



No Equal Justice

The Prison Litigation Reform Act in the United States

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I. Summary

Because a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most fundamental political right, because preservative of all rights.

—United States Supreme Court, *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992).

This amendment will help put an end to the inmate litigation fun-and-games.

—Senator Robert Dole, during Senate debate on an early version of the Prison Litigation Reform Act, September 29, 1995.

What was a sentence for a white collar crime that should have ended many years ago will never end. I got a life sentence.

—Keith DeBlasio, December 8, 2008. DeBlasio was raped while incarcerated in a federal prison and contracted HIV as a result.

Carved in stone over the entrance to the United States Supreme Court are the words “equal justice under law.” And for more than 140 years, the US Constitution has guaranteed to all persons the “equal protection of the laws.”¹ But for those in prisons, jails, and juvenile facilities in the United States, the promise of equal justice is illusory. The Prison Litigation Reform Act (PLRA), passed by Congress in 1996, denies equal access to the courts to the more than 2.3 million incarcerated persons in the United States.

The PLRA subjects lawsuits brought by prisoners in the federal courts to a host of burdens and restrictions that apply to no other persons. As a result of these restrictions, prisoners seeking the protection of the courts against unhealthy or dangerous conditions of confinement, or those seeking a remedy for injuries inflicted by prison staff and others, have had their cases thrown out of court. These restrictions apply not only to persons who have been convicted of crime, but also to pretrial detainees who have not yet been tried and are presumed innocent. Human Rights Watch is not aware of any other country in which national

¹ United States Constitution, amend. 14, sec. 1.

legislation singles out prisoners for a unique set of barriers to vindicating their legal rights in court.²

The PLRA's restrictions include:

The exhaustion of remedies requirement. Before a prisoner may file a lawsuit in court, he must first take his complaints through all levels of the prison's or jail's grievance system, complying with all deadlines and other procedural rules of that system.³ If the prisoner fails to comply with all technical requirements, or misses a filing deadline that may be as short as a few days, his right to sue may be lost forever.

The physical injury requirement. A prisoner may not recover compensation for "mental or emotional injury" unless she makes a "prior showing of physical injury."⁴ Under this provision, prisoners who have been subjected to sexual assault and other intentional abuse by prison staff have been denied a remedy. Indeed, because of this provision, many of the abuses that took place in Iraq's Abu Ghraib prison would not have been compensable if they had occurred in a US prison or jail.

Application to children. The provisions of the PLRA apply not only to adult prisoners, but also to children confined in prisons, jails, and juvenile detention facilities.⁵ The exhaustion requirement has proven to be an especially formidable barrier to justice for incarcerated children, particularly in light of court rulings that efforts to exhaust on their behalf by parents or other adults do not satisfy the PLRA.

Restrictions on court oversight of prison conditions. The PLRA restricts the power of federal courts to make and enforce orders limiting overcrowding or otherwise remedying unlawful conditions in prisons and jails.⁶

Limitations on attorney fees. If a prisoner files a lawsuit and wins, establishing that her rights have been violated, the PLRA limits the amount her attorneys can be paid.⁷

² For ease of reference, this report uses the term "prisoners" to refer collectively to convicted persons, pretrial detainees, and children held in juvenile detention facilities. The terms "children," "juveniles," and "youths" refer to persons under the age of 18.

³ 42 United States Code (U.S.C.) sec. 1997e(a).

⁴ 42 U.S.C. sec. 1997e(e).

⁵ 18 U.S.C. sec. 3626(g)(3) and (5); 42 U.S.C. sec. 1997e(h).

⁶ 18 U.S.C. sec. 3626.

⁷ 42 U.S.C. sec. 1997e(d).

The PLRA’s sponsors argued that the law was necessary to deal with “frivolous” lawsuits brought by prisoners. Some prisoners, like some non-prisoners, do file frivolous suits, and the PLRA includes the reasonable requirement that prisoner cases be subject to a preliminary screening process and be immediately dismissed if they are frivolous or malicious, or if they fail to state a claim on which relief can be granted.⁸ But the cases described in this report show that other provisions of the PLRA have resulted in dismissal of claims involving serious physical injury, sexual assault, and intentional abuse by prison staff—claims that no reasonable person would characterize as frivolous.

Unlike many other democracies, the United States has no independent national agency that monitors conditions in prisons, jails, and juvenile facilities and enforces minimal standards of health, safety, and humane treatment. Perhaps for this reason, oversight and reform of conditions in these institutions has fallen primarily to the federal courts. Beginning in the 1970s, lawsuits brought by prisoners led to improved medical care, sanitation, and protection from assault. While significant problems remained, by the time the PLRA was passed in 1996, US prison conditions had been transformed in just a few short decades.

The effect of the PLRA on prisoners’ access to the courts was swift. Between 1995 and 1997, federal civil rights filings by prisoners fell 33 percent, despite the fact that the number of incarcerated persons had grown by 10 percent in the same period. By 2001 prisoner filings were down 43 percent from their 1995 level, despite a 23 percent increase in the incarcerated population. By 2006 the number of prisoner lawsuits filed per thousand prisoners had fallen 60 percent since 1995.

If the effect of the PLRA were to selectively discourage the filing of frivolous or meritless lawsuits, as its sponsors predicted, then we would expect to find prisoners winning a larger percentage of their lawsuits after the law’s enactment than they did before. But the most comprehensive study to date shows just the opposite: since passage of the PLRA, prisoners not only are filing fewer lawsuits, but also are succeeding in a smaller proportion of the cases they do file. This strongly suggests that rather than filtering out meritless lawsuits, the PLRA has simply tilted the playing field against prisoners across the board. The author of a comprehensive study on the impact of the act concludes that “the PLRA’s new decision standards have imposed new and very high hurdles so that even constitutionally meritorious cases are often thrown out of court.”

⁸ 28 U.S.C. sec. 1915(e)(2); 28 U.S.C. sec. 1915A; 42 U.S.C. sec. 1997e(c)(1).

Jeanne Woodford, the former warden of San Quentin State Prison and former director of the California Department of Corrections, told Human Rights Watch that she believes the PLRA has endangered the progress that has been made in prison administration:

I do think the PLRA does need to be reformed. I think that there's prison experts around the country who would agree with that.... I'm told that many people in [the American Correctional Association] believe that as well. That they're starting to see abuses.... A lot of the corrections professionals were telling me that they had concerns that a lot of the steps forward they'd made in Texas were reverting because of the PLRA. And I can see that happening in California too.⁹

Drawing on interviews with former corrections officials, prisoners denied remedies for abuse, and criminal justice experts, this report examines three provisions of the PLRA—the exhaustion requirement, the physical injury requirement, and the law's application to children—and their effect on prisoners' access to justice.

Thirteen years after the passage of the PLRA, it has become apparent that Congress went too far. Congress must act now to amend the PLRA, to restore the rule of law to US prisons, jails, and juvenile facilities, and ensure that “equal protection of the laws” is not an empty promise.¹⁰

⁹ Human Rights Watch telephone interview with Jeanne Woodford, former warden of San Quentin State Prison and former director of the California Department of Corrections, October 29, 2008.

¹⁰ The PLRA governs lawsuits brought in the federal courts of the United States. Many US states have subsequently enacted laws that similarly restrict prisoners' access to state courts. See, for example, Maryland Prisoner Litigation Act, Annotated Code of Maryland, secs. 5-1001–5-1007, 1997. Those laws are beyond the scope of this report.

II. Recommendations

To the President and Congress of the United States:

Enact legislation that amends the PLRA by:

1. removing the requirement that courts dismiss lawsuits in which prisoners have not exhausted the prison or jail grievance system, and instead substituting a provision allowing courts to stay such lawsuits temporarily to allow prisoners to take their complaints through the grievance system (amend 42 U.S.C. sec. 1997e(a)).
2. allowing prisoners to recover compensation for mental or emotional injuries on the same basis as non-prisoners (eliminate 42 U.S.C. sec. 1997e(e)).
3. removing from the scope of the PLRA persons held in juvenile detention facilities, and persons under age 18 held in adult prisons and jails (amend 18 U.S.C. sec. 3626(g)(3) and (5) and 42 U.S.C. sec. 1997e(h)).

III. Incarceration in the United States

The United States has the largest prison population in the world, with more than 2.3 million persons behind bars on any given day.¹¹ The United States also has the world's highest per capita rate of incarceration, with 760 incarcerated persons for every 100,000 residents. This rate is five to ten times higher than those of other industrialized democracies like England and Wales (151 per 100,000), Canada (116), and Sweden (74).¹²

But the US prison system is also atypical in other ways. As already noted, unlike many other democracies, the United States has no independent national agency that monitors prison conditions and enforces minimal standards of health, safety, and humane treatment. The bipartisan Commission on Safety and Abuse in America's Prisons recently concluded that "few [US] states have monitoring systems that operate outside state and local departments of corrections, and the few systems that do exist are generally underresourced and lacking in real power."¹³ By contrast, in Great Britain, independent oversight of prison conditions is provided by Her Majesty's Inspectorate of Prisons. In 46 European states, the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment supplements monitoring by national bodies.¹⁴

The United States is also unusual in depriving prisoners of the right to vote. In all but two of the fifty US states, convicted prisoners are barred from voting. This is in marked contrast to many other democracies, which either allow all prisoners to vote (such as Austria, Germany, and Ireland) or disfranchise only a small proportion of prisoners (such as France, Norway, and Portugal).¹⁵ The United States Supreme Court has recognized that the disfranchisement of prisoners makes their right of access to the courts correspondingly more important: "[b]ecause a prisoner ordinarily is divested of the privilege to vote, the right to file a court

¹¹ The number of individuals who are incarcerated at some point in a given year is even higher; the US Bureau of Justice Statistics estimates that 13.6 million persons were admitted to local jails in the 12-month period ending June 30, 2008. Bureau of Justice Statistics, "Growth in Prison and Jail Population Slowing: 16 States Report Decline in the Number of Prisoners," March 31, 2009, <http://www.ojp.usdoj.gov/bjs/pub/press/pimjimo8stpr.htm> (accessed May 31, 2009).

¹² International Centre for Prison Studies, King's College London, "World Prison Brief," http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_poprate (accessed May 31, 2009).

¹³ "Confronting Confinement: A report of the Commission on Safety and Abuse in America's Prisons," June 2006, http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf (accessed June 4, 2009), p. 79.

¹⁴ *Ibid.*, p. 80.

¹⁵ American Civil Liberties Union, "Out of Step with the World: An Analysis of Felony Disfranchisement in the U.S. and Other Democracies," May 2006, http://www.aclu.org/images/asset_upload_file825_25663.pdf (accessed June 4, 2009), pp. 3, 6-7.

action might be said to be his remaining most fundamental political right, because preservative of all rights.”¹⁶

Perhaps for these reasons, reform of US prisons and jails has taken place primarily through litigation, rather than through executive or legislative action.¹⁷ And lawsuits brought by prisoners and their lawyers have transformed the US prison system in a few short decades. In the 1978 case of *Hutto v. Finney*, the US Supreme Court gave the following description of conditions in one Arkansas prison:

Cummins Farm, the institution at the center of this litigation, required its 1,000 inmates to work in the fields 10 hours a day, six days a week, using mule-drawn tools and tending crops by hand. The inmates were sometimes required to run to and from the fields, with a guard in an automobile or on horseback driving them on. They worked in all sorts of weather, so long as the temperature was above freezing, sometimes in unsuitably light clothing or without shoes. The inmates slept together in large, 100-man barracks and some convicts, known as “creepers,” would slip from their beds to crawl along the floor, stalking their sleeping enemies. In one 18-month period, there were 17 stabbings, all but 1 occurring in the barracks. Homosexual rape was so common and uncontrolled that some potential victims dared not sleep; instead they would leave their beds and spend the night clinging to the bars nearest the guards' station....

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

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

Confinement in punitive isolation was for an indeterminate period of time. An average of 4, and sometimes as many as 10 or 11, prisoners were crowded

¹⁶ *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992).

¹⁷ For a typical view, see Malcolm M. Feeley and Van Swearingen, “The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications,” *Pace Law Review*, vol. 24, 2004, p. 442, concluding that “litigation has probably been the single most important source of change in prisons and jails in the past forty years.”

into windowless 8'x10' cells containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell. At night the prisoners were given mattresses to spread on the floor. Although some prisoners suffered from infectious diseases such as hepatitis and venereal disease, mattresses were removed and jumbled together each morning, then returned to the cells at random in the evening.¹⁸

Spurred by *Hutto* and other Supreme Court decisions ruling that prison conditions were subject to constitutional limits, prisoners and their attorneys filed lawsuits challenging inadequate medical and mental health care, dangerous and unhealthy physical facilities, abuse by prison staff, and other unlawful conditions. In many cases, federal courts issued prison-wide or even statewide orders to remedy these deficiencies. There remain serious problems in US prisons, particularly with respect to the treatment of vulnerable prisoners such as juveniles and persons with mental illness or physical disabilities. But by the mid-1990s, conditions such as those at Cummins Farm were largely a thing of the past.¹⁹

While the passage of the PLRA has had a detrimental effect on reform efforts, litigation brought by prisoners continues to play a critical role in enforcing minimal standards in US prisons and jails. According to Jeanne Woodford, former San Quentin warden and California corrections director, “litigation is probably the only thing that allows us to do our jobs as professionals.” Woodford told Human Rights Watch of her testimony in a lawsuit involving conditions on California’s death row. “I said to the judge, ‘if it wasn’t for this litigation, I wouldn’t be able to do my job as a warden, and my job as a warden is to keep everyone safe.’”²⁰

¹⁸ *Hutto v. Finney*, 437 U.S. 678, 682-683 nn. 3-6 (1978) (citations omitted).

¹⁹ See, for example, Vincent M. Nathan, “Have the Courts Made a Difference in the Quality of Prison Conditions? What Have We Accomplished to Date?” *Pace Law Review*, vol. 24, 2004, pp. 423-24 (describing cases); Human Rights Watch, *Ill-Equipped: US Prisons and Offenders with Mental Illness* (New York: Human Rights Watch, 2003), <http://www.hrw.org/en/reports/2003/10/21/ill-equipped-0> pp. 46-47 (same).

²⁰ Human Rights Watch telephone interview with Jeanne Woodford, October 29, 2008.

IV. Enactment of the Prison Litigation Reform Act

In the spring of 1996 Congress passed the Prison Litigation Reform Act, and President Clinton signed the bill into law on April 26, 1996. The PLRA brought sweeping and unprecedented changes in the ability of prisoners to seek relief in court from conditions that threaten their health and safety or otherwise violate their legal rights.²¹

The PLRA governs lawsuits brought in the federal courts of the United States, whether those lawsuits involve federal, state, or local facilities. Many US states have enacted laws that similarly restrict prisoners' access to state courts; those laws are beyond the scope of this report.²²

The proponents of the PLRA argued that prisoners were clogging the courts with an avalanche of frivolous lawsuits, thus impairing the quality of justice enjoyed by law-abiding persons. In reality, prisoners were filing lawsuits at about the same rate as non-incarcerated persons,²³ and prisoner lawsuits often involved allegations of physical abuse, inadequate medical care, and other non-frivolous claims. The PLRA's supporters also expressed concern about court orders regulating prison conditions, although such orders were issued only if a court found that prisoners' rights had been violated, or if prison officials consented to the order. Nevertheless, the PLRA passed with broad support from both Republicans and Democrats.²⁴

For a bill that made major changes in the enforceability of fundamental rights, the PLRA received remarkably little congressional scrutiny. It was passed not as a freestanding bill, but as an amendment to a bill to appropriate funds for the continued operation of the federal government.²⁵ The legislative record consists largely of anecdotes about allegedly frivolous litigation brought by prisoners, such as a case in which “an inmate sued, claiming

²¹ Under US law, a private citizen cannot compel the criminal prosecution of another person. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). Therefore, for prisoners who are subjected to unlawful conduct, a civil lawsuit is the only remedy.

²² See, for example, the Maryland Prisoner Litigation Act, Ann. Code Md. secs. 5-1001–5-1007.

²³ Margo Schlanger, “Inmate Litigation,” *Harvard Law Review*, vol. 116, April 2003, p. 1692.

²⁴ For a critique of the arguments of the PLRA's proponents, see Schlanger, “Inmate Litigation,” *Harvard Law Review*, p. 1692 (concluding that “the most basic element of the critics' account—that the reason so few inmate plaintiffs were successful was that their cases were simply frivolous (and not just legally frivolous but actually laughable)—is not true”).

²⁵ Schlanger, “Inmate Litigation,” *Harvard Law Review*, p. 1559.

cruel and unusual punishment because he received one jar of chunky and one jar of creamy peanut butter after ordering two jars of chunky from the prison canteen.”²⁶

While the provision for preliminary screening of prisoner lawsuits is reasonable, other provisions of the PLRA erect significant obstacles to the enforcement of fundamental rights. For example, when a court has issued an order to remedy unlawful conditions in a prison, jail, or juvenile facility, the PLRA provides that officials can render that order unenforceable simply by filing a motion in court.²⁷ And the law’s severe restrictions on attorney fees mean that even prisoners with meritorious cases have difficulty finding lawyers to assist them.²⁸

²⁶ Dennis C. Vacco, Frankie Sue del Papa, Pamela Fanning Carter, and Christine O. Gregoire, “Free the Courts from Frivolous Prisoner Suits,” *New York Times*, March 3, 1995, p. A26 (letter to the editor from Attorneys General of New York, Nevada, Indiana, and Washington). Federal Appeals Court Judge Jon O. Newman researched three of the cases described in this letter, and concluded that the descriptions were “at best highly misleading and, sometimes, simply false.” Jon O. Newman, “Pro Se Prisoner Litigation: Looking for Needles in Haystacks,” *Brooklyn Law Review*, vol. 62, 1996, p. 520.

²⁷ 18 U.S.C. sec. 3626(e)(2).

²⁸ See, for example, *Robbins v. Chronister*, 435 F.3d 1238 (10th Cir. 2006) (en banc) (attorney who won excessive force case for prisoner received payment of \$1.50 as a result of PLRA’s limits on attorney fees); *Pearson v. Welborn*, 471 F.3d 732 (7th Cir. 2006) (attorney who won prisoner’s claim that staff unlawfully retaliated against him, resulting in confinement in “supermax” prison for more than one year, received payment of \$1.50 due to PLRA’s fee limitations). The Pearson case is discussed further in section VI, below.

V. The Exhaustion Requirement

Ordinarily, a person filing a lawsuit alleging that government officials have violated her constitutional rights may go directly to court. Even if an administrative process exists, there is no requirement to complete it as a prerequisite to filing suit.²⁹ Until passage of the PLRA, this general rule applied to prisoners as well.

Most prisons and jails have a system of administrative remedies, more commonly known as grievance systems. These are mechanisms through which prisoners can file complaints or make requests in writing, and receive a written response from corrections officials. Most grievance systems have filing deadlines—a prisoner must file within a certain time of the incident complained about—and most have one or more levels of appeal.

Grievance systems emerged in the 1970s as a means of quickly and informally resolving minor issues by encouraging prisoners to address problems through established channels. They are also a means of keeping officials apprised of problems and concerns among the prison population—a review of all the grievances filed in a given month or year may reveal, for example, a pattern of misconduct by a particular staff member. Grievance systems were never designed to be the first step in a lawsuit, and it was never contemplated when they were first introduced that a misstep in the grievance process could result in a prisoner forfeiting his right to file in court.

Before passage of the PLRA, exhaustion of prison grievance systems could be required only in very narrow circumstances. If the attorney general of the United States had certified that a prison's or jail's grievance system met specified standards, or if a federal judge found that the system was "otherwise fair and effective," a lawsuit filed by a prisoner could be stayed for up to six months to require the prisoner to exhaust "such plain, speedy, and effective administrative remedies as are available." In addition, exhaustion could be required only of adults who had been convicted of a crime, not of detained children or persons held in jail awaiting trial.³⁰

The PLRA dramatically altered this legal landscape, deleting the requirement that grievance systems be "fair and effective," and requiring that a lawsuit filed by a prisoner who had not pursued all avenues for redress within the grievance system be dismissed rather than merely

²⁹ *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 516 (1982).

³⁰ 42 U.S.C. sec. 1997e (1995).

stayed. The PLRA’s exhaustion requirement also applies to any adult or child held in a prison, jail, or juvenile detention facility.³¹ Indeed, it applies even if the grievance system cannot provide the remedy the prisoner is seeking, such as monetary compensation.³²

A basic structural problem with the exhaustion requirement is that prison officials themselves—the defendants in most lawsuits brought by prisoners—typically design the grievance system that prisoners must exhaust before filing suit. This creates obvious incentives for prison officials to design grievance systems with short deadlines, multiple steps, and numerous technical requirements. And unlike prior law, the PLRA imposes no requirements for grievance systems: “the sky’s the limit for the procedural complexity or difficulty of the exhaustion regime.”³³

Some grievance systems include requirements that seem designed to discourage, rather than facilitate, compliance by prisoners. For example, some systems require that a prisoner first raise the issue she wishes to grieve with the staff member involved—even if the grievance involves an assault or other abusive conduct by that same staff member. One recent case ruled that a prisoner whose complaint was that he was threatened and physically assaulted by a corrections officer failed to exhaust because he did not first discuss the issue with the officer who had allegedly assaulted him.³⁴

There is also some evidence that prison officials have taken advantage of the PLRA to discourage lawsuits by making grievance systems more demanding. In Illinois, after a court ruled that a prisoner had complied with the state prison system’s grievance process, rejecting prison officials’ argument that his grievance was not sufficiently detailed,³⁵ the prison system revised the policy to require “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.”³⁶

³¹ 42 U.S.C. sec. 1997e(a), (h).

³² *Booth v. Churner*, 532 U.S. 731, 734 (2001).

³³ Schlanger, “Inmate Litigation,” *Harvard Law Review*, p. 1650.

³⁴ *Sanders v. Bachus*, 2008 WL 54228571, at *5 (W.D. Mich. 2008).

³⁵ *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002).

³⁶ Corrections, Criminal Justice, and Law Enforcement: Filing of Grievances, Illinois Administrative Code, title 20, sec. 504.810(b), 2003.

Shortening the Statute of Limitations

The statute of limitations is the time period within which a person must bring a lawsuit; after the statute of limitations has run, the right to sue is lost. These limitation periods vary from state to state, but are typically one, two, or three years from the incident that is the subject of the suit.

For prisoners, the PLRA effectively shortens the statute of limitations, from one or more years sometimes to a matter of days. If a prisoner misses the deadline for filing his initial grievance—or for filing any required appeals within the grievance system—his right to sue is forever lost. In *Woodford v. Ngo*, in 2006, the US Supreme Court ruled that a prisoner’s lawsuit must be dismissed because he had missed the California prison system’s deadline for filing a grievance, which was 15 working days.³⁷ Although the statute of limitations for the prisoner’s claim was one year,³⁸ the court ruled that the PLRA requires prisoners to comply with the grievance system’s “deadlines and other critical procedural rules,” and that the prisoner’s failure to meet the 15-day deadline had forfeited his right to sue.³⁹

California’s deadline of 15 working days is far from unusual. According to one brief filed in the *Woodford* case, 13 state prison systems have grievance filing deadlines of 10 calendar days or less; some are as short as two or three days.⁴⁰ Deadlines typically apply not only to the filing of the initial grievance, but to filing at each of the required levels of appeal. The California grievance system has three levels, each with a 15-day filing deadline.⁴¹

Courts have generally not excused prisoners’ failures to meet even very short grievance filing deadlines, despite the existence of extenuating circumstances. For example:

- A court dismissed a prisoner’s lawsuit for failure to exhaust, despite the fact that he had been hospitalized outside the institution during the entire grievance filing period.⁴²

³⁷ 548 U.S. 81, 87 (2006).

³⁸ See *Maldonado v. Harris*, 370 F.3d 945, 954-55 (9th Cir. 2004) (at the time of Ngo’s lawsuit, the statute of limitations for civil rights actions brought under 42 U.S.C. sec. 1983 in California was one year; it has since been revised to two years).

³⁹ 548 U.S. at 90.

⁴⁰ Brief for the Jerome N. Frank Legal Services Organization of the Yale Law School as Amicus Curiae in Support of Respondent, *Woodford v. Ngo*, No. 05-416, 2006 WL 304573. See also *Woodford*, 548 U.S. at 118 (Stevens, J., dissenting) (noting that grievance filing deadlines “are generally no more than 15 days, and ... in nine States, are between 2 and 5 days”).

⁴¹ Brief for the Jerome N. Frank Legal Services Organization of the Yale Law School as Amicus Curiae in Support of Respondent, *Woodford v. Ngo*, No. 05-416, 2006 WL 304573.

⁴² *Steele v. N.Y. State Department of Correctional Services*, 2000 WL 777931, at *1 (S.D.N.Y. 2000).

- A prisoner’s lawsuit alleging that he was beaten by staff was dismissed because the prisoner had not initiated the grievance process within two business days of the incident, despite the prisoner’s claim that immediately following the assault he was placed in segregation, where officers did not provide him with grievance forms.⁴³
- A prisoner missed the 14-day grievance deadline because he was on suicide watch, with no access to writing materials, for 19 days immediately after the incident giving rise to the grievance. Although he later filed a grievance, the court dismissed for failure to exhaust, ruling that he should have filed “as soon as he was released from suicide watch.”⁴⁴
- A court ruled that a prisoner who had filed his grievance late, after being stabbed and having a kidney removed in the hospital, had failed to exhaust; the PLRA “does not ... excuse prompt filing of prison administrative remedies because of mental or emotional injury.”⁴⁵
- A prisoner missed the 48-hour grievance filing deadline because he needed the names of the officers involved in the incident and it took him a week to obtain this information; his case was dismissed for failure to exhaust.⁴⁶

A Trap for the Unwary

In a case involving employment discrimination, the US Supreme Court warned that “technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.”⁴⁷ But under the PLRA, it is common for courts to conclude that prisoners have failed to exhaust because they made minor technical errors in the grievance process.

Jeanne Woodford, former director of the California Department of Corrections, described to Human Rights Watch some of the difficulties prisoners have in navigating the grievance system in California state prisons:

Their appeal gets screened out for lack of documentation and they’re unable to get the documentation. I think a lot of them have trouble once the appeal is screened out—maybe not understanding why the appeal was screened

⁴³ *Latham v. Pate*, 2007 WL 171792, at *2 (W.D. Mich. 2007).

⁴⁴ *Green v. McBride*, 2007 WL 2815444, at *3 (S.D.W.Va. 2007).

⁴⁵ *Harris v. Walker*, 2006 WL 2669050, at *3-4 (S.D. Miss. 2006).

⁴⁶ *Whitener v. Buss*, 268 Fed. Appx. 477, 478-79 (7th Cir. 2008).

⁴⁷ *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972).

out.... For example, you're only supposed to put one issue on an appeal, and some inmates put multiple issues on an appeal, because it may have all occurred in the same incident, and the inmate doesn't understand that.⁴⁸

Woodford added that at some California prisons, as many as half of all grievance appeals are "screened out" because of technical errors by prisoners.⁴⁹

Cases in which prisoners have had their cases dismissed because of technical errors in the grievance process are common:

- A prisoner who was stabbed in the eye had his lawsuit dismissed because, while he had properly filed his original grievance, he failed to indicate whether he wished to appeal when this grievance was denied.⁵⁰
- A prisoner alleging that he had received inadequate dental care had his grievance rejected because he appended seven pages of information regarding his dental needs; when the prisoner then filed suit over inadequate dental care, the case was dismissed for non-exhaustion.⁵¹
- A prisoner who alleged that he was attacked by other prisoners, was left for 12 hours without medical attention, was in a coma for days and in the hospital for months, and suffered severe permanent injuries including cognitive impairment and memory loss, had his lawsuit dismissed because he appealed his grievance too *soon*.⁵²

Many cases are dismissed because the prisoner used the wrong form, or wrote to the wrong entity within the prison system. Cases have been dismissed, in whole or in part, because the prisoner:

- Submitted a form to the "inmate appeals branch" rather than to the "appeals coordinator."⁵³
- Filed an "administrative appeal" rather than a "disciplinary appeal."⁵⁴

⁴⁸ Human Rights Watch telephone interview with Jeanne Woodford, October 29, 2008.

⁴⁹ *Ibid.*

⁵⁰ *Russell v. Johnson*, 2008 WL 596524, at *2-3 (M.D. Ga. 2008).

⁵¹ *Cadogan v. Vittito*, 2007 WL 2875464, at *2-3 (E.D. Mich. 2007).

⁵² *Asberry v. Oklahoma Department of Corrections*, 2009 WL 152536, at *3 (E.D. Okla. 2009).

⁵³ *Chatman v. Johnson*, 2007 WL 2023544, at *6, *report and recommendation adopted*, 2007 WL 2796575 (E.D. Cal. 2007).

⁵⁴ *Richardson v. Spurlock*, 260 F.3d 495, 499 (5th Cir. 2001).

- Wrote directly to the grievance body rather than filing a “service request” form.⁵⁵
- Sent appeal documents to the secretary of the Department of Corrections rather than to the secretary’s Office of Inmate Grievances and Appeals.⁵⁶
- Filed a new grievance rather than seeking reinstatement of a previous grievance (the court characterized its dismissal of the case as “hyper-technical” but required by the PLRA).⁵⁷

No Exceptions, No Excuses

Courts have not been receptive to the argument that the exhaustion requirement should be excused, even when there is good cause for the prisoner’s failure to pursue remedies within the prison grievance system. Among the justifications for non-exhaustion courts have rejected are:

- Dyslexia⁵⁸
- Illiteracy⁵⁹
- Inability to read English⁶⁰
- Cerebral palsy⁶¹
- Mental illness⁶²
- Brain injury and memory loss⁶³
- Blindness⁶⁴
- Being in a coma⁶⁵

⁵⁵ *McNeal v. Cabana*, 2006 WL 2794337, at *1 (N.D. Miss. 2006).

⁵⁶ *Keys v. Craig*, 160 Fed. Appx. 125, 126 (3d Cir. 2005).

⁵⁷ *Whitney v. Simonson*, 2007 WL 3274373, at *2, *report and recommendation adopted*, 2007 WL 4591593 (E.D. Cal. 2007), *aff’d*, 2009 WL 604912 (9th Cir. 2009).

⁵⁸ *Williams v. Pettiford*, 2007 WL 3119548, at *3 (D.S.C. 2007).

⁵⁹ *Ramos v. Smith*, 187 Fed. Appx. 152, 154 (3d Cir. 2006).

⁶⁰ *Benavidez v. Stansberry*, 2008 WL 4279559, at *4 (N.D. Ohio 2008).

⁶¹ *Elliott v. Monroe Correctional Complex*, 2007 WL 208422, at *3 (W.D. Wash. 2007).

⁶² *Yorkey v. Pettiford*, 2007 WL 2750068, at *4 (D.S.C. 2007).

⁶³ *Williams v. Kennedy*, 2006 WL 18314, at *2 (S.D. Tex. 2006); *Rigsby v. Schriro*, 2008 WL 2705376, at *3 (D. Ariz. 2008).

⁶⁴ *Fry v. Al-Abduljalil*, 164 Fed. Appx. 788, 790-91 (10th Cir. 2006); *Ferrington v. Louisiana Department of Corrections*, 315 F.3d 529, 532 (5th Cir. 2002).

⁶⁵ *Parker v. Adjetey*, 89 Fed. Appx. 886, 887-88 (5th Cir. 2004).

One scholar, after surveying cases decided under the PLRA's exhaustion requirement, summarized her findings: "Inmates who filed only the first level of grievance, or who failed to comply with a stringent time limit (sometimes even because they were hospitalized for the injury motivating the lawsuit), or who simply wrote a letter to prison authorities rather than filling out the requisite form, are seeing their constitutional cases dismissed for failure to exhaust."⁶⁶ Indeed, the PLRA is not limited to constitutional claims, but restricts prisoners' ability to bring claims under other laws as well.

In a case involving the exhaustion requirement, the US Supreme Court said that "[b]eyond doubt, Congress enacted [the PLRA] to reduce the quantity and improve the quality of prisoner suits."⁶⁷ A central argument of the PLRA's supporters was that the law would filter out only frivolous or plainly meritless prisoner suits, but would not affect those that raised serious issues. As Senator Orrin Hatch put it, "I 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."⁶⁸ Representative Charles Canady sounded a similar note: "These reasonable requirements will not impede meritorious claims by inmates but will greatly discourage claims that are without merit."⁶⁹

But the exhaustion requirement has nothing to do with the merit of the prisoner's underlying claim. It requires dismissal of the case—regardless of its merit—if the prisoner has failed to comply with the procedural requirements, however petty, of the prison grievance regime. The legality or illegality of the conduct the prisoner is complaining of, or the magnitude of the harm she has suffered, simply do not matter. As one scholar summarized the first several years of the PLRA, "inmates who experience even grievous loss because of unconstitutional misbehavior by prison and jail authorities will nonetheless lose cases they once would have won, if they fail to comply with technicalities of administrative exhaustion."⁷⁰

⁶⁶ Schlanger, "Inmate Litigation," *Harvard Law Review*, pp. 1653-54 (footnotes omitted).

⁶⁷ *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

⁶⁸ Statement of Senator Orrin Hatch (R-UT), September 29, 1995, *Congressional Record*, vol. 141, 1995, p. S14,627.

⁶⁹ Statement of Representative Charles Canady (R-FL), February 9, 1995, *Congressional Record*, vol. 141, 1995, p. H1480.

⁷⁰ Schlanger, "Inmate Litigation," *Harvard Law Review*, p. 1694.

Case Study: Immunizing Rape

Sexual abuse of female prisoners by male prison staff is a well-documented phenomenon in US prisons.⁷¹ In January 2003, 16 women prisoners filed suit alleging an ongoing pattern of rape and sexual abuse by staff of the New York State Department of Correctional Services (DOCS). The lawsuit, detailing instances of forcible rape, coerced sexual activity, oral and anal sodomy, and forced pregnancies, asked the court to intervene to halt the ongoing sexual abuse.⁷²

Rather than address the merits of the women's claims, the federal court hearing the case took nearly five years to first consider whether they had exhausted administrative remedies as required by the PLRA. In 2007 the court dismissed all of the women's claims for injunctive relief—that is, for an order to the prison system to remedy the ongoing abuse. The court acknowledged that some of the women had complained about the abuse to the New York state prison system's inspector general; others had complained to the supervisor of the officer who had abused them; others still had spoken about the abuse to a prison official whom they felt comfortable approaching. One woman had filed a formal grievance and pursued it through all three levels of the grievance system, but the judge ruled that that was not sufficient because, he said, she had not named all supervisory defendants or linked their actions to her abuse by a particular officer, even though she had identified the core failing in the lawsuit: officers about whom there are repeated credible complaints of sexual abuse are nonetheless permitted to continue to guard women prisoners. As a result, the court ruled that she could not challenge the supervisory defendants' failings in supervision, investigation, and discipline of staff.

The court ruled that none of the actions taken by the women to alert DOCS to the ongoing sexual abuse were sufficient to satisfy the PLRA, and so all their claims for injunctive relief were dismissed:

The evidence does not demonstrate that Plaintiffs' efforts at grieving properly were thwarted, but rather shows that they merely selected to pursue informal avenues instead of the formal grievance procedure.... One cannot exhaust *all* administrative remedies by merely pursuing an informal avenue over the

⁷¹ See, for example, Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (New York: Human Rights Watch, December 1996), <http://www.hrw.org/legacy/reports/1996/Us1.htm>; *Daskalea v. District of Columbia*, 227 F.3d 433, 436 (D.C. Cir. 2000) (“Uncontradicted evidence at the trial of this case established the routine sexual abuse of women inmates by prison guards at the District of Columbia Jail”).

⁷² *Amador v. Andrews*, No. 03 Civ. 0650 (KTD) (GWG) (S.D.N.Y.), First Amended Complaint, Sept. 5, 2003.

formal grievance procedure. Thus, because Plaintiffs ... did not complete the three-step grievance procedure, they have not properly exhausted all of their administrative remedies.⁷³

Dori Lewis, one of the lawyers representing the women, explained to Human Rights Watch that prison officials had previously taken the position that prisoners complaining about staff sexual abuse were not required to file a grievance:

With respect to staff sexual assault, DOCS had told women prisoners that they could complain to anyone with whom they feel comfortable, and their complaint would be forwarded to the inspector general's office. They made clear that the inspector general's office, and only the inspector general's office, had authority to take action. And in spite of that, they have come into court and argued that women prisoners needed to file grievances.⁷⁴

Lisa Freeman, Lewis's co-counsel, summed up the effect of the PLRA in the New York case: "It allows for the ongoing problem of staff sexual abuse to continue unabated."⁷⁵ Lewis elaborated,

For other women in prison, it reinforces that there's no point in coming forward about these kinds of complaints. Women prisoners already think that their complaints of staff sexual abuse will accomplish nothing unless they have physical proof of the complaint. Now they're being told that even when women have come forward, even when they may have had physical evidence or other strong evidence, it's still not good enough to get into court because they didn't navigate this opaque and complex system.⁷⁶

⁷³ *Amador v. Andrews*, 2007 WL 4326747, at *7-9 (S.D.N.Y. 2007) (emphasis in original).

⁷⁴ Human Rights Watch telephone interview with Dori Lewis, New York, NY, March 31, 2009. Ultimately, six women were permitted to proceed against individual officers for money damages, but none were permitted to challenge DOCS policies and procedures or seek a court order that would remedy the ongoing abuse. As of spring 2009—six years after the suit was filed—an appeal of this ruling is pending. *Ibid.*

⁷⁵ Human Rights Watch telephone interview with Lisa Freeman, New York, NY, March 31, 2009.

⁷⁶ Human Rights Watch telephone interview with Dori Lewis, March 31, 2009.

Dangers of Reporting Rape in Prison

When a prisoner has been sexually assaulted by another prisoner, to complain to prison staff is to risk violent retaliation, either by the original assailant or by other prisoners. One 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 told on him. Then I paid for it. Because I told on him, he got even with me. So after that, I would not, did not tell again.⁷⁷

For a male prisoner, to be known as a rape victim (“punk”) dramatically increases the risk of future assault, and to be known as someone who informs on prisoners to the authorities (a “snitch”) invites attack by other prisoners. Thus, a prisoner who complains to staff about being raped is doubly at risk:

[T]he first time I was raped, I did the right thing. I went to an officer, told him what happened, got the rectal check, the whole works. Results? I get shipped to [another prison]. Six months later, same dude that raped me is out of seg[regation] and on the same wing as I am. I have to deal with 2 jackets now: snitch & punk. I ... had to think real fast to stay alive. This was my first 2 years in the system. After that I knew better.⁷⁸

Case Study: No Remedy for Rape Resulting in HIV Infection

Keith DeBlasio was incarcerated in a federal prison for credit card fraud and other white collar crimes when another prisoner, a known leader of a prison gang, began threatening him. DeBlasio repeatedly sought protection from prison staff, but no action was taken. The gang leader raped him on a number of occasions, which resulted in DeBlasio contracting HIV.

DeBlasio filed grievances about the assaults. Although his initial grievances were timely filed, his subsequent appeals were rejected as untimely or otherwise defective. As a result, DeBlasio was deemed to have failed to exhaust administrative remedies, a prerequisite to filing a lawsuit to recover compensation for his injuries.

⁷⁷ Human Rights Watch, *No Escape: Male Rape in U.S. Prisons* (New York: Human Rights Watch, April 2001), <http://www.hrw.org/legacy/reports/2001/prison/>, p. 132.

⁷⁸ *Ibid.*, p. 132.

Now out of prison, DeBlasio is chronically ill with HIV disease:

I get \$637 a month from the government because of my disability. And that doesn't even pay the bills. And if it wasn't for my family, I'd be out on the street. And they did this.... I should have had some way to have something—to go after damages. This was an individual they knew was a sexual predator, and HIV positive.... You cannot tell me it was not the responsibility of the institution to have protected me.⁷⁹

DeBlasio does not believe that the PLRA was intended to prevent prisoners in his situation from filing suit:

The whole purpose of the PLRA, and this is in the congressional record, was to alleviate some of the frivolous lawsuits.... At no point in time can somebody claiming a sexual assault or physical assault be considered frivolous.... In a situation where my entire ability to support myself, not to mention my health being so bad that my mother had to hold the glass and put the straw into my mouth—this is a situation where there's no doubt that I should be compensated. But these are the types of things that because of the PLRA that they manage to keep out of court.⁸⁰

DeBlasio summed up his situation: “What was a sentence for a white collar crime that should have ended many years ago will never end. I got a life sentence.”⁸¹

Expecting a prisoner to commence the grievance process within a few days of experiencing rape, assault, or a similar event is unrealistic in light of the dynamics of trauma. Terry Kupers, a psychiatrist who has interviewed and evaluated more than a thousand prisoners, explained:

Trauma has specific dynamics of its own. The person goes into a very dysfunctional state right after the trauma. They're flooded with emotions. What we generally find is a dysregulation of emotions and cognition that lasts for many days. This is the period when there are intrusive symptoms,

⁷⁹ Human Rights Watch telephone interview with Keith DeBlasio, Great Cacapon, WV, December 8, 2008.

⁸⁰ Ibid.

⁸¹ Ibid.

flashbacks, et cetera. And in that state a person is unable to carry out an organized task. And that happens to be the same timeline as the deadline for the internal grievances.... Particularly when you're looking at survivors of sexual assault, they don't do anything for a long time. They mull it over. They tend to withdraw and be isolated. And they tend to be flooded with emotions, and for instance, experience shame. And reporting in a formal way is the last thing on their mind.⁸²

Attorney Lisa Freeman, who represents female prisoners who allege sexual abuse by prison staff, agreed:

The time frame of the grievance process basically calls for people who are suffering this very traumatic injury to come forward and complain about it in a timely fashion.... In the community there's a complete understanding that victims of sexual abuse don't come forward with an immediate outcry in most instances.⁸³

⁸² Human Rights Watch telephone interview with Terry Kupers, Oakland, CA, November 14, 2008.

⁸³ Human Rights Watch telephone interview with Lisa Freeman, March 31, 2009.

VI. The Physical Injury Requirement

In 2004, images of sadistic abuse at Iraq's Abu Ghraib prison shocked the world. Photos showed naked prisoners terrorized by snarling dogs, hooded prisoners made to stand in "stress positions," and prisoners piled naked into pyramids for the amusement of guards. If those abuses had occurred in a US prison, compensation for the victims would be barred by the "physical injury" requirement of the PLRA.⁸⁴

The general rule in US law is that mental or emotional injury to a person, if caused intentionally, is harm for which monetary compensation can be claimed ("compensable" in legal terminology). For example, victims of verbal sexual or racial harassment in the workplace can recover money damages for the resulting emotional distress, even if they suffer no physical injury.

The PLRA abolishes this rule for prisoners. It provides that a prisoner may not sue "for mental or emotional injury suffered while in custody without a prior showing of physical injury."⁸⁵ The physical injury requirement simply declares a certain category of injury to be noncompensable, without regard to the merit of the prisoner's claim or the culpability of the defendant. Thus, even a prisoner who is the victim of intentionally abusive staff conduct, resulting in extreme emotional distress, cannot recover compensation. As one federal judge put it,

[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 [under the PRLA].⁸⁶

One witness testifying before the Commission on Safety and Abuse in America's Prisons suggested that this provision of the PLRA "seems to make it national policy ... that mental

⁸⁴ See Bob Herbert, "America's Abu Ghraibs," *New York Times*, May 31, 2004, p. A17 ("Not only are inmates at prisons in the U.S. frequently subjected to similarly grotesque treatment, but Congress passed a law in 1996 to ensure that in most cases they were barred from receiving any financial compensation for the abuse").

⁸⁵ 42 U.S.C. sec. 1997e(e).

⁸⁶ *Siggers-El v. Barlow*, 433 F.Supp.2d 811, 816 (E.D. Mich. 2006) (quoting with approval a hypothetical set forth in plaintiff's brief).

torture is not actionable.”⁸⁷ And indeed, a recent study of 279 survivors of torture in the former Yugoslavia concluded that “psychological stressors cannot be easily distinguished from physical torture in terms of their relative psychological impact.” The study’s authors identified “sham executions, threats of rape, sexual advances, threats against self or family, witnessing the torture of others, humiliating treatment, isolation, deprivation of urination/defecation, blindfolding, sleep deprivation, and certain forced stress positions” as forms of abuse that “seemed to be as distressing as most physical torture stressors.”⁸⁸ Many of these abuses have been documented in US prisons, and under the PLRA, all of them would be considered “mental or emotional injury” that would not be compensable without a “prior showing of physical injury.”

The physical injury provision of the PLRA is particularly anomalous in light of the fact that, under US criminal law, many acts that produce only “mental or emotional injury” are treated as serious crimes. For example, a person may be convicted of assault on a federal officer and sentenced to prison even if there is no physical contact, as long as there is “such a threat or display of physical aggression toward the officer as to inspire fear of pain, bodily harm, or death.”⁸⁹ However, if the same conduct were directed toward a prisoner by a corrections officer, the PLRA’s physical injury requirement would bar any compensation.

Indeed, some courts have ruled that the PLRA bars compensation for even the most extreme mistreatment of prisoners. Stephen Jarriett filed a lawsuit alleging that prison officials forced him to stand in a two-and-a-half foot square cage for about 13 hours, naked for the first eight to ten hours, and unable to sit for more than 30 or 40 minutes of this time. He was in acute pain from a clearly visible swelling in his leg from a previous injury and repeatedly asked to see a doctor, but his requests were ignored. The court ruled that the PLRA barred compensation for this treatment because any physical injury was “de minimis,” a legal term meaning too trivial to deserve the court’s attention.⁹⁰

Although the plain language of the PLRA suggests that any “physical injury” is enough to support compensation, many courts have ruled that injuries they deem minor do not qualify.

⁸⁷ Commission on Safety and Abuse in America’s Prisons, “Confronting Confinement,” p. 86. This provision of the PLRA does not affect the availability of injunctive relief—a legal term meaning a court order to halt ongoing unlawful conduct. However, in the case of a sexual assault or other discrete incident of abuse that is already completed, injunctive relief is not available, and the only possible remedy is money damages.

⁸⁸ Metin Başoğlu, Maria Livanou, and Cvetana Crnobarić, “Torture vs. Other Cruel, Inhuman, or Degrading Treatment: Is the Distinction Real or Apparent?” *Archives of General Psychiatry*, vol. 64, no. 3, 2007, pp. 277-285, <http://archpsyc.ama-assn.org/cgi/content/full/64/3/277> (accessed June 2, 2009).

⁸⁹ *U.S. v. Walker*, 835 F.2d 983, 987 (2d Cir. 1987).

⁹⁰ *Jarriett v. Wilson*, 162 Fed. Appx. 394, 403 (6th Cir. 2005) (dissenting opinion).

Conditions courts have found insufficient to satisfy the PLRA's physical injury requirement include:

- Facial burns⁹¹
- An “open wound” to the head causing “severe pain”⁹²
- Being forced to defecate in one’s clothing and sleep in feces⁹³
- An asthma attack requiring hospitalization in the critical care unit⁹⁴
- Extreme pain resulting from broken teeth with exposed nerve⁹⁵
- Sexual touching and even assault (see details below)

Under the physical injury requirement, courts have also ruled that prisoners who suffer violation of their constitutional right to practice their religion cannot recover compensation for that violation.⁹⁶ And at least one court has ruled that racially discriminatory treatment by prison staff is a “mental or emotional injury” for which the PLRA bars compensation.⁹⁷ Before enactment of the PLRA, prisoners were able to recover damages both for violation of their religious rights and for racial discrimination.⁹⁸

Several courts have relied on this provision of the PLRA to dismiss prisoner claims of sexual abuse by staff. The following claims have been dismissed under the physical injury requirement:

- A prisoner who alleged that a female corrections officer had grabbed his penis and held it in her hand.⁹⁹
- A prisoner who alleged that a prison employee reached between his legs and rubbed his genitals.¹⁰⁰

⁹¹ *Brown v. Simmons*, 2007 WL 654920, at *6 (S.D. Tex. 2007).

⁹² *Diggs v. Emfinger*, 2008 WL 544293, at *4, *report and recommendation rejected on other grounds*, 2008 WL 516378 (W.D. La. 2008).

⁹³ *Brooks v. Delta Correctional Facility*, 2007 WL 2219303, at *1 (N.D. Miss. 2007).

⁹⁴ *Williams v. Smith*, 2006 WL 938980, at *2 (W.D. Ky. 2006).

⁹⁵ *Olivas v. Corrections Corp. of America*, 408 F.Supp.2d 251, 254, 259 n. 4 (N.D. Tex. 2006).

⁹⁶ *Searles v. Van Bebber*, 251 F.3d 869, 876-77 (10th Cir. 2001); *Allah v. Al-Hafeez*, 226 F.3d 247, 250-51 (3d Cir. 2000).

⁹⁷ *Jones v. Pancake*, 2007 WL 4104890, at *3 (W.D. Ky. 2007).

⁹⁸ See *Bryant v. McGinnis*, 463 F. Supp. 373 (W.D.N.Y. 1978) (religious rights); *Mickens v. Winston*, 462 F. Supp. 910 (E.D. Va. 1978) (racial discrimination).

⁹⁹ *Smith v. Shady*, 2006 WL 314514, at *2 (M.D. Pa. 2006).

- Prisoners who alleged that an officer had fondled their genitals and “sexually battered them by sodomy;” the court dismissed the case because “the plaintiffs do not make any claim of physical injury beyond the bare allegation of sexual assault.”¹⁰¹
- 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 de minimis physical injury.”¹⁰²

Courts have also ruled that people who are wrongly imprisoned, or wrongly placed in segregation or solitary confinement, cannot recover compensation due to the physical injury requirement. For example, Christopher Brumett alleged that he was illegally jailed for approximately six months; the court ruled that the PLRA barred any compensation because he did not allege a physical injury.¹⁰³

The PLRA bars damages even for prisoners placed in segregation due to intentional staff misconduct. A court specifically found that prison staff unconstitutionally retaliated against Jeffery Royal for his complaints about inadequate medical care by placing him in segregation for 60 days. Nevertheless, because Royal did not allege any physical injury as a result of this violation of his rights, he could recover only \$1 in damages.¹⁰⁴

According to Dr. Kupers, confinement in segregation, while not compensable under the PLRA, can result in injuries that are very real:

What we know is that long-term isolated confinement causes difficulty thinking, cognitive impairment, and difficulty with memory. A very frequent, almost universal symptom is that they’ve stopped reading, because it’s useless to read—they can’t remember what they read three pages ago.... I’ve

¹⁰⁰ *Cobb v. Kelly*, 2007 WL 2159315 (N.D. Miss. 2007).

¹⁰¹ *Hancock v. Payne*, 2006 WL 21751, at *3 (S.D. Miss. 2006).

¹⁰² *Moya v. City of Albuquerque*, Civil No. 96-1257 DJS/RLP (D.N.M., Memorandum Opinion and Order, Nov. 17, 1997), pp. 3-4.

¹⁰³ *Brumett v. Santa Rosa County*, 2007 WL 4287558, at *2 (N.D. Fla. 2007).

¹⁰⁴ *Royal v. Kautzky*, 375 F.3d 720, 722-24 (8th Cir. 2004).

never met anybody who hasn't been damaged by long-term confinement in segregation.¹⁰⁵

Similarly, in a 2005 filing in the US Supreme Court, a group of psychologists and psychiatrists surveyed the literature on isolated confinement and concluded that “[n]o study of the effects of solitary or supermax-like confinement that lasted longer than 60 days failed to find evidence of negative psychological effects.”¹⁰⁶

Case Study: No Remedy for a Year in Solitary Confinement

Alex Pearson was just two days away from transfer out of Tamms Correctional Center, Illinois’s most restrictive prison, when he was found guilty of a disciplinary infraction. This infraction halted his transfer to a less restrictive prison and extended his time at Tamms by more than a year. A court described conditions at Tamms as follows:

In contrast to inmates in a typical “general population” prison, inmates in Tamms have no contact with other inmates. Instead, they are housed in single cells, which they leave for only an hour each day for “individualized recreation” in a 30-foot long, 15-foot wide partially-covered cement enclosure. Inmates at Tamms do not hold prison jobs, do not interact with other prisoners, and are allowed contact with visitors, if at all, only through a glass partition while in restraints.¹⁰⁷

Pearson described to Human Rights Watch the effects of his extra year at Tamms:

I was at my lowest I could possibly be. I was super stressed out.... I couldn't write, I couldn't eat—it took me at least six months to where I could gain my full functioning back. It affected me physically, and it also affected me emotionally in terms of my relationship with my family. It took me six months

¹⁰⁵ Human Rights Watch telephone interview with Terry Kupers, November 14, 2008. Human Rights Watch has repeatedly documented the damaging effects of isolated confinement, particularly on persons with mental illness. See, for example, Human Rights Watch, *Ill-Equipped*, pp. 145-173; Human Rights Watch, *Cold Storage: Super-Maximum Security Confinement in Indiana*, October 1997, <http://www.hrw.org/legacy/reports/1997/usind/>, pp. 62-74.

¹⁰⁶ *Wilkinson v. Austin*, No. 04-495, Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae in Support of Respondent, 2005 WL 539137, at *4.

¹⁰⁷ *Pearson v. Welborn*, 471 F.3d 732, 734 (7th Cir. 2006).

to get up the strength to write to them and tell them I wouldn't be leaving [Tamms].¹⁰⁸

With the assistance of counsel, Pearson filed a civil lawsuit, and a jury found that prison staff had unlawfully given him the infraction in retaliation for complaining about conditions and for refusing to act as an informant. However, when Pearson tried to recover compensation for the harsh conditions he had endured at Tamms as a result of the retaliatory infraction, the court ruled that recovery was barred by the PLRA because Pearson had suffered no physical injury. Although Pearson testified that during the additional year at Tamms he had become depressed and lost approximately 50 pounds, the court ruled that this did not constitute a physical injury that would allow him to recover compensation.¹⁰⁹

Pearson described the lasting effects of this experience with the PLRA:

You want to think that the justice system works for those who are in the right.... [But] if you are a prisoner, no matter what you do, even if you're right, the justice system is still not going to acknowledge you or treat you like someone else whose rights have been violated. They're not going to treat you the way they would treat an average person, just because you are a prisoner.¹¹⁰

¹⁰⁸ Human Rights Watch telephone interview with Alex Pearson, Pontiac, Illinois, January 7, 2009.

¹⁰⁹ *Pearson v. Welborn*, 471 F.3d 732, 744-45 (7th Cir. 2006).

¹¹⁰ Human Rights Watch telephone interview with Alex Pearson, January 7, 2009.

VII. The PLRA's Application to Children

The chief argument of the PLRA's Congressional sponsors was that prisoners were inundating the courts with lawsuits, many of them frivolous and malicious. But incarcerated children filed very few lawsuits even before the PLRA's passage.¹¹¹ Nevertheless, the PLRA applies with equal force to adult prisoners and to children—both children tried as adults and sent to adult prison, and those detained in the juvenile justice system.¹¹²

While incarcerated children do not often file lawsuits, they are sometimes the victims of serious mistreatment and abuse. For more than a decade Human Rights Watch has documented physical and sexual abuse, as well as unhealthy and inhumane conditions of confinement, suffered by incarcerated children in the United States.¹¹³

In February 2007 a report revealed that two high-ranking administrators at the West Texas State School, a juvenile facility operated by the Texas Youth Commission (TYC), had engaged in sexual conduct with several incarcerated children.¹¹⁴ Under the PLRA, detained children wishing to file a lawsuit over such abuse must first take their complaints all the way through the facility's grievance system. But the same report found that "[y]outh and employee grievance programs at the facility were ineffective and sabotaged."¹¹⁵

The following month, the US Department of Justice Civil Rights Division notified the governor of Texas of its conclusion that staff at TYC's Evins Regional Juvenile Center failed to protect residents from abuse by staff and violence by other children, in violation of the US Constitution.¹¹⁶ The Justice Department characterized the grievance system at Evins as

¹¹¹ Margo Schlanger and Giovanna Shay, "Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act," *University of Pennsylvania Journal of Constitutional Law*, vol. 11, December 2008, p. 152, n. 66.

¹¹² 18 U.S.C. sec. 3626(g)(3), (5); 42 U.S.C. sec. 1997e(h).

¹¹³ See, for example, Human Rights Watch, *Custody and Control: Conditions of Confinement in New York's Juvenile Prisons for Girls*, September 2006, <http://www.hrw.org/sites/default/files/reports/us0906webwcover.pdf>; Human Rights Watch, *No Minor Matter: Children in Maryland's Jails*, November 1999, <http://www.hrw.org/legacy/reports/1999/maryland/>; Human Rights Watch, *High Country Lockup: Children in Confinement in Colorado*, August 1997, <http://www.hrw.org/sites/default/files/reports/us978.pdf>; Human Rights Watch, *Children in Confinement in Louisiana*, October 1995, <http://www.hrw.org/legacy/reports/1995/Us3.htm>.

¹¹⁴ Texas Youth Commission, Office of the General Counsel, "Summary Report for Administrative Review," West Texas State School, http://www.dallasnews.com/sharedcontent/dws/img/02-07/0218tyc_pages1.pdf (accessed May 31, 2009), p. 1.

¹¹⁵ Texas Youth Commission, Office of the General Counsel, "Summary Report for Administrative Review," West Texas State School, http://www.dallasnews.com/sharedcontent/dws/img/02-07/0218tyc_pages2.pdf (accessed May 31, 2009), p. 8.

¹¹⁶ Letter from Wan J. Kim, assistant US attorney general, to Texas Governor Rick Perry, March 15, 2007, <http://www.dallasnews.com/sharedcontent/dws/img/03-07/0316tycletter.pdf> (accessed May 31, 2009), p. 2.

“dysfunctional,” adding that “[o]ne youth reported that he was sitting at a table writing a grievance when a staff member came by and took it away from him.”¹¹⁷

A March 2007 report by the Texas state auditor similarly concluded that “TYC’s youth grievance process does not ensure that all grievances are received and investigated appropriately and in a timely manner.”¹¹⁸ The auditor noted substantial delays in processing grievances; policies that allowed staff members to investigate grievances filed against themselves; and policies allowing youth to be punished for filing grievances deemed frivolous or excessive by staff.¹¹⁹

Deborah P., age 18, has been incarcerated in juvenile facilities operated by the Texas Youth Commission since she was 14 years old. She explained,

When I first came here it was very hard for me to actually fill out a grievance because I never went to school, and my grade level was so low. When I finally did fill out a grievance, they didn’t accept it because of my handwriting.¹²⁰

Deborah P. also said that other youth in the facility do not know how to use the grievance system.¹²¹

The grievance exhaustion requirement has significantly interfered with the ability of adult prisoners to protect their rights in court (see section V, above). But it has had an even more pronounced effect on incarcerated children because of their greater vulnerability and more limited ability to follow complex and multi-step grievance processes.

Former Corrections Director Woodford told Human Rights Watch of her observations in California: “I’ve been in some of the county facilities where I’ve been very concerned about the conditions [for children] ... I think they’re particularly vulnerable, and [have] an inability to reach outside the prison to get to [lawyers] and others, that we all need to be concerned about.” Woodford described a visit to one juvenile facility (which she preferred not to name)

¹¹⁷ *Ibid.*, p. 9.

¹¹⁸ Texas State Auditor’s Office, “An Investigative Report on the Texas Youth Commission,” SAO Report No. 07-022, March 2007, <http://www.sao.state.tx.us/reports/main/07-022.pdf> (accessed May 31, 2009), p. 4.

¹¹⁹ *Ibid.*, pp. 4-8.

¹²⁰ Human Rights Watch telephone interview with Deborah P. (pseudonym), Brownwood, Texas, February 2, 2009. Deborah P. is currently a plaintiff in a class action lawsuit challenging conditions in TYC facilities; a paralegal from her lawyers’ office was on the line during this interview.

¹²¹ *Ibid.*

where “[t]he staff couldn’t clearly articulate to me what the grievance system was.” She believes that children in custody have an especially difficult time with grievances: “I think the rules are very complicated, and I think the literacy among juveniles is usually pretty poor. The ability to find people to help you seems to have been more difficult in the juvenile system.”¹²²

Orlando Martinez has been director of juvenile corrections for the states of Georgia and Colorado. He too told Human Rights Watch that incarcerated children have difficulty exhausting multi-step grievance systems:

I don’t know if they have the reading skills, the language skills, or conceptualization skills, maturity, to be able to follow it. I think they have a short attention span. If it’s not resolved right away, they’re not going to pursue it.... They have learning disabilities, they have mental health issues—their needs are so great.¹²³

Kim Brooks Tandy is a lawyer and executive director at the Children’s Law Center in Covington, Kentucky. She explained the difficulty of getting incarcerated children to navigate, or even understand, multi-step grievance systems: “The concept of ‘exhaustion’ is almost nonexistent with my clients. They are confused by language on grievance forms and do not understand why there are multiple levels at the institution and through the Chief Inspector’s office which must be completed.”¹²⁴

Psychiatrist Terry Kupers explained to Human Rights Watch why it is even more difficult for children to successfully navigate a prison grievance system than for adult prisoners: “On average, juveniles are more impulsive, less capable of planning a course of action and taking steps, particularly when there are timelines for taking those steps.... So they’re just less capable, on average, than an adult of doing that.”¹²⁵

Despite these limitations, courts have enforced the exhaustion requirement against children as strictly as they have against adult prisoners. In one case in Indiana, a detained juvenile’s lawsuit alleging that he had been beaten was dismissed because he had not exhausted the facility’s five-level grievance system. Although it was undisputed that immediately after the

¹²² Human Rights Watch telephone interview with Jeanne Woodford, October 29, 2008.

¹²³ Human Rights Watch telephone interview with Orlando Martinez, April 16, 2009.

¹²⁴ Email correspondence from Kim Brooks Tandy to Human Rights Watch, April 15, 2009.

¹²⁵ Human Rights Watch telephone interview with Terry Kupers, November 14, 2008.

beating he had no access to writing materials and was held in segregation until after the deadline for filing a grievance had passed, the court stated without explanation that “if he had submitted a grievance after his release from segregation ... it would have been considered [by facility officials], even though submitted after the period prescribed for the filing of a grievance.”¹²⁶

In most other settings, society recognizes the limited abilities of children by permitting (and in many cases requiring) their parents or other adults to act on their behalf. For example, a minor cannot bring or defend a lawsuit in US federal court without assistance from a guardian or other adult.¹²⁷ However, federal courts have ruled that the efforts of parents or other adults on behalf of incarcerated children do not satisfy the PLRA’s exhaustion requirement.¹²⁸

S.Z., a resident in an Indiana juvenile detention facility, was raped and repeatedly beaten by other detainees over a period of months. On one occasion he was beaten with “padlock-laden socks”; on another day a beating triggered a seizure-like reaction. Some staff allegedly encouraged the beatings and would arrange fights between detainees, sometimes handcuffing one resident so that others could beat him.¹²⁹

S.Z.’s mother learned of the ongoing abuse of her son and frantically tried to protect him. She complained to staff at the facility, wrote to the facility superintendent, wrote to juvenile court judges, contacted the deputy director of the Department of Corrections, and eventually contacted the governor of Indiana.¹³⁰

However, when S.Z. filed a lawsuit to recover compensation for his injuries, the case was dismissed on the ground that his mother’s actions did not satisfy the PLRA’s exhaustion requirement: “[H]er efforts cannot be said to have satisfied [S.Z.’s] obligation under the Prison Litigation Reform Act to exhaust available administrative remedies, and [S.Z.] did not

¹²⁶ *M.C. ex rel. Crider v. Whitcomb*, 2007 WL 854019, at *3 (S.D. Ind. 2007).

¹²⁷ Fed. R. Civ. P. 17(c).

¹²⁸ This is consistent with the general rule under the PLRA that exhaustion must be completed by the detained person, not by others acting on his or her behalf. See, for example, *Harris v. Le Roy Baca*, 2003 WL 21384306, at *3 (C.D. Cal. 2003) (rejecting the contention that a grievance filed by counsel on prisoner’s behalf satisfies the exhaustion requirement); *El’Shabazz v. City of Philadelphia*, 2007 WL 2155676, at *3 (E.D. Pa. 2007) (grievances filed by prisoner’s father on his behalf did not satisfy PLRA).

¹²⁹ *Minix v. Pazera*, 2005 WL 1799538, at *1-2 (N.D. Ind. 2005). For the purpose of ruling on the state’s motion to dismiss the case, the court accepted these facts as true.

¹³⁰ *Ibid.*, at *2, *4.

satisfy that obligation either.”¹³¹ The grievance system had five steps and would have required S.Z. to file his initial grievance within 48 hours of being raped or beaten.¹³²

In another case, a juvenile filed a lawsuit alleging that staff had hit him, shocked him with a stun gun, and then led him down the hall by his testicles to an isolation cell. Although his lawyer had discussed the incident with the jail administrator, the Federal Bureau of Investigation, the Kentucky State Police, and the Kentucky Department of Juvenile Justice, the court ruled that this did not satisfy the PLRA and the suit was dismissed for failure to exhaust.¹³³

There have also been cases of correctional officials interfering with efforts to help incarcerated youth file grievances. Kim Brooks Tandy told Human Rights Watch of a lawyer from her office who helped two youths complete grievance forms and explained exhaustion requirements to them; both youths had been assaulted by staff and wanted to take legal action. After the lawyer provided this assistance, correctional officials barred her from returning to the facility, and asserted in court papers that she was “destabiliz[ing] the ... population” by “violat[ing] an unwritten ... regulation prohibiting attorneys from actively participating in the grievance process.” A federal judge ordered that the attorney be allowed to enter the facility and meet with detained children, but specified that she “is not permitted to write the grievance application, request the processing of, or process the grievance application.”¹³⁴

Attorney Dori Lewis told Human Rights Watch that the PLRA has made it even more difficult to vindicate the legal rights of detained youth: “The PLRA is making litigation on behalf of juveniles extremely difficult. Finding kids who are willing to come forward and file a complaint inside the institution, while [they are] still there, where everyone knows about it, is almost impossible.”¹³⁵

Former juvenile corrections director Orlando Martinez believes that applying the PLRA to incarcerated youth fails to recognize important differences between children and adults:

¹³¹ *Ibid.*, at *7.

¹³² *Ibid.*, at *3. Because S.Z. was released before the statute of limitations expired, he was able to re-file his lawsuit. Since he was no longer a prisoner, the PLRA did not apply, so his lawsuit was allowed to proceed. Schlanger and Shay, “Preserving the Rule of Law in America’s Jails and Prisons,” *University of Pennsylvania Journal of Constitutional Law*, p. 154 n. 82.

¹³³ *Brock v. Kenton County, KY*, 93 Fed. Appx. 793, 795, 799 (6th Cir. 2004).

¹³⁴ Email correspondence from Kim Brooks Tandy to Human Rights Watch, April 15, 2009; *J.P. v. Taft*, No. 04-CV-692 (S.D. Ohio), order, April 8, 2005, pp. 2, 5.

¹³⁵ Human Rights Watch telephone interview with Dori Lewis, March 31, 2009.

It's almost like the public policy issue is that kids are not like adults, except when it comes to crime. They can't marry, they can't sign contracts, they can't drink, they can't vote, until they're 18. But when it comes to crime, the PLRA just assumes that they'll be able to follow the same process as an adult. But all the scientific research and studies of the brain we have indicate that they don't mature until they're age 25.... It really calls into the question what the purpose of the juvenile court is.... The juvenile court is there to protect and help this kid mature and live crime free. The PLRA is not consistent with that philosophy—it's a very criminal justice process.¹³⁶

¹³⁶ Human Rights Watch telephone interview with Orlando Martinez, April 16, 2009.

VIII. The PLRA's Effect on Prisoners' Access to the Courts

The effect of the PLRA on prisoners' access to the courts was swift and devastating. Between 1995 and 1997, federal civil rights filings by prisoners fell 33 percent, despite the fact that the number of incarcerated persons had grown by 10 percent in the same period.¹³⁷ By 2001 prisoner filings were down 43 percent from their 1995 level, despite a 23 percent increase in the incarcerated population.¹³⁸ By 2006, the number of prisoner lawsuits filed per thousand prisoners had fallen 60 percent since 1995.¹³⁹

If the effect of the PLRA were to selectively discourage the filing of frivolous or meritless lawsuits, as its sponsors predicted, then we would expect to find prisoners winning a larger percentage of their lawsuits after the law's enactment than they did before. But the most comprehensive study to date shows just the opposite: since passage of the PLRA, prisoners not only are filing fewer lawsuits, but also are succeeding in a smaller proportion of the cases they do file.¹⁴⁰ This strongly suggests that, rather than filtering out meritless lawsuits, the PLRA has simply tilted the playing field against prisoners across the board. The author of a comprehensive study on the impact of the act concludes that "the PLRA's new decision standards have imposed new and very high hurdles so that even constitutionally meritorious cases are often thrown out of court."¹⁴¹

The PLRA has also apparently resulted in a significant decline in judicial oversight of conditions in correctional facilities. Between 1995 and 2000, the number of states with less than 10 percent of their prison populations under court supervision more than doubled, from 12 to 28.¹⁴² After tracing the history of US prison litigation from the 1960s to the present, one scholar recently concluded that "the PLRA has contributed to a major decline in the regulation of prisons and jails by court order."¹⁴³ In the absence of other methods of oversight, this decreased monitoring by the courts is cause for concern.

¹³⁷ Schlanger, "Inmate Litigation," *Harvard Law Review*, p. 1634.

¹³⁸ Schlanger, "Inmate Litigation," *Harvard Law Review*, pp. 1559-60.

¹³⁹ Schlanger and Shay, "Preserving the Rule of Law in America's Jails and Prisons," *University of Pennsylvania Journal of Constitutional Law*, pp.141-42.

¹⁴⁰ Schlanger, "Inmate Litigation," *Harvard Law Review*, p. 1664 ("the average likelihood of plaintiffs' success is lower, not higher, on the post-PLRA docket").

¹⁴¹ Schlanger, "Inmate Litigation," *Harvard Law Review*, p. 1644.

¹⁴² Commission on Safety and Abuse in America's Prisons, "Confronting Confinement," pp. 85-86.

¹⁴³ Margo Schlanger, "Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders," *New York University Law Review*, vol. 81, 2006, p. 602.

Former director Woodford told Human Rights Watch that she believes the PLRA has had a negative effect on conditions in US prisons:

I do think the PLRA does need to be reformed. I think that there's prison experts around the country who would agree with that.... I'm told that many people in [the American Correctional Association] believe that as well. That they're starting to see abuses.... A lot of the corrections professionals were telling me that they had concerns that a lot of the steps forward they'd made in Texas were reverting because of the PLRA. And I can see that happening in California too.¹⁴⁴

Former director Martinez similarly believes that the obstacles erected by the PLRA have a negative effect on conditions for incarcerated youth: "I think they need advocacy from the outside. I think that without having either legal advocacy or other advocacy, the conditions at these facilities will continue to deteriorate."¹⁴⁵

¹⁴⁴ Human Rights Watch telephone interview with Jeanne Woodford, October 29, 2008. However, this view is not unanimous. Martin Horn, Commissioner of the New York City Department of Correction, has stated that "[t]here is no real evidence any of [the PLRA's] prudent rules have resulted in the denial of access to the courts on the part of state or local inmates. The concerns [PLRA critics] express are speculative and theoretical." Letter from Martin F. Horn to Honorable John Conyers and Honorable Lamar Smith, April 10, 2008, p. 4.

¹⁴⁵ Human Rights Watch telephone interview with Orlando Martinez, April 16, 2009.

IX. The PLRA Violates Human Rights

Under the US Constitution, treaties signed and ratified by the United States “shall be the supreme law of the land.”¹⁴⁶ The United States has signed and ratified a number of human rights treaties, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), the International Covenant on Civil and Political Rights (ICCPR), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The United States has also signed, but not yet ratified, the Convention on the Rights of the Child (CRC).¹⁴⁷

A bedrock principle of international human rights law is the equality of all persons before the law. Thus the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁴⁸

The ICCPR specifically provides that “[a]ll persons shall be equal before the courts and tribunals.”¹⁴⁹ The PLRA’s restrictions on court access, which apply only to prisoners, are fundamentally at odds with these requirements.

A second foundational principle of human rights law relevant here is that persons whose rights have been violated are entitled to an effective remedy for that violation. The ICCPR requires that ratifying countries “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”¹⁵⁰ The Convention against

¹⁴⁶ United States Constitution, art. VI, cl. 2.

¹⁴⁷ Although the United States has not yet ratified the CRC, as a signatory to the treaty it is obligated “to refrain from acts which would defeat [its] object and purpose.” Vienna Convention on the Law of Treaties, art. 18.

¹⁴⁸ International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992, art. 26.

¹⁴⁹ *Ibid.*, art. 14, sec. 1.

¹⁵⁰ *Ibid.*, art. 2, sec. 3.

Torture similarly requires each ratifying country to “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.”¹⁵¹ ICERD requires that victims of racial discrimination have “the right to seek ... just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”¹⁵²

As this report makes clear, the PLRA in many cases operates to deprive prisoners of an effective remedy—or indeed, any remedy at all—for violations of their rights. Prisoners who fail to comply with all the requirements of their institution’s grievance system may forfeit their right to compensation even for extremely serious injuries. And the PLRA’s physical injury requirement means that even prisoners who are the victims of intentional staff abuse will often be denied a remedy.

The Committee Against Torture, the body of independent experts that monitors state parties’ compliance with the Convention against Torture, most recently reviewed US compliance with the Convention in 2006. In its conclusions and recommendations, the committee recognized that the PLRA’s physical injury requirement contravenes article 14 of the treaty (requiring redress for victims of torture), and called for its repeal:

The Committee is concerned by section 1997e(e) of the 1995 Prison Litigation Reform Act which provides “that no federal civil action may be brought by a prisoner for mental or emotional injury suffered while in custody without a prior showing of physical injury.” (article 14).

The State party should not limit the right of victims to bring civil actions and amend the Prison Litigation Reform Act accordingly.¹⁵³

¹⁵¹Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, ratified by the United States on October 21, 1994, art. 14, sec. 1.

¹⁵² International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969, ratified by the United States on October 21, 1994, art. 6.

¹⁵³ Committee Against Torture (CAT), “Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture, United States of America,” CAT/C/USA/CO/2, May 18, 2006, [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/\\$FILE/Go643225.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/Go643225.pdf) (accessed June 5, 2009), para. 29 (emphasis in original).

Finally, human rights treaties recognize the special status and needs of children. The ICCPR provides:

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.¹⁵⁴

The treaty also requires that “juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status,”¹⁵⁵ and that when juveniles are accused of crime, “the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.”¹⁵⁶

In its General Comment 17, the Human Rights Committee reiterated:

[I]f lawfully deprived of their liberty, accused juvenile persons shall be separated from adults and are entitled to be brought as speedily as possible for adjudication; in turn, convicted juvenile offenders shall be subject to a penitentiary system that involves segregation from adults and is appropriate to their age and legal status, the aim being to foster reformation and social rehabilitation.¹⁵⁷

The Convention on the Rights of the Child similarly requires that:

Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age....¹⁵⁸

Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance[.]¹⁵⁹

¹⁵⁴ ICCPR, art. 24, sec. 1.

¹⁵⁵ *Ibid.*, art. 10, sec. 3.

¹⁵⁶ *Ibid.*, art. 14, sec. 4.

¹⁵⁷ UN Human Rights Committee, General Comment 17, Rights of the Child, E/C.12/GC/17 (2005), para. 2.

¹⁵⁸ Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, art. 37(c).

¹⁵⁹ *Ibid.*, art. 37(d).

The PLRA’s application of the same restrictions to detained children as to adult prisoners cannot be reconciled with this well-established recognition of the special needs and status of children, and the obligation to provide detained children with treatment “appropriate to their age and legal status.”

X. Calls for Reform

As the disturbing effects of the PLRA have come to light, calls to reform the law have come from a variety of quarters. Concerned with the PLRA's negative effects on the health and safety of incarcerated persons, Human Rights Watch consistently has called for its reform or repeal since its enactment in 1996.¹⁶⁰

In February 2007 the American Bar Association (ABA) passed a resolution urging governments at all levels in the United States 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.”¹⁶¹ The ABA specifically called for reform of the PLRA in several respects, including repeal of the physical injury requirement, amendment of the exhaustion requirement, and repeal of the provisions extending the law to children.¹⁶²

The Commission on Safety and Abuse in America's Prisons¹⁶³ similarly recommended significant reform of the PLRA, including elimination of the physical injury requirement and modification of the exhaustion requirement to require exhaustion only of grievance systems that meet minimal standards of fairness.¹⁶⁴ In a November 2007 letter to Congress, the commission's co-chairs summarized its conclusions regarding the PLRA:

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....

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

¹⁶⁰ See, for example, Human Rights Watch, *Ill-Equipped*, p. 10; Human Rights Watch, *No Escape*, p. 12; Human Rights Watch, *All Too Familiar*, pp. 10-11.

¹⁶¹ American Bar Association, Criminal Justice Section, “Report to the House of Delegates: Recommendation,” approved by the House of Delegates February 12, 2007.

¹⁶² *Ibid.*

¹⁶³ The Commission on Safety and Abuse in America's Prisons, convened by the nonprofit Vera Institute of Justice, was co-chaired by a former US attorney general and a former appellate judge. Its 20 members included prison administrators, scholars, and a former director of the Federal Bureau of Investigation.

¹⁶⁴ Commission on Safety and Abuse in America's Prisons, “Confronting Confinement,” pp. 86-87.

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....

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 court 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.¹⁶⁵

Most recently, in January 2008 the chairman of the National Prison Rape Elimination Commission¹⁶⁶ wrote to Congress to express the Commission’s view “that certain PLRA provisions frustrate Congress’s goal of eliminating sexual abuse in US prisons, jails, and detention centers.”¹⁶⁷ The chairman explained,

Medical professionals, corrections experts, and advocates have provided us with extensive information indicating that the PLRA’s requirement that a prisoner successfully exhaust all available administrative remedies before filing suit has undermined the ability of sexual assault victims to gain access to the crucial external oversight of the judicial branch—and as a result, has obstructed their ability to obtain the relief and redress to which they may be legally entitled. Because of the emotional trauma and fear of retaliation or repeated abuse that many incarcerated rape victims experience, as well as the lack of confidentiality in many administrative grievance procedures, many victims find it extremely difficult—if not impossible—to meet the short timetables of administrative procedures.

¹⁶⁵ Letter from Nicholas de B. Katzenbach and Hon. John J. Gibbons, co-chairs of the Commission on Safety and Abuse in America’s Prisons, to Chairman John Conyers Jr., US House of Representatives Committee on the Judiciary, et al., November 8, 2007, pp. 2-3.

¹⁶⁶ The National Prison Rape Elimination Commission, established by the National Prison Rape Elimination Act of 2003, is chaired by a federal trial judge. Its eight members include a former prison administrator, academics, a former prisoner, and a Human Rights Watch staff member.

¹⁶⁷ Letter from Reggie B. Walton, chairman, National Prison Rape Elimination Commission, to Representatives Bobby Scott (D-VA) and Randy Forbes (R-VA), January 24, 2008.

Additionally, we have learned that the physical injury requirement of the PLRA fails to take into account the emotional and psychological damage incurred by victims of sexual assault and abuse, even in the absence of actual or obvious physical injury. Indeed, we were shocked to learn that there have even been cases in which courts have ruled that actual rape does not constitute physical injury under the PLRA. Very real non-physical harms can result from a wide array of sexual abuse situations in prisons and jails, such as explicit sexual gestures and harassing language, groping of breasts and touching of genitals, or being forced to masturbate another or in front of another. Additionally, sexual assault victims often suffer from rape trauma syndrome, a type of post traumatic stress disorder; and a range of psychological distress (fear, emotional numbness, flashbacks, nightmares, obsessive thoughts, major depressive episodes, and anger) can occur months or years after an incident. We have become distressingly confident that victims of sexual assault are losing vital protections and avenues for relief as a result of the legislative provision requiring an actual physical injury.¹⁶⁸

¹⁶⁸ Ibid.

XI. Conclusion

The PLRA has had a devastating effect on the ability of incarcerated persons to protect their health and safety and vindicate other fundamental rights. While justified by the PLRA's sponsors as necessary to prevent frivolous lawsuits, the requirement that prisoners first take their complaints through the facility's grievance system, no matter how complicated or multilayered the process or how short the deadlines, has barred relief for prisoner claims regardless of their merit. The provision prohibiting compensation for "mental or emotional injury" unless accompanied by physical injury has placed an entire category of improper and even abusive staff behavior beyond the reach of the law. And the PLRA's application to children has made it even more difficult for courts to protect the rights of this vulnerable population, even in cases of ongoing physical or sexual abuse.

Even some judges who stand to benefit from reduced workload as a result of the PLRA have found the law unhelpful. One federal appellate judge expressed his frustration:

I ... wonder aloud why this sort of administrative/procedural detail under the PLRA has to be so complicated. I'd say that when an experienced district judge ... is reversed three times in the same case on a little point like this, something is rotten in Denmark.... I always thought the PLRA was supposed to make the handling of prisoner litigation more efficient. If that's its goal, and this sort of thing is its result, Congress should go back to the drawing board.¹⁶⁹

Thirteen years after the enactment of the PLRA, it is time for Congress to amend the law.

Prisons, jails, and juvenile detention facilities are unique environments. On the one hand, they are places where liberty is severely restricted—where men, women, and children live, often for years or decades at a time, under the constant surveillance and near-absolute power of custodial staff. Even their ability to communicate with the outside world is restricted, with letters and telephone calls subject to monitoring and censorship.

At the same time these facilities are, of necessity, closed institutions to which outside access is limited. Most prisons severely restrict access by the news media and many flatly prohibit media interviews with prisoners, practices that have been upheld by the US

¹⁶⁹ *Hyche v. Christensen*, 170 F.3d 769, 771 (7th Cir. 1999) (Evans, J., concurring).

Supreme Court.¹⁷⁰ Therefore, the kind of public and media scrutiny that helps prevent abuses of power in other government institutions simply does not operate in places of incarceration.

This combination of virtually unlimited power and lack of transparency creates a potential for abuse—a potential that, as this report makes clear, is realized all too frequently in prisons, jails, and juvenile detention facilities. If abuse is to be prevented, and remedied when it does occur, there must be an outside agency with the power to compel access to information and order a remedy in appropriate cases.

In the United States this role has historically been carried out by the federal courts. But the PLRA, by erecting barriers to court access that apply only to incarcerated persons, has severely limited the ability of the courts to perform this function. Reasonable amendments to the PLRA would remove these barriers while leaving intact the law's central feature: the preliminary screening of prisoner cases and early dismissal if they are plainly without merit. Congress should enact these amendments without delay to restore the rule of law to prisons, jails, and juvenile detention facilities in the United States.

¹⁷⁰ *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974).

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