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## **Keeping Jailers from Keeping the Keys to the Courthouse: The Prison Litigation Reform Act's Exhaustion Requirement and Section Five of the Fourteenth Amendment**

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Joseph Alvarado<sup>1</sup>

### I. INTRODUCTION

Prisons, jails, and other detention facilities in the United States are dangerously overcrowded, creating highly stressful environments for inmates and prison staff alike. As tensions run high, so do the occurrences of civil rights violations. In February of 2009, a three-judge panel in California tentatively ordered the release of approximately fifty-seven thousand inmates on the grounds that overcrowding in state prisons denied prisoners their right to mental health and medical treatment.<sup>2</sup> In 2007, more than seventy thousand prisoners were sexually abused in the United States, according to Human Rights Watch.<sup>3</sup> In 2006, the Orleans Parish Prison lost its accreditation by the National Commission on Correctional Health Care because of “service shortfalls” after Hurricane Katrina, and now it has one of the highest prison mortality rates in the country.<sup>4</sup>

Subjecting a prisoner to cruel and unusual punishment is a violation of the Eighth Amendment to the U.S. Constitution.<sup>5</sup> State prisoners can bring federal claims against a prison for maltreatment or inadequate conditions by bringing a claim under title 42 of the U.S. Code, Section 1983, for violations of their federal rights.<sup>6</sup> Federal prisoners can bring a “Bivens” claim, which allows federal prisons to be sued in federal court for constitutional violations.<sup>7</sup> Before a civil rights claim (or any claim pursuant to a federal statute) against the prison or prison officials can be filed in federal court, an inmate must first take his or her grievance through the prison’s own administrative remedy system.<sup>8</sup> The administrative remedy

processes can be strict, difficult, and implemented inconsistently, resulting in an unfair tolling of statutes of limitation and civil rights violations committed with impunity.

A legislative effort known as the Prison Litigation Reform Act (PLRA) purportedly sought to reduce the number of frivolous lawsuits filed by inmates.<sup>9</sup> The PLRA was passed in 1996 with the stated goal of stemming the flow of frivolous lawsuits that some politicians felt were inundating the federal court system.<sup>10</sup> Within the act lies an exhaustion requirement which requires inmates with grievances against an institution to exhaust all administrative remedies that the institution avails to them before they bring their suit to federal court.<sup>11</sup> The PLRA has not made prisoner grievance systems more effective: while the number of lawsuits has in fact decreased following the passage of the PLRA, evidence suggests that meritorious and legitimate claims have been prevented from being raised right along with the frivolous ones.

In November of 2007, in response to the many unintended consequences of the PLRA, the U.S. House of Representatives introduced the Prison Abuse Remedy Act (PARA) to make sorely needed amendments to several PLRA provisions, including the exhaustion requirement.<sup>12</sup> Unfortunately, the bill died in the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security with the close of the 110th Congressional Session.<sup>13</sup>

It is imperative that Congress address the inadequacies of the PLRA by reintroducing PARA in the next Congressional Session. Congress should pass legislation requiring all prisons and jails to implement uniform grievance procedures or at least hold all prisons and jails to the same set of minimum standards that would ensure inmates with legitimate, meritorious claims access to the federal judicial system. This can be achieved either by expanding the requirements of the PLRA or by a separate action.

Part I of this article will discuss the particulars of what the PLRA requires, its historical background, and its consequences. Part II addresses the PLRA's exhaustion requirement and the consequences attributable to

that provision, such as the difficulties and limitations of administrative remedy procedures. Part III discusses what changes are needed and what efforts have or have not been made to implement those changes, including what led to the PARA's rise and fall. Part IV analyzes the strengths and weaknesses of those recent efforts and proposes additional provisions for the PARA; and that, as an alternative, Congress can exercise its Section Five powers of the Fourteenth Amendment to implement blanket remedies to standardize administrative remedy procedures.

## II. THE PRISON LITIGATION REFORM ACT

The PLRA lays out the federal guidelines for inmates to bring a federal claim against their prison. The legislative history of the PLRA (described in section A below) provides insight into the political and social context under which the act was passed; and thus, how the act's strict and rigid requirements (described in section B below) were rationalized. Though the PLRA's proponents have considered the legislation a success, section C examines its unintended consequences, most notably the obstacles it created for legitimate and meritorious claims to be heard.

### *A. Historical Background of the PLRA*

Prior to the 1960s, prisoners were among those minority groups that traditionally lacked the political power to pursue the expansion and protection of constitutional rights.<sup>14</sup> As a result of the successes of civil rights litigation in the 1960s under the Warren Court, the federal judiciary gained "broad equitable powers to undertake significant prison reform."<sup>15</sup> In 1964, the Supreme Court case *Cooper v. Pate*<sup>16</sup> expanded the availability of 42 U.S.C. § 1983,<sup>17</sup> allowing prison inmates to bring suit against prisons that deprived them of their constitutional rights.<sup>18</sup> In *Cooper*, an inmate in the Illinois State Penitentiary was allowed to bring a cause of action against the state for the denial of equal treatment on the basis of religion.<sup>19</sup> The inmate had been denied permission to buy certain religious publications,

and he alleged religious discrimination as a basis for his cause of action.<sup>20</sup> This case marked the beginning of an era of prison reform litigation.<sup>21</sup> Given the distrust in state and lower courts to protect criminal procedural civil rights, the federal judiciary expanded “individual liberties, including new criminal procedural protections, [but] also created more constitutional limitations on the states.”<sup>22</sup> From the 1960s through the 1980s, prisoners and prisoners’ rights activists took advantage of the expanded availability of 42 U.S.C. § 1983<sup>23</sup> by filing more lawsuits.<sup>24</sup> However, beginning in the late 1970s, many others, including the Rehnquist Court, became displeased with the federal courts’ involvement with prison operations, particularly at the state level.<sup>25</sup>

In 1980, Congress—signaling their own concern with the rising number of federal suits—enacted the Civil Rights of Institutionalized Persons Act (CRIPA) as a means to reduce the number of federal civil rights claims brought by inmates.<sup>26</sup> In order to achieve that end, the act required adult prison inmates in state facilities to exhaust their administrative remedies at the state level prior to bringing their claims in federal court.<sup>27</sup> CRIPA authorized suits by prisoners and established several guidelines concerning the deprivation of their constitutional rights.<sup>28</sup>

One CRIPA provision included the promulgation of voluntary “minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility.”<sup>29</sup> If the institution’s administrative remedies did not meet these minimum standards, however, the act did not require their exhaustion before the claims were brought to court.<sup>30</sup> As such, the act also required that the U.S. Attorney General develop a procedure for the review and certification of the individual administrative remedy procedures (ARPs).<sup>31</sup>

According to the U.S. Department of Justice’s Bureau of Justice Statistics, the number of federal civil rights claims filed by state prisoners continued to rise, despite the intended purpose of CRIPA.<sup>32</sup> Indeed, the

period between 1980 and 1996—the year in which the PLRA was signed into law by President Clinton—petitions filed by federal and state inmates in U.S. district courts nearly tripled from 23,230 to 68,235.<sup>33</sup>

This increase in federal civil rights claims filed by inmates was primarily attributed “to the increase in the [s]tate prison population.”<sup>34</sup> The total U.S. prison population—state and federal—increased by more than three-and-a-half times within this same time period according to the Justice Department’s study (from 329,821 in 1980, to 1,181,919 in 1996).<sup>35</sup> In the years following the passage of CRIPA, the United States also saw the construction of approximately one thousand new prisons and jails.<sup>36</sup> Despite the boom, prisons and jails still became increasingly overcrowded during that time.<sup>37</sup>

Overcrowded facilities are known to be dangerous and degrading,<sup>38</sup> so it is understandable that the potential for grievances and lawsuits would be significantly increased as stress and frustration grows within the prisons. Given the fact that the number of civil rights claims after CRIPA’s enactment remained proportionate to the prison population, it is arguable whether CRIPA was ineffective at achieving its intended goal of reducing the number of federal civil rights claims.

Regardless of whether CRIPA was actually successful, in 1995, Congress sought yet again to reduce the number of federal claims filed by prison inmates, attributing the high volume to the ease with which prisoners were able to file lawsuits. Congress was seemingly very concerned with the federal judicial resources spent on frivolous lawsuits and the federal judiciary’s micromanagement of prisons.<sup>39</sup> The 103<sup>rd</sup> Congress passed the PLRA while neglecting to confront the causes of legitimate civil rights petitions or the causes of rising incarceration levels.

In April 1996, the PLRA was passed as part of the Omnibus Consolidated Rescissions and Appropriations Act, an emergency appropriations bill that ended the federal government budget standoff in 1996.<sup>40</sup> The legislature attempted to strike the balance between reducing the number of frivolous

lawsuits filed by prisoners and maintaining the ability of prisoners to file meritorious cases.<sup>41</sup> In the debates preceding the passage of the bill, a supporter of the PLRA, Senator Orrin Hatch, stressed that the high number of frivolous lawsuits filed by inmates impeded the courts' ability to consider meritorious claims, and that he did "not want to prevent inmates from raising legitimate claims."<sup>42</sup> A co-sponsor of the bill, Senator Strom Thurmond, claimed that the act would allow the filing of meritorious claims but that a judge would have "broader discretion to prevent frivolous and malicious lawsuits filed by prison inmates."<sup>43</sup> These concerns came together to form the basis of the PLRA's requirements.

*B. Requirements of the PLRA*

The PLRA established several hurdles for inmates wishing to bring federal lawsuits. In addition to the exhaustion requirement, the PLRA requires that an inmate show physical injury before damages "for mental or emotional injury suffered while in custody" may be recovered.<sup>44</sup> Inmates that bring an action, but have had at least three previous actions dismissed "for being frivolous, malicious, or for failing to state a claim for which relief may be granted," must pay the entire filing fee.<sup>45</sup> Indigent filers are also required to pay a portion of the filing fee.<sup>46</sup> One provision of the PLRA threatens filers of malicious or harassing suits with the revocation of earned good time credit,<sup>47</sup> while another simply limits the courts' power to grant injunctive relief to prisoners, regardless of whether the suit is frivolous.<sup>48</sup>

Civil rights groups have described the PLRA as "extremely anti-prisoner, and designed to limit a prisoner's access to the federal courts."<sup>49</sup> Compared with the CRIPA<sup>50</sup>—the PLRA's predecessor<sup>51</sup>—the provisions are highly burdensome and discouraging to prisoners who have grievances and legitimate complaints. While the stated intention of the act was to filter out the number of frivolous lawsuits filed from within prison walls, legitimate lawsuits have been filtered out as well.<sup>52</sup>

### *C. Effects and Consequences of the PLRA*

The PLRA's requirements have made filing a complaint more expensive, more time-consuming, and more dangerous for prisoners.<sup>53</sup> As such, a number of unintended consequences have resulted, including the inability of cases concerning, rape, assault, and religious rights violations to get filed in federal court.<sup>54</sup> At best, it seems disingenuous that these are the types of cases that Congress truly envisioned would get more attention in lieu of the frivolous claims.

The provisions in the PLRA, not contained in the CRIPA, that are mainly responsible for producing the unintended consequences are the physical injury requirement, the "three-strikes" provision, and the exhaustion requirement. Whereas the CRIPA only applied to convicted adults in any correctional facility,<sup>55</sup> the PLRA expanded the affected population to "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program."<sup>56</sup> As a result, the provisions of the PLRA also constrain juvenile detainees, pre-trial detainees, and federal prisoners.

#### **1. The Physical Injury Requirement**

42 U.S.C. Section 1997e(e)—one of the statutes amended by the PLRA—requires that an inmate must show that a physical injury has been suffered before the inmate can recover damages for a claim of mental or emotional distress. This has caused several problems.<sup>57</sup> Because the statute fails to define what constitutes a physical injury, many courts are split on the issue. Some courts have held that the physical injury requirement includes all injuries, including non-physical constitutional rights violations,<sup>58</sup> still other courts have ruled that those rights are non-compensable.<sup>59</sup> Some courts have even ruled that a sexual assault is not a physical injury,<sup>60</sup> a significant concern considering the prevalence of sexual abuse in prisons.<sup>61</sup>



## 2. The Three Strikes Provision

The “three strikes” provision (often referred to as the “frequent filer provision”) limits the number of times an inmate can file a federal case in a given amount of time. A consequence is that some inmates who are prone to frequent abuse, either from other inmates or prison staff, are barred from filing legitimate claims within the given amount of time.<sup>62</sup> Sometimes, a failure to exhaust an administrative remedy as a result of some minor technical error will count as a dismissal, and thus count against an inmate’s permitted number of claims.<sup>63</sup>

## 3. The Exhaustion Requirement

Because the exhaustion requirement seems to exacerbate the consequences of the two aforementioned requirements (the physical injury requirement and the three strikes provision) of the PLRA, it is the main focus of this article. The consequences of the exhaustion requirement will be covered in Part II.

### III. SPECIFIC CONSEQUENCES OF THE PLRA’S EXHAUSTION REQUIREMENT

Many key consequences of the PLRA stem from its exhaustion requirement. 42 U.S.C. Section 1997e(e) states that inmates must first exhaust all administrative remedies that are available to them before they may bring their claim to federal court.<sup>64</sup> Prior to the U.S. Supreme Court’s recent rulings in *Porter v. Nussell*, *Booth v. Churner*, and *Woodford v. Ngo*, there was much controversy and many circuit court splits as to the meaning of the exhaustion requirement and what actually constituted exhaustion.<sup>65</sup> Some have argued that this was the result of poorly written and hastily passed legislation, evidenced by its method of passage in an omnibus appropriations bill.<sup>66</sup> Regardless, the Supreme Court has provided some clarity, even though some new questions have been raised as a result, and some lingering questions remain unanswered.

A. Porter v. Nussel and Booth v. Churner

While “prison conditions” went undefined in the PLRA, leaving ambiguity as to what inmates could sue for, the Supreme Court has held that the term “prison conditions” refers to everything that takes place within a prison, from inadequate living conditions to excessive force.<sup>67</sup> In *Porter v. Nussel*, Nussel, an inmate in a Connecticut prison, brought a federal suit against the institution for a violation of his constitutional right to be free from cruel and unusual punishment, as he was severely beaten by prison guards, following a pattern of harassment.<sup>68</sup> However, he did not file a grievance with the prison prior to his federal court filing, as required by the PLRA when suing for inadequate “prison conditions” under Section 1983.<sup>69</sup> The Court held “that the PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.”<sup>70</sup>

The Supreme Court also held that in order to comply with the PLRA’s exhaustion requirement, an inmate must exhaust the prison’s grievance system, regardless of whether the grievance system offers the type of relief the inmate is seeking.<sup>71</sup> In *Booth v. Churner*, Booth was a prisoner in a Pennsylvania state prison, and he sued for an Eighth Amendment violation of excessive force.<sup>72</sup> Booth sued for monetary damages in federal court as the Pennsylvania grievance system did not provide monetary remedies.<sup>73</sup> However, the Court explained that it is the administrative process itself that is to be exhausted, not merely the relief offered by individual grievance processes.<sup>74</sup> As a result, even though most grievance systems do not allow for relief in the form of damages, a prisoner must file a grievance and await the inevitable denial before filing a claim in federal court.<sup>75</sup>

B. Woodford v. Ngo

In 2007, the Supreme Court ruled that the exhaustion requirement was not met “by filing an untimely or otherwise procedurally defective

administrative grievance or appeal.”<sup>76</sup> Before *Woodford v. Ngo*, the federal appellate circuits were split as to whether an administrative grievance filed after a prison’s set deadline, and consequently rejected by the prison’s administration, was considered an exhaustion of an administrative remedy.<sup>77</sup>

In *Woodford*, the exhaustion requirement was challenged by an inmate serving a life sentence in a California prison.<sup>78</sup> The inmate was segregated from the general population for over one month “as punishment for alleged ‘inappropriate activity’ with volunteer Catholic priests.”<sup>79</sup> Upon his release from segregation, Ngo was prohibited from participating in “evening fellowship and bible study sessions” and from corresponding with a former chapel volunteer.<sup>80</sup> He filed a grievance six months later, arguing that his punishment was ongoing and continuous, but his grievance and subsequent appeal were denied because the original grievance was not filed within fifteen days of the “event or decision being appealed.”<sup>81</sup> He then filed his claim in district court, but it was dismissed for failure to exhaust his administrative remedies; the Ninth Circuit subsequently reversed.<sup>82</sup> The Supreme Court reversed and remanded the Ninth Circuit decision, holding “that proper exhaustion of administrative remedies is necessary.”<sup>83</sup>

The prison argued that the exhaustion requirement meant “proper exhaustion,” i.e., “that a prisoner must complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as a precondition to bringing suit in federal court.”<sup>84</sup> The Court agreed that this interpretation was necessary “because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings.”<sup>85</sup> The Court focused on the wording of the PLRA when it stated that the exhaustion provision will not allow a judicial remedy to “be sought or obtained unless, until, or before certain other remedies are exhausted.”<sup>86</sup>

Indeed, because of the use of the word “until,” the Court deemed the wording of the PLRA closer to the wording of the traditional doctrine of administrative exhaustion.<sup>87</sup> Appealing to the well-established “Doctrine of

Exhaustion of Administrative Remedies,”<sup>88</sup> which provides “that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted,”<sup>89</sup> the Court explained that the PLRA exhaustion provision means using “all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits).”<sup>90</sup> The Court explained that the only time they can “topple over administrative decisions” is when the decision was made in error and that the error was appropriately objected to according to the administrative rules.<sup>91</sup> Under a plain reading, “42 U.S.C. § 1997e(a) strongly suggests that the PLRA uses the term ‘exhausted’ to mean what the term means in administrative law, where exhaustion means proper exhaustion. Section 1997e(a) refers to ‘such administrative remedies as are available,’ and thus points to the doctrine of exhaustion in administrative law.”<sup>92</sup>

The ruling in *Woodford* has very serious implications. If a grievant misses a deadline to file a grievance, at any level of the administrative process—including appeals—and the prison administration refuses to review the grievance on those grounds, the grievance will be dismissed, and the remedies will not be deemed exhausted. Consequently, the grievant with a legitimate meritorious claim will be left without an avenue for relief. The ruling in *Woodford* has placed a significant burden on prisoners in states whose ARPs make it extremely difficult for a grievant to meet his or her deadlines. The next subsection will address how the difficulty in securing relief varies among the states.

### C. Administrative Remedy Procedures

In *Woodford*, the Court stated that “[c]orrections officials concerned about maintaining order in their institutions have a reason for creating and retaining grievance systems that provide—and that are perceived by prisoners as providing—a meaningful opportunity for prisoners to raise meritorious grievances.”<sup>93</sup> Indeed, one of the reasons for the exhaustion

requirement is to give the prison the opportunity to address the grievance on their own before they get haled into court.<sup>94</sup> Notwithstanding these reasons, administrative remedies are often difficult to follow.

Most ARPs have a three-step process. The first step requires a prisoner to make an effort to informally resolve the matter. The second step, if the first was unsuccessful and the prisoner can provide such proof, requires the prisoner to formally appeal.<sup>95</sup> The third step usually involves another formal appeal.<sup>96</sup> The deadlines and requirements for each step vary among different facilities.<sup>97</sup>

ARPs exist in every level and type of detention facility. The Federal Bureau of Prisons (BOP) sets the guidelines for ARPs that are to be implemented at both government-run prisons and private prisons contracted to house federal prisoners.<sup>98</sup> At the state and local level, ARP guidelines are usually set by the state and implemented by the institutions that run the facilities.<sup>99</sup> Such facilities include state penitentiaries, city and county jails, and juvenile detention centers.

### **1. The Federal Administrative Remedy Policy**

As many of the challenges to the exhaustion requirement stem from state ARPs, some of the PLRA's critics have held the federal system to be a model for individual state procedures. The BOP system is said to be designed to handle inmate grievances more efficiently, somewhat fairly, and with a higher level of investigation.<sup>100</sup> It is intended to be applied consistently throughout all federal prisons regardless of the state.<sup>101</sup>

The BOP's ARP for federal prisons requires an informal attempt by the aggrieved prisoner to resolve the issue before requesting a formal administrative remedy.<sup>102</sup> Both the informal and formal processes are established by the wardens of each facility, both of which must be completed within twenty days of the event that is the basis of the request.<sup>103</sup>

The BOP's ARP allows for extensions under four circumstances: (1) the inmate must have been in-transit and thus unable to obtain the necessary

documents; (2) the inmate must have been physically incapable of preparing a request (though assistance to illiterate, disabled, or non-English literate inmates is to be ensured by the warden);<sup>104</sup> (3) the inmate had to wait an unusually long time for a response to an informal resolution attempt; or (4) if the prison staff had verified a claim, the response to a request for copies was delayed.<sup>105</sup> Only one claim (and any related issues) may be placed on a single grievance form; noncompliance will result in rejection. The facilities are required to provide responses and reasonable time extensions for resubmission in writing, when resubmission is allowed. Decisions not allowing resubmission may also be appealed.<sup>106</sup>

There are two levels of formal appeals. First, appeals from a warden's decision are due to the regional director's office within twenty days of the warden's dated response; and second, appeals from the regional director's office are due to the general counsel's office within thirty days of that dated response.<sup>107</sup>

While the BOP system is preferable to many state procedures, it is not without faults. If one counts the initial filing as an appeal to the informal attempt at resolution, then there are a total of three appeals for the inmate to pursue, and therefore three deadlines to meet (the margin of error for technical mistakes or not meeting deadlines is logically increased with every additional step, possibly resulting in dismissal and thus, an inability to exhaust all administrative remedies).<sup>108</sup> The deadline for the initial appeal is twenty days.<sup>109</sup> However, if the inmate is initially confident that the informal attempt will be successful, but is subsequently unsatisfied with the result, the time in which to prepare a formal complaint (or first appeal) is shortened. Not only does this put the grievant at a disadvantage, it deems the informal process futile if the grievant decides to pursue and prepare for both avenues simultaneously. Although the rules allow for a waiver of the informal attempt if the issue is demonstrably sensitive (i.e., if the inmate's safety would be compromised) and is filed at a level above the warden,<sup>110</sup> or

if the warden allows for an exception after a request, the grievant still incurs more procedural requirements (and thus an increased margin of error).<sup>111</sup>

## **2. Variance of Administrative Remedy Policies within the Ninth Circuit**

A brief look at two states in the Ninth Judicial Circuit provides a snapshot of the differences between various state ARPs. California, the state with the highest incarceration rate in the nation, has a policy that is very similar to the BOP's system.<sup>112</sup> While the BOP requires the formal grievance to be filed within twenty days of the subject event, the California system requires it to be filed within fifteen working days.<sup>113</sup> Because California requires the same procedure to be used for filing grievance systems as it does for challenging disciplinary infractions, there are two appellate procedures after the initial formal grievance is filed, resulting in a total of four levels.<sup>114</sup> Although the informal level requires confronting the staff involved in the inmate's grievance, it may be waived if it "may result in a threat to the appellant's safety or cause other serious and irreparable harm."<sup>115</sup>

In addition to the higher standard that California requires in order to bypass the informal level, the same concerns raised by the BOP system are also raised by the California system, (i.e., that more appellate levels invite more mistakes and informal grievances are discouraging). Also, as far as necessary conditions required for informal resolutions are concerned, even if inmates do not sense imminent danger when they complete the informal level, they may still feel discouraged to take that initial step, for fear of ridicule.<sup>116</sup>

Washington provides a slightly longer deadline for the initial complaint to be filed—twenty business days.<sup>117</sup> Though it does not have an informal remedy requirement, it does have three appellate processes.<sup>118</sup> The deadline to file these appellate processes is only two days.<sup>119</sup>

While California and Washington have some advantages and disadvantages for inmates when compared with the BOP (i.e., different

numbers of appeal levels and different timelines for reporting and appeals), both states allow the PLRA to be applied differently within the same circuit. The U.S. Supreme Court has attempted to interpret the exhaustion requirement with limited success.

*D. Jones v. Bock*

A recent, unanimous U.S. Supreme Court decision has allowed some leniency and fairness with regard to different interpretations of the exhaustion requirement. In *Jones v. Bock*, three petitioners from separate correctional facilities in Michigan challenged three of the Sixth Circuit's then-existing interpretations of the PLRA: specifically, whether a prisoner must prove exhaustion in a complaint, whether the prisoner must name defendants in a complaint not named in the grievance, and whether failure to exhaust a single issue is grounds to dismiss an entire complaint.<sup>120</sup>

First, the Court ruled that inmates do not necessarily prove exhaustion in a complaint under the PLRA because Federal Rule of Civil Procedure (FRCP) 8(a) only requires “‘a short and plain statement of the claim’ in a complaint, Rule 8(c) identifies a non-exhaustive list of affirmative defenses that must be pleaded in response” and “that courts typically regard exhaustion as an affirmative defense.”<sup>121</sup> Thus, the Court stated that the PLRA does not require “a prisoner to allege and demonstrate exhaustion in his complaint.”<sup>122</sup>

The second issue addressed by the *Jones* court was whether, under the PLRA, all defendants named in the complaint must have been identified in the original grievance. The Court reasoned that:

Compliance with prison grievance procedures . . . is all that is required by the PLRA to ‘properly exhaust.’ The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion.<sup>123</sup>



Therefore, because Michigan's ARP did not require the identification of particular prison officials, it was not required under the PLRA, per se.<sup>124</sup>

The third issue was whether all claims presented in a complaint must be exhausted at the administrative level before bringing them in a single federal action in compliance with PLRA. The Court explained that "[t]here is no reason [that] failure to exhaust on one [claim] necessarily affects any other."<sup>125</sup> Thus, only those claims that have not been exhausted pursuant to the exhaustion requirement may be dismissed; "if a complaint contains both good and bad claims, the court proceeds with the good and leaves the bad."<sup>126</sup>

The *Jones* decision clarifies ambiguity within the PLRA and promotes consistency in its implementation among the various states. However, when we consider the Court's ruling in regard to naming individual officials in a grievance claim and the power that prison officials have in determining what will constitute a proper federal constitutional claim, the Court's "hands off" attitude toward prison administration becomes clear.<sup>127</sup> If a prison's ARP contains certain requirements for a grievance to be exhausted, then the ease or difficulty with which a prisoner can bring a federal claim is dependant upon those requirements. If a particular prison administration sets unreasonable or arbitrary requirements that a given prisoner is unable to meet, then it is because of that prison's administration that the prisoner is unable to bring a claim. This issue will be addressed further in Part III.

#### *E. Juvenile Detention Centers*

The PLRA's exhaustion requirement carries heightened consideration when we consider the fact that the PLRA, as opposed to its predecessor, the CRIPA, applies to incarcerated juveniles.<sup>128</sup> According to a 2007 report, more than 100,000 juveniles were incarcerated in the United States, either in juvenile detention centers or adult facilities.<sup>129</sup> In 2005 and 2006, there were close to seventeen allegations of sexual violence made for every 1,000 youths held in juvenile detention.<sup>130</sup> Female youths are most at risk of

experiencing sexual abuse by staff.<sup>131</sup> Part of the problem is that in the United States, male officers are allowed to work in all areas of female detention centers.<sup>132</sup> These statistics suggest that juvenile detainees face constitutional violations as well. It is worth noting that while the PLRA applies to juvenile correction centers, juvenile lawsuits were not the intended target in the PLRA's goal of reducing frivolous lawsuits.<sup>133</sup> In fact, two years after the PLRA was enacted, no more than a dozen federal claims challenged the conditions of juvenile institutions in 1998.<sup>134</sup> This is evidence that, while juvenile detainees are vulnerable to constitutional violations, they are not likely to seek a legal remedy.

Abuses in juvenile detention centers go beyond sexual abuse, and the PLRA can be a barrier to getting those issues resolved. A quintessential example of how the exhaustion requirement is a detriment to juveniles is the case of *Minix v. Paezera*.<sup>135</sup> This case was brought by a juvenile in custody in the state of Indiana and his mother. During his incarceration, the young man was beaten several times by other inmates. He once suffered a seizure as a result but was denied help by facility staff. The youth was also raped, and was forced to witness another inmate being raped. He feared retaliation from the facility's staff, as they were known to arrange fights and beatings among the inmates, so he did not file a grievance—which the state of Indiana requires to be filed within forty-eight hours of the event.<sup>136</sup> The federal claim against the prison officers, officials, and the Indiana Department of Corrections was dismissed for failure to exhaust all administrative remedies.<sup>137</sup>

Presumably, juveniles have even more difficulty reporting abuse because they are less sophisticated and legally savvy than adult detainees. They do not even have a constitutional right to a law library,<sup>138</sup> so even more competent juveniles are afforded less access to legal information. An exhaustion requirement is yet another unnecessary hurdle for juvenile detainees to access justice. The PLRA needs to be amended in order to give

juveniles the ability to challenge abuses and conditions without fear of reprisal and stigma.

#### IV. THE NEED FOR REFORM

##### *A. The PLRA's Deceiving Success Rates and Other Statistics*

It stands to reason that if the PLRA had improved the quality of the cases that were filed in federal court, the success rate of plaintiffs would also go up.<sup>139</sup> This has not been the case. The number of civil rights cases filed fell from 41,679 in 1995 to 25,504 in 2000.<sup>140</sup> “[B]etween 2000 and 2004, the rate of filing remained relatively constant, dropping only slightly to approximately 16 suits per 1000 inmates.”<sup>141</sup> In 1995, plaintiffs who filed federal civil rights claims were 13 percent successful.<sup>142</sup> In 2002, six years after the PLRA was passed, plaintiffs were only 10 percent successful.<sup>143</sup> Thus, six years after the PLRA was passed, an inmate who filed a civil rights claim was less likely to succeed.

In the immediate years after the PLRA was passed, a 2003 study found that while inmate plaintiffs were winning a large portion of their cases that were taken to trial, fewer cases were going to trial, and fewer cases were settling, suggesting more dismissals.<sup>144</sup>

Although the drop in the number of suits filed confirms that the PLRA has been successful in reducing the number of federal claims, the decrease in success rates among inmates and the increase in dismissals also suggest that the rate of frivolous federal claims has remained the same. Comparing the current incarceration levels to levels when the PLRA was passed, it follows that more abuses would tend to occur, thus giving rise to more successful meritorious claims.

The PLRA was enacted in a different era with different statistics, and this country has since experienced a significant rise in incarceration levels. The prison population was 1,125,874 in 1995, growing to 1,381,892 in 2000.<sup>145</sup> In the beginning of 2008, there were 1,596,127 inmates held in either state

or federal prisons, combined with 723,131 held in local jails, for a total of 2,319,258 people incarcerated in the United States.<sup>146</sup> To illustrate the disturbing rate of rising incarceration levels, the Texas prison population increased by 300 percent over the course of twenty years, between 1985 and 2005.<sup>147</sup> Florida's inmate population has increased from 53,000 to 97,000 between 1993 and 2007 and is estimated to reach 125,000 by 2013.<sup>148</sup>

Sources vary on whether overcrowding in prisons is on the decline. One source estimated that while state prisons were running at 114 percent of their operational capacity in 1999, in 2004 they were operating at 99 percent.<sup>149</sup> Another source, however, reported that in 2004, state prisons were running at 115 percent of their capacity.<sup>150</sup>

Despite the difference in estimates, it is reasonable to infer that with the current levels of incarceration, and the resultant overcrowding and understaffing, there should be a proportionate rise in meritorious civil rights claims.<sup>151</sup> Overcrowded conditions can lead to violence and abuse.<sup>152</sup> As it stands, "prisons are struggling mightily to keep a full complement of officers on staff."<sup>153</sup> If correctional officers are in less of a position to provide appropriate care, there should be a rise in meritorious and successful lawsuits.

#### *B. The Need to Reform Administrative Remedy Procedures*

There is no limit to the complexity or difficulty that an incarcerating authority can place on an inmate via an internal grievance procedure.<sup>154</sup> Prisoners' rights advocates have explained that the exhaustion requirement "obstructs rather than incentivizes constitutional oversight of prison conditions. It strongly encourages prison authorities to come up with ever higher procedural hurdles in order to foreclose subsequent litigation."<sup>155</sup> It is understood that correctional facilities would prefer to have an initial opportunity to take corrective action when an inmate files a complaint.<sup>156</sup> While it is in their interest to avoid litigation, an effective grievance system also provides a source of information to make improvements to the facility,

promote accountability and lawfulness, provide an opportunity for inmates to be heard, and reduce tension.<sup>157</sup> Unfortunately, the exhaustion requirement encourages incarcerating authorities to immunize themselves from liability instead of taking it as an opportunity to address concerns and improve conditions.<sup>158</sup> The exhaustion requirement is an arbitrary obstruction to constitutional claims that should be heard before an impartial court.<sup>159</sup>

States have been known to alter their ARPs in order to serve as a hurdle that inmates must overcome in order to bring a claim in federal court.<sup>160</sup> After the ruling in *Jones v. Bock*, the State of Illinois altered its ARP to require that “prisoners name all of the individuals involved in the incident” when filing a grievance.<sup>161</sup> Prior to the ruling, the Seventh Circuit had dismissed the State’s defense of non-exhaustion because Illinois’s ARP did not specify a requirement for that level of detail at the time.<sup>162</sup> Such a change in procedure suggests that any state, not just Illinois, is able to create barriers to limit access to courts, regardless of the merits of the case. As individual states are responsible for the administration of state prisons and thus liable for tort actions against prisons, such a technical nuance allows a state to quickly dispose of a case, and thus end its exposure to litigation.

Although a requirement to name all defendants involved in an incident may not seem like a difficult hurdle, it is entirely plausible for an inmate to be kept from filing a grievance in the first place if he or she cannot discover the name of those involved in his or her claim until after the deadline for the grievance has passed. Normally, a plaintiff would have up until the normal statute of limitations to discover the names of unknown defendants. Such plaintiffs would even be able to amend a complaint in order to add the names of defendants identifiable during discovery. But because of an extra requirement in a state’s grievance procedure, the state potentially hinders such inmates from filing a claim in court.

Filing is also complicated by the recurrent pattern “of threats and retaliation against prisoners who file grievances and complaints.”<sup>163</sup>

Recently, a complaint against a Michigan officer for physical threats and assault was dismissed because the inmate failed to discuss the issue with the officer, as required by the grievance system.<sup>164</sup> Inmates are often required to submit their grievance forms to, or attempt to informally resolve their grievance with, the same guards that have abused them. This would invariably discourage inmates from filing grievances.<sup>165</sup> As an example of intimidation, the staff at the Orange County Jail in Santa Ana, California, has been known to refer to a grievance form as a “snivel sheet” and routinely rejects them automatically for improper completion.<sup>166</sup>

Improper and untimely completion may occur for several reasons, including incompetence. According to a study in 1998, “[a]bout 70 percent of the prison inmates in the United States are illiterate.”<sup>167</sup> Another study in 2003 showed, “forty percent of state prison inmates, twenty-seven percent of federal inmates, and forty-seven percent of inmates in local jails have failed to complete high school or its equivalent, compared with only about eighteen percent of the general population.”<sup>168</sup> It has been estimated that approximately 200,000 incarcerated individuals in the United States “suffer from a serious mental illness,”<sup>169</sup> although that count may be higher considering a 1999 estimate that there were “at least 350,000 mentally ill people in jail and prison on any given day.”<sup>170</sup> While many grievance procedures ensure assistance to this population, and indeed, they may have a right to such assistance,<sup>171</sup> there are instances where this service is denied. It is therefore very difficult for particularly vulnerable inmates to exhaust the grievance system, at least within the timeframe required by many of the current systems.

To illustrate that this is a real problem, consider the case in which a non-English literate inmate filed a grievance in Spanish, alleging that he had not been placed in English classes as he had requested.<sup>172</sup> His grievance was denied, albeit with the permission to resubmit the grievance in English.<sup>173</sup> In another instance, an inmate in Pennsylvania submitted a grievance form replete with spelling and grammatical errors. The grievance was denied, and

he was asked to resubmit the grievance with corrected spelling and punctuation.<sup>174</sup>

Some prisoners' rights advocates have suggested that the "exhaustion provision should not be eliminated, but rather amended, to require simply that prisoners' claims be presented to corrections officials prior to court filing" (i.e., a notification requirement).<sup>175</sup> A notification of a lawsuit to prison officials would certainly be one way to deal with the problems presented by the exhaustion requirement, but a more direct and effective way would be to amend the administrative remedies themselves.

Proponents of the PLRA might argue that a notification requirement would not serve the reasons behind the exhaustion requirement. The majority in *Woodford* stated that the purpose of the exhaustion requirement is to allow an incarcerating authority the first opportunity to address its own internal problems and to encourage compliance with individual grievance processes. Furthermore, the Court stated that the exhaustion requirement is designed to promote efficiency by discouraging frivolous cases.<sup>176</sup> Unfortunately, all of these desired outcomes are attained at the expense of the prisoner's constitutional rights and are arguably better achieved with a notification approach.

Assuming that a grievance procedure is effective and fair, a notification would allow the facility the first opportunity to address its unique problem, and it would certainly promote the resolution of meritorious cases, in that prisons would get the first chance at resolving frivolous claims, and meritorious ones would advance. However, if an aggrieved inmate were merely required to notify the prison of an impending lawsuit, there would be no incentive to comply with the administrative procedures.

If the reduction of frivolous lawsuits, with an ultimate goal of allocating more resources toward meritorious ones, were the intention of the PLRA, then it should not matter if meritorious claims are compliant with the ARPs. The Court in *Woodford* points out that state institutions have the most to benefit from handling grievances first because "it is difficult to imagine an

activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.”<sup>177</sup> However, there seems to be no benefit to subjecting meritorious claims to ARP compliance.

*C. The Prison Abuse Remedies Act*

On November 7, 2007, U.S. Representatives Robert Scott and John Conyers introduced the Prison Abuse Remedies Act (H.R. 4109) (PARA) “[t]o provide for the redress of prison abuses.”<sup>178</sup> A hearing was held on November 8, 2007, concerning the problems of the PLRA; this was the first such hearing in the eleven years since the PLRA was enacted.<sup>179</sup> The PARA might have been introduced as a response to *Woodford* and *Jones*, but more than likely it was born out of the recent call for reform by groups that were not typically considered prisoners’ rights advocates, such as the American Bar Association (ABA).<sup>180</sup>

The PARA sought to revise the PLRA’s exhaustion requirement, or U.S.C. 1997e(a). Section 3 of the PARA entitled “Staying of Nonfrivolous Civil Actions to Permit Resolution Through Administrative Processes,” reads as follows:

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

(a) Administrative Remedies -

(1) PRESENTATION - No claim with respect to prison conditions under section 1979 of the Revised statutes (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility shall be adjudicated except under section 1915A(b) of title 28, United States Code, until the claim has been presented for consideration to officials of the facility in which the claim arose. Such Presentation satisfies the requirement of this paragraph if it provides prison



officials of the facility in which the claim arose with reasonable notice of the prisoner's claim, and if it occurs within the generally applicable limitation period for filing suit.

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

(3) PROCEEDING - Upon the expiration of the stay under paragraph (2), the court shall proceed with the action except to the extent the court is notified by the parties that it has been resolved.<sup>181</sup>

PARA's changes to the PLRA were based on suggestions given by Professor Margo Schlanger and the Coalition to Stop Abuse and Violence Everywhere (SAVE), a prisoners' rights group dedicated to the prevention of violence.<sup>182</sup> The SAVE Coalition and Schlanger, a prominent prisoners' rights scholar, suggested that a presentation requirement, as described in paragraph (1) of the PARA, be substituted for the exhaustion requirement.<sup>183</sup> In addition, the ABA suggested that a stay be granted to prisoners who have filed a lawsuit but who have not yet exhausted the administrative remedies in order to give the inmate and the institution an opportunity to resolve the conflict without running the risk of having a meritorious case dismissed for non-exhaustion. The ABA also pointed out in its resolution that the *Woodford* decision, which engrafted a "procedural-default rule . . . onto the exhaustion requirement[,] imposes a statute of limitations on many prisoners that ranges from a few days to a few

weeks.”<sup>184</sup> However, the ABA noted that even 120 days may not be enough for a victim to realize that they have a civil rights claim.<sup>185</sup>

Although the PARA proposed a ninety day stay, as opposed to the minimal 120 day stay suggested by the ABA, the PARA was a step in the direction of giving all inmates, regardless of what state they are in, an equal amount of time to pursue a federal claim pursuant to a federal statute.<sup>186</sup>

The PARA did not proceed beyond the committee stage. Additional hearings were held on April 22, 2008, but that was the last congressional action that took place in regard to the PARA.<sup>187</sup> When the 111th Congress meets, it is imperative that the PARA get reintroduced and passed. Prisoners tend to be left out of the political debate, especially when there is a call to be “tough on crime” by the electorate. Prisoners and prisoner advocates should not have to endure another eleven years of prison abuse that is fostered through the PLRA and its respective case law.

Though the PARA did not pass in 2008, it can be improved. As the dissent in *Woodford* points out, the majority did not answer the question as to what constitutes a “meaningful” grievance system.<sup>188</sup> As discussed in detail in Part IV below, regardless of whether the exhaustion requirement is amended (but more importantly if it is not), there needs to be some sort of standardization of the various ARPs. If grievance systems are to efficiently resolve meritorious claims and successfully dispose of frivolous ones, Congress should pass legislation that will require all correctional facilities’ grievance procedures to comply with a system that ensures that they will function effectively.<sup>189</sup> If Section 3 of the PARA successfully passes, then it will be easier to pass legislation that enforces a minimum set of requirements. And to avoid the opportunity for states to opt out of compliance, Part IV describes an avenue that will further incentivize compliance with the standardization of grievance systems.

## V. AVENUES TO REFORM THE NATION'S ADMINISTRATIVE REMEDY PROCEDURES

### *A. Advancement of the ABA's Suggested Proposals*

In February of 2007, the chair of the American Bar Association's Criminal Justice Section wrote a report in support of a resolution to amend the PLRA.<sup>190</sup> He suggested that possible "steps the federal government can take to foster the just resolution of prisoners' complaints by correctional grievance systems . . . might include linking federal funding to specified improvements in grievance processes [and] technical assistance from the federal government to improve those processes. . . ."<sup>191</sup>

In the spirit of the ABA's recommendation, Congress should use its federal enforcement power under Section 5 of the Fourteenth Amendment of the Constitution to reinstate the five minimum standards required of internal prison grievance systems under CRIPA: (1) a decentralized advisement board; (2) time limits for responses to inmate grievances; (3) prioritization of certain grievances; (4) safeguards against reprisal for filing grievances; and (5) independent review of grievance dispositions.<sup>192</sup>

The ABA letter further opined that grievance systems should "maximize their potential to solve problems, address prisoner's legitimate concerns, and remedy violations of prisoner's legal rights. . . ."<sup>193</sup> These three criteria existed to some extent prior to the PLRA. First, under CRIPA, grievance systems maximized their problem-solving potential in that all correctional facilities were required to provide for a decentralized advisory role of both staff and inmates in "the formulation, implementation, and operation of [grievance] system[s]."<sup>194</sup>

Second, the legitimate concerns of inmates would certainly be addressed because CRIPA mandated time limitations for written responses to grievances, as well as mandated that specific reasons be given for the decisions in the written responses.<sup>195</sup>

Third, the remaining three standards under CRIPA ensured the remedy for legal rights violations. CRIPA stated that grievances that would result in “substantial risk of personal injury” by the grievant if delayed were to be given priority processing.<sup>196</sup> Safeguards against reprisal were required for a grievant if the resolution of the grievance posed a risk of such reprisal.<sup>197</sup> Most importantly, CRIPA required an independent review of all grievance dispositions by a party who was “not under control or under direct supervision of the institution.”<sup>198</sup>

These five recommended standards would serve as a sufficient basis for a system of federally mandated grievance systems proposed herein. However, if legislation is needed in lieu of the PARA’s presentation requirement, i.e., if Section 1997e(a) does not get amended, four more recommended standards could create a viable alternative.

First, the specific time limit for written responses should be regulated to leave enough time to meet the statute of limitations to file a suit in federal court. As described above, a detention facility’s response to a grievance is required to be in writing in most instances, yet the time limit for a prison to provide this response varies from state to state. Under this proposal, a sufficient time limit for a response to an administrative appeal will be before one third of the normal statute of limitations has elapsed. This would give the aggrieved inmate a sufficient amount of time to prepare a federal case should the response not provide an adequate remedy.

Second, the number of appeal levels within the individual grievance systems should be limited to one. This would serve two purposes: it would reduce the level of complexity for the aggrieved inmate, and it would reduce the bureaucracy and costs to the states. The more levels of appeals an aggrieved inmate is forced to comply with increases that inmate’s chances of missing a deadline and making a procedural error, especially for the undereducated, mentally ill, or illiterate. Also, numerous appeals take more resources. Because an individual state would be more familiar with its own system and allocation of funds, it would be up to the state to determine

who should be the appellate authority, e.g., the warden, regional director, state correction department, etc.

Third, any requirement that calls for an inmate to pursue informal procedures to remedy the problem should be made optional. There are two reasons for this as well: an inmate may find it more convenient, efficient, or expedient to deal with the problem informally, yet another inmate may not feel safe or comfortable doing so. To enforce a mandatory informal attempt to remedy a situation as a default procedure—which thereby makes a bypass of this step an exception that would require additional paperwork—unnecessarily increases the danger of retaliation toward an aggrieved inmate.

Finally, in an effort to ensure compliance, an aggrieved inmate should be allowed to bring a cause of action against the state for the violation of any of the minimum standard requirements.

#### *B. Constitutional Considerations*

This proposed legislation is likely to be controversial. First, the regulation of state prisons is traditionally a power that has been reserved for the states.<sup>199</sup> CRIPA originally made their requirements optional and would allow an affirmative defense of failure to exhaust all administrative remedies as a reward for compliance. Under this proposal, the standards would not be optional. Second, because this proposed law would abrogate sovereign state immunity from being sued in federal court, Eleventh Amendment issues must also be taken into account. Should Congress take these steps, it would stand to reason that some states would challenge the statute on the grounds that a provision allowing a civil remedy to a prisoner against that state would violate their sovereign immunity under the Eleventh Amendment. In order to make sure these issues pass constitutional muster, it will be necessary to determine whether Congress acted within its rights under Section 5 of the Fourteenth Amendment.

The Supreme Court has declared that Section 5 of the Fourteenth Amendment is “a positive grant of legislative power authorizing Congress to exercise its discretion in determining the need for and nature of legislation to secure Fourteenth Amendment guarantees.”<sup>200</sup> A prisoner’s access to court is certainly a Fourteenth Amendment guarantee,<sup>201</sup> it is well established that “prisoners have a constitutional right of access to the courts,”<sup>202</sup> and of course, the equal protection clause provides that “[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>203</sup>

This new legislation would aim to prevent and remedy constitutional violations by state governments (i.e., to protect the right of prisoners to bring their legitimate and meritorious claims in federal court without the interference of prison officials). If passed, this law would eliminate the possibility that a valid claim would be prevented from being heard by a federal court because certain administrative procedures, procedures that are separate from the judicial process, were not followed. According to the Supreme Court, “[b]ecause prisoners retain . . . [their First Amendment right to petition the government for a redress of grievances], ‘when a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.’”<sup>204</sup> Congress, by enacting these minimum requirements, would enhance a constitutional right already recognized and defined by the Supreme Court. A prison’s refusal to comply with such requirements does not serve a legitimate penological interest.<sup>205</sup> Such a rational basis for review would be the lowest standard that a prison would have to meet in order for them to justify such violations. Indeed, such laws would further the safety and integrity of prisons, without taking away too much of their traditional authority as the legislation would allow discretion in determining the best way to meet all of the minimal requirements.

### **1. Remedial and Preventive Measure**

In order to enact this law and exercise its power under the enforcement clause it must be shown “[that] Congress had evidence of a pattern of constitutional violations on the part of the States in this area.”<sup>206</sup> Congress will need to find that prison administrations have pervasively denied court access to inmates with valid claims. Part III above provides empirical and statistical evidence that state governments, through prison administrations, have not only violated prisoners’ rights to access courts, but that all states maintain the ability to do so. As such, Congress will have shown that the new law seeks to remedy and prevent constitutional violations.

However, as “preventive rules are sometimes appropriate remedial measures,” appropriateness “must be considered in light of the evil presented.”<sup>207</sup> Congress would then have to show “a congruence between the means used and the ends to be achieved.”<sup>208</sup> Ultimately, it is important that preventive measures are not unwarranted responses to other, lesser harms.<sup>209</sup>

### **2. Congruent and Proportional**

A constitutional violation under these circumstances would occur when inmates, for all intents and purposes, are kept from filing legitimate suits. Some argue that prisoners are not barred from bringing meritorious claims under the PLRA, “provided that the prisoners fully proceed through the prison’s internal grievance system and abide by its deadlines.”<sup>210</sup> However, as mentioned earlier, current ARP guidelines are established by the states, and the actual ARPs are developed by the incarcerating authorities, thus allowing those entities to make the rules concerning who has access to federal courts to protect their constitutional rights.<sup>211</sup> Under the PLRA, prisons are encouraged “to come up with high procedural hurdles, and to refuse to consider the merits of serious grievances, in order to best preserve a defense of non-exhaustion.”<sup>212</sup>

As mentioned previously, there have been many instances where an inmate failed to exhaust all administrative remedies as required by the PLRA and was therefore prevented from bringing a federal claim against a prison.<sup>213</sup> As unjust and inappropriate a system that would perpetuate such a phenomenon may be, merely showing that inmates are notoriously late in filing grievances, or are reluctant to obtain available assistance to correctly complete the requisite forms, will not convincingly illustrate that the prison is denying the inmates access to courts. But when inadequate timelines and arbitrary procedures affect the ability of incompetent aggrieved inmates to successfully complete a grievance, the denial of rights by prison officials is highlighted.

The legislation recommended here is, therefore, congruent and proportional. First, the requirement that a final written response to an aggrieved inmate's claim leave a substantial amount of time to meet the statute of limitations is necessary, as state guidelines may allow a claim to go unanswered for long periods of time. If the final response arrives and it is unsatisfactory to the aggrieved inmate, the inmate may not have enough time to prepare a timely complaint. The first proposal would eliminate the possibility of this occurrence.

Second, because of the high volume of undereducated, illiterate, and mentally ill inmates, an excess number of appeals at the administrative level may become unnecessarily and detrimentally burdensome. Keeping the number of appeals to a minimum reduces the chances of inmates with legitimate claims from making clerical errors.

Third, voluntary informal grievances protect vulnerable inmates from further abuse or retaliation if they are allowed to bypass that step. The risk of harassment could dissuade inmates from pursuing a valid claim. The showing of immediate danger, which many systems require, appears to be an arbitrary obstruction.

Finally, a claim for damages is needed to deter state governments from choosing not to comply with federal standards, thereby diminishing the



possibility that state governments would deny inmates their constitutional right to access the courts. The federal government may use the distribution of funds to the states in order to induce compliance, but if a state chooses to decline, then the door for violations is left open.

The sort of obstruction described in Part III above is prevalent throughout the nation's prisons and jails. States and correctional facilities have an incentive to alter their regulations at their own discretion in order to deny an individual a constitutional right to access the courts. Because the nation's institutions run the risk of such misconduct, and the laws proposed herein have applied to all states in the past, via the CRIPA, enacting the proposed legislation is appropriate. This proposed law would give all inmates a fair chance of suing state officials pursuant to federal statutes. Congress is authorized to allow individuals to bring suit against the state in federal court for violation of these acts because such a proposal would be a congruent and proportional solution to the problems it is intended to prevent. In addition, the looming threat of lawsuits would force correctional facilities to comply.

## VI. CONCLUSION

Despite the stated intentions of its original supporters, the PLRA has proved to be unsuccessful in its efforts to reduce the number of frivolous lawsuits filed by prisoners. Although it was claimed that the PLRA would not hinder the ability of inmates to bring meritorious claims into federal court, and would in fact increase judicial resources so that meritorious claims would receive more attention, evidence has shown otherwise. The PLRA has had a sweeping effect of preventing many cases, regardless of their merits, from being litigated in federal court.

Among the top provisions responsible for this harsh effect is the PLRA's exhaustion requirement, which requires the exhaustion of prison grievance systems before inmates can bring their claims to court. If the promotion of justice and civil rights was the intention of the PLRA, it is irrelevant

whether prisoners have complied with ARPs. The exhaustion requirement is simply an arbitrary obstruction to inmates' access to the courts.

Although members of the House of Representatives introduced an amendment to the PLRA in 2008, the attempt was unsuccessful. The PARA would have taken away the exhaustion requirement and replaced it with a requirement that would simply allow grievant prisoners to notify the appropriate prison officials of their intended lawsuit. Such a notification would encourage prison officials to rectify the situation complained of, and thus give them an opportunity to prevent litigation; however, it could render the grievance process ineffective. Regardless, if the PLRA were intended to promote justice and civil rights, it is irrelevant whether prisoners have complied with the ARPs. The exhaustion requirement does little more than keep legitimately aggrieved inmates from entering a federal courthouse. As an alternative, I have recommended that Congress exercise its Section 5 powers under the Fourteenth Amendment to enact legislation that would set minimum requirements for all grievance systems and provide a legal remedy against the sovereign states. This would ensure that prisoners have access to federal courts and that all prisoners enjoy the freedom to raise their concerns without fear of reprisal when they feel that other constitutional rights have been violated. The time for reform is now.

In 2003, Congress passed the Prison Rape Elimination Act, affirming its "duty to protect incarcerated individuals from sexual abuse."<sup>214</sup> The Act required the establishment of a national commission to develop standards for correctional facilities nationwide that would set up a process to eliminate prison rape.<sup>215</sup> The National Prison Rape Elimination Commission (NPREC) released a report in June 2009 in which it stated that the PLRA "has compromised the regulatory role of the courts and the ability of incarcerated victims of sexual abuse to seek justice in court."<sup>216</sup> The NPREC explicitly cited the exhaustion requirement as one of the contributing factors to this breakdown of justice.<sup>217</sup> As such, the NPREC has recommended a standard under which "an inmate will have been

deemed to have exhausted all administrative remedies as of ninety days after a report of sexual abuse has been made.”<sup>218</sup> The standard allows reports to be made at any time after the incident of abuse.<sup>219</sup> It also allows the ninety days to be reduced to forty-eight hours in cases where an inmate petitions the court for an immediate injunction seeking protection from imminent harm.<sup>220</sup>

Should the U.S. Attorney General approve these standards in 2010, the U.S. government will have recognized that prisoners face enormous obstacles in accessing justice. This will create the right political climate for advocates to push for further changes to the PLRA and the exhaustion requirement. “With the number of adults just shy of 230 million,” we are reaching a point in our history when traditional punitive measures and prison administration must change.<sup>221</sup>

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<sup>1</sup> Seattle Univ. School of Law, Juris Doctor Candidate, degree expected May 2010.

<sup>2</sup> Michael Rothfeld, *Judges Back a One-Third Reduction in State Prison Population*, L.A. TIMES, Feb. 10, 2009, available at <http://www.latimes.com/news/local/la-me-prisons10-2009feb10,0,815133.story>.

<sup>3</sup> HUMAN RIGHTS WATCH, U.S.: FEDERAL STATISTICS SHOW WIDESPREAD PRISON RAPE (Dec. 15, 2007), <http://www.hrw.org/en/news/2007/12/15/us-federal-statistics-show-widespread-prison-rape?>.

<sup>4</sup> Laura Maggi, *Death Rate at Orleans Parish Prison Ranks Near Top*, THE TIMES-PICAYUNE, Feb. 7, 2009, available at [http://www.nola.com/news/index.ssf/2009/02/death\\_rate\\_at\\_orleans\\_parish\\_p.html](http://www.nola.com/news/index.ssf/2009/02/death_rate_at_orleans_parish_p.html).

<sup>5</sup> U.S. CONST. amend. VIII. (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

<sup>6</sup> CTR. FOR CONST. RIGHTS & NAT’L LAWYERS GUILD, THE JAILHOUSE LAWYER’S HANDBOOK: HOW TO BRING A FEDERAL LAWSUIT TO CHALLENGE VIOLATIONS OF YOUR RIGHTS IN PRISON, 1, 9 (4th ed. 2003) [hereinafter CTR. FOR CONST. RIGHTS & NAT’L LAWYERS GUILD].

<sup>7</sup> *Id.* at 2, 8 (citing *Bivens v. Six Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)).

<sup>8</sup> 42 U.S.C. 1997e(a) (2006) (“No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”).

<sup>9</sup> Prison Litigation Reform Act of 1995, Pub. L. No. 104–34 (1996) (codified as amended in scattered sections of the U.S.C.).

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

<sup>11</sup> *Id.*

<sup>12</sup> Prison Abuse Remedies Act of 2007, H.R. 4109, 110th Cong. (2007).

<sup>13</sup> *Id.*

<sup>14</sup> Harv. L. Rev. Ass'n, *Developments in the Law, The Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act: Implications for Federal District Judges*, 115 HARV. L. REV. 1846, 1848–49 n.9 (2002).

<sup>15</sup> *Id.* at 1849.

<sup>16</sup> *Cooper v. Pate*, 378 U.S. 546 (1964).

<sup>17</sup> 42 U.S.C. 1983 (1996) (“Every person who, under color of [state law] . . . subjects . . . any . . . person . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable. . .”).

<sup>18</sup> Harv. L. Rev. Ass'n, *supra* note 14, at 1848–49 n.9.

<sup>19</sup> *Cooper*, 378 U.S. at 546.

<sup>20</sup> *Id.* at 546 (citing *Pierce v. LaVelle*, 293 F.2d 233 (holding that cases regarding the discipline of inmates because of religious beliefs can be reviewed in federal court, and that a claim based on such discipline should be entertained by federal courts); and *Sewell v. Degelow*, 291 F.2d 196 (4th Cir. 1961) (holding that federal prisoner’s claim for injunctive relief based on unconstitutional denial of religious freedom requires a hearing in federal court)).

<sup>21</sup> *See* Harv. L. Rev. Ass'n, *supra* note 14, at 1847–49.

<sup>22</sup> *Id.* at 1849.

<sup>23</sup> 42 U.S.C. 1983 (“Every person who, under color of [state law] . . . subjects . . . any . . . person . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable. . .”).

<sup>24</sup> Harv. L. Rev. Ass'n, *supra* note 14, at 1849.

<sup>25</sup> *Id.* at 1850.

<sup>26</sup> Dept. of Justice, Bureau of Justice Statistics Special Report, Prisoner Petitions File in U.S. District Courts, 2000, with Trends 1980–2000, at 3 (Jan. 2002) [hereinafter DOJ Report].

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

<sup>28</sup> Civil Rights of Institutionalized Persons Act, Pub. L. No. 96–247, § 7(a)(1), 94 Stat. 349, 352 (1980) (codified as amended at 42 U.S.C. §§ 1997–1997(j) (1996)).

<sup>29</sup> *Id.* at § 7(b)(1).

<sup>30</sup> *Id.* at § 7(a)(2).

<sup>31</sup> *Id.* at §7(c)(1).

<sup>32</sup> DOJ Report, *supra* note 26.

<sup>33</sup> *Id.* at 1.

<sup>34</sup> *Id.* at 3.

<sup>35</sup> *Id.* at 4, t. 3.

<sup>36</sup> Eric Schlosser, *The Prison-Industrial Complex*, THE ATLANTIC MONTHLY, Dec. 1998, at 2, available at <http://www.theatlantic.com/doc/print/199812/prisons>.

<sup>37</sup> *Id.*; *See also*, Ruth Wilson Gilmore, *Globalisation and US Prison Growth: From Military Keynesianism to Post-Keynesian Militarism*, 40 RACE & CLASS 171, 171–74 (1999) (The growth in the prison population has been attributed to high crime rates and

drug use, but also anti-Black racism and “the economic development and profit-generating potential that prisons promise.” Ironically, there was a decline in the national crime rate as well as a decline in drug use among Americans in the 1980s and 1990s.).

<sup>38</sup> DOJ Report, *supra* note 26, at 9.

<sup>39</sup> See, e.g., Harv. L. Rev. Ass’n, *supra* note 14, at 1855 (“[T]he two purposes of the Act—limiting the burden of inmate litigation and curtailing the micromanagement of prison suits . . . .”); see also Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1778 (2003) (“The PLRA provisions fell into two relatively distinct categories. The first group . . . [was] intended to ‘get the federal courts out of the business of running jails.’” The second group included “the provisions that target individual inmate suits and are intended to relieve courts from the alleged burden of frivolous litigation.” (quoting Benjamin v. Jacobson, 172 F.3d 144, 182 (2d Cir. 1999)).

<sup>40</sup> Margo Schlanger & Giovanna Shay, American Const. Soc’y, *Preserving the Rule of Law in America’s Prisons: The Case for Amending the Prison Litigation Reform Act*, at 1 (Mar. 2007) (citing Pub. L. No. 104–34, §§ 801–10, 110 Stat. 1321, 1321–66 to –77 (Apr. 26, 1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; 42 U.S.C. §§ 1997–1997h)). It is also worth noting that Congress passed the Antiterrorism and Effective Death Penalty Act (ADEPA) that same year which was intended to limit federal courts from delaying executions as they reviewed habeas corpus petitions; Harv. L. Rev. Ass’n, *supra* note 14, at 1846.

<sup>41</sup> Woodford v. Ngo, 548 U.S. 81, 117 (2006) (Stevens, J., dissenting).

<sup>42</sup> *Id.* (citing 141 Cong. Rec. 27042 (Sept. 29, 1995)).

<sup>43</sup> *Id.* (citing 141 Cong. Rec. 27044 (Sept. 29, 1995)) (Senator Thurmond’s statement concerning the court’s discretion is suspicious, insofar as that the same supporters of the PLRA had issue with the amount of discretion that judges had in remedying certain violations prior to the passage of the act, i.e., “federal judge[s]’ ability to issue broad remedial orders which proponents of reform viewed as effectively turning prison administration over to judges ‘for the indefinite future for the slightest reason.’”); Harv. L. Rev. Ass’n, *supra* note 14 at 1854–55 (quoting 141 Cong. Rec. 26, 554 (1995) (statement of Sen. Abraham)).

<sup>44</sup> 42 U.S.C. § 1997e(e) (2008).

<sup>45</sup> 28 U.S.C. § 1915(g) (2008).

<sup>46</sup> 42 U.S.C. § 1997e(e) (“No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”).

<sup>47</sup> Robert Warring, *Better Late Than Never?: A Faithful Interpretation of the Prison Litigation Reform Act’s Exhaustion Requirement Says No*, 80 TEMP. L. REV. 365, 376 (2007).

<sup>48</sup> *Id.*

<sup>49</sup> CTR. FOR CONST. RIGHTS & NAT’L LAWYERS GUILD, *supra* note 6, at 6.

<sup>50</sup> DOJ Report, *supra* note 26.

<sup>51</sup> Prison Litigation Reform Act of 1995, Pub. L. No. 104–34.

- <sup>52</sup> Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1644 (Apr. 2003) (“[T]he PLRA’s new decision standards have imposed new and very high hurdles so that even constitutionally meritorious cases are often thrown out of court.”).
- <sup>53</sup> CTR. FOR CONST. RIGHTS & NAT’L LAWYERS GUILD, *supra* note 6, at 6.
- <sup>54</sup> *Testimony for the House Judiciary Subcomm. on Crime, Terrorism, and Homeland Security* (Apr. 22, 2008) (statement of Coalition to Stop Abuse and Violence Everywhere (SAVE Coalition)) [hereinafter Save Coalition].
- <sup>55</sup> 42 U.S.C. § 1997e(e).
- <sup>56</sup> Prison Litigation Reform Act of 1995, Pub. L. No. 104–34.
- <sup>57</sup> 42 U.S.C. § 1997e(e) (“No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”).
- <sup>58</sup> SCHLANGER & SHAY, *supra* note 40, at 5.
- <sup>59</sup> *Id.* at 5–6.
- <sup>60</sup> *Id.* at 6 (citing *Hancock v. Payne*, No. Civ.A.1.03CV671JMRJMR, 2006 WL 21751 (S.D. Miss. Jan 4, 2006)).
- <sup>61</sup> *Id.* at 1.
- <sup>62</sup> 28 U.S.C. § 1915 (2008).
- <sup>63</sup> *Id.*
- <sup>64</sup> 42 U.S.C. § 1997e(e) (“No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”).
- <sup>65</sup> *See* *Porter v. Nussle*, 534 U.S. 516 (2002); *Booth v. Churner*, 532 U.S. 731, 734 (2001); *Woodford v. Ngo*, 548 U.S. 81 (2006).
- <sup>66</sup> SCHLANGER & SHAY, *supra* note 40, at 1.
- <sup>67</sup> CTR. FOR CONST. RIGHTS & NAT’L LAWYERS GUILD, *supra* note 6, at 37.
- <sup>68</sup> *Porter*, 534 U.S. at 519–21.
- <sup>69</sup> *Id.* at 521.
- <sup>70</sup> *Id.* at 532.
- <sup>71</sup> CTR. FOR CONST. RIGHTS & NAT’L LAWYERS GUILD, *supra* note 6, at 37.
- <sup>72</sup> *Booth*, 532 U.S. at 734.
- <sup>73</sup> *Id.*
- <sup>74</sup> *Id.* at 739.
- <sup>75</sup> CTR. FOR CONST. RIGHTS & NAT’L LAWYERS GUILD, *supra* note 6, at 37.
- <sup>76</sup> *Woodford*, 548 U.S. at 83–84.
- <sup>77</sup> *Id.* at 87.
- <sup>78</sup> *Id.* at 86.
- <sup>79</sup> *Ngo v. Woodford*, 403 F.3d 620, 622 (N.D. Cal. 2005), *rev’d*, 548 U.S. 81 (2006).
- <sup>80</sup> *Id.*
- <sup>81</sup> *Id.*
- <sup>82</sup> *Woodford*, 548 U.S. at 87.
- <sup>83</sup> *Id.* at 84.
- <sup>84</sup> *Id.* at 88.
- <sup>85</sup> *Id.* at 90–91.
- <sup>86</sup> *Id.* at 101–02.

- <sup>87</sup> *Id.*
- <sup>88</sup> *Id.* at 88 (quoting *McKart v. United States*, 395 U.S. 185, 193 (1969)).
- <sup>89</sup> *Id.* (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938)).
- <sup>90</sup> *Id.* at 90 (quoting *Pozo*, 286 F.3d at 1024 (emphasis in original)).
- <sup>91</sup> *Id.* (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (emphasis added)).
- <sup>92</sup> *Id.* at 93.
- <sup>93</sup> *Id.* at 102.
- <sup>94</sup> *Id.* at 89.
- <sup>95</sup> Save Coalition, *supra* note 54, at app. 4.
- <sup>96</sup> *Id.*
- <sup>97</sup> *Id.*
- <sup>98</sup> 28 C.F.R. § 542.10(b) (2008).
- <sup>99</sup> *Woodford*, 548 U.S. at 94 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491–92 (1973)).
- <sup>100</sup> Andrea Jacobs, *Prison Power Corrupts Absolutely: Exploring the Phenomenon of Prison Guard Brutality and the Need to Develop a System of Accountability*, 41 CAL. W. L. REV. 277, 295 (2004).
- <sup>101</sup> 28 C.F.R. § 542 (2008).
- <sup>102</sup> 28 C.F.R. § 542.13 (2008).
- <sup>103</sup> *Id.* at § 542.13(a) (2008).
- <sup>104</sup> *Id.*
- <sup>105</sup> *Id.* at § 542.14(b) (2008).
- <sup>106</sup> *Id.* at § 542.17 (2008).
- <sup>107</sup> *Id.*
- <sup>108</sup> 28 C.F.R. § 542 (2008).
- <sup>109</sup> *Id.* at § 542.14(a) (2008).
- <sup>110</sup> *Id.*
- <sup>111</sup> *Id.*
- <sup>112</sup> See Brief for Jerome N. Frank Legal Servs. Org. of the Yale Law School as Amicus Curiae Supporting Respondent, *Woodford v. Ngo*, 548 U.S. 81 (2006) (No. 05-416) at 6–13, 2006 WL 304573 [hereinafter Amicus Brief].
- <sup>113</sup> *Id.*
- <sup>114</sup> See *id.*
- <sup>115</sup> Save Coalition, *supra* note 54, at app. 4.
- <sup>116</sup> American Civil Liberties Union, *The Prison Litigation Reform Act Must be Fixed*, (Apr. 22, 2008) available at <http://www.aclu.org/prison/gen/34970prs20080422.html>.
- <sup>117</sup> Amicus Brief, *supra* note 112.
- <sup>118</sup> *Id.*
- <sup>119</sup> See *id.*
- <sup>120</sup> *Jones v. Bock*, 549 U.S. 199 (2007).
- <sup>121</sup> *Id.* at 212.
- <sup>122</sup> *Id.* at 203.
- <sup>123</sup> *Id.* at 218.
- <sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 222.

<sup>126</sup> *Id.* at 221.

<sup>127</sup> CTR. FOR CONST. RIGHTS & NAT'L LAWYERS GUILD, *supra* note 6, at 5.

<sup>128</sup> 42 U.S.C. § 1997e(h) (2006) (“[T]he term prisoner means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole probation, pretrial release or diversionary program.”); 18 U.S.C. § 3626(g)(5) (2007) (“[T]he term ‘prison’ means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law.”); Prison Litigation Reform Act of 1995, Pub. L. No. 104–34 (“[A]ny action brought . . . by an adult convicted of a crime confined in any jail, prison, or other correctional facility. . . .”).

<sup>129</sup> Just Detention Int’l, *Fact Sheet, Incarcerated Youth at Extreme Risk of Sexual Abuse*, (Mar. 2009), available at <http://www.justdetention.org/en/factsheets/Youth.pdf>.

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

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

<sup>132</sup> *Id.*

<sup>133</sup> SCHLANGER & SHAY, *supra* note 40, at 3 n.18.

<sup>134</sup> *Id.*

<sup>135</sup> *Minix v. Pazera*, No. 1:04 CV 447 RM, 2005 WL 1799538 (N.D. Ind., July 27, 2005).

<sup>136</sup> *Id.* at 6.

<sup>137</sup> *Id.* at 7 (Federal jurisdiction was relinquished to the state courts, and the minor plaintiff was released from custody early.).

<sup>138</sup> *Alexander S. v. Boyd*, 876 F. Supp. 773, 790 (D.S.C. 1995); see also SCHLANGER & SHAY, *supra* note 40, at 4; Just Detention Int’l, *Fact Sheet, Incarcerated Youth at Extreme Risk of Sexual Abuse* (Mar. 2009), available at <http://www.justdetention.org/en/factsheets/Youth.pdf>.

<sup>139</sup> THE COMM’N ON SAFETY AND ABUSE IN AMERICA’S PRISONS, CONFRONTING CONFINEMENT 84 (2006), available at: [http://www.prisoncommission.org/pdfs/Confronting\\_Confinement.pdf](http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf) [hereinafter CONFRONTING CONFINEMENT].

<sup>140</sup> DOJ Report, *supra* note 26, at 1.

<sup>141</sup> *Woodford*, 548 U.S. at 115.

<sup>142</sup> CONFRONTING CONFINEMENT, *supra* note 139, at 84.

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

<sup>144</sup> Schlanger, *supra* note 52, at 1661–64.

<sup>145</sup> DOJ Report, *supra* note 26, at 4, t. 3.

<sup>146</sup> PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 5 (2008) [hereinafter PEW CTR.].

<sup>147</sup> *Id.* at 17.

<sup>148</sup> *Id.* at 9.

<sup>149</sup> CONFRONTING CONFINEMENT, *supra* note 139, at 26.

<sup>150</sup> *Id.*

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

<sup>152</sup> *Id.* at 27.

<sup>153</sup> PEW CTR., *supra* note 146, at 13.



- <sup>154</sup> Schlanger, *supra* note 52, at 1650.
- <sup>155</sup> Schlanger & Shay, *supra* note 40, at 3.
- <sup>156</sup> *Woodford*, 548 U.S. at 93.
- <sup>157</sup> CONFRONTING CONFINEMENT, *supra* note 139, at 92.
- <sup>158</sup> SCHLANGER & SHAY, *supra* note 40, at 10.
- <sup>159</sup> *See id.*
- <sup>160</sup> *Id.* at 9.
- <sup>161</sup> Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 319 n.219 (2007).
- <sup>162</sup> *Id.*
- <sup>163</sup> CONFRONTING CONFINEMENT, *supra* note 139, at 92.
- <sup>164</sup> Human Rights Watch, No Equal Justice: The Prison Litigation Reform Act in the United States, 12 (2009) (citing *Sanders v. Bachus*, 2008 WL 54228571, at 5 (W.D. Mich. 2008)).
- <sup>165</sup> American Civil Liberties Union, *supra* note 116.
- <sup>166</sup> Jacobs, *supra* note 100, at 296.
- <sup>167</sup> Schlosser, *supra* note 36, at 3.
- <sup>168</sup> Amicus Brief, *supra* note 112.
- <sup>169</sup> Schlosser, *supra* note 36, at 3.
- <sup>170</sup> CONFRONTING CONFINEMENT, *supra* note 139 at 43.
- <sup>171</sup> *See* CTR. FOR CONST. RIGHTS & NAT'L LAWYERS GUILD, *supra* note 6 at 66.
- <sup>172</sup> Save Coalition, *supra* note 54, at app. 6.
- <sup>173</sup> *Id.*
- <sup>174</sup> *Id.*
- <sup>175</sup> SCHLANGER & SHAY, *supra* note 40, at 10.
- <sup>176</sup> *Woodford*, 548 U.S. at 89–90.
- <sup>177</sup> *Id.* at 94 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491–92 (1973)).
- <sup>178</sup> Prison Abuse Remedies Act of 2007, H.R. 4109, 110th Cong.
- <sup>179</sup> THE 2009 CRIMINAL JUSTICE TRANSITION COALITION, SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS 96 (2008) [hereinafter RECOMMENDATIONS].
- <sup>180</sup> Shay & Kalb, *supra* note 161, at 328–29.
- <sup>181</sup> Prison Abuse Remedies Act of 2007, H.R. 4109, 110th Cong. at § (a).
- <sup>182</sup> *See* Coalition to Stop Abuse and Violence Everywhere (SAVE Coalition), *Testimony for the House Judiciary Subcomm. on Crime, Terrorism and Homeland Security* (Apr. 22, 2008).
- <sup>183</sup> *See id.*; *see also* Margo Schlanger & Giovanna Shay, *American Const. Soc'y, Preserving the Rule of Law in America's Prisons: The Case for Amending the Prison Litigation Reform Act*, at 10, n.56 (Mar. 2007).
- <sup>184</sup> Robert M. A. Johnson, Chair, Criminal Justice Section, American Bar Association, [Resolution to Amend the PLRA], February 12, 2007, *available at* <http://www.savecoalition.org/americanbar.html>, last visited Nov. 2, 2008.

<sup>185</sup> *Id.* (citing *Felder v. Casey*, 487 U.S. 131 (1988) (holding that a state statute requiring that state and local officials be notified of a claim within 120 days after the incident on which it is based is unenforceable in a Section 1983 suit).

<sup>186</sup> *See id.*

<sup>187</sup> RECOMMENDATIONS, *supra* note 179.

<sup>188</sup> *Woodford*, 548 U.S. at 120 (Stevens, J., dissenting); *Shay & Kalb*, *supra* note 161 at; CONFRONTING CONFINEMENT, *supra* note 139, at 87.

<sup>189</sup> CONFRONTING CONFINEMENT, *supra* note 139, at 87.

<sup>190</sup> *Johnson*, *supra* note 184.

<sup>191</sup> *Id.*

<sup>192</sup> *See Warring*, *supra* note 47, at 377 (citing CRIPA §§ 7(b)(2) (A)-(E) and (c)).

<sup>193</sup> *Johnson*, *supra* note 184.

<sup>194</sup> Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, § 7(b)(2)(A).

<sup>195</sup> Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, § 7 (b)(2)(B).

<sup>196</sup> Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, § 7 (b)(2)(C).

<sup>197</sup> Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, § 7 (b)(2)(D).

<sup>198</sup> Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, § 7 (b)(2)(E).

<sup>199</sup> *See Woodford*, 548 U.S. at 94 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491–92, (1973)).

<sup>200</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

<sup>201</sup> *See Woodford*, 548 U.S. at 122–23 (Stevens, J., dissenting).

<sup>202</sup> *Bounds v. Smith*, 430 U.S. 817, 821 (1977); *see also Woodford*, 548 U.S. at 122 (Stevens, J., dissenting) (citing *Lewis v. Casey*, 518 U.S. 343, 351, 346 (1996)).

<sup>203</sup> U.S. CONST., amend. XIV, § 1.

<sup>204</sup> *Turner v. Safely*, 482 U.S. 78, 84 (1987) (quoting *Procunier v. Martinez*, 416 U.S., at 405–06 (1974)).

<sup>205</sup> *Id.* at 87.

<sup>206</sup> *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003).

<sup>207</sup> *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Warring*, *supra* note 47, at 389. (This assertion, however, seems to undermine the stated intended purpose of the PLRA, i.e., to reduce the number of frivolous lawsuits filed by prisoners. *See id.* at 368. The author goes on to say that “barring late grievances actually furthers Congress’s intended goal of freeing up resources from frivolous suits to be used on meritorious ones.” *Id.* at 389. By this rationale, the converse can also be argued: that barring late grievances frees up resources from meritorious suits to be used on frivolous ones, if the exhaustion requirement is “unrelated to the merit (or lack thereof) of the prisoner’s claim.” *Id.*).

<sup>211</sup> *Save Coalition*, *supra* note 54, at 3.

<sup>212</sup> SCHLANGER & SHAY, *supra* note 40, at 9.

<sup>213</sup> As mentioned in Section III above.

<sup>214</sup> National Prison Rape Elimination Comm’n, National Prison Rape Elimination Comm’n Report 1 (Jun. 2009).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 10.

<sup>217</sup> *Id.*

<sup>218</sup> National Prison Rape Elimination Comm'n, Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails 35 (Jun. 2009).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> PEW CTR., *supra* note 146.