

Testimony of Elizabeth Alexander
National Prison Project of the American Civil Liberties Union Foundation
before the Sub-Committee on Crime, Terrorism and Homeland Security
November 8, 2007

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

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

Why Do Prisons Require Special Oversight?

Because the powers of government are at their height when the state imprisons someone, prisons provide a test case for the potential for abusive use of power by the state. As the famous “Stanford Experiment” of Prof. Philip G. Zimbardo demonstrated, extraordinary abuse is very easy to engender in the closed environment of a prison. In that experiment, Prof. Zimbardo used

as subjects college undergraduates who had been screened to assure their psychological health. Nine of the subjects were randomly assigned to play guards, and the other nine as prisoners at a simulated prison on the Stanford University campus. The “guards “ were told that they should do whatever was necessary to maintain law and order. As the experiment progressed, the guards quickly began to use their power to inflict serious psychological abuse on the prisoners. In fact, the experiment had to be stopped after six days because four of the prisoners had suffered emotional breakdowns and the guards were escalating their abuse of the prisoners in the middle of the night when they thought no one was watching.¹

The message from the Stanford Prison Experiment is a chilling one. As the Abu Ghraib scandal has reminded us, prisons by their nature present an ever-present threat of abuse. Of necessity prison officials are given enormous power over the lives and well-being of their charges. In order to prevent abuse of that power, prisons need an effective form of oversight with the resources and commitment to maintaining the rule of law. In this country, the federal courts have traditionally provided the most effective form of oversight over prison conditions. Indeed, prior to the intervention of the federal courts, too many prisons were soul-destroying dungeons that betrayed American ideals of innate human dignity, as the examples below, from five prison systems in different sections of the country, demonstrate:

Arkansas Prison System

The inmates slept together in large, 100-man barracks and some convicts, known as “creepers,” would slip from their beds to crawl along the floor, stalking their sleeping enemies. . . . [R]ape was so common and uncontrolled that some potential victims dared not sleep; instead, they would leave their beds and spend the night clinging to the guards’ station.

Most of the guards were simply inmates who had been issued guns. . . . Inmates could obtain access to medical treatment only if they bribed the trusty [inmate guard] in charge of sick call. . . . [I]t was within the power of a trusty guard to murder another inmate with practical impunity[.]

Confinement in punitive isolation was for an indefinite period of time. An average of 4, and sometimes as many as 10 or 11, prisoners were crowded into windowless 8' X 10' cells containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell. . . . Although some prisoners suffered from infectious diseases like hepatitis and venereal disease, mattresses were removed and jumbled together each morning, then returned to the cells at random in the evening. Prisoners in isolation received less than 1,000 calories per day; their meals consisted mainly of 4-inch squares of "grue."²

Menard Correctional Institution in Illinois

The general housekeeping level and sanitation conditions in segregation have always been extremely poor[.] Open sewage, standing water, flies, roaches, dried food on galleries, adherent dirt and food residues and decaying garbage are all persistent problems[.]

Photographs . . . show numerous cells with toilets missing and uncapped waste lines.

The mattresses are dirty, torn, badly stained. Linen is old and filthy and infrequently changed. The sanitation of beds and linens is grossly deficient[.]

The control cells . . . were, however, cut-off from the rest of the gallery by a concrete block enclosure with a solid door which was normally kept locked. . . . [T]he only visibility into these cells was through plexiglass enclosures. These enclosures allowed for no ventilation into the control cell area, and very little light. Several fires were started in the control cells . . .

which [by clouding the plexiglass] made visibility into the cells extremely limited. Individuals with a chronic health care problem, including epileptics, [asthmatics and] psychiatrically disturbed inmates, were placed in control cells. . . . Without observation, an inmate could become ill and die within minutes in these cells.

Due to inadequate physician coverage. . . numerous medical tasks were performed by unlicensed and unqualified medical technicians, nurses or inmates. This included prescribing and administering controlled medication without authorization from or consultation with a physician.³

Alabama Prison System

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

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

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

Colorado State Prison (“Old Max”)

Leaking pipes and defective plumbing cause sewage to accumulate in cells and service areas or to drain into adjacent or lower cells, resulting in innumerable health and safety problems

which, when combined with the temperature and ventilation problems, make the main living areas particularly unfit for human habitation.

In addition, the evidence also shows an extensive problem with rodent and insect infestation in the cellhouses.

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

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

New Hampshire State Prison

The kitchen area is infested with rodents, cockroaches, and other insects. Broken windows and inadequate screening augment the basic insect problem[.]

Inmates placed in solitary confinement are stripped to their underwear or left naked if they wear none. No beds are provided and only a canvas mattress and, sometimes, a blanket are issued to the occupant. One inmate testified that he was stripped and denied both a blanket and a canvas mattress. He spent several nights tossing and turning on the freezing concrete trying to keep warm. Others did not receive blankets. . . . When it was too hot, the heat “baked in the dirt on your feet,” and, when it was too cold, sleep was impossible[.]

Five layers of steel and a considerable distance separate an occupant from the rest of the prison. No guard or any other person is posted in or near the area, and the cells are not checked regularly. Only the guard who brings the meals is a sure visitor, and were an inmate to scream for help at any other time, no one would hear.

In the face of the professed orientation of the program and severe understaffing, it is not surprising that plaintiffs' experts found mental health treatment at NHSP basically nonexistent. The program is reactive and crisis oriented, and, while there is some diagnostic work done, there is little or no capacity to follow through with treatment.⁶

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

Why was PLRA Enacted?

By the mid-1990's, some began to argue that prison litigation had become as much a problem as a solution, by producing too many frivolous lawsuits that took up the time of the courts and correctional officials. Congress responded to these concerns by passing the Prison Litigation Reform Act of 1995 as part of an appropriations bill and PLRA became law on April 26, 1996.⁹

In passing PLRA, however, it was never the intention of Congress to prevent the federal courts from addressing the serious violations of the law and common decency that were the subject of the cases cited above. Indeed, both the House and Senate sponsors of the bills that became PLRA noted that the Act was not intended to interfere with meritorious conditions of confinement litigation. Representative Canady stated that PLRA's provisions "will not impede meritorious claims by inmates but will greatly discourage claims that are without merit."¹⁰

Similarly, Senator Hatch, in introducing an amendment “virtually identical” to the provisions of PLRA, said that he did not want “to prevent inmates from raising legitimate claims.”¹¹

How Well Has PLRA Worked?

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

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

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

The first of the critical reforms needed in PLRA involves what is referred to as the “physical injury” requirement (42 U.S.C. § 1997e(e)). The “physical injury” requirement epitomizes the unintended consequences of certain provisions of the Act. This provision requires that, in order to sue for compensatory damages in a civil rights case in federal court, the prisoner must first demonstrate a physical injury before he or she can win damages for mental or emotional injuries.¹³ Much of the unintended consequences flow from the fact that most federal courts have applied this provision to bar damages claims involving all constitutional violations

that intrinsically do not involve a physical injury.¹⁴ Thus, for example, most federal courts bar prisoners from seeking recompense when officials deny them religious rights guaranteed by the Constitution and protected by Congress in the Religious Land Use and Institutionalized Persons Act.¹⁵

In addition to barring actions for invasions of religious rights, this provision has led to the dismissal of large numbers of cases seeking to hold prison staff accountable for gross violations of human dignity. Notoriously, some courts have applied this provision to bar actions challenging sexual assault including forcible sodomy in the absence of other physical injury.¹⁶ These cases are, however, just the tip of the iceberg of the cases alleging outrageous conduct that have been dismissed under this provision. This provision has also led to dismissal of cases challenging a prisoner's false arrest and illegal detention¹⁷, failure to protect a prisoner from repeated beatings that resulted in cuts and bruises,¹⁸ placement in a filthy cell and exposure to the deranged behavior of psychiatric patients,¹⁹ causing a prisoner to experience pain and depression when he was denied his psychiatric medications,²⁰ and deliberate unauthorized disclosure of a prisoner's HIV-positive status.²¹

Cases of sexual abuse or unjustified gross invasions of bodily privacy that fall short of a sexual assault, regardless of how outrageous the claimed conduct is, are subject to the physical injury requirement. Thus, for example, a claim that a prisoner was punished for refusing to give up his religion by being subjected to abusive strip searches was dismissed under this provision.²² Indeed, if one calls to mind the iconic photographs from Abu Ghraib, every single image – the mock execution, the forced nudity, the simulated sex acts, the use of dogs to terrify – portrays conduct for which the perpetrators in U.S. prisons would receive immunity from compensatory

damages under PLRA. This provision has even been interpreted to bar compensation for physical injury resulting from emotional harm,²³ so a prisoner who suffered a heart attack or a mental breakdown as a result of outrageous conduct, such as a mock execution, would be denied damages for the resulting physical injuries. Surely Congress did not intend this result, which removes a deterrent to staff sadistic behavior and sexual misconduct. The ACLU urges Congress to repeal this provision.

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

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

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

process, he or she can now complete another section of the form, then submit the form with other documents to the first level of appeal within fifteen working days. After the prisoner receives a denial at this level, the prisoner may appeal to the warden, again within fifteen working days, by filling out another section of the same form. If the warden denies the second-level of appeal, the prisoner fills out yet another section of the form and mails it to the Director of the Department of Corrections, again within fifteen working days.²⁶

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

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

that the prisoner for the rest of his sentence lost the right to grieve restrictions on his religious rights even if what he is really complaining about is the continuation of the restrictions?

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

Further, too often, there is an inverse relationship between the responsiveness of the grievance system and the importance of the issue. Even if routine complaints are handled reasonably well, grievances that prison staff view as likely to lead to litigation, such as complaints about serious injuries, are the most likely to be subject to a strict interpretation of the system's rules, because of the likelihood that a decision that the prisoner failed to exhaust according to the grievance system's rule will immunize the potential defendants from both damages and injunctive relief.³¹

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

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

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

One provision that is particularly unrelated to the goal of Congress to reduce frivolous litigation is the inclusion of juveniles within the definition of those subjected to its special rules limiting access to courts. In fact, it would be extremely difficult for anyone to identify a single problem with the filing of frivolous lawsuits by juveniles, even before or after the passage of PLRA. At the same time, juveniles are particularly vulnerable to abuse in institutions, and so the

potential for court oversight if abuse occurs is particularly important. Unfortunately, in recent years, that potential has too often been realized. The wide-spread sexual abuse scandal within the Texas juvenile system, in which boys and girls were sexually and physically abused by staff, and faced retaliation, including being thrown into an isolation cell in shackles if they complained, has been widely reported by the national news media.³³ Unfortunately, the Texas scandal is not an isolated event; staff sexual and physical abuse and harassment of youth in custody has been an issue from New York to Hawaii.³⁴ Because youth in custody are uniquely at risk for abuse and because confined youth have never been a source of frivolous litigation, none of the restrictions in PLRA should apply to these youth.

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

PLRA contains a number of restrictions on the powers of federal courts to issue effective relief in prison conditions of confinement litigation. It is important, however, to understand exactly how these restrictions work to make it more difficult to eliminate dangerous and degrading conditions in our nation's prisons. PLRA provides a set of standards that are supposed to limit the power of federal courts to issue injunctions in prison conditions cases. These provisions, however, simply reflect the standards for injunctive relief previously developed in the federal courts and so these provisions do not by themselves change the law applicable to injunctive relief in prison cases.³⁵

The harm from these restrictions on the powers of federal courts comes from the provisions that allow prison officials to repeatedly challenge the injunctions, and require the complete termination of injunctions if the court fails to find a constitutional violation at the time of retrial. Under PLRA, the court is required to retry, at the defendants' request, any award of

injunctive relief two years after the relief was first granted, and yearly thereafter. In addition, the court must terminate injunctive relief unless there is a “current and ongoing” constitutional violation. In other words, the only injunction that a federal court is authorized to continue after such a retrial is an injunction that has not worked to eliminate the constitutional violation. If the injunction has worked, but the constitutional violation is highly likely to return in the absence of the injunction, that injunction must terminate. This limitation on the power of the courts to prevent constitutional violations applies even if the defendants intend to begin violating the law just as soon as the injunction is lifted.³⁶

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

Two other restrictions on federal power should also be removed. PLRA limits all preliminary injunctions in conditions of confinement cases to ninety days.³⁸ As a result, even if a court finds that prisoners face an imminent threat of physical harm, its preliminary injunction may expire before the court can hold a full trial and decide whether final injunctive relief is warranted. Similarly, the automatic stay provision of PLRA provides that the mere act of filing a motion to terminate an existing injunction will result in suspending that injunction unless the court reaches a final decision on the termination motion in 30 to 90 days. This means that, even

if the court is completely unable to reach a final decision on whether the defendants are still violating the Constitution because of the complexity of the issues or congestion in the court's docket, the injunction is suspended and the adjudicated constitutional violations may resume.³⁹ Neither restriction is justified; prisoners should not be denied the protections all other persons receive under our laws because the courts simply run out of time.

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

Recovery of attorneys' fees by the rare lawyer who is willing to handle a civil rights claim regarding conditions of confinement is severely restricted by the PLRA, both by imposing an hourly cap on the rate that lawyers may recover in successful cases, and by limiting recoverable fees to 150% of any damages awarded to the plaintiff. These are restrictions imposed in no other civil rights cases, and have nothing to do with the purpose of PLRA; by definition, cases in which the prisoner proves a violation of the Constitution or federal statutory law are not frivolous. While a few major law firms have done heroic work in this area by undertaking *pro bono* litigation⁴⁰, many small civil law offices that specialize in general civil rights cases have stopped taking prisoner cases.⁴¹ The fees provisions of PLRA, which are of substantially more concern to lawyers in solo practice or in small firms than to practitioners in large firms, have thus contributed to a substantial decline in the number of lawyers who will consider taking a prisoners' rights case, a trend exacerbated by the ban on representation of prisoners imposed on the Legal Services Corporation.⁴²

Because prisoners are uniquely at risk of abuse, it is particularly dangerous to make it difficult for prisoners to obtain lawyers. Accordingly, it is critically important that the few lawyers willing to handle such cases have the incentives that are provided in other civil rights

cases to assure that constitutional protections remain a reality in practice as well as theory. Since removing the current disincentives to these cases cannot undermine the goal of discouraging prisoner frivolous litigation, this provision should be repealed.

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

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

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

While no one wants to encourage the filing of frivolous actions, the penalties should not be so severe as to bar claims such as racial discrimination, sexual abuse, and religious

discrimination because the prisoner made three mistakes in filing a case. First, it is particularly difficult for prisoners to know if a particular complaint is frivolous or does not state a claim because they currently have few sources of accurate advice or information. In 1996, in *Lewis v. Casey*, the Supreme Court substantially cut back on the scope of the constitutional right of prisoners to assistance in filing complaints. As a result, many prison systems discarded their law books and shut down programs to assist prisoners in filing meaningful legal papers.

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

The purposes of PLRA in discouraging frivolous litigation can be satisfied by satisfied by limiting the "three strikes" rule to prisoners who file malicious lawsuits, particularly because the

amendment of the statute would not prevent federal courts from applying appropriate sanctions, on an individual basis, to prisoners who abuse the indigency provisions.⁴⁷

Conclusion

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

End Notes

-
1. For a readily accessible introduction to the Stanford Prison Experiment, see *Stanford Prison Experiment* at <http://www.prisonexp.org/>.
 2. *Hutto v. Finney*, 437 U.S. 678, 681 n.3, 682 & n.6, 683 (1979) (citations and internal quotation marks omitted).
 3. *Lightfoot v. Walker*, 486 F. Supp. 504, 510-11, 515 (S.D. Ill. 1980).
 4. *Pugh v. Locke*, 406 F. Supp. 318, 325 (M.D. Ala. 1976).
 5. *Ramos v. Lamm*, 639 F.2d 559, 569-70, 573 (10th Cir. 1980) (citations omitted).
 6. *Laaman v. Helgemoe*, 437 F. Supp. 269, 278-79, 290 (D.N.H. 1977).
 7. For a sample of other cases noting similar findings, see, e.g., *Burks v. Teasdale*, 603 F.2d 59 (8th Cir. 1979); *Todaro v. Ward*, 565 F.2d 48 (2d Cir. 1977); *Battle v. Anderson*, 564 F.2d 388 (10th Cir. 1977); *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974); *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980); *Feliciano v. Barcelo*, 497 F. Supp. 14 (D.P.R. 1979); *Capps v. Atiyeh*, 495 F. Supp. 802 (D. Ore. 1980); *Johnson v. Levine*, 450 F. Supp. 648 (D. Md. 1978); *Palmigiano v. Garrahy*, 443 F. Supp. 956 (D.R.I. 1977); *Anderson v. Redman*, 429 F. Supp. 1105 (D. Del. 1977); *Barnes v. Government of the Virgin Islands*, 415 F. Supp. 1218 (D.V.I. 1976); *Costello v. Wainwright*, 397 F. Supp. 20 (M.D. Fla. 1975).
 8. In the wake of federal lawsuits, state corrections departments realized that only professionalization of prison staff would cure the violations of law found by the courts. The American Correctional Association, the leading association of correctional professionals,

responded by developing prison standards and a mechanism for prison accreditation by the organization. Even today, the American Correctional Association touts accreditation as a defense against litigation. American Correctional Association, *Standards & Accreditation*, available at <http://www.aca.org/standards/benefits.asp>.

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

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

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

12. U.S. Dep’t of Justice Office of Justice Programs Bureau of Justice Statistics, http://www.uscourts.gov/judicial_business/c2_asep97.pdf; Margo Schlanger & Giovanna Shay, American Const. Soc’y, *Preserving the Rule of Law in America’s Prisons: The Case for Amending the Prison Litigation Reform Act 2* (2007), available at <http://www.acslaw.org/files/Shlanger%20Shay%20PLRA%20Paper%203-28-07.pdf>.

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

14. *See, e.g., Royal v. Kautzky*, 375 F.3d 720 (8th Cir. 2004) (damages are not available based on retaliation for exercise of First Amendment rights); *Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002) (damages are not available for violation of due process rights); *Searles v. Van Bebber*, 251 F.3d 869 (10th Cir. 2001) (no damages for violation of religious rights); *Allah v. Al-Hafeez*, 226 F.3d 247 (3d Cir. 2000) (damages are not available for violation of religious rights); *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998) (damages are not available for invasion of privacy violating the Constitution); *but see Rowe v. Shake*, 196 F.3d 778 (7th Cir. 1999) (damages are available for violation of First Amendment rights if prisoner is not seeking compensation for mental or emotional injury); *Cannell v. Lightner*, 143 F.3d 1210 (9th Cir. 1997) (allowing damages for violations of religious rights).

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

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

-
17. *Young v. Knight*, 113 F.3d 1248, 1997 WL 297692 (10th Cir. June 5, 1997); *see also Colby v. Sarpy Co.*, 2006 WL 519396 (D. Neb. March 1, 2006) (dismissal of a claim of wrongful confinement for four months).
 18. *Luong v. Hatt*, 979 F. Supp. 481 (N.D. Tex. 1997).
 19. *Harper v. Showers*, 174 F.3d 716 (5th Cir. 1999).
 20. *Weatherspoon v. Valdez*, 2005 WL 1201118 (N.D. Tex. May 17, 2005).
 21. *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998).
 22. *Adams v. Rockafellow*, 66 Fed. Appx. 584, 2003 WL 21259701 (6th Cir. May 28, 2003); *see also Seaver v. Manduco*, 178 F. Supp. 2d 30 (D. Mass. 2002) (challenge to retaliatory strip and body cavity searches as well as verbal harassment); *Adnan v. Santa Clara Dep't of Corrections*, 2002 WL 32058464 at *3 (N.D. Cal. Aug. 15, 2002) (challenge to body cavity strip searches); *Ashrann Ra v. Virginia*, 112 F. Supp. 2d 559, 566 (E.D. Va. 2000) (routine viewing in the nude by correctional officers of the opposite sex); *Moya v. City of Albuquerque*, No. 96-1257 DJS/RLP, Mem. Op. & Order (D.N.M. Nov. 17, 1997) (strip search of two female detainees by male correctional officers, resulting in an attempted suicide by one of the prisoners, dismissed under this provision).
 23. *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998).
 24. *See* Giovanna E. Shay & Joanna Kalb, *More Stories of Jurisdiction Stripping and Executive Power: The Supreme Court's Recent Prison Litigation Reform Act (PLRA)*, 29 *Cardozo Law Review* 291, 321(2007) (reporting that in a study of cases in which an exhaustion issue was raised after the Supreme Court decision in *Woodford v. Ngo*, 126 S. Ct. 2378 (2006), all claims survived exhaustion in fewer than 15% of reported cases).
 25. *See Woodford v. Ngo*, 126 S. Ct. 2378, 2402 (Stevens, J., dissenting) (noting that most grievance systems have deadlines of 15 days or less, and that the grievance systems of nine states have deadlines of between two to five days).
 26. *See Woodford v. Ngo*, 126 S. Ct. 2378, 2383 (2006) (describing the California Department of Corrections grievance system).
 27. *See, e.g., Spaulding v. Oakland Co. Jail Medical Staff*, 2007 WL 2336216 at *2 (E.D. Mich. Aug. 15, 2007) (lawsuit dismissed despite prisoner's claim that he was unable to obtain required grievance form).
 28. *See, e.g. Richardson v. Spurlock*, 260 F.3d 495, 499 (5th Cir. 2001) (prisoner failed to exhaust because grievance system refused to consider grievance submitted on wrong form).

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

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

31. See *Woodford v. Ngo*, 126 S. Ct. 2378 (2006) (prisoner who has not complied with rules of the grievance system has failed to exhaust, so lawsuit must be dismissed).

32. See, e.g., *Williams v. CDCR*, 2007 WL 2384510 at *4 (E.D. Cal., Aug. 17, 2007) (claim of suffering from food poisoning); *Ford v. Smith*, 2007 WL 1192298 at *2 (E.D. Tex., Apr. 23, 2007) (claim of threat to personal safety); *Aburomi v. United States*, 2006 WL 2990362 at *1 (D.N.J., Oct. 17, 2006) (claim of cancer recurrence needing immediate treatment).

33. See Gregg Jones, et al., *TYC Facilities Ruled by Fear*, Dallas Morning News, March 18, 2007, available at <http://www.dallasnews.com/sharedcontent/dws/dn/latestnes/stories/031807dnprotycretalii...>

34. See, e.g., Stop Prisoner Rape, *The Sexual Abuse of Female Inmates in Ohio* (Dec. 2003), available at <http://www.spr.org/pdf/sexabuseohio.pdf> (including discussion of sexual assaults by staff in juvenile wing of facility); American Civil Liberties Union of Hawai'i, "Hawai'i Youth Correctional Facility to Pay over Half a Million Dollars for 'Relentless Campaign of Harassment of Gay and Transgender Youth'" (June 15, 2006) (threats of violence and physical and sexual assault), available at <http://www.acluhawaii.org/news.php?id=24>; letter from Deval Patrick, Civil Rights Division of U.S. Department of Justice to Louisiana Governor Mike Foster, July 15, 2006, available at <http://www.usdoj.gov/crt/split/documents/lajuvfind3.htm> (describing physical and sexual assaults on youth held in secure juvenile facilities in Louisiana); American Civil Liberties Union & Human Rights Watch, *Custody and Control: Conditions of Confinement in New York's Juvenile Prisons for Girls* 44-56, 63-71 (2006).

35. See *Gilmore v. California*, 220 F.3d 987, 1006 (9th Cir. 2000) (except for the limitations on consent decrees, the prospective relief provisions of PLRA reflect "essentially the same" limits on federal injunction as does the general law because no injunction should require more than is necessary to correct the underlying constitutional violation); *Smith v. Ark. Dep't of Correction*, 103 F.3d 637, 647 (8th Cir. 1996) (PLRA merely codifies existing law and does not change the standards for whether to issue an injunction).

36. See *Para-Profl Law Clinic at SCI-Graterford v. Beard*, 334 F.3d 301, 304 n.1, 306 (3d Cir. 2003) (PLRA requires termination of injunctive relief even though defendants have announced plans that are likely to lead to a return of the constitutional violation); see also *Castillo v. Cameron County*, 238 F.3d 339, 353 (5th Cir. 2001); *Cason v. Seckinger*, 231 F.3d 777, 784 (11th Cir. 2000).

37. 18 U.S.C. § 3626(c) (2007) prohibits federal courts from approving consent decrees that omit findings that the relief is necessary to correct a violation of the Constitution or other federal

law by subjecting consent decrees to the same jurisdictional limits that apply to contested orders pursuant to 18 U.S.C. § 3626(a) (2007).

38. 18 U.S.C. § 3626(a)(2) (2007).

39. 18 U.S.C. § 3626(e) (2007).

40. Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. Law Rev. 550, 601 (2006) (noting that there has been an increase in pro bono litigation by large firms).

41. This statement is based on the experience of staff of the National Prison Project in providing advice and support to private lawyers litigating conditions of confinement claims in the eleven years since PLRA; *but see* Schlanger, *supra* note 40 (finding insufficient evidence to express an overall conclusion on the effect on private litigators of the restrictions in PLRA).

42. *See* Omnibus Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(15), 110 Stat. 1321, 1321-55.

43. *See* 28 U.S.C. § 1915(a,b) (2007).

44. *See* 28 U.S.C. § 1915(g) (2007).

45. 511 U.S. 825 (1994).

46. *Farmer v. Brennan*, 11 F.3d 668 (7th Cir. 1992).

47. *See, e.g., Olivares v. Marshall*, 59 F.3d 109 (9th Cir. 1995) (in a case pre-dating PLRA, holding that district judge was entitled to impose partial filing fee on indigent prisoner who appeared to be manipulating indigency status).