

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
REPORT TO THE HOUSE OF DELEGATES

RESOLVED, That the American Bar Association urges federal, state, local, and territorial governments to ensure that prisoners are afforded meaningful access to the judicial process to vindicate their constitutional and other legal rights and are subject to procedures applicable to the general public when bringing lawsuits.

FURTHER RESOLVED, That the American Bar Association urges Congress to repeal or amend the Prison Litigation Reform Act (PLRA) as follows:

1. Repeal the requirement that prisoners (including committed and detained juveniles and pretrial detainees, as well as sentenced prisoners) suffer a physical injury in order to recover for mental or emotional injuries caused by their subjection to cruel and unusual punishment or other illegal conduct;
2. Amend the requirement for exhaustion of administrative remedies to require that a prisoner who has not exhausted administrative remedies at the time a lawsuit is filed be permitted to pursue the claim through an administrative-remedy process, with the lawsuit stayed for up to 90 days pending the administrative processing of the claim;
3. Eliminate the restrictions on the equitable authority of federal courts in conditions-of-confinement cases;
4. Allow prisoners who prevail on civil-rights claims to recover attorney's fees on the same basis as the general public in civil-rights cases;
5. Repeal the provisions extending the PLRA to juveniles confined in juvenile detention and correctional facilities; and
6. Repeal the filing-fee provisions that apply only to prisoners.

FURTHER RESOLVED, That the American Bar Association urges Congress to hold hearings to determine if any other provisions of the PLRA should be repealed or modified and that legislatures of states having comparable provisions do the same.

FURTHER RESOLVED, That the American Bar Association urges Congress to hold hearings to determine what other steps the federal government may take to foster the just resolution of prisoner grievances in the nation's prisons, jails, and juvenile detention and correctional facilities.

REPORT

In 1996, Congress enacted the Prison Litigation Reform Act (PLRA). Pub. L. No. 104-34, 110 Stat. 1321 (1996). Although the PLRA placed substantial restrictions on prisoners' access to the courts to vindicate constitutional and other legal rights, Congress never fully vetted the statute and its implications. A House Report issued in 1995 briefly discussed two House bills that contained some, but not all, of the provisions that were later included in the PLRA. H.R. REP. NO. 104-21, at 5-6 (1995). But the PLRA itself simply was inserted and approved as a rider to an omnibus appropriations bill, much to the consternation of members of Congress who recognized the need for in-depth review of legislation of such import. *See, e.g.*, 142 CONG. REC. S2297 (1996) (statement of Senator Simon) ("I am very discouraged that this legislation was considered as one of the many issues on an appropriations bill. Legislation with such far-reaching implications certainly deserves to be thoroughly examined by the committee of jurisdiction and not passed as a rider to an appropriations bill.").

For several reasons, the PLRA is of especial concern to all who believe in the need to adhere to the Constitution and other legal requirements. First, the Act places formidable, and often insurmountable, obstacles in the paths of incarcerated individuals seeking redress from the courts for violations of their federally secured rights. And without access to the courts, the legal rights accorded prisoners are ephemeral and unenforceable – meaningless words and empty promises.

Second, the PLRA contravenes the basic premise, one to which the American Bar Association has long subscribed, that it is as important for prisoners to have ready access to the courts to enforce their legal rights as it is for everyone in our country. For over twenty-five years, the ABA steadfastly has maintained that convicted individuals should be able to bring and defend lawsuits "under procedures applicable to the general public." *ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, Standard 19-2.6(a)(i) (3rd ed. 2004); *ABA Standards for Criminal Justice, Legal Status of Prisoners*, Standard 23-8.5(a) (1981).

Third, the PLRA singles out for differential treatment individuals who are particularly vulnerable to violations of their constitutional and other legal rights. In part because prisoners are isolated from public view, in part because they are so reviled, and for other reasons, prisoners are frequently the targets and victims of illegal conduct. The recently issued report of the Commission on Safety and Abuse in America's Prisons reaffirmed what is generally known about the nation's correctional systems: that problems of sexual and physical abuse of prisoners, the failure to meet their basic medical and mental-healthcare needs, and sordid conditions of confinement continue unabated in many prisons and jails across the country. Commission on Safety and Abuse in America's Prisons, *Confronting Confinement* (2006). The Commission report also underscored that the federal courts historically have played an integral role in unveiling and remedying the mistreatment of prisoners and violations of their rights that occur behind the walls and fences of this nation's prisons and jails, a role that the Commission found the PLRA has greatly undermined. *Id.* at 84-87.

Fourth, the PLRA singles out for differential treatment individuals who are particularly ill-equipped to surmount the barriers to justice the Act erects. Most prisoners are functionally illiterate, with seven out of every ten performing at the lowest literacy levels. Karl O. Haigler et al., *Literacy Behind Prison Walls* xviii, 17 (1994). More than half of all prisoners, including jail inmates, are mentally ill. Bureau of Justice Statistics, U.S. Dep't of Justice, *Mental Health Problems of Prison and Jail Inmates*, at 1 (2006). And the persons subject to the PLRA include another category of individuals especially vulnerable to the prolixities of the PLRA: juveniles, those confined in juvenile as well as adult detention and correctional facilities.

The ABA is calling on Congress to revisit the PLRA and repeal or amend those provisions of the Act that curtail the ability of confined juveniles, jail inmates, and prisoners to vindicate their constitutional and other legal rights. As a first priority, the ABA is urging Congress to make the following changes to the PLRA:

1. *Repeal the PLRA's physical-injury requirement.* The PLRA prohibits a prisoner from recovering damages for mental or emotional injuries suffered while in custody unless the prisoner also was injured physically. See 42 U.S.C. § 1997e(e). The effect of this provision is to leave a wide range of constitutional violations beyond redress, including some forms of torture. See, e.g., *Bean v. Washington*, 1999 WL 759481 (N.D. Ill. 1999) (prisoner's claim for damages dismissed where correctional officials sicced an attack dog on the plaintiff, but the dog did not bite him); *Walker v. Akers*, 1999 WL 787602 (N.D. Ill. 1999) (claim alleging that correctional officer, while holding an electric stun gun, demanded that the prisoner-plaintiff perform a sex act dismissed because of the absence of a physical injury). Absent a physical injury, the requirement bars prisoners confined in vile conditions or subjected to patent violations of their constitutional rights from obtaining compensatory relief. See, e.g., *Alexander v. Tippah County, Mississippi*, 351 F.3d 626, 631 (5th Cir. 2003) (physical-injury requirement necessitated the dismissal of the Eighth Amendment claim of a prisoner who vomited from the smell of the raw sewage covering the floor of his isolation cell); *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999) (prisoner confined in filthy, feces-smeared cells barred by the physical-injury requirement from recovering damages); *Ashann-Ra v. Commonwealth of Virginia*, 112 F. Supp. 2d 559, 566 (W.D. Va. 2000) (although prisoner's complaint that female officers routinely saw his genitals stated a violation of a "clearly established" constitutional right, the physical-injury requirement barred his claims for monetary relief). And because most courts have construed the physical-injury requirement to apply to constitutional violations that typically do not cause physical injuries, such as First Amendment, equal protection, and procedural due process violations, prisoners cannot obtain compensatory relief for violations of these fundamental rights. See *Geiger v. Jowers*, 404 F.3d 371, 375 (5th Cir. 2005) (listing cases holding that the physical-injury requirement applies to all constitutional violations).

2. *Amend the requirement for exhaustion of administrative remedies to provide that prisoners who have filed a lawsuit within the time period set by the statute of limitations but have not exhausted their administrative remedies can pursue their claim through an administrative-remedy process while the lawsuit is stayed.* The PLRA requires prisoners to exhaust available administrative remedies before filing a lawsuit that challenges the legality of the conditions of their confinement under 42 U.S.C. § 1983 or any other “[f]ederal law.” In *Woodford v. Ngo*, 126 S.Ct. 2378 (2006), the Supreme Court held that this exhaustion requirement implicitly includes a procedural-default sanction. In other words, if a prisoner does not file a grievance within the timelines set by prison officials, the prisoner has failed to exhaust administrative remedies and is barred from bringing suit. In an amicus brief filed with the Supreme Court, the American Bar Association strongly disagreed with this interpretation of the PLRA’s exhaustion requirement.

One of the problems with the exhaustion requirement, as it is currently constructed, is that it effectively closes the courthouse door to many prisoners. *See, e.g., Gauntt v. Miracle*, 2002 WL 1465763 (N.D. Ohio) (complaint alleging injuries from a correctional officer’s excessive use of force dismissed because of the prisoner’s failure to meet a 5-day deadline in filing a grievance). The deadlines for filing a prison grievance typically are very short, usually no more than fifteen days and in some states as little as two to five days. *See id.* at 2402 (Stevens, J., dissenting). In effect, a procedural-default rule engrafted onto the exhaustion requirement imposes a statute of limitations on many prisoners that ranges from a few days to a few weeks. Yet the Supreme Court has recognized that many victims of civil-rights violations will not recognize, even within 120 days, that their rights have been violated. *See 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 § 1983 suit).

Prisoners, isolated from the outside world and often illiterate, are even less likely to recognize, in an even shorter timeframe, that their rights have been violated and that they have the right to legal redress. And since prisoners live in an environment fraught with suspicion and fears of retaliation, they are even less likely to muster the courage, particularly under such tight time constraints, to seek the redress to which they are or may be entitled. Finally, some constitutional violations are so egregious (e.g., rape by a correctional officer) or stigmatizing (e.g., failure to protect from a homosexual assault) that a prisoner-victim will need more time than that allotted for the filing of a grievance to overcome the trauma of the event before seeking administrative or legal redress.

Consequently, the PLRA’s exhaustion-of-remedies requirement should be amended to allow prisoners the same amount of time as other individuals to recognize and pursue their legal rights. This objective can be realized by

allowing prisoners who have filed a lawsuit within the time period set by the statute of limitations but have not exhausted their administrative remedies to pursue their claim through an administrative-remedy process while the lawsuit is stayed. With this refinement to the PLRA, prison officials will retain the opportunity to interview material witnesses, marshal relevant evidence, and resolve grievances, either averting or preparing for litigation.

3. *Eliminate the restrictions on the equitable authority of courts in conditions-of-confinement cases.* Lawsuits seeking injunctive relief have been brought to remedy what are sometimes egregious violations of prisoners' constitutional rights. *See, e.g., Tillery v. Owens*, 907 F.2d 418 (3d Cir. 1990) (cellblocks infested with vermin, bed bugs, mice, fleas, and lice; bird feces on floors and railings and "so dense" that cellblock windows are "virtually covered"; auditorium and gymnasium, where several hundred inmates are supervised by one correctional officer, are "dens of violence"; no master system for unlocking cells during a fire, as a result of which it would take at least fifteen minutes to evacuate all inmates from a cellblock, although the block would be filled with smoke within two to three minutes); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) (water supply contaminated with sewage; exposed electrical wiring; lack of sufficient fire-fighting equipment; broken windows; cells known as the "dark holes," which lack lights, a sink, a toilet, or furniture and which have a hole in the floor for bodily wastes; inmates placed in the dark hole without clothes or bedding; brutal methods of discipline employed, including the forced administration of milk of magnesia to inmates and turning fans on wet and naked inmates); *Madrid v. Gomez*, 889 F.Supp. 1146 (N.D. Cal. 1995) (endemic failure to meet prisoners' medical needs and prevalent use of excessive force against prisoners, such as when correctional officers held a mentally ill prisoner in a bathtub of scalding water, burning him so badly that large clumps of skin from his buttocks hung down around his legs).

Despite the importance of enforcing prisoners' constitutional rights and the demonstrated penchant of some government officials to violate or tolerate violations of those rights, the PLRA significantly restricts, in a number of ways, the traditional equitable power of courts to redress unconstitutional conditions of confinement. To give but three examples of ways in which the PLRA has contracted courts' remedial authority, the Act limits the amount of time that a preliminary injunction can remain in effect in a conditions-of-confinement case to just ninety days. 18 U.S.C. § 3626(a)(2).

Second, the Act provides that upon motion of a defendant or certain state or local officials, an injunction will be terminated two years after its entry unless the court finds that the injunction is needed to remedy a "current and ongoing" violation of a federal right, extends "no further than necessary to correct the violation," is "narrowly drawn," and is the "least intrusive means" of correcting the violation. *Id.* § 3626(b)(1)(A)(i); *id.* § 3626(b)(3). In other

words, to avoid termination of the injunction, the plaintiffs must once again prove their entitlement to relief. (By contrast, when defendants seek termination of an injunction in a case in which nonprisoners prevailed, the defendants have the burden of proving that they are operating an institution in conformance with the Constitution and that it is unlikely that they will resume their unconstitutional conduct. *Board of Education v. Dowell*, 498 U.S. 237, 247 (1991)). And even if the prisoner-plaintiffs are able to make the showing required by the PLRA, the Act allows the defendants to file a termination motion every year thereafter, placing perpetual and onerous burdens on the plaintiffs and the court. 18 U.S.C. § 3626(b)(1)(A)(ii).

Finally, the mere filing of a motion to terminate an injunction, without more, automatically stays the injunction thirty to ninety days after the motion is filed. *Id.* § 3626(e)(2). In other words, enforcement of the injunction halts pending the adjudication of the motion even if the defendants have failed to comply with the injunction and unconstitutional conditions persist in the prison.

As the American Bar Association has long contended, legislation should not curtail the remedies available to federal courts to enforce constitutional rights. Report of the Board of Governors to the House of Delegates, Annual Report of the American Bar Association 701 (1982). In addition, the scope of the courts' equitable powers in cases involving prisoners should be no different than the scope of those powers in cases brought by all other litigants. The remedial authority that the PLRA has wrested from courts therefore should be returned to them. And to the extent that the enactment of these restrictions on the courts' equitable powers stemmed from legitimate concerns about the length of time that some correctional facilities have operated under a court order, Congress should initiate a full-ranging factual inquiry to determine the reasons for the prolonged periods of time that some court orders have been in effect. *See, e.g., Glover v. Johnson*, 934 F.2d 703, 715 (6th Cir. 1991) ("The history of this case shows a consistent and persistent pattern of obfuscation, hyper-technical objections, delay, and litigation by exhaustion on the part of the defendants to avoid compliance with the letter and the spirit of the district court's orders. The plaintiff class has struggled for eleven years to achieve the simple objectives of equal protection under the law generally, and equality of opportunity specifically."). Only then can an informed decision be made as to what steps Congress can and should take to ensure that unconstitutional conditions of confinement are abated promptly.

4. *Amend the PLRA to allow prisoners who prevail on civil-rights claims to recover the same attorney's fees recoverable in civil-rights cases brought by the general public.* Title 42 U.S.C. § 1988(b) provides for the award of "reasonable" attorney's fees to parties who prevail in suits brought under § 1983 and several other federal statutes to enforce civil rights. Believing that the enforcement of civil rights is of the "highest priority," S. REP. NO. 94-

1011, at 3 (1976), Congress enacted § 1988 because, without a fee-award provision enabling lawyers to recover their costs in representing civil-rights plaintiffs, victims of civil-rights violations often would be unable to procure the assistance of counsel. The nation's civil-rights laws then would go largely unenforced. *See id.* at 5 (“In several hearings held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which S. 2278 applies are to be fully enforced.”); 122 CONG. REC. 35,182 (statement of Rep. Seiberling) (“[A] failure to authorize the awarding of attorneys’ fees in civil rights cases will, as a practical matter, repeal the civil rights laws for most Americans.”).

The requirement that the attorney’s fees awarded under § 1988 be “reasonable” already places limits on the fees that can be awarded prevailing plaintiffs in civil-rights actions. For example, the degree to which a plaintiff has or has not succeeded in a case is factored into the assessment of what are “reasonable” attorney’s fees and can affect the size of the fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 434-36 (1983).

But the PLRA places a number of additional restrictions on the attorney’s fees that can be recovered under § 1988 by prisoner-plaintiffs who prevail in civil-rights suits, restrictions that do not apply to any other prevailing litigants. For example, instead of the defendant paying the full fee award, a certain portion (up to twenty-five percent) of the damages a prisoner recovers must be applied to pay the attorney’s fees awarded against the defendant. 42 U.S.C. § 1997e(d)(2). In addition, the PLRA imposes a cap on the hourly rate at which attorneys who represent prevailing prisoners are reimbursed, creating a disincentive for attorneys to represent prisoners. *Id.* § 1997e(d)(3). And no matter how much time a lawyer invests in a prisoner-client’s case, the fee award is capped at 150% of the judgment. *Id.* § 1997e(d)(2). *See Riley v. Kurtz*, 361 F.3d 906, 917-18 (6th Cir. 2004) (finding that the 150% cap forbade the award of additional attorney’s fees for the over \$25,000 in fees and expenses incurred by the prisoner’s counsel in successfully defending on appeal the judgment entered on the prisoner’s behalf). For example, if a prisoner recovers a hundred dollars in damages, the fee award will be just \$150, hardly the recompense needed to enable prisoners seeking damages for violations of their constitutional rights to procure the assistance of counsel. *See, e.g., Robbins v. Chronister*, 435 F.3d 1238 (10th Cir. 2006) (finding that a prisoner awarded one dollar in damages for the violation of his Fourth Amendment rights was entitled to \$1.50 in attorney’s fees).

These restrictions on attorney’s fees make it even more difficult for prisoners to secure counsel to represent them in cases brought to remedy violations of their civil rights. Consequently, the Commission on Safety and Abuse in America’s Prisons recommended that the PLRA’s restrictions on attorney’s fees be removed. Commission on Safety and Abuse in America’s Prisons,

Confronting Confinement 86 (2006). The American Bar Association joins in that recommendation.

5. *Repeal the PLRA provisions extending its requirements to juveniles confined in juvenile detention and correctional facilities.* The PLRA's proponents professed that its provisions were designed to curb the filing of frivolous lawsuits by prisoners. Juveniles incarcerated in juvenile detention and correctional facilities had not filed the frivolous lawsuits that those lobbying for the PLRA's enactment referred to in largely unsubstantiated anecdotes. See Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 Brook. L. Rev. 519, 520-22 (1996) describing the accounts of the prisoners' lawsuits cited in an effort to secure the PLRA's passage as "at best highly misleading and, sometimes, simply false"). In fact, because of their age and other encumbrances, incarcerated juveniles file very few lawsuits at all, much less frivolous lawsuits, even when they have suffered gross violations of their constitutional rights. Nonetheless, the PLRA's provisions currently apply to children confined in detention and correctional facilities for juveniles, further diminishing the protection the law affords this very vulnerable stratum of confined individuals. See, e.g., *Minix v. Pazera*, 2005 WL 1799538 (N.D. Ind. 2005) (federal claims dismissed because plaintiff, who was repeatedly raped while confined in juvenile facilities and whose mother contacted numerous government officials in her "heroic efforts" to protect her son, failed to file a formal grievance protesting the defendants' failure to protect him).
6. *Repeal the PLRA's filing-fee provisions.* The PLRA's filing-fee provisions impose a heavy financial burden on poor prisoners who want and need to file a federal lawsuit in order to obtain relief from violations of their civil rights. Under these provisions, indigent prisoners who bring a federal lawsuit and cannot pay the full filing fee upfront must pay a partial filing fee at the outset and must pay the entire fee over time, a requirement to which no other indigent litigant is subject. 28 U.S.C. § 1915(b)(1). These filing-fee provisions not only raise concerns because of their disparate treatment of prisoners but also because the size of the filing fee -- now \$350 in federal district courts -- dissuades impoverished prisoners from bringing potentially meritorious claims to court.

In addition to adopting the recommended amendments to the PLRA set forth above, Congress should fully examine the repercussions of other PLRA provisions on the ability of inmates with meritorious legal claims to obtain redress for the violation of their federal rights. Because access to the courts is crucial to the enforcement of constitutional and other legal rights, the burden is upon those who favor these other PLRA restrictions to demonstrate that they do not frustrate the enforcement of the Constitution and civil-rights laws or impair the ability of prisoners to obtain full redress for violations of their legal rights.

Following the enactment of the PLRA, many states adopted state statutes that mirrored its provisions and were designed to restrict prisoners' access to state courts. *See* Margo Schlanger, *Inmate Litigation*, 116 Harv.L.Rev. 1555, 1635 & nn. 271-72 (2003). As a first and immediate priority, state legislatures should repeal or amend the statutory provisions that are the state counterparts to the PLRA provisions highlighted above. In addition, the state legislatures should hold hearings to determine if other provisions in the states' statutes should be repealed or amended because they impede the enforcement of inmates' legal rights.

Finally, Congress should hold hearings to determine what steps the federal government can take to foster the just resolution of prisoners' complaints by correctional grievance systems. Those steps might include linking federal funding to specified improvements in grievance processes, technical assistance from the federal government to improve those processes, and further changes in the PLRA to limit application of the exhaustion requirement to grievance systems that meet certain delineated requirements. State and local governments also should identify and take steps to improve the functioning of correctional grievance systems. If grievance systems are structured in a way that maximizes their potential to solve problems, address prisoners' legitimate concerns, and remedy violations of prisoners' legal rights, prisoners will be less likely, and have less of a need, to turn to the federal courts for redress.¹

¹ For a discussion of some of the structural features of a grievance system that may avert the need for litigation, see *LIMITING THE BURDENS OF PRO SE INMATE LITIGATION: A TECHNICAL-ASSISTANCE MANUAL FOR COURTS, CORRECTIONAL OFFICIALS, AND ATTORNEYS GENERAL* (American Bar Association 1997).