

SCHOOL OF LAW

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BY FACSIMILE to the Intercontinental Hotel, Miami (305-577-0384)

Laurel G. Bellows, Chair

House of Delegates

American Bar Association

321 N. Clark Street

Chicago, IL 60610

Dear Ms. Bellows:

I am writing to express my strong support for the resolution that has been submitted to the American Bar Association's House of Delegates calling for reforms to the Prison Litigation Reform Act (PLRA).

I have observed the PLRA in action since it was passed in 1996, first as a lawyer at the U.S. Department of Justice, charged with helping to develop the Department's interpretation of the statute and its constitutional defense, and since 1998 as a law professor. I have written three scholarly articles that examine the empirical effects of the PLRA on jail and prison litigation: *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006); *Determinants of Civil Rights Filings in Federal District Court by Jail and Prison Inmates*, 1 J. EMPIRICAL LEG. STUD. 79 (2004) (with Anne Piehl); and *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003). Most recently, I also have had the privilege to serve as a member of the Commission on Safety and Abuse in America's Prisons, chaired by former Attorney General Nicholas Katzenbach and former Court of Appeals Judge John Gibbons, and in that capacity heard from corrections officials, prisoners, advocates, and others about the positive and negative effects of the PLRA. (The views I express in this letter are my own, and should not be attributed to Washington University or to the Commission, though I understand that the Commission's chairmen will be writing you in support of the resolution as well.)

I wish to make two main points. First, because much of the debate about prisoner litigation has proceeded without recourse to facts, I want to share with the ABA some underlying facts about prisoner litigation and the PLRA. Second, I want to elaborate the ways in which the proposal would, if the ABA adopted it and was successful in bringing reform to fruition, solidify the rule of law in America's jails and prisons.

I first address several important facts about prisoner litigation and the PLRA:

1. *Prisoner filing rates were not skyrocketing prior to the PLRA's passage.* The PLRA was passed after an enormous increase in the amount of prisoner civil rights litigation. But that increase was *not* caused by some large or sustained increase in

prisoners' litigiousness. Rather, the rise of prisoner filings was directly attributable to the most rapid expansion of prison and jail populations this country had ever seen. From the perspective of correctional administrators, the increase was real: the number of federal civil rights cases filed by prisoners increased from 16,000 in 1981 to 39,000 in 1995. But over the same period the *rate* of inmate filings actually decreased, from 29 per 1000 prisoners to 25 per 1000 prisoners.¹ Just as we don't talk about prisoners' skyrocketing need for food when correctional populations increase, it is inaccurate to talk about skyrocketing prisoner litigation figures.

2. *Prisoners are not hyperlitigious.* The best data available indicates that inmates are no more litigious, on average, than anyone else.² For example, in 1995, just prior to the PLRA's passage, the overall rate of lawsuits brought by the entire U.S. population in state courts of general jurisdiction and in federal district courts was 56 per 1000 people; the number of federal civil rights actions brought by prisoners was 25 per 1000 prisoners.
3. *The PLRA has not succeeded in its effort to "reduce the quantity and improve the quality of prisoner suits."*³ The quantity of litigation in federal court by prisoners has certainly declined since passage of the PLRA: in 1995, at the pre-PLRA peak, 1.6 million prisoners filed about 40,000 federal civil rights actions. In 2005, 2.2 million prisoners filed under 25,000 actions. If the PLRA were succeeding at winnowing out the non-meritorious cases, one would expect that prisoners in this reduced pool of litigation would succeed more often. The opposite is true: since 1996, prisoners' civil rights cases have fared ever worse in the federal courts. Defendants have been winning more cases pretrial and settling fewer cases. This suggests that the PLRA has made meritorious cases more difficult to file and more difficult to win.⁴

More generally, the organized bar's commitment to the rule of law means that while the ABA should take seriously the litigation burden felt by corrections officials, it should advocate that any softening of that burden be tailored to maintain accountability and prisoners' constitutional rights. The resolution does not challenge the PLRA's most important innovation designed to lighten the burden of litigation—courts would continue screening prisoners' cases prior to authorizing service on the defendants, and would sua sponte dismiss cases that are frivolous, malicious, fail to state a claim, or seek damages from an immune defendant. It is in large part because of this pre-service screening that correctional administrators no longer see the volume of cases they once did. The components of the PLRA that the resolution would affect are those that undercut the ability of prisoners with legitimate constitutional grievances to receive redress. For example, the statutory provision barring recovery for emotional and mental injury in the absence of physical injury has been held to render compensatory damages unavailable for proven or conceded violations of religious freedom, due process, free speech,

¹ See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1583-87 (2003).

² *Id.* at 1575-78.

³ *Porter v. Nussle*, 534 U.S. 516, 525 (2002).

⁴ Schlanger, *Inmate Litigation*, *supra*, at 1644-64.

and the like.⁵ The administrative exhaustion provisions have barred recovery for prisoners (including pretrial and juvenile detainees) with legitimate and serious cases, because they failed to comply with some formal aspect of a facility's grievance procedure—even if their complaint was timely and fully set forward before the correct administrators.⁶ The PLRA's sharp limits on plaintiffs' attorneys fees affects *only* meritorious cases, because attorneys fees are available only to prevailing parties.

The point is that the resolution is aimed at improving the PLRA's achievement of its sponsors' own stated aspirations. As Senator Orrin Hatch phrased it in one version of this point made repeatedly in floor speeches in support of the various PLRA versions, "I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised. The legislation will, however, go far in preventing inmates from abusing the Federal judicial system."⁷

I gather that several correctional administrators have written you in opposition of this resolution. It is understandable that the defendants in a common type of lawsuit would seek the continuation of statutory provisions that have rendered them substantially immune from damages even for proven violations of constitutional rights. Nobody likes to be sued. But if constitutional lawsuits have merit, then the organized bar should be in favor of compensation for their plaintiffs, not immunity for the constitutional violators.

Thank you for allowing me to share my views with you.

Sincerely,



Margo Schlanger

cc: Karen Mathis, President, American Bar Association
James Dimos, Indiana Delegate
Tracy Giles, Virginia Delegate
Jimmy Goodman, Oklahoma Delegate
Timothy Kirven, Wyoming Delegate
Peter Langrock, Vermont Delegate

⁵ See, e.g., *Allah v. al-Hafeez*, 226 F.3d 247 (3d Cir. 2000); *Pearson v. Welborn*, 471 F.3d 732 (7th Cir. 2006).

⁶ See, e.g., *Jackson v. District of Columbia*, 254 F.3d 262, 269-70 (D.C.Cir. 2001) (dismissing case for non-exhaustion by a plaintiff who complained to three prison officials and was told by the warden to "file it in the court"); *Chelette v. Harris*, 229 F.3d 684, 688 (8th Cir. 2000) (dismissing case for non-exhaustion by a plaintiff who had complained to the warden and been told that the warden would take care of his problem), cert. denied, 531 U.S. 1156 (2001).

⁷ 141 CONG. REC. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch); *see also* 141 CONG. REC. S18,136 (daily ed. Dec. 7, 1995) (statement of Sen. Hatch); 141 CONG. REC. H1480 (daily ed. Feb. 9, 1995) (statement of Rep. Canady) ("These reasonable requirements will not impede meritorious claims by inmates but will greatly discourage claims that are without merit).