

## **Testimony of Human Rights Watch**

**For the House Judiciary Subcommittees on Crime, Terrorism, and Homeland**

**Security and the Constitution, Civil Rights, and Civil Liberties**

**Regarding proposed revisions to the Prison Litigation Reform Act (PLRA)**

**November 8, 2007**

Human Rights Watch welcomes this opportunity to present to the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security and the Subcommittee on the Constitution, Civil Rights, and Civil Liberties our concerns about several misguided provisions in the Prison Litigation Reform Act of 1996 and to urge you to support long overdue reforms.

### **Introduction**

Human Rights Watch is the largest human rights organization based in the United States. Our researchers conduct fact-finding investigations into human rights abuses in all regions of the world. Human Rights Watch has been investigating and reporting on prison conditions and the treatment of incarcerated people in the United States for over twenty years. Our reports on US prison conditions include *Prison Conditions in the United States* (1991); *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (1996); *Cold Storage: Super-Maximum Security Confinement in Indiana* (1997); *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons* (1998); *No Escape: Male Rape in U.S. Prisons* (2001); *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* (2003); and *Cruel and Degrading: The Use of Dogs for Cell Extractions in U.S. Prisons* (2006). In recognition of Human Rights Watch's expertise on US prison conditions, a senior Human Rights Watch staff member has been appointed as a Commissioner of the National Prison Rape Elimination Commission, established by the Prison Rape Elimination Act of 2003 (PREA).<sup>1</sup>

Human Rights Watch's research both before and after the PLRA was passed has convinced us that this legislation undermines both the public interest and US human rights obligations. It is a serious obstacle to holding prison officials accountable when they fail to provide humane treatment and decent living conditions; to securing appropriate remedies for incarcerated adults and youth when their civil and human rights are violated; and to promoting the public interest in well-managed, safe and productive prisons.

In the United States constitutional framework of checks and balances, the courts ensure that public officials cannot violate their legal obligations with impunity, and that

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<sup>1</sup> 42 U.S.C. § 15601, et seq.

individuals -- however disfavored politically or socially-- have the opportunity to seek vindication of their rights and redress for violations of those rights.<sup>2</sup>

Under international law, prisoners possess the same panoply of fundamental human rights as everyone else, subject only to the restrictions that are unavoidable in a closed environment.<sup>3</sup> In particular they possess rights that govern their treatment while detained or incarcerated, including the right to be treated with “humanity and with respect for the inherent dignity of the human person.”<sup>4</sup> Among the rights all persons possess is the right to an accessible and effective remedy. The International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, provides that an “effective remedy” must be available to all persons whose internationally recognized rights have been violated.<sup>5</sup> The UN Human Rights Committee has emphasized that remedies should include measures to prevent a recurrence of the violation as well as appropriate compensation.<sup>6</sup> Accordingly prisoners, like all other persons, have the right to an accessible and effective remedy when their rights are violated.

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<sup>2</sup> As early as 1803, the US Supreme Court noted that “it is a settled and invariable principle...that every right, when withheld, must have a remedy, and every injury its proper redress.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

<sup>3</sup> See the UN Committee on Human Rights, General Comment No. 21, Article 10, Humane Treatment of Prisoners Deprived of their Liberty, at paragraph 3 (1994). The UN Committee provides authoritative interpretation and guidance on the scope and nature of obligations under the International Covenant on Civil and Political Rights (ICCPR) to which the United States is a party (see below). Several other international documents also affirm the tenet that prisoners retain fundamental human rights while incarcerated, including the United Nations Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the Basic Principles for the Treatment of Prisoners. The Basic Principles, adopted by the General Assembly in 1990, state:

Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.

Art. 5, Basic Principles for the Treatment of Prisoners, adopted and proclaimed by General Assembly Resolution 45/111 of 14 December 1990.

<sup>4</sup> Art. 10(1), International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc.A/6316 (1966), 999 UNTS 171, entered into force March 23, 1976, ratified by the U.S. on June 8, 1992.

<sup>5</sup> ICCPR, Art. 2(3).

<sup>6</sup> “Article 2, paragraph 3 [of the ICCPR] requires that States parties make reparation to individuals whose Covenant rights have been violated...In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation.” Human Rights Committee, General Comment 31[80], Nature of the General legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), par.16. In addition to compensation, the Committee also emphasizes that remedies include taking “measures to prevent a recurrence of a violation of the Covenant,” “guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.” *Ibid.*

Congress enacted the PLRA in 1996 to curb what it believed was a deluge of frivolous prisoner lawsuits abusing the judicial system. The legislation's chief sponsor, Senator Orrin Hatch, emphasized at the time that his purpose was not "to prevent inmates from raising legitimate claims." Yet a decade of experience with the PLRA reveals that the legislation has had precisely that unintended effect.

The PLRA places severe limitations on the ability of incarcerated adults and youth to challenge and obtain remedies for abusive prison conditions through litigation. It prevents countless serious claims by prisoners from reaching federal courts – including claims of physical and sexual abuse, gross mistreatment of confined juveniles, medical mistreatment, and lack of mental health treatment. It unfairly limits the damages incarcerated persons can receive for violations of their rights. And it permits unconstitutional prison conditions to fester, because it prevents courts from ensuring solutions to the problem when corrections officials are unwilling or unable to do so. The restrictions and limitations imposed by the PLRA cannot be squared with US international human rights obligations. They operate to deny prisoners access to effective remedies that will end and compensate them for violations of their rights.

### **PLRA and Prison Sexual Violence**

We believe the impact of the PLRA can best be appreciated if we illustrate how it frustrates Congress's goal of eliminating sexual abuse in US prisons. In 2003, shocked by the extent of sexual abuse in prison, its devastating consequences, and the lack of response by prison officials, Congress enacted the Prison Rape Elimination Act (PREA). The legislation inaugurated a national effort to eliminate prison rape by staff or inmates. The ability of prisoners to obtain the assistance of the courts when prison officials fail to protect them from sexual abuse is critical to the success of this effort. But absent reform, the PLRA severely limits that ability.

#### 1) The exhaustion requirement

The PLRA requires courts to dismiss prisoners' cases if they have not satisfied all internal complaint procedures, including meeting tight deadlines for filing the initial grievance and making administrative appeals. It is entirely reasonable to ensure that prison officials have an opportunity to respond to and resolve prisoners' grievances before a court steps in. It is not reasonable, however, for prison officials to escape accountability for unlawful conduct simply because a prisoner fails to dot an "i" or cross a "t" in following internal grievance procedures – for example, because the prisoner fails to submit a grievance within 48 hours of the incident of abuse, as many prison systems require.

Although complying with grievance procedures can be difficult for any prisoner, it may be particularly difficult for prisoners who have endured sexual abuse at the hands of staff or other inmates. The trauma of sexual violence may leave them emotionally incapable of filing a complaint within a short time period – particularly when a prisoner abused by staff must first informally "complain" to the very officer who abused her as the first step

in the grievance process.<sup>7</sup> Prisoners are also reluctant to grieve against officers who have abused them because the lack of confidentiality that often surrounds grievances exposes them to retaliation by the officer or other staff and because prisoners are aware that those who come forward with allegations of staff sexual abuse are often intimidated or even punished for doing so.

Fear of retaliation also deters prisoners from complaining about inmate-on-inmate rape. They fear being attacked and injured by the perpetrator of the abuse because prison officials often fail to take adequate steps to protect them and because the perpetrators are rarely effectively punished. As a prisoner explained to Human Rights Watch,

The first time [I was raped] I told on my attackers. All [the authorities] did was moved me from one facility to another. And I saw my attacker again not too long after I told on him. Then I paid for it. Because I told on him, he got even with me. So after that, I would not, did not tell again.<sup>8</sup>

They also know that they risk assault from other prisoners if they are known to have “snitched” on another inmate. One prisoner who was repeatedly raped by his cellmate wrote to Human Rights Watch, “I never went to the authorities, as I was too fearful of the consequences from any other inmate. I already had enough problems, so didn’t want to add to them by taking on the prison identity as a ‘rat’ or ‘snitch.’ I already feared for my life. I didn’t want to make it worse...”<sup>9</sup> Prisoners who have been raped by other prisoners may also fail to meet grievance deadlines because they feel complaining is futile; they believe prison officials are disdainful and indifferent about sexual abuse and will not do anything about it. As one prisoner told Human Rights Watch, “I told my complaint and Mrs. P said that I was never raped that I just gave it up.”<sup>10</sup>

A class action lawsuit pending in New York illustrates the particular difficulty the PLRA exhaustion requirement poses for prisoners alleging staff sexual abuse. Fifteen female prisoners in four different New York prisons alleged that male guards sexually abused them from 2001 to 2003. The alleged abuse included sexual assault, harassment, forcible rape, sexual intercourse, anal intercourse, oral sexual acts, sexual touching, voyeurism, invasion of personal privacy, demeaning sexual comments, and intimidation to deter women prisoners from reporting sexual misconduct.<sup>11</sup> The women also alleged that the prisons’ system for reporting and investigating complaints of sexual misconduct was inadequate and contributed to the persistence of staff sexual abuse.<sup>12</sup> They allege that complaints of sexual abuse are not treated confidentially, and that “the persons to whom

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<sup>7</sup> In many prison systems, grievance procedures require a prisoner to confront informally the implicated officer as a first step before filing a formal grievance, even while the officer is still in a contact position with the prisoner. Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (1996), at 5.

<sup>8</sup> Human Rights Watch, *No Escape: Male Rape in U.S. Prisons* (2001) (hereinafter “*No Escape*”), at 132.

<sup>9</sup> *No Escape*, at 212.

<sup>10</sup> *No Escape*, at 152.

<sup>11</sup> *Amador v. Andrews, et al.*, No. 03 Civ. 0650 (KTD) (S.D.N.Y.), First Amended Class Action Complaint, September 5, 2003, at 2.

<sup>12</sup> *Ibid.*, ¶ 26.

such complaints are to be made are colleagues of the perpetrator(s) of the abuse, putting the victim at risk of retaliation.”<sup>13</sup> The lawsuit also states that the system deters women from reporting sexual misconduct by providing ambiguous and incomplete information about how to complain; punishing women for admitting to sexual relations with staff; failing to protect complainants against retaliation; failing to adequately investigate complaints; and failing to take appropriate action against perpetrators if and when women do come forward.<sup>14</sup>

In 2005, the state moved to have the suit dismissed, because some of the plaintiffs in the class action lawsuit had failed to exhaust administrative remedies as required by the PLRA. The judge has yet to rule on the motion. The state is thus insisting, bizarrely, that all the plaintiffs must exhaust the administrative system that they are challenging as useless and counterproductive. The state’s motion to dismiss on PLRA grounds and the judge’s failure to rule on it have delayed by years the ability of the plaintiffs to vindicate their right to be free of staff sexual abuse.

**Recommendation: The PLRA should be amended so that if prisoners have not presented their claims to responsible prison officials before filing suit, the court may stay the case for a sufficient time to give prison officials the opportunity to resolve the complaint administratively.**

## 2) The physical injury requirement

With the Prison Rape Elimination Act, Congress has sought to eliminate not only violent rape, but also such sexual misconduct as fondling prisoners’ breasts or genitals, subjecting them to unnecessary strip searches, making lewd remarks, or peeping at them while they shower or use the toilet. Yet the PLRA bars prisoners from recovering damages for such sexual degradation and humiliation. Under the PLRA a prisoner may not obtain damages for unlawful or unconstitutional conduct that has caused mental or emotional suffering unless the prisoner has also suffered a more than minor physical injury.<sup>15</sup>

There are numerous examples of prisoners denied judicial relief for alleged sexual abuse because they did not claim physical injury. Because of the physical injury requirement, courts have dismissed complaints by:

- two female prisoners who alleged that they were strip-searched by male guards. After the incident, one woman began to suffer migraine headaches, while the other attempted suicide by drug overdose. The court ruled that the women had not satisfied the PLRA’s physical injury requirement; “a few hours of lassitude and nausea and the discomfort of having her stomach pumped is no more than a

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<sup>13</sup> Ibid., ¶ 27.

<sup>14</sup> Ibid., ¶¶ 29, 32, 35-39.

<sup>15</sup> The PLRA states that “No Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.” 42 U.S.C. § 1997e(e).

*de minimis* physical injury.”<sup>16</sup>

- a prisoner who alleged that a female corrections officer had grabbed his penis and held it in her hand.<sup>17</sup>
- a prisoner who alleged that a prison employee reached between his legs and rubbed his genitals.<sup>18</sup>
- a prisoner who claimed to be routinely viewed in the nude by opposite-sex staff. The court dismissed the action despite finding that the complaint alleged a violation of clearly established constitutional rights.<sup>19</sup>

At least one court has held that even an allegation of sexual assault, without further statement of physical injury, did not satisfy the physical injury requirement of the PLRA. Although the prisoners’ complaint asserted that officers had fondled their genitals and “sexually battered them by sodomy” the court dismissed their case because “the plaintiffs do not make any claim of physical injury beyond the bare allegation of sexual assault.”<sup>20</sup>

Congress no doubt thought that the physical injury requirement would help protect prison officials from having to respond to frivolous lawsuits. But the provision is not necessary. Even without it, the courts have the authority needed to screen out cases that allege staff conduct that does not raise constitutional concerns. Congress certainly did not intend the PLRA to allow prison staff to sexually abuse and humiliate prisoners with impunity.

**Recommendation: The physical injury requirement should be repealed.**

3) Other constraints on prisoner litigation

The PLRA contains several other provisions that limit the ability of prisoners to challenge and remedy abusive prison conditions through litigation. None of these provisions is necessary to deter or prevent frivolous prisoner litigation. All of them restrict litigation that raises serious claims involving, for example, sexual or physical abuse. And all of them impose unique limitations and restrictions on prisoner litigation that do not exist in other civil rights cases.

- The PLRA severely restricts the amount of attorney fees that can be recovered in successful cases brought by prisoners, hindering the ability of prisoners to find legal representation, even in the most meritorious cases. For example, the PLRA caps the fee award at 150 percent of the judgment no matter how much time or expense a lawyer has invested in a prisoner’s case. If, for example, a jury awards a prisoner

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<sup>16</sup> *Moya v. City of Albuquerque*, Civil No. 96-1257 DJS/RLP (D.N.M., Memorandum Opinion and Order, Nov. 17, 1997), at 3-4.

<sup>17</sup> *Smith v. Shady*, 2006 U.S. Dist. LEXIS 24754 (M.D. Pa., Feb. 8, 2006), at \*5-6.

<sup>18</sup> *Cobb v. Kelly*, 2007 WL 2159315 (N.D. Miss., July 26, 2007).

<sup>19</sup> *Ashann Ra v. Commonwealth of Virginia*, 112 F. Supp. 2d 559, 565-66 (W.D. Va. 2000).

<sup>20</sup> *Hancock v. Payne*, 2006 U.S. Dist. LEXIS 1648 (S.D. Miss., Jan. 4, 2006), at \*10.

\$5,000 because staff failed to protect him and he was raped, the lawyer can receive no more than \$7,500 in attorney fees, even if the actual legal costs were many times that much. Unable to find lawyers to take on their cases, prisoners all too often are forced to represent themselves, dooming most of their cases to failure, whatever the true merits of their claims.

- The PLRA requires that up to 25% of the damages prisoners are awarded in a successful case be applied to the attorney fees the court orders prison officials to pay. This unfairly deprives inmates of the compensation to which they would otherwise be entitled and provides an unconscionable windfall for officials by reducing their costs for violating the law.

- The PLRA requires automatic termination of court orders regarding prison conditions after two years unless the prisoners prove ongoing constitutional violations, i.e., unless they successfully re-litigate the merits of the case.<sup>21</sup> Meaningful reform of abusive prison conditions pursuant to court orders often takes time; institutional inertia, bureaucratic obstacles, lack of funding or even disagreement with the court can slow the pace of change. The public interest in well-run prisons is better served when courts are not hamstrung in their ability to ensure full compliance with their orders.

**Recommendation: The PLRA should be amended to remove limitations on attorney fees and the courts' power to provide relief that do not exist in non-prison civil rights cases.**

#### 4) Application of the PLRA to Juveniles

It is unclear why the PLRA applies to juveniles. Far from being likely to submit frivolous claims, young people in custody are far less likely than adults to seek relief even from abusive detention conditions. Indeed, because youth may be even more likely than adults to confront unchecked violence and sexual assault in detention, their access to the courts should be encouraged, not discouraged.

In one recent case, a youth was repeatedly assaulted and once even raped by other residents while he was held in state juvenile facilities. Staff were allegedly aware of the beatings and the boy's mother made what the court called "heroic" efforts to protect her son by notifying numerous authorities about the problem. The court nonetheless dismissed the boy's civil rights complaint because he had never filed any formal grievances about any of the incidents of abuse he endured and the staff's failure to protect him. If he had sought to comply with the specified grievance process, he would have had to file grievances within 48 hours of any incident of abuse.<sup>22</sup>

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<sup>21</sup> By contrast, in civil rights cases that do not involve prisoners, the burden is on defendants seeking to terminate a court order to prove that they are operating and will continue to operate according to constitutional requirements.

<sup>22</sup> *Minix v. Pazera*, 2005 U.S. Dist. LEXIS 44824 (N.D. Ind., July 27, 2005).

**Recommendation: The PLRA should be amended to exempt from its provisions children under the age of 18.**

5) Filing Fees and other Bars to Prisoner Civil Rights Cases

Indigent persons are typically exempted from having to pay the steep federal court filing fees in civil rights cases. Yet the PLRA requires poor prisoners to pay at least a partial filing fee at the outset of the case and to pay the entire fee—currently a hefty \$350—over time. And a prisoner who has had three complaints or appeals dismissed – even if solely on technical grounds, and even if the dismissals happened years ago – is *permanently* barred from ever filing another case without first paying the entire \$350 up front, something few prisoners can do. Congress has recognized that poverty should not be a barrier to judicial relief from unlawful conduct by public officials and it has authorized the waiver of judicial filing fees for indigent civil rights plaintiffs. It should not treat poor prisoners any differently.

**Recommendation: The PLRA should be amended to ensure that prisoners in civil rights cases are not subject to filing fee provisions more onerous than those that apply to any other person bringing a civil rights case.**