270 (N.D.Fla.2002), it is questionable whether their holdings are more consistent with the statutory language than is *Hancock*.

[12] *Jarriett v. Wilson*, 2005 WL 3839415 at *8 (6th Cir., July 7, 2005) (dissenting opinion). The claim was dismissed under § 1997e(e) as *de minimis* on the ground that the prisoner did not complain about his leg upon release or shortly thereafter when he saw medical staff. *Id.* at *4. (This decision was initially published, but Westlaw has removed the opinion from its original citation and replaced it with a note stating that it was "erroneously published." *Jarriett v. Wilson*, 414 F.3d 634 (6th Cir. 2005).)

[13] *Id.* at *4. The court justified its claim on the dubious ground that the prisoner did not complain about his leg upon release or shortly thereafter when he saw medical staff. Ordinarily—that is, without the PLRA—such a judgment about the seriousness of the injury and the significance of facts such as those the court cited would be made by a jury. This decision was initially published, but Westlaw has removed the opinion from its original citation and replaced it with a note stating that it was "erroneously published." *Jarriett v. Wilson*, 414 F.3d 634 (6th Cir. 2005).

confinement, his hands and feet were shackled, and he was subjected to body cavity strip searches and allowed out of his cell only three hours a week. The court held that under the PLRA, he could not seek compensatory damages for this treatment, however unjustified it might have been, because he did not allege actual physical injury.[14] Yet another is that of a Texas prisoner who alleged that an officer hit him in the head with an iron bar, punched his back, and twisted his neck; the federal district court dismissed his case on the grounds that his injuries, characterized as a soft knot on his head and an abrasion on his leg, were *de minimis*.[15]

This provision should be repealed because it obstructs court remediation of plainly unconstitutional conditions, and serves no useful function. The above described provisions for initial screening and dismissal of frivolous prisoner cases have proven effective at disposing of truly frivolous lawsuits.

2. Amend the administrative exhaustion provision of 42 U.S.C. § 1997e(a) to ensure that complaints are first addressed at the prison level, without precluding subsequent judicial review).

The PLRA requires prisoners to exhaust "such administrative remedies as are available" before filing suit, in the hope that many disputes will be resolved before they get to court. The Supreme Court has held that this requires "proper exhaustion," *i.e.*, "compliance with an agency's deadlines and other critical procedural rules."[16]

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[14] *Adnan v. Santa Clara County Dept. of Corrections*, 2002 WL 32058464 at *3 (N.D.Cal., Aug. 15, 2002).

[15] *Wallace v. Brazil*, 2005 WL 4813518 at *1 (N.D.Tex., Oct. 10, 2005).

[16] *Woodford v. Ngo*, ___ U.S. ___, 126 S.Ct. 2378, 2386 (2006). This "proper exhaustion" rule contrasts sharply with the treatment of other civil rights litigants in federal court. Concerning the administrative filing requirement of Title VII of the Civil Rights Act of 1964, the Court said that "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process," *Love v. Pullman*, 404 U.S. 522, 526 (1972), and it refused to allow violation of a state administrative time limit to bar the litigant from proceeding in federal court.

Over the past decade, hundreds, even thousands, of claims of serious and unconstitutional abuse of prisoners have been forever barred for lack of "proper exhaustion,"[17] with no inquiry into truth of the prisoner's substantive claims.[18] Thus, a Wisconsin prisoner alleged that he was denied testing for symptoms of cancer until the disease had become terminal and untreatable; his lawsuit was dismissed because his complaint to the director of the bureau of health services did not comply with the inmate grievance policy.[19]

Prisoners – many of whom have little education, read poorly or not at all,[20] or have mental illness or mental retardation[21] – are ill-equipped to comply with technical

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A more recent Supreme Court decision concerning the exhaustion requirement was decided in the prisoners' favor. *See Jones v. Bock*, ___ U.S. ___, 127 S.Ct. 910 (2007). However, that decision addressed several extreme interpretations of the PLRA adopted in the Court of Appeals for the Sixth Circuit, which required prisoners to plead exhaustion in their complaints with specificity and documentary support and to have named all the defendants in their lawsuits in their prison grievance. That court also required "total exhaustion," meaning that if any aspect of the prisoner's complaint (including the naming of a defendant) had not been exhausted, the entire complaint must be dismissed. The Supreme Court's correction of these aberrant rules did not cure the problems discussed in this testimony.

[17] Dismissal for non-exhaustion is usually without prejudice, meaning that in theory the prisoner can exhaust the claim properly and return to court. *See, e.g., Berry v. Kerik*, 366 F.3d 85, 87-88 (2d Cir. 2004). Reality is more like *Catch-22*: by the time a case is dismissed for a mistake in exhaustion, the brief time limit for filing a grievance will inevitably have passed, so under the "proper exhaustion" rule, the prisoner can never satisfy the exhaustion requirement. (Some prison systems have provisions for late grievances at officials' discretion, but it is unlikely that that discretion will be exercised in favor of prisoners who clearly are seeking to sue prison personnel.)

[18] *See, e.g., Mingilton v. Wright*, 2007 WL 1732388 (N.D.Tex., June 14, 2007) (dismissing claim of prisoner who had boiling water mixed with cleaning agent thrown in his face, and then was beaten in the head with a pot, by his cellmate, about whom he had complained to prison officials; his complaint was previously dismissed because he did not file a grievance, and when he tried to file a grievance after that first dismissal, it was dismissed as untimely); *Minix v. Pazera*, 2005 WL 1799538 at *4 (N.D.Ind., July 27, 2005) (dismissing for non-exhaustion because the 15-year-old prisoner, who had been repeatedly beaten and raped, did not file a grievance, even though his mother had made repeated complaints to numerous officials while the abuse was ongoing).

[19] *Gerrard v. Daley*, 2000 WL 34229777 (W.D.Wis., July 24, 2000), *subsequent determination*, 2000 WL 34231492 (W.D.Wis. Aug. 21, 2000); *see Minix v. Pazera*, 2005 WL 1799538 at *4 (N.D.Ind., July 27, 2005) (dismissing for non-exhaustion because the 15-year-old prisoner, who had been repeatedly beaten and raped, did not file a grievance, even though his mother had made repeated complaints to numerous officials while the abuse was ongoing). The *Minix* case is discussed further below.

[20] The National Center for Education Statistics reported in 1994 that seven out of ten prisoners perform at the lowest literacy levels. Karl O. Haigler et al., U.S. Dept. of Educ., *Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey* xviii, 17- 19 (1994) (available at http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=94102).

rules under short deadlines and without the assistance of legal counsel. Unlike most federal administrative remedies, prison and jail grievance systems tend to have extremely short time deadlines, mostly 30 days or less, many as short as a week or two,[22] or even shorter. Thus, in the case of a juvenile prisoner who complained of repeated assault and of rape, and of a lack of protection by facility staff, which was dismissed without consideration of the merits because of non-exhaustion, the child plaintiff would have had to have filed grievances within *48 hours* of these traumatizing occurrences.[23]

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[21] Prisoners with mental illness are subject to the same exhaustion requirement as other prisoners. *See Hall v. Cheshire County Dept. of Corrections*, 2007 WL 951657 at *1-2 (D.N.H., Mar. 27, 2007) (dismissing for non-exhaustion even though plaintiff's claim was failure to treat his mental illness resulting in conduct such as cutting himself repeatedly and swallowing glass; no inquiry into whether his mental condition could have affected his ability to exhaust); *Williams v. Kennedy*, 2006 WL 18314 at *2 (S.D.Tex., Jan. 4, 2006) (dismissing despite prisoner's claim he didn't know of the exhaustion requirement and a prior brain injury made it difficult for him to remember things); *Bakker v. Kuhnes*, 2004 WL 1092287 (N.D.Iowa, May 14, 2004) (rejecting plaintiff's argument that his medication doses were so high they "prohibited him from being of sound mind to draft a grievance"; noting that he failed to submit a grievance after his medication was corrected, and he filed other grievances during the relevant period.

Another court addressing a claim by a prisoner with mental illness also felt constrained to dismiss for non-exhaustion. It did direct prison officials to appoint someone to assist the plaintiff in exhausting. *Ullrich v. Idaho*, 2006 WL 288384 at *3 (D.Idaho, Feb. 6, 2006). However, it is not clear that a court has the power to direct such relief in a case that must be dismissed. In any case, such an order would likely be ineffectual, since the prisoner's claim would almost always be time-barred under the short deadlines characteristic of prison grievance systems.

There is very little law on this subject despite the well-known concentration of persons with mental illness in prison. We suspect that many prisoners with mental illness are not capable of adequately framing an argument that their mental condition has prevented them from strictly complying with grievance procedures as the Supreme Court has directed.

[22] *Woodford v. Ngo*, ___ U.S. ___, 126 S.Ct. 2378, 2389 (2006). The Court noted that the 15-day deadline the plaintiff missed is not unusual; grievance deadlines are typically 14 to 30 days according to the United States and even shorter according to the plaintiff. *Woodford*, 126 S.Ct. at 2389.

[23] *Minix v. Pazera*, 2005 WL 1799538 at *2 (N.D.Ind., July 27, 2005). The dissenting opinion in the Supreme Court's *Woodford v. Ngo* decision cited this case as an illustration of the injustice of the "proper exhaustion" requirement of that decision. *Woodford,* 126 S.Ct. at 2403.

Further, many prison grievance systems have unclear rules[24] or are inconsistently administered,[25] and some prisoners are misinformed by staff about proper procedures.[26]

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[24] Even prison officials sometimes can't get their own rules straight. In *Giano v. Goord*, 380 F.3d 670 (2d Cir. 2004), New York State prison officials argued that the plaintiff's claim that evidence in a disciplinary hearing had been falsified was not exhausted by appealing his disciplinary conviction, but that he should have filed a separate grievance on the subject. The court held that the plaintiff had shown special circumstances justifying his failure to exhaust, since any misunderstanding he had of the rule was entirely reasonable. In a later case presenting the same fact situation under the same rules, prison officials made precisely the opposite argument, claiming that a prisoner who had filed a separate grievance about false disciplinary charges should instead have pursued his claims through a disciplinary appeal. *Larkins v. Selsky*, 2006 WL 3548959 at *9 (S.D.N.Y., Dec. 6, 2006). In the years after *Giano*, the prison system did nothing to clarify its rules to distinguish between the scope of disciplinary appeals and that of grievances. *See also Westefer v. Snyder*, 422 F.3d 570, 580 (7th Cir. 2005) (observing prison policies did not "clearly identif[y]" the proper administrative remedy and there was no "clear route" to administrative review of certain decisions); *Abney v. McGinnis*, 380 F.3d 663, 668-69 (2d Cir. 2004) (noting the lack of instruction in the grievance rules for instances where a favorable grievance decision is not carried out).

[25] *Warren v. Purcell*, 2004 WL 1970642 at *6 (S.D.N.Y. Sept. 3, 2004) (holding "baffling" grievance response that left prisoner with no clue what to do next was a special circumstance); *Kendall v. Kittles*, 2004 WL 1752818 at *2 (S.D.N.Y., Aug. 4, 2004) (noting that Grievance Coordinator's affidavit said that plaintiff needed a physician's authorization to grieve medical concerns; no such requirement appears in the New York City grievance policy); *Livingston v. Piskor*, 215 F.R.D. 84, 86-87 (W.D.N.Y. 2003) (holding that evidence that grievance personnel refused to process grievances where a disciplinary report had been filed covering the same events created a factual issue precluding summary judgment); *Casanova v. Dubois*, 2002 WL 1613715 at *6 (D.Mass., July 22, 2002) (finding that, contrary to written policy, practice was "to treat complaints of alleged civil rights abuses by staff as 'not grievable'"), *remanded on other grounds*, 304 F.3d 75 (1st Cir. 2002).

[26] *See Jackson v. District of Columbia*, 254 F.3d 262, 269-70 (D.C.Cir. 2001) (holding that a plaintiff who complained to three prison officials and was told by the warden to "file it in the court" had not exhausted); *Chelette v. Harris*, 229 F.3d 684, 688 (8th Cir. 2000) (holding that a plaintiff who complained to the warden and was told the warden would take care of his problem, but the warden didn't, was not excused from exhausting the grievance system), *cert. denied*, 531 U.S. 1156 (2001); *U.S. v. Ali*, 396 F.Supp.2d 703, 707 (E.D.Va. 2005) (holding that a prisoner who received a response that "[a]s these issues are addressed by your attys [sic] and the government you will be informed" and did not appeal failed to exhaust); *Thomas v. New York State Dep't of Correctional Services*, 2003 WL 22671540 at *3-4 (S.D.N.Y., Nov. 10, 2003) (dismissing case where prison staff told the prisoner a grievance was not necessary; this was "bad advice, not prevention or obstruction," and the prisoner did not make sufficient efforts to exhaust).

In other cases, the courts have allowed claims to go forward where prisoners were misled. *See, e.g.*, *Brown v. Croak*, 312 F.3d 109, 112-13 (3d Cir. 2002) (holding that if security officials told the plaintiff to wait for completion of an investigation before grieving, and then never informed him of its completion, the grievance system was unavailable to him); *Scott v. California Supreme Court*, 2006 WL 2460737 at *7 (E.D.Cal., Aug. 23, 2006) (holding that a prisoner who had relied on officials' misinformation and sought relief in state court had exhausted, notwithstanding officials' subsequent issuance of an untimely decision which he did not appeal); *Beltran v. O'Mara*, 405 F.Supp.2d 140, 154 (D.N.H. 2005) (holding, where a grievance was rejected on the ground that incidents which were the subject of disciplinary proceedings could not be grieved, "a reasonable inmate in [the plaintiff's] position" would believe the grievance process was not an available remedy and his claims should be raised in the disciplinary process), *on reconsideration*, 2006 WL 240558 (D.N.H., Jan. 31, 2006); *O'Connor v. Featherston*, 2003 WL 554752 at *2-3 (S.D.N.Y., Feb. 27, 2003) (holding allegation that prison Superintendent told a prisoner to complain via the Inspector General rather than the grievance procedure presented triable factual issues).

Thus, in one New York case, a prisoner's property, including important legal documents, disappeared when he was transferred. First, prison officials erroneously advised him that his lost property was not the responsibility of the prison he had been transferred to, which resulted in a failure to investigate. Then, another official advised him to abandon his lost property claim and pursue a grievance instead, resulting in loss of the ability to appeal the property claim.[27] That court allowed the claim to go forward because of the problems created by prison staff, but other courts would likely have reached the opposite result under the Supreme Court's "proper exhaustion" rule. Indeed, another appeals court did *not* allow the claim to go forward in a case where federal prison authorities gave the prisoner "misleading" information suggesting that the prison administrative system had no jurisdiction over his problem.[28]

In some cases, prisoners are subjected to threats or retaliation by prison staff[29] that impede them from exhausting properly.[30] Some prisoners' grievances simply

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[27] *Brownell v. Krom*, 446 F.3d 305, 311-12 (2d Cir. 2006).

[28] *Yousef v. Reno*, 254 F.3d 1214, 1221-22 (10th Cir. 2001).

[29] There is a well-known pattern in American prisons of threats and retaliation against prisoners who file grievances and complaints. *See Pearson v. Welborn*, 471 F.3d 732, 745 (7th Cir. 2006) (affirming jury verdict that prisoner was sent to a "supermax" facility for a year in retaliation for First Amendment-protected complaints about conditions); *Dannenberg v. Valadez*, 338 F.3d 1070, 1071-72 (9th Cir. 2003) (noting jury verdict for plaintiff on claim of retaliation for assisting another prisoner with litigation); *Walker v. Bain*, 257 F.3d 660, 663-64 (6th Cir. 2001) (noting jury verdict for plaintiff whose legal papers were confiscated in retaliation for filing grievances), *cert. denied*, 535 U.S. 1095 (2002); *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir.) (affirming injunction protecting prisoners who were the subject of retaliation for filing grievances and for litigation), *cert. denied*, 534 U.S. 1066 (2001); *Trobaugh v. Hall*, 176 F.3d 1087 (8th Cir. 1999) (directing award of compensatory damages to prisoner placed in isolation for filing grievances); *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997) (affirming jury verdict for plaintiff subjected to retaliation for filing grievances), cert. denied, 524 U.S. 936 (1998); *Cassels v. Stalder*, 342 F.Supp.2d 555, 564-67 (M.D.La. 2004) (striking down disciplinary conviction for "spreading rumors" of prisoner whose mother had publicized his medical care complaint on the Internet); *Atkinson v. Way*, 2004 WL 1631377 (D.Del., July 19, 2004) (upholding jury verdict for plaintiff subjected to retaliation for filing lawsuit); *Tate v. Dragovich*, 2003 WL 21978141 (E.D.Pa., Aug. 14, 2003) (upholding jury verdict against prison official who retaliated against plaintiff for filing grievances); *Hunter v. Heath*, 95 F.Supp.2d 1140 (D.Or. 2000) (noting prisoner's acknowledged firing from legal assistant job for sending "kyte" (officially sanctioned informal complaint) to the Superintendent of Security concerning the confiscation of a prisoner's legal papers), *rev'd on other grounds*, 26 Fed.Appx. 754, 2002 WL 112564 (9th Cir. 2002); *Maurer v. Patterson*,

disappear.[31] In a remarkable number of cases, prisoners receive no response whatsoever to their grievances,[32] and prison officials have gotten many cases dismissed by arguing

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197 F.R.D. 244 (S.D.N.Y. 2000) (upholding jury verdict for plaintiff who was subjected to retaliatory disciplinary charge for complaining about operation of grievance program); *Gaston v. Coughlin*, 81 F.Supp.2d 381 (N.D.N.Y. 1999) (awarding damages for trumped-up disciplinary charge made in retaliation for prisoner's complaining about state law violations in mess hall work hours), on reconsideration, 102 F.Supp.2d 81 (N.D.N.Y. 2000); *Alnutt v. Cleary*, 27 F.Supp.2d 395, 397-98 (W.D.N.Y. 1998) (noting jury verdict for plaintiff who was subject to verbal harassment, assault, and false disciplinary charges in retaliation for his work as an Inmate Grievance Resolution Committee representative).

[30] Results have been mixed in cases involving claims of failure to exhaust because of threats or intimidation. Some courts have simply dismissed such claims. *See, e.g,, Enright v. Heine*, 2006 WL 2594485 at *2 (D.Mont., Sept. 11, 2006) ("Even a prisoner's fear of retaliatory action could not excuse her from pursuing administrative remedies."); *Broom v. Engler*, 2005 WL 3454657 at *3 (W.D.Mich., Dec. 16, 2005) (stating, where plaintiff recounted threats he received, "[t]he PLRA does not excuse exhaustion for a prisoner . . . who is afraid to complain"). Others have held that retaliation and threats can make a remedy unavailable or excuse the failure to exhaust. *See, e.g., Hemphill v. New York*, 380 F.3d 680, 688 (2d Cir. 2004); *accord*, *Kaba v. Stepp*, 458 F.3d 678, 684-86 (7th Cir. 2006). But even where courts hold the latter view, it will ultimately be a prisoner's word against that of prison staff members who will be accused of covert misconduct to which there are unlikely to be witnesses.

[31] *See Dole v. Chandler*, 438 F.3d 804, 811-12 (7th Cir. 2006) (holding a prisoner had exhausted when he did everything necessary to exhaust but his grievance simply disappeared, and he received no instructions as to what if anything to do about it); *Williams v. Burgos*, 2007 WL 2331794 (S.D.Ga. Aug 13, 2007) (dismissing for non-exhaustion where prisoner said he mailed his appeal, but it never arrived; federal regulations define filing an appeal as its being received).

[32] See, for example, these cases, which courts have allowed to go forward in spite of the protracted failure to respond to grievances or appeals. *Brown v. Koenigsmann*, 2003 WL 22232884 at *4 (S.D.N.Y., Sept. 29, 2003); *accord*, *Levi v. Briley*, 2006 WL 2161788 at *3 (N.D.Ill., July 28, 2006) (declining to dismiss where the prisoner had waited two years for a final decision); *Jones v. Blanas*, 2005 WL 1868826 at *3 (E.D.Cal., Aug. 3, 2005); *White v. Briley*, 2005 WL 1651170 at *6 (N.D.Ill., July 1, 2005); *Casarez v. Mars*, 2003 WL 21369255 at *6 (E.D.Mich., June 11, 2003) (holding that prison officials' lack of response to a Step III grievance did not mean failure to exhaust); *John v. N.Y.C. Dept. of Corrections*, 183 F.Supp.2d 619, 625 (S.D.N.Y. 2002) (rejecting argument, three years after grievance appeal, that plaintiff must continue waiting for a decision).

This response by the courts is far from universal. Some courts have stated categorically that exhaustion is not completed until the prisoner receives a decision, even if the prisoner has taken all necessary steps to exhaust. *See Petrusch v. Oliloushi*, 2005 WL 2420352 at *4 (W.D.N.Y., Sept. 30, 2005) (dictum); *Rodriguez v. Hahn*, 209 F.Supp.2d 344, 347-48 (S.D.N.Y. 2002). That view would let prison officials keep prisoners out of court just by failing to decide grievances. Other courts have said that exhaustion is complete once the time for a decision on the final appeal has passed. *See, e.g., Powe v. Ennis*, 177 F.3d 393, 394 (5th Cir. 1999). However, that view is not necessarily followed in practice. In *Wyatt v. Doe*, 2006 WL 1407636 at *1 (S.D.Tex., May 19, 2006), the court said that a prisoner whose grievance had remained "under exhaustion" for eight months and whose appeal had been ignored "[did] not establish that the investigation has been delayed unreasonably," even though the grievance process in Texas is supposed to be completed within 90 days. *See Pugh v. Braneff*, 2006 WL 1408392 at *2 (E.D.Tex., May 19, 2006); *see also Mendez v. Artuz*, 2002 WL 313796 at *2 (S.D.N.Y., Feb. 27, 2002) (dismissing for non-exhaustion where a prisoner's grievance appeal had not been initially processed as a result of "administrative oversight").

Some grievance systems do not even have deadlines for responses, so the prisoner must engage in guesswork as to whether enough time has passed that the court will think he has waited long enough. See *Ford v. Johnson*, 362 F.3d 395, 400 (7th Cir. 2004) (holding prisoner who waited six months to file suit in

that the prisoner failed to appeal the officials' *failure* to respond.[33] There is no exception to the exhaustion rule for immediate threats to health or safety.[34]

Thus, the chief result of the exhaustion requirement is that prisoner litigation has turned into a game of "gotcha"[35] in which prisons' lawyers and the federal courts scour

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a system that called for appeals to be decided within 60 days "whenever possible" had not waited long enough); *compare Olmsted v. Cooney*, 2005 WL 233817 at *2 (D.Or., Jan. 31, 2005) (holding prisoner who waited seven weeks after filing last appeal was not shown to have failed to exhaust).

[33] *See Cox v. Mayer*, 332 F.3d 422, 425 n.2 (6th Cir. 2003); *Donahue v. Bennett*, 2004 WL 1875019 at *6 n.12 (W.D.N.Y., Aug. 17, 2004); *Bailey v. Sheahan*, 2003 WL 21479068 at *3 (N.D.Ill., June 20, 2003); *Sims v. Blot*, 2003 WL 21738766 at * 3 (S.D.N.Y., July 25, 2003); *Larry v. Byno*, 2003 WL 1797843 at *2 n.3 (N.D.N.Y., Apr. 4, 2003) ("This Court's decision should not be seen as condoning" the failure to follow procedure by not rendering a decision); *Harvey v. City of Philadelphia*, 253 F.Supp.2d 827, 830 (E.D.Pa. 2003) (holding that failure to use a procedure permitting sending a grievance directly to the Commissioner if the prisoner believes he is being denied access to the process was a failure to exhaust); Croswell v. McCoy, 2003 WL 962534 at *4 (N.D.N.Y., Mar. 11, 2003); *Mendoza v. Goord*, 2002 WL 31654855 at *3 (S.D.N.Y., Nov. 21, 2002) (dismissing for failure to appeal a non-response even though the plaintiff "tried many avenues to seek relief from prison authorities"); *Petty v. Goord*, 2002 WL 31458240 at *4 (S.D.N.Y., Nov. 4, 2002); *Graham v. Cochran*, 2002 WL 31132874 (S.D.N.Y., Sept. 25, 2002); *Reyes v. Punzal*, 206 F.Supp.2d 431, 432-33 (W.D.N.Y.2002); *Martinez v. Dr. Williams R.*, 186 F.Supp.2d 353, 357 (S.D.N.Y. 2002); *Saunders v. Goord*, 2002 WL 1751341 at *3 (S.D.N.Y., July 29, 2002); *Jorss v. Vanknocker*, 2001 WL 823771 at *2 (N.D.Cal., July 19, 2001), *aff'd*, 44 Fed.Appx. 273, 2002 WL 1891412 (9th Cir. 2002); *Smith v. Stubblefield*, 30 F.Supp.2d 1168, 1174 (E.D.Mo. 1998); *Morgan v. Arizona Dept. of Corrections*, 976 F.Supp. 892, 895 (D.Ariz. 1997).

[34] *See, e.g. Jones v. Oaks Correctional Facility Health Services*, 2005 WL 3312562 at *2 (W.D.Mich., Dec. 7, 2005) (stating even a case that presents imminent danger of serious physical harm must be exhausted); *Calderon v. Anderson*, 2005 WL 2277398 at *5 (S.D.W.Va., Sept. 19, 2005) (stating exhaustion was required despite the prisoner's claim of "life-or-death situation"); *Drabovskiy v. U.S.*, 2005 WL 1322550 at *2 (E.D.Ky., June 2, 2005) ("To the extent the plaintiff's motion for emergency appeal is intended to be a request for the Court to forgive the exhaustion requirement necessary [sic], he provides no factual or legal grounds therefor."); *Joseph v. Jocson*, 2004 WL 2203298 at *1 (D.Or., Sept. 29, 2004) ("Plaintiff contends he should not be required to exhaust available remedies because delay may result in irreparable harm. Exhaustion is mandatory.") While one court has suggested that preliminary relief may be granted pending exhaustion, *see Jackson v. District of Columbia*, 254 F.3d 262, 267-68 (D.C.Cir. 2001), we are not aware of cases in which that argument has actually been applied. One court did decline to dismiss for non-exhaustion where the prisoner was shortly to be executed and exhaustion was not complete. *Evans v. Saar*, 412 F.Supp.2d 519, 527 (D.Md. 2006).

[35] In addition to cases cited in the previous notes, another example of PLRA "gotcha" is cases where prisoners fail to exhaust out of fear or other justifiable circumstances, and courts then hold that they should have filed grievances when those conditions ceased to apply—even though, given the short deadlines for prison grievances, the grievance filing deadlines would generally have long passed and their grievances would be untimely. The result of a prisoner's failure to appreciate this point, as with other failures to exhaust, is dismissal of the prisoner's case, however meritorious it might be. A good illustration is the acknowledged pattern of physical abuse of prisoners by staff at the Rogers State Prison in Georgia, which resulted in the termination of a number of employees and lesser discipline to others, as well as a "series of prisoner-beating cases" in the federal district court. *See Priester v. Rich*, 457 F.Supp.2d 1369, 1371 & n.1 (S.D.Ga. 2006). In one of these cases, the plaintiff said he did not file a grievance because of his fear of violent retaliation, but the court said he should have filed a grievance when conditions changed, i.e., the administration was replaced and several officers were suspended and eventually terminated.

the record for mistakes in exhausting, while the merits are forgotten,[36] often on the most hair-splitting of grounds. For example, one Indiana prisoner brought suit alleging that he had been subject to adverse disciplinary and classification action in retaliation for constitutionally protected activity. He did not file a grievance because the grievance system excludes disciplinary and classification matters. However, the defendants said, and the court agreed, that his claim was really about retaliation, not about classification and discipline, and he should have filed a grievance. Mr. Marshall's case was dismissed because he followed a common-sense interpretation of the prison's own grievance policy,

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Stanley v. Rich, 2006 WL 1549114 at *3 (S.D.Ga., June 1, 2006). Similarly, in *Langford v. Rich*, 2006 WL 1549120 at *2 (S.D.Ga., June 1, 2006), a prisoner who complained of threats of retaliation at Rogers should have filed an out-of-time grievance upon being transferred to another prison. Although these prisoners' claims were dismissed without prejudice, as a practical matter they would be unable to exhaust and then refile their claims under the "proper exhaustion" rule of *Woodford v. Ngo*, *supra*, because any new attempt to exhaust would be untimely. *Accord*, *Hemingway v. Lantz*, 2006 WL 1237010 at *2 (D.N.H., May 5, 2006) (holding a prisoner who said he did not grieve for fear of staff retribution should have done so once transferred to the "safety" of another state); *Haroon v. California Dept. of Corrections and Rehabilitation*, 2006 WL 1097444 at *3 (E.D.Cal., Apr. 26, 2006) (holding that a prisoner who was in a coma during the usual time limit should have filed afterwards), *report and recommendation adopted*, 2006 WL 1629123 (E.D.Cal., June 9, 2006); *Isaac v. Nix*, 2006 WL 861642 at *4 (N.D.Ga., Mar. 30, 2006) (holding prisoner who said he couldn't get grievance forms within a five-day time limit should have filed a grievance within five days of getting the forms); *Brazier v. Maricopa County Sheriff's Office*, 2006 WL 753157 at *4 (D.Ariz., Mar. 22, 2006) (holding that a prisoner who was physically traumatized and unable to file a grievance within the 48-hour time limit was required to exhaust them later, even untimely), *reconsideration denied*, 2006 WL 1455569 (D.Ariz., May 22, 2006); *Ming Ching Jin v. Hense*, 2005 WL 3080969 at *3 (E.D.Cal., Nov. 15, 2005) (holding a prisoner informed that there was no record of his appeal was obliged to take steps to pursue the appeal), *report and recommendation adopted*, 2006 WL 177424 (E.D.Cal., Jan. 20, 2006).

[36] As one court put it, once suit is filed, "the defendants in hindsight can use any deviation by the prisoner to argue that he or she has not complied with 42 U.S.C. § 1997e(a) responsibilities." *Ouellette v. Maine State Prison*, 2006 WL 173639 at *3 n.2 (D.Me., Jan. 23, 2006), *aff'd*, 2006 WL 348315 (D.Me., Feb. 14, 2006). Other courts have expressed similar concerns. *See, e.g.*, *Campbell v. Chaves*, 402 F.Supp.2d 1101, 1106 n.3 (D.Ariz. 2005) (noting danger that grievance systems might become "a series of stalling tactics, and dead-ends without resolution"); *LaFauci v. New Hampshire Dept. of Corrections*, 2005 WL 419691 at *14 (D.N.H., Feb. 23, 2005) ("While proper compliance with the grievance system makes sound administrative sense, the procedures themselves, and the directions given to inmates seeking to follow those procedures, should not be traps designed to hamstring legitimate grievances."); *Rhames v. Federal Bureau of Prisons*, 2002 WL 1268005 at *5 (S.D.N.Y., June 6, 2002) ("While it is important that prisoners comply with administrative procedures designed by the Bureau of Prisons, rather than using any they might think sufficient, . . . it is equally important that form not create a snare of forfeiture for a prisoner seeking redress for perceived violations of his constitutional rights.").

and as noted, any attempt by him to exhaust after the dismissal would have been untimely.[37]

One of many examples of facially meritorious and serious claims dismissed under the administrative exhaustion requirement is that of an Arizona prisoner who alleged that he had been raped. He said he did not exhaust because he had been told by prison staff that his rape complaint could not be grieved through the facility's formal grievance process. The court dismissed his case, stating that "futility" was not an excuse for failing to exhaust, even though he followed the directions of prison staff.[38]

The purpose and value of exhaustion can be preserved by requiring that claims be presented to responsible prison officials before filing suit. Where a prisoner has not done so, the court should stay the case for up to 90 days and return it to prison officials for whatever administrative consideration they deem appropriate. Some cases will be resolved; those that are not will go forward, and the courts' time will not be wasted on satellite litigation about the adequacy of the prisoner's grievances.

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[37] *Marshall v. Knight*, 2006 WL 3714713 (N.D.Ind., Dec. 14, 2006). In *Scarborough v. Cohen*, 2007 WL 934594 (N.D.Fla., Mar. 26, 2007), the prisoner plaintiff sought to get married, but his grievance was rejected because the rules required the prior filing of an "informal" grievance; Mr. Scarborough had filed a request to marry, but prison officials said that this did not qualify as an informal grievance, and the court agreed that he had failed to exhaust and his case had to be dismissed. In *Aguirre v. Dyer*, 2007 WL 1541327 (5th Cir., May 24, 2007), the prisoner filed a Step 1 grievance but failed to file a Step 2 grievance because his Step 1 grievance was referred to the Inspector General's office. The court wrote: "Aguirre's ignorance of the rules requiring a Step 2 grievance does not excuse his noncompliance." *Id.* at *1. In *Dunbar v. Jones*, 2007 WL 2022083 at *7-8 (M.D.Pa., July 9, 2007), the prisoner omitted a required piece of information from his grievance because he did not have the information; the court dismissed for non-exhaustion because, having obtained it, he did not add it to the appeal of the denial of his grievance. There is no indication by the court that prison rules require or permit grievances to be supplemented on appeal or that the plaintiff was on notice of any such obligation.

[38] *Mendez v. Herring*, 2005 WL 3273555, at *2 (D.Ariz., Nov. 29, 2005).

3. Exempt youth detained in juvenile facilities from the PLRA by amending 42 U.S.C. § 1997e(h).

The PLRA presently applies to all prisoners, regardless of age or status. Its provisions should not apply to minors. Historically, youth confined in juvenile facilities have filed a very small amount of litigation,[39] so the concerns expressed by Congress about large volumes of frivolous litigation simply do not apply.

Detained youth are among the most vulnerable to some constitutional violations.[40] They are also far less sophisticated about legal and administrative processes than adults, and are more at risk of losing their rights if required to comply with the PLRA's extensive requirements. This is particularly true for youth in juvenile facilities, who generally lack access to even the meager legal resources available in adult prisons, and are ill-equipped to use them anyway.[41]

An example of the application of the PLRA to juvenile prisoners is *Minix v. Pazera*,[42] in which a child detainee alleged that he had been raped and repeatedly

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[39] As of 1998, there were fewer than a dozen reported opinions directly involving challenges to conditions in juvenile detention centers, and around two dozen cases with unreported opinions or settlements. Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F. L. Rev. 675, 681-98 (1998). This figure contrasts strongly with the much larger number of reported and unreported opinions arising from challenges to adult prison conditions. I am generally familiar with institutional litigation and can confirm that this large disparity persists.

[40] For example, detained youth have higher rates of sexual assaults than adult prisoners. *See* Allen J. Beck & Timothy A. Hughes, Bureau of Justice Statistics, *Sexual Violence Reported By Correctional Authorities, 2004* (2005) (finding that the rate of reported sexual violence was nearly ten times higher in juvenile facilities than adult prisons). A more recent BJS survey, which focused solely sexual violence reports filed in adult facilities confirmed that young inmates are also more likely to be victimized when in adult prisons. Allen J. Beck & Paige M. Harrison, Bureau of Justice Statistics, *Sexual Violence Reported By Correctional Authorities, 2005* (2006).

[41] *See Alexander S. v. Boyd*, 876 F. Supp. 773, 790 (D.S.C. 1995) (holding that juvenile detainees had no constitutional right to a law library because, in light of their limited capacity, they "would not benefit in any significant respect from a law library, and the provision of such would be a foolish expenditure of funds"); *accord, Shookoff v. Adams*, 750 F.Supp. 288 (M.D.Tenn. 1990), *aff'd in pertinent part, reversed in part on other grounds sub nom. John L. v. Adams*, 969 F.2d 228 (6th Cir. 1992).

[42] 2005 WL 1799538 (N.D.Ind. 2005).

assaulted in a juvenile institution. The boy's lawsuit was thrown out of court because he had not filed a formal grievance, even though he feared further abuse if he reported the incidents, and even though his mother repeatedly contacted prison and juvenile court officials to try to get them to stop the abuse. To satisfy the PLRA's exhaustion requirement, he would have had to file his formal grievance within 48 hours of any incident that he complained about.

The *Minix* case clearly illustrates why it is necessary to change the definition of "prisoner" to exclude detained youth.

4. Repeal the "prospective relief" provisions of 18 U.S.C. § 3626.

The PLRA contains a number of provisions restricting the equitable powers of federal courts to enter orders remedying prison conditions that violate the law. These restrictions are unjustified. Judges should be empowered with the same range of remedies in prisoners' civil rights actions that they possess in other civil rights cases. While prisoners' legal rights are diminished by the fact of their incarceration, those limited rights that they do retain are as worthy of judicial protection as anyone else's legal rights. This is not merely a question of prisoners' rights; it goes to the meaning of a society of laws and of the separation of powers. We all benefit when corrections systems are required to comply with the Constitution.

Rather than limit prisoner lawsuits, the most harmful of the prospective relief provisions encourage more civil trials and constant judicial review where they are otherwise not needed. For example, a judge may only approve a consent decree if it meets the standard for injunctive relief – i.e., that it is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least

intrusive measure necessary to correct the violation of the Federal right." Because of this requirement, government officials must stipulate that they have violated federal law in order to agree to a consent judgment.[43] One of the primary reasons litigants settle cases is to avoid findings that they have violated the law. By creating a disincentive to settle, the consent decree provision increases the burden on courts, which are forced to conduct otherwise unnecessary trials.

The PLRA's framework for monitoring injunctive relief is similarly problematic. Where a court has found that injunctive relief is necessary to remedy a constitutional violation, the PLRA provides that after the passage of two years, and every year thereafter, prison officials can seek to terminate the injunctive order, and the court must terminate the order unless it finds that there is a "continuing and ongoing" violation of Federal rights. That is, the plaintiffs are required to prove their case again and again. In addition to posing an extreme burden on the public interest organizations that generally handle these cases, it burdens the courts with complicated proceedings that rehash issues the courts have previously addressed. It is also counter-productive. If it has taken an injunction to bring a constitutional violation under control, then terminating the

[43] It remains possible under the PLRA for parties to enter into "private settlement agreements" that are treated as contracts in state court. However, these agreements are enormously wasteful and duplicative because they cannot be enforced in federal court. In one recent decision approving a private settlement of claims of physical abuse of prisoners by jail staff, the federal judge noted that "it makes little sense that, if a perceived problem with compliance should arise, short of seeking reinstatement of this action, plaintiffs can seek relief only in state court under state law. In view of the time and effort I have spent on this case, including countless hours discussing not only the substantive terms of the Agreement but also its language, it would be a tremendous waste of resources for the parties to have to go to state court to seek relief from a state court judge wholly unfamiliar with the case." *Ingles v. Toro*, 438 F.Supp.2d 203, 215 (S.D.N.Y. 2006).

Further, it is inappropriate as a matter of federalism to force litigants seeking an enforceable order to protect federal rights to go to state courts for that purpose. State courts are already overburdened—in many cases, much more so than the federal courts—and the federal government should not slough off this responsibility onto them. When litigants seek to enforce federal rights in federal courts, those courts should remain open to them when litigation is settled.

injunction is bound to cause future violations. When the PLRA was enacted, the Supreme Court had already addressed when to terminate injunctions against public agencies: before a court may terminate a decree, the public agency defendant must show (a) that it has fully and satisfactorily complied with the decree for a reasonable period of time; (b) that it has exhibited a good-faith commitment to the decree and the legal principles that warranted judicial intervention, and (c) that it is "unlikely to return to its former ways."[44] There is no reason injunctions against prisons' constitutional violations should be treated any differently from injunctions against other civil rights violations.

Finally, the PLRA's "automatic stay" section provides that prison officials' mere filing of a motion to terminate an injunction or consent decree suspends the operation of the decree until the court rules on the motion. 18 U.S.C. § 3626(e)(2). During the period of the stay, which may be months or even years, the prisoners are deprived of any protection under the decree. At the same time, the existence of the decree bars the prisoners from filing a new lawsuit to protect their rights.

The consequences of this provision are illustrated by litigation over conditions at the Maricopa County Jail in Phoenix, Arizona, the nation's fourth largest jail, which is supervised by the well-known Sheriff Joe Arpaio, and which is one of the only American jails to have its own special report from Amnesty International.[45] In 1995, the Sheriff

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[44] *Board of Educ. of Oklahoma v. Dowell*, 498 U.S. 237, 247-50 (1991); *accord, Freeman v. Pitts*, 503 U.S. 467, 491 (1992). Courts have the discretion to make this assessment on an issue-by-issue basis. *Freeman*, 503 U.S. at 489. While the decree is in effect, the court may address any operational problems by modifying it if there is a "significant change in circumstances" in either fact or law, and the proposed modification is "suitably tailored to the changed circumstance." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992).

[45] Amnesty International, *Ill-Treatment of Inmates in Maricopa County Jails, Arizona* (August 1997) (http://web.amnesty.org/library/pdf/AMR510511997ENGLISH/$File/AMR5105197.pdf) (citing excessive force, inappropriate and inhumane use of restraint chairs, confinement of prisoners in outdoor tents). The jail's "Tent City" was described by Amnesty International as posing "serious environmental

and other county officials agreed to settle a class action lawsuit that alleged dangerous and life-threatening conditions in the jail,[46] and agreed to entry of a federal court consent decree. In September 2001, the officials moved to terminate the decree under the PLRA; thus, the protections of the decree were automatically stayed. More than five years later, the court still has not ruled on the termination motion, and as a result of the automatic stay, continuing allegations of inadequate medical care and unsafe and inhumane conditions of confinement, affecting thousands of prisoners, remain unaddressed in judicial limbo under the PLRA.

5. Repeal the restrictions on attorneys' fees of 42 U.S.C. § 1997e(d).

In general, federal civil rights litigants who prove their cases are entitled to recover a reasonable attorneys' fee from the defendants. The purpose of this fee-shifting provision is to encourage counsel to represent persons whose civil rights have in fact been violated, even if the resulting economic harm is insufficient to pay lawyers a contingency fee.

The PLRA, however, imposed severe restrictions on the recovery of attorneys' fees in prisoner cases. The statute restricts compensation to 150% of the rates paid defense counsel under the Criminal Justice Act (CJA), which are drastically lower than market rates in most jurisdictions. While CJA lawyers are paid regardless of outcome, counsel representing civil rights litigants are compensated only if they prevail, which

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hazards which make [it] unsuitable for inmate housing" and serious security and safety risks to prisoners and staff. An illustration of the latter is a decision of the Arizona Supreme Court upholding over $600,000 in compensatory and punitive damages to a prisoner severely injured in an assault; the court held that "[t]he history of violence, the abundance of weaponry, the lack of supervision, and the absence of necessary security measures" at Tent City support a finding of deliberate indifference to prisoner safety. *Flanders v. Maricopa County*, 203 Ariz. 368, 377, 54 P.2d 837 (2002).

[46] *Hart v. Arpaio*, No. CIV-77-479-PHX-EHC (D.Ariz.)

presents an enormous risk when representing unpopular clients like prisoners. The restriction to below-market rates is a severe disincentive for private counsel to take even the most meritorious prisoner case. The statute also restricts compensation to 150% of damages awarded. This presents another major disincentive, since juries often award minimal damages to plaintiffs they disapprove of even when they are persuaded of liability. Moreover, it is fairly common for both judges and juries to be unable to place a dollar value on substantial constitutional rights and to award nominal damages of $1.00 – leaving the attorney who has proved a constitutional violation with compensation of $1.50.[47] That will also be the outcome if the court holds that a constitutional claim is for "mental or emotional injury" under 42 U.S.C. § 1997e(e), discussed above, and only nominal damages may be awarded.

These restrictions are illustrated by the case of an Illinois prisoner who, a jury found, had been subjected to a year's unjustified confinement in a "supermax" prison in retaliation for his complaints about prison conditions, which were of course protected by the First Amendment. The jury, however, awarded him only $1.00 in damages pursuant to the judge's instructions, and under the PLRA, the court could award no more than $1.50 in attorneys' fees for the exposure of this constitutional violation.[48]

These provisions should be repealed. Since only "prevailing parties" recover fees under any circumstances, these restrictions do not affect frivolous cases—they affect only meritorious ones. Discouraging attorneys from representing prisoners with meritorious cases is quite counterproductive, since prisoners (or any other litigants) who try to

[47] *See Boivin v. Black*, 225 F.3d 36 (1st Cir. 2000) (awarding $1.00 and $1.50 fees where pre-trial detainee was bound into a restraint chair with a towel over his mouth and lost consciousness).

[48] *Pearson v. Welborn*, 471 F.3d 732 (7th Cir. 2006).

represent themselves not only are much less likely to succeed even in the most meritorious litigation, but also present significant management problems for the courts because they are often unable to understand and comply with court rules and procedures.

6. Amend the filing fees provisions of 28 U.S.C. § 1915(a,b) to avoid penalizing indigent prisoners who file complaints that state a valid claim.

The PLRA provides that indigent prisoners seeking to proceed *in forma pauperis*, unlike other indigent persons, must pay the full filing fee. An initial fee is calculated based on a percentage of the prisoner's resources (if any), and the remainder of the fee is collected in installments out of the prisoner's institutional account as funds are available. The theory behind this provision was to make prisoners "stop and think" before filing cases that might not be meritorious. But filing fees of $150 and $100 in the trial and appellate courts respectively (as they were when the PLRA was enacted) were even then an extremely steep price to charge for a chance at justice for indigent people who have meritorious claims of civil rights violations. Worse, those fees have been drastically increased, to $350 and $450 respectively.[49] These are grossly excessive for indigent prisoners who *do* "stop and think" and get it right. The filing fee should therefore be imposed only on those prisoners whose cases are dismissed at the initial merits screening. Prisoner cases that are found to state a valid claim at that stage should go forward in the same manner as other indigent litigants' cases.

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[49] The Deficit Reduction Act of 2005, P.L. 109-171, 120 Stat. 183, increased the filing fees to $350 in district court and to $450 in the Court of Appeals. *See* 28 U.S.C. §§ 1913, 1914.

7. Amend the "three strikes" provision of 28 U.S.C. § 1915(g) by limiting "strikes" to cases that are dismissed as malicious and that are reasonably proximate in time.

Under the PLRA, a prisoner who has had three complaints or appeals dismissed as "frivolous, malicious, or fail[ing] to state a claim on which relief may be granted," is barred from using the *in forma pauperis* provisions at all, even on the installment basis applied to other prisoners. If the prisoner cannot pay $350 up front—and most prisoners cannot—he cannot file his case, no matter how meritorious it may be. This provision was intended to address a real problem –the "frequent filer" who consciously abuses the court system by persistently filing multiple meritless cases – but it is grossly overbroad in operation. First, the prohibition is permanent; a prisoner who files three ill-considered lawsuits in his first year of incarceration will be barred from filing *in forma pauperis* fifteen years later if he is still in prison, no matter how meritorious his case may be and how seriously his rights may have been violated. (The provision also counts as "strikes" cases that were filed even before the PLRA was enacted.) Second, the provision counts as "strikes" not just frivolous or malicious cases, but those that fail to state a claim on which relief can be granted. Since the Justices of the Supreme Court often sharply disagree whether a complaint states a claim on which relief can be granted, such cases can hardly be labeled as abusive.[50] The provision also counts as strikes cases that involve mistakes of law by uneducated litigants rather than any attempt to abuse the court system.

[50] For example, in *Olim v. Wakinekona*, 461 U.S. 238 (1983), the federal district court held that a prisoner who complained that he was transferred from Hawai'i to the mainland without due process failed to state a claim; two out of three judges on the Ninth Circuit held that his allegation did state a claim; and the Supreme Court held by a 6-3 vote that it did not state a claim and was properly dismissed. In *Helling v. McKinney*, 509 U.S. 25, 35 (1993), the Supreme Court held that a prisoner alleging danger to his future health from exposure to second-hand tobacco smoke stated a cause of action under the Eighth Amendment; the vote was 7-2.

The extremity of the three strikes provision is illustrated by the case of a Texas prisoner who filed a lawsuit alleging excessive force. He was assisted in preparing the suit by another prisoner, but was transferred to another prison (and his legal papers confiscated) before he could file the suit. The other prisoner filed the complaint on his behalf, without the required signature of the plaintiff (who was now in another prison) but within the statute of limitations. The plaintiff then submitted a signed copy, but after the limitations period. Despite these attempts to comply with all legal requirements without the assistance of counsel, the court declared the lawsuit frivolous based on this technical error, and it will count as a strike against the plaintiff if he ever needs to resort to the judicial system again.[51] Under the three strikes provision, it is far from unusual that prisoners acting without legal assistance are penalized for such legal errors.[52]

While this provision addresses a genuine problem, it is grossly overbroad and excessive in its present form. It should be amended to limit "strikes" to cases that are dismissed as malicious and therefore constitute genuine abuses of the court, and also to apply the provision only to litigants who have accumulated three qualifying dismissals within the preceding five years. This proposal would cure the overbreadth of the present

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[51] *Gonzales v. Wyatt*, 157 F.3d 1016, 1019-22 (5th Cir. 1998).

[52] In *Monroe v. Lewis*, 165 F.3d 27 (Table), 1998 WL 537562 (6th Cir., Aug. 7, 1998), the prisoner's medical care claim was dismissed as frivolous because the court found it time-barred: it was timely relative to the date the prisoner had learned of the seriousness of his injury, but the court held that the claim accrued earlier, when he was first denied care. The prisoner was charged a strike for not appreciating this technical point. Cases are often declared frivolous because the prisoner has raised a claim in a civil rights action that must properly be pursued via writ of habeas corpus. *See Hassler v. Carson County*, 111 Fed.Appx. 728 (5th Cir. 2004) (affirming dismissal as frivolous of allegation of failure to credit jail time served); *Ballesteros v. Vasquez*, 161 F.3d 11 (Table), 1998 WL 537008 (9th Cir., August 21, 1998) (affirming dismissal as frivolous of allegation of falsified evidence in disciplinary proceeding); *Grant v. Sotelo*, 1998 WL 740826 at *1 (N.D.Tex., Oct. 17, 1998) (citing cases). The United States Supreme Court has grappled for three decades with the difficulty of drawing the line between habeas corpus and civil rights actions. *See Preiser v. Rodriguez*, 411 U.S. 475, 494 (1973); *Heck v. Humphrey*, 512 U.S. 477 (1994); *Edwards v. Balisok*, 520 U.S. 641 (1997); *Muhammad v. Close*, 540 U.S. 709 (2004) (per curiam); *Wilkinson v. Dotson*, 544 U.S. 74 (2005).

provision, while continuing to address the problem of the persistently abusive prisoner litigant.

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Washington, DC 20515

Dear Chairmen and Ranking Members:

As the Co-Chairs of the Commission on Safety and Abuse in America's Prisons, we write in response to the request of the Subcommittee on Crime, Terrorism, and Homeland Security to offer our views on the Prison Litigation Reform Act (PLRA). We strongly believe that reform of the PLRA is of critical importance to improving conditions of confinement, and we welcome the opportunity to explain further how the Commission came to its conclusions.

As you may know, our Commission – brining together an extraordinarily diverse group of 20 public servants – conducted a 15-month inquiry to understand and publicly discuss the most serious issues of safety in correctional facilities for prisoners, staff, and the public. The work of the Commission, which was created by the Vera Institute of Justice, led to thirty recommendations. Among the four major topics that we encountered were a collection of issues relating to the oversight of prisons and jails. One of these was the question of the use of federal court litigation – which is a critical

component of oversight – to confront and remedy constitutional and other violations that occur behind bars. Addressing the unique importance of access to the courts for the promotion of safe and humane correctional facilities, one of the Commission's recommendations set out four reforms to the PLRA that Congress should undertake:

- Eliminate the physical injury requirement;
- Eliminate the filing fee for indigent prisoners or make it reflective of the person's earning power, and eliminate the restrictions on attorneys' fees;
- Lift the requirement that correctional agencies concede liability as a prerequisite to court-supervised settlement; and
- Change the exhaustion rule, including eliminating the procedural default component at issue in the recent U.S. Supreme Court decision in *Woodford v. Ngo*.

The Commission focused on these four reforms to the PLRA because they were highlighted by our witnesses, the scholarly and practical literature, and because they reflected the views of the Commissioners based on their considerable professional experience. These recommendations were not intended to provide an exhaustive list of ways in which the statute could be successfully reformed. One of the Commission's goals throughout the report was to contribute to a conversation about how best to achieve improvements in correctional practice. We are grateful for the opportunity to continue that conversation in this hearing.

Our Commission concluded that there are aspects of the PLRA that, in effect if not in intention, present serious obstacles to the federal courts' ability to deliver justice and protect prisoners who are in danger or subject to abuse. Ten years of experience with the PLRA provide a sufficient empirical basis to conclude that its reform is imperative.

We understand the core salutary feature of the PLRA to be its requirement that federal courts pre-screen prisoners' lawsuits (28 U.S.C. §§1915(e)(2) and 1915A). That is, before defendant corrections officials are required to respond in any way to a complaint (indeed before they are even served with the complaint), the court must review the complaint and dismiss it if it is deemed frivolous, malicious, fails to state a claim for which relief can be granted, or seeks damages from a defendant who enjoys immunity. Named defendants suffer no prejudice if they present no response prior to the initial court screening – they cannot be found in default and no negative inference can be drawn from their silence. They have no obligation to respond unless and until the court determines that the prisoner has presented a claim that surpasses the PLRA's statutory threshold. This pre-screening requirement strikes an appropriate balance between prisoners' rights of access to the courts to remedy alleged constitutional violations and the burdens that all on prison officials to respond to individual lawsuits.

Other provisions of the PLRA do not strike the same balance and in practice function as insurmountable obstacles to many serious and meritorious claims. The Commission reached the conclusion that the PLRA's physical injury requirement should be repealed. The requirement stands as an unconscionable bar to fully remedying – and thus, hopefully, preventing – a range of violations of constitutional rights. It is a blunt tool that does not differentiate in any way between meritorious and

non-meritorious claims. Rather, it discourages prisoners with very serious constitutional claims from bringing those claims to light in a federal court. Moreover, it does so in a way that discriminates for no valid purpose – and to much harmful effect – against prisoners. There is no comparable statutory bar for any other group of civil rights litigants to the recovery of monetary damages for violations by government actors of rights to freedom of religion or freedom of speech or deprivations of liberty or due process.

The Commission also recognized the importance of amending the PLRA's exhaustion rules. The exhaustion rule, like the physical injury requirement, poses far too high a barrier to a federal curt hearing of federal law violations. Its breadth and inflexibility discriminates against prisoners among other civil rights litigants and results in the suppression of meritorious claims no less than non-meritorious claims, indeed perhaps even more so. As our Commission's final report explained, the PLRA (largely through the exhaustion requirement) has had the intended effect of suppressing prisoners' civil rights lawsuits. But it appears that it also has had the unintended, and dangerous, effect of sifting out meritorious claims somewhat more thoroughly than non-meritorious claims as shown by a decline in the ratio of successful suits (see our report, *Confronting Confinement*, at pages 84-85).

Furthermore, the exhaustion requirement has proven to be a difficult and contentious aspect of the statute, itself consuming a tremendous amount of judicial resources. The Commission's view was that exhaustion should only be required where the correctional system's grievance procedure was deemed sufficiently meaningful in terms of the remedies available and the flexibility of the procedures allowed. We were concerned that the rule dangerously puts form over function, too often barring access to the courts for no meaningful purpose or based on almost insurmountable procedural obstacles.

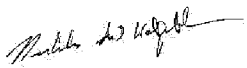
Our Commission further concluded that the PLRA could be amended to allow prisoners who prevail on civil rights claims to recover attorneys' fees. We see no reason to single out prisoners' civil rights claims for disparate treatment. Indeed, we recognize that prison litigation, especially class action litigation, plays a critical oversight role in our correctional institutions. Therefore, it ill serves prisoners, correctional agencies, and the public interest to discourage legal representation in these important cases. We are aware of no indication that the availability of attorneys' fees on the same basis as in other civil right matters results in frivolous or malicious litigation. On the contrary, one of the purposes of the PLRA – to improve the quality of prisoners' suits – would be supported by eliminating the disparate fee recovery rules.

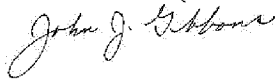
Along the same lines, the Commission recommended that the PLRA be amended to reduce or eliminate the filing fees for prisoner lawsuits. Under the PLRA, even indigent prisoners must pay a filing fee of $350, which is collected over time from their accounts (28 U.S.C. §§1914 and 1915(b)). This filing fee, which is imposed even on indigent prisoners and collected over time from their accounts, presents an insurmountable burden for many prisoners. As with many other provisions of the PLRA, it has the effect of discouraging (or even prohibiting) prisoners with meritorious claims from accessing the court system.

The Commission's recommendations regarding the PLRA are the result of a long and thoughtful process that took into account both the benefits and the costs of the Act. It is absolutely critical, we believe, that we not be content with rules that indiscriminately achieve one societal good (relief from the burdens of litigation) while at the same time causing injustice (barring remedies for very serious violations of constitutional rights). As a former federal judge and Attorney General of the United States, we believe that the parts of the PLRA that support our shared principles of justice can be preserved while those that conflict with those principles should be amended forthwith.

We thank the Subcommittees for holding what we believe to be a very important hearing on an issue that directly affects the millions of people incarcerated in the United States, as well as their families, and ultimately the communities to which they return after they are released. We look forward to the passage of amendments that reaffirm the positive goals of the PLRA while eliminating those that unfairly burden inmates and hinder meaningful oversight of America's correctional facilities.

Sincerely,





Nicholas de B. Katzenbach

Hon. John J. Gibbons

WASHINGTON
LEGISLATIVE OFFICE

November 8, 2007

The Honorable Robert C. Scott
Chair, Subcommittee on Crime, Terrorism, and Homeland Security
House Judiciary Committee
Washington, D.C. 20515

The Honorable J. Randy Forbes
Ranking Member, Subcommittee on Crime, Terrorism,
and Homeland Security
House Judiciary Committee
Washington, D.C. 20515

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EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Re: The ACLU supports H.R. 1889, the Private Prison Information Act of 2007

Dear Chairman Scott and Ranking Member Forbes,

On behalf of the American Civil Liberties Union, a non-partisan organization with hundreds of thousands of activists and members and 53 affiliates nationwide, we write to support H.R.1889, the Private Prison Information Act of 2007. This legislation would require private prisons that detain and incarcerate federal prisoners to release information about the operation of the prison in accordance with the Freedom of Information Act (FOIA) as any federal agency operating a facility is required to do.

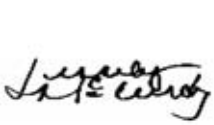
Allowing the public to have access to FOIA information about private prisons is critical to the ongoing role the public plays in monitoring conditions of confinement and protecting people in federal facilities. Private facilities are often responsible for some of the most vulnerable prisoners and detainees from various federal agencies across the country. Presently, FOIA laws do not apply to private prisons and immigration detention centers. This omission in the law makes it extremely difficult to acquire the information necessary to ensure that the constitutional rights of people being held in these facilities are not being violated and that they are living in humane conditions. Recently, the media and non-governmental organizations have exposed some of the horribly inadequate living conditions faced by prisoners and immigration detainees held in private prisons. For example, at a San Diego immigration detention facility managed by the Corrections

Corporation of America, Inc. (CCA), hundreds of detainees were forced to live for months and years in dangerously overcrowded conditions, many of them sleeping on plastic slabs placed on the floor by the toilet. Records pertaining to the detainee population, CCA's staffing levels, and any CCA policies regarding sanitation, security, or overcrowding at the facility were publicly unavailable because of current FOIA limitations. Unlike other federal prisons, these private prisons cannot be monitored by the American public for unacceptable conditions because private prisons are not required to release this type of information.

Since its enactment over forty years ago, FOIA has created the transparency necessary to ensure that the public and the media have the ability to access basic government records. This is vital to the public's and the media's ability to hold the government accountable, when it denies a person his or her freedom by incarceration. Currently, the federal Bureau of Prisons houses more than 27,000 prisoners in private facilities—this figure does not include the thousands of federal immigration detainees held in private federal prisons. With the increasing number of federal prisoners being held in private prisons it is important that these privately owned and operated facilities be held to the same standards and have the same responsibilities as the federal government to promptly process requests for information and release information concerning prisoners and detainees under the FOIA laws.

We are pleased to support H.R. 1889 and urge you and other members of the House Judiciary Committee, Crime, Terrorism and Homeland Security Subcommittee to support this important legislation. If you have any questions about the ACLU's position on H.R. 1889, please feel free to contact Jesselyn McCurdy, Legislative Counsel at phone: (202)675-2314or e-mail: jmccurdy@dcaclu.org.

Sincerely,



Caroline Fredrickson
Director

Jesselyn McCurdy
Legislative Counsel

cc: House Judiciary Committee
Crime, Terrorism and Homeland Security Subcommittee Members

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Summer, 1996

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FOREWORD: PRO SE PRISONER LITIGATION: LOOKING FOR NEEDLES IN HAYSTACKS *

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NAME: Hon. Jon O. Newman **

BIO:

** Chief Judge, United States Court of Appeals, Second Circuit. This article is an expanded version of a commencement address delivered at the 1995 commencement of Brooklyn Law School.

SUMMARY:
... In recent years, the fastest growing category of civil litigation in federal district courts has been prisoner lawsuits. ... Their national association canvassed the attorneys general for their lists of top ten frivolous prisoner lawsuits and widely disseminated to the press the lists the association collected. ... Upon submission of an affidavit of poverty, any litigant is entitled to file a lawsuit in a district court or an appeal in a court of appeals without prepayment of fees. ... The prisoner pays an initial partial filing fee equal to twenty percent of the greater of the average monthly deposits or the average monthly balance in the prison account for the six months prior to filing the complaint or notice of appeal. ... To implement the filing fee payment obligation, the PLRA requires the prisoner to submit a certified copy of the prisoner's trust fund account statement (or institutional equivalent) for the six months preceding the complaint or appeal. ... In the first decision construing the PLRA, Leonard v. Lacy, the Second Circuit created a prisoner authorization form to be used by every prisoner endeavoring to appeal in forma pauperis. ... The authorization form eliminates potential disputes between the prisoner and the prison concerning the availability of the prison account statement, and potential disputes between the court and the prison concerning the initial payment. ...

TEXT:
[*519]

In recent years, the fastest growing category of civil litigation in federal district courts has been prisoner lawsuits. Though some of these suits are habeas corpus challenges to convictions, the vast majority are challenges to various aspects of the conditions of confinement. In 1995, what the Administrative Office of the United States Courts categorizes as "civil rights" petitions by prisoners totaled 41,679, thirteen percent of all civil cases in district courts. n1

Prisoner lawsuits challenging prison conditions share two characteristics. Nearly all of these lawsuits are filed pro se, and the vast majority are dismissed as frivolous. However, among this growing number of frivolous lawsuits are a small number of serious matters that pose substantial issues, and a few of these serious lawsuits have resulted in significant victories. n2 [*520]

It should come as no surprise that the burden of the vast number of frivolous prisoner suits has created hostility to the entire category of lawsuits--opposition that has the potential of obscuring the few meritorious prisoner lawsuits which are about as scarce as the proverbial needle in the haystack. I propose to consider (1) the often exaggerated re-

sponses of the state attorneys general to prisoner lawsuits, (2) the more sensible congressional approach of limiting prisoner lawsuits by imposing obligations to pay filing fees, and (3) the initial appellate decisions of the Second Circuit applying the fee provision of the new statute.

I. Exaggerations from the State Attorneys General

Laboring under the burdens of having to respond to thousands of lawsuits, most of which are frivolous, the attorneys general of the states adopted the tactic of condemning all prisoner litigation as frivolous. Their national association canvassed the attorneys general for their lists of top ten frivolous prisoner lawsuits and widely disseminated to the press the lists the association collected. n3

Unfortunately, the lists included some accounts that were at best highly misleading and, sometimes, simply false. Three examples were cited in a letter by four attorneys general that was published in the New York Times on March 3, 1995. n4 Three cases, described as "typical," were reported in the following words:

* the inmate who sued because there were no salad bars or brunches on weekends and holidays; * the case where a prisoner is suing New York because his prison towels are white instead of his preferred beige; and * the case where an inmate sued, claiming cruel and unusual pun- [*521] ishment because he received one jar of chunky and one jar of creamy peanut butter after ordering two jars of chunky from the prison canteen.

I was skeptical of the description of these three cases because it has not been my experience in twenty-four years as a federal judge that what the attorneys general described was at all "typical" of prisoner litigation. I obtained the court documents on these three cases and learned the following. In the "salad bar" case, forty-three prisoners filed a twenty-seven page complaint alleging major prison deficiencies including overcrowding, forced confinement of prisoners with contagious diseases, lack of proper ventilation, lack of sufficient food, and food contaminated by rodents. n5 The prisoners' reference to salads was part of an allegation that their basic nutritional needs were not being met, and they mentioned, in passing, that at their prison a salad bar is available to prison guards and, at other state prisons, is available to prisoners. The complaint concerned dangerously unhealthy prison conditions, not the lack of a salad bar.

In the "beige towel" case, the suit was not brought because of a color preference. The prisoner's claim was that the prison had confiscated the towels and a jacket that the prisoner's family had sent him, and then disciplined him with loss of privileges for receipt of the package from his family. As he stated, the confiscation "caused a burden on my family who work hard and had to make sacrifices to buy me the items mentioned in this claim." n6

In the "chunky peanut butter" case, the prisoner did not sue because he received the wrong kind of peanut butter. He sued because the prison had incorrectly debited his prison account $ 2.50 under the following circumstances. He had ordered two jars of peanut butter; one sent by the canteen was the wrong kind, and a guard had quite willingly taken back the wrong product and assured the prisoner that the item he had ordered and paid for would be sent the next day. Unfortunately, the authorities transferred the prisoner that night to another prison, and his prison account remained charged $ 2.50 for the item that he had ordered but had never received. [*522]

The "chunky peanut butter" case has become the favorite canard of those who wish to ridicule prisoner litigation. Many journalists have reported it, using the inaccurate description of the case popularized by the attorneys general. n7 Their misleading characterization of the case was repeatedly cited during congressional consideration of proposals to limit prisoner litigation. n8

I readily acknowledge that $ 2.50 is not a large sum of money, and there is a substantial argument that lawsuits for such sums should be relegated to forums other than federal district courts. But such a sum is not trivial to the prisoner whose limited prison funds are improperly debited. The more important point is that those in positions of responsibility should not ridicule all prisoner lawsuits by perpetuating myths about some of them.

II. The Congressional Response

This year, Congress endeavored to curtail prisoner litigation by enacting the Prisoner Litigation Reform Act of 1995 ("PLRA"), signed into law on April 26, 1996. n9 The PLRA covers several topics, including prospective remedies in suits challenging prison conditions and exhaustion of administrative remedies, that are beyond the scope of this brief Article. My focus is on the provision concerning payment of filing fees, which Congress adopted in the expectation that prisoners would file fewer lawsuits if they had to pay filing fees out of their prison fund accounts.

Prior to the PLRA, most prisoners filing lawsuits accompanied their complaints with a motion for leave to proceed in forma pauperis. n10 Upon submission of an affidavit of poverty, [*523] any litigant is entitled to file a lawsuit in a

district court or an appeal in a court of appeals without prepayment of fees. n11 An action brought in forma pauperis is, by statute, subject to dismissal if determined to be frivolous. n12

The PLRA amends the in forma pauperis provision with respect to any prisoner seeking "to bring a civil action" or "appeal a judgment in a civil action." n13 Such prisoners are now liable for filing fees, even though they have only the minimal financial resources that would qualify them for in forma pauperis status if they were not prisoners. The fees are to be debited from the prisoner's trust fund account. n14 The prisoner pays an initial partial filing fee equal to twenty percent of the greater of the average monthly deposits or the average monthly balance in the prison account for the six months prior to filing the complaint or notice of appeal. n15 Thereafter, twenty percent of the income credited to the account is debited in each month that the account balance exceeds $ 10 until the balance of the filing fees is paid. n16 The PLRA exempts only those prisoners who have "no assets and no means by which to pay the initial partial filing fee." n17 To implement the filing fee payment obligation, the PLRA requires the prisoner to submit a certified copy of the prisoner's trust fund account statement (or institutional equivalent) for the six months preceding the complaint or appeal. n18

III. Initial Second Circuit Consideration of the PLRA

In a series of cases decided in the summer of 1996, the Second Circuit resolved a number of issues arising under the fee provisions of the PLRA. n19 The first issue concerned the [*524] mechanics of complying with the new statute. The PLRA states that the prisoner shall file the certified copy of the prison trust fund account statement and that the court shall assess and collect the initial partial filing fee payment. n20 The subsequent payments are to be made by "the agency having custody of the prisoner." n21 These provisions created essentially administrative choices as to how compliance should be achieved.

The Second Circuit devised an administrative arrangement that simplifies the tasks of the prisoner and the court of appeals, and shifts some functions to the prison authorities. In the first decision construing the PLRA, Leonard v. Lacy, n22 the Second Circuit created a prisoner authorization form to be used by every prisoner endeavoring to appeal in forma pauperis. n23 Using this form, the prisoner authorizes the prison authorities to send to the court of appeals the certified copy of the prisoner's prison account and all of the payments required by the PLRA. The court considered the use of the authorization form to be compliance with the statutory requirements on the theory that requiring the form "causes" submission of the account statement by the prisoner and collection by the court of the initial payment. n24

The authorization form eliminates potential disputes between the prisoner and the prison concerning the availability of the prison account statement, and potential disputes between the court and the prison concerning the initial payment. The authorization form procedure centralizes all steps to implement the fee payment requirements in the prison authorities, once the prisoner has signed the required authorization. Submission of a signed authorization form is a requirement of proceeding with an appeal without prepayment of fees. If the form is not submitted within thirty days of filing the appeal, the appeal is dismissed. n25 [*525]

Leonard also resolved an important issue concerning the time at which the prisoner becomes obligated for fee debits from the prison account. Prior to the PLRA, it had been the practice of the Second Circuit, upon consideration of any pro se litigant's motion for leave to appeal in forma pauperis, to make a threshold determination of whether the appeal surmounted the "frivolousness" standard of section 1915(d). In scores of cases, the court determined that the appeal was frivolous and for that reason denied the motion to appeal in forma pauperis and simultaneously dismissed the appeal. This procedure followed the Supreme Court's guidance in Neitzke v. Williams. n26

With enactment of the PLRA, the Second Circuit faced the choice of whether to impose the fee payment obligation as soon as the notice of appeal is received or only after the threshold determination that the appeal surmounts the "frivolousness" standard. If "frivolousness" were determined first and frivolous appeals were dismissed before the fee obligation was imposed, the PLRA would have the perverse effect of letting prisoners with frivolous appeals avoid the fee payment obligation and imposing the obligation only on those whose appeals were not frivolous. The court therefore concluded that the fee payment obligation must be imposed at the outset of the appeal, thereby implementing the congressional objective of making prisoners feel the deterrent effect of liability for fees. n27

The court also resolved issues concerning the application of the PLRA to pending appeals. In Covino v. Reopel, n28 the court ruled that the PLRA fee requirements applied to prisoners who, before the effective date of the Act, had filed notices of appeal, n29 had moved for leave to appeal in forma pauperis, n30 or had acquired in forma pauperis status on appeal by virtue of having such status unrevoked in the district court. n31 The PLRA fee requirements do not

apply to such cases, however, if [*526] the court has already invested substantial resources in the appeal, n32 or if the appeal was submitted before the effective date of the PLRA. n33

The court also determined the amount of appellate fees to which the fee payment obligation applies. Though the only fee denominated by statute as an appellate filing fee is the $ 5 fee imposed by *28 U.S.C. § 1917*, the court ruled in Leonard that the fee obligation applied to both the $ 5 fee and the $ 100 docketing fee required by resolution of the Judicial Conference of the United States, n34 acting pursuant to its authority to determine "the fees and costs to be charged and collected in each court of appeals." n35

Finally, the court resolved two issues concerning the applicability of the fee payment obligation. In In re Nagy, n36 the court ruled that the PLRA requirements apply to mandamus petitions that seek relief from prison officials comparable to the relief usually sought in civil rights actions under *42 U.S.C. § 1983*, but did not apply to mandamus petitions seeking relief against judges in the course of criminal proceedings. Of more significance was the ruling in Reyes v. Keane, n37 that the PLRA fee requirements do not apply to appeals from the denial of habeas corpus petitions.

Conclusion

Pro se prisoner lawsuits and appeals will very likely continue to impose significant burdens on federal district courts and courts of appeals. Prisoners who are subject to governmental authority twenty-four hours a day will inevitably encounter some actions they consider worthy of legal redress, and they have ample time to devote to the task of preparing their court [*527] papers. The challenge for courts is to avoid letting the large number of frivolous complaints and appeals impair their conscientious consideration of the few meritorious cases that are filed.

Whether the new fee obligations of the PLRA will deter some prisoners from filing complaints and appeals remains to be seen. My guess is that some prisoners will think twice before subjecting the limited funds in their prison accounts to debiting of the $ 120 fee for filing a complaint and the $ 105 aggregate fee for filing an appeal, and some prisoners will decide not to file. n38 Whatever the deterrent effect of the PLRA, courts will continue to have the important task of looking through the "haystacks" of prisoner lawsuits for the "needles" of meritorious prisoner claims.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityExhaustion of RemediesAdministrative RemediesCriminal Law & ProcedurePosteonviction ProceedingsImprisonmentCivil Rights LawPrisoner RightsPrison Litigation Reform ActGeneral Overview

FOOTNOTES:

n1 Leonidas Ralph Mecham, Administrative Office of the United States Courts, Judicial Business of the United States Courts, Report of the Director 139 (1995).

n2 See, e.g., *Helling v. McKinney, 509 U.S. 25 (1993)* (upholding right of prisoner not to be deliberately subjected to second-hand tobacco smoke); *Hudson v. McMillian, 503 U.S. 1 (1992)* (upholding prisoner's claim of use of excessive force); *Vitek v. Jones, 445 U.S. 480 (1980)* (barring involuntary transfer of prisoner to mental hospital without procedural due process); *Wolff v. McDonnell, 418 U.S. 539 (1974)* (requiring procedural due process protections for prison disciplinary proceedings); *Fisher v. Koehler, 902 F.2d 2 (2d Cir. 1990)* (unconstitutional conditions at local jail); *Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974)* (unconstitutional conditions at local jail); *Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971)* (in banc) (unlawful to impose segregated confinement because of political beliefs), cert. denied, *404 U.S. 1049 (1972)*, and *405 U.S. 978 (1972)*; see generally Susan P. Sturm, The Legacy and Future of Corrections Litigation, *142 U. Pa. L. Rev. 639 (1993)*.

n3 Attorneys General Seek to Curtail Frivolous Inmate Lawsuits; Call Upon U.S. Congress, States Legislatures to Respond, News Release (Nat'l Ass'n of Att'ys Gen., Washington, D.C.), Aug. 1, 1995.

n4 Dennis C. Vacco et al., Letter to the Editor, Free the Courts from Frivolous Prisoner Suits, N.Y. Times, Mar. 3, 1995, at A3.

n5 Tyler v. Carnahan, No. 4 94 CV 0017WSB (E.D. Mo. filed Dec. 17, 1993).

n6 Rivera v. State of New York, No. 90811 (N.Y. Ct. Cl. filed Dec. 21, 1994).

n7 See, e.g., George F. Will, 1995: Oh, A Revolution, Newsweek, Dec. 25, 1995/Jan. 1, 1996, at 136.

n8 See, e.g., 142 Cong. Rec. S3, 703-01 (daily ed. Apr. 19, 1996) (statement of Sen. Abraham); id. at S2, 219-03 (daily ed. Mar. 18, 1996) (statement of Sen. Reid); 141 Cong. Rec. S14, 626-1 (daily ed. Sept. 29, 1995) (statement of Sen. Dole); id. at S14, 418-01 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl); id. at H1, 480-06 (daily ed. Feb. 9, 1995) (statement of Rep. Canady).

n9 The Prison Litigation Reform Act of 1995 is Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996).

n10 See *28 U.S.C. § 1915* (1994), as amended by Prisoner Litigation Reform Act of 1995.

n11 Id. § 1915(a), as amended by Prisoner Litigation Reform Act of 1995.

n12 Id. § 1915(d), as amended by Prisoner Litigation Reform Act of 1995.

n13 Id. § 1915(a)(2), as amended by Prisoner Litigation Reform Act of 1995.

n14 Id. § 1915(b), as amended by Prisoner Litigation Reform Act of 1995.

n15 *28 U.S.C. § 1915*(b)(1), as amended by Prisoner Litigation Reform Act of 1995.

n16 Id. § 1915(b)(2), as amended by Prisoner Litigation Reform Act of 1995.

n17 Id. § 1915(b)(4), as amended by Prisoner Litigation Reform Act of 1995.

n18 Id. § 1915(a)(2), as amended by Prisoner Litigation Reform Act of 1995.

n19 *Reyes v. Keane, 90 F.3d 676 (2d Cir. 1996); In re Nagy, 89 F.3d 115 (2d Cir. 1996); Covino v. Reopel, 89 F.3d 105 (2d Cir. 1996); Leonard v. Lacy, 88 F.3d 181 (2d Cir. 1996).*

n20 *28 U.S.C. § 1915*(a)(2), (b)(1), as amended by Prisoner Litigation Reform Act of 1995.

n21 Id. § 1915(b)(2), as amended by Prisoner Litigation Reform Act of 1995.

n22 *88 F.3d 181 (2d Cir. 1996).*

n23 See *id. at 187 n.3.*

n24 *Id. at 187.*

n25 Id.

n26 *490 U.S. 319 (1989).*

n27 *Leonard, 88 F.3d at 185.*

n28 *89 F.3d 105 (2d Cir. 1996).*

n29 *Id. at 108* (Covino and Vann).

n30 Id. (Kellams).

n31 Id. (David); see *Fed. R. App. P. 24(a).*

n32 *Covino, 89 F.3d at 106.*

n33 *Ramsey v. Coughlin, 94 F.3d 71 (2d Cir. 1996);* see Duamutef v. O'Keefe, No. 96-2238, slip op. at 105, 108 (2d Cir. Oct. 18, 1996) (PLRA inapplicable where notice of appeal filed before effective date of PLRA, briefs filed after effective date but before decision in Covino.)

n34 See Report of the Proceedings of the Judicial Conference of the United States 12 (March 17, 1987).

n35 *28 U.S.C. § 1913* (1994), as amended by Prisoner Litigation Reform Act of 1995; see *Leonard v. Lacy, 88 F.3d 181, 186 (2d Cir. 1994).*

n36 *89 F.3d 115 (2d Cir. 1996).*

n37 *90 F.3d 676 (2d Cir. 1996).*

n38 Of the first 38 prisoners to whom the Second Circuit sent notices of intent to dismiss unless the authorization form for fee payments was filed within 30 days, 10 decided not to authorize fees to be debited from their prison accounts, and their appeals were dismissed.

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