Testimony of John Boston, Project Director, Prisoners' Rights Project of the New York City Legal Aid Society before the Sub-Committees on Crime and on the Constitution and Civil Rights of the House Committee on the Judiciary

I am the Project Director of the Prisoners' Rights Project of the New York City Legal Aid Society, which represents New York State and City prisoners in class action and test case litigation, advocates for them with prison and jail agencies, and advises them of their legal rights. I am also co-author of the *Prisoners' Self-Help Litigation Manual*, which advises prisoners on their legal rights and on how to enforce those rights correctly in court if they must proceed without counsel (*pro se*). I am generally familiar with the field of prison litigation. I have taken a particular interest in the Prison Litigation Reform Act (PLRA) since its enactment in 1996, and have written and spoken about it in various forums,[1] have appeared as counsel for prisoners or for *amici curiae* in a number of significant PLRA cases,[2] and regularly advise other prison law practitioners locally and nationally concerning PLRA-related problems. I appreciate this opportunity to comment on the need for reform of the PLRA.

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[1] *See* John Boston, *The Prison Litigation Reform Act*, in Columbia Human Rights L.Rev., A JAILHOUSE LAWYERS MANUAL, ch. 13 (2007); Boston, *The Prison Litigation Reform Act: The New Face of Court-Stripping*, 67 Brooklyn L.Rev. 429 (2001); Boston, *The Prison Litigation Reform Act*, available on Westlaw at 640 PLI/Lit 687 (Practising Law Institute, October 2000). I have continued to update and expand the latter item for training programs and Continuing Legal Education seminars, including the staff attorney training program of the United States Court of Appeals for the Second Circuit, most recently in October 2007. It comprises the most comprehensive guide to the PLRA and its judicial application that I am aware of.

[2] *See Jones v. Bock*, ___ U.S. ___, 127 Ct. 910, 923 (2007); *Woodford v. Ngo*, ___ U.S. ___, 126 S.Ct. 2378 (2006) (both involving PLRA administrative exhaustion requirement; appeared with others as *amicus curiae*); *Ortiz v. McBride*, 380 F.3d 649 (2d Cir. 2004); *Mojias v. Johnson*, 351 F.3d 606, 608-10 (2d Cir. 2003) (both involving interpretation of the PLRA administrative exhaustion requirement); *Benjamin v. Fraser*, 343 F.3d 35 (2d Cir. 2003) (addressing the application of the PLRA's restrictions on prospective relief and special masters).

The PLRA's Purpose—and Its Effects

In enacting the PLRA, Congress sought to curb what was perceived to be an overwhelming number of frivolous prisoner lawsuits. There certainly are frivolous lawsuits that have been kept out of federal court by the PLRA. But after a decade of experience under the legislation, it is clear that the PLRA is also keeping countless serious claims from reaching the courts—including claims of physical and sexual abuse, indifference to inmate on inmate rape, gross mistreatment of confined juveniles, and markedly deficient medical and mental health treatment. The result is effectively to prevent courts from exercising their role of protecting constitutional rights.

What Works in the PLRA

The core of the PLRA is its preliminary screening requirement. Prisoner cases that are frivolous or malicious, that fail to state a claim on which relief can be granted, or that seek damages from a defendant who is immune from them, are to be dismissed out of hand, without service of process on the defendants and without requiring prison officials to respond.[3] As a result of this pre-service screening, correctional administrators no longer see a large proportion of prisoner cases, and courts only must deal with those insubstantial cases once, at the outset. These provisions directly address the problem of frivolous prisoner litigation that prompted the PLRA, and they have substantially reduced its burden to courts and prison officials. They should remain the law.

[3] 28 U.S.C. § 1915(e)(2); 28 U.S.C. § 1915A; 42 U.S.C. § 1997e(c)(1). Former law authorized the dismissal of any case filed *in forma pauperis* (as are the vast majority of prisoner cases) if it was frivolous or malicious. Collectively, these PLRA provisions expand the grounds for dismissal of cases filed *in forma pauperis* to include those that fail to state a claim or that seek to recover damages from an immune defendant as well as those that are frivolous or malicious, and they extend the initial screening process applying those criteria to all prisoner cases, including those where a fee has been paid.

Needed Reforms to the PLRA

1. Repeal the physical injury requirement of 42 U.S.C. § 1997e(e).

The PLRA prohibits prisoners from bringing actions "for mental or emotional injury" without physical injury.[4] This provision, while intended to facilitate dismissal of frivolous claims, has been applied by most courts to virtually any violation of intangible constitutional rights, including deprivation of religious freedom,[5] wrongful imprisonment,[6] and protracted punitive confinement without due process or in retaliation

[4] Courts have generally interpreted this statute as a prohibition on the recovery of compensatory damages for mental or emotional injury. *See Thompson v. Carter,* 284 F.3d 411, 417 (2d Cir. 2002). While injunctive relief may be pursued in theory, in my observation the large majority of prisoner suits involve allegations of already completed instances of abusive treatment for which injunctive relief is not available or helpful. Some courts have held that punitive damages may be recovered notwithstanding this provision. *Thompson*, 284 .3d at 418. Others, however, have held that punitive damages are barred absent physical injury. *Smith v. Allen*, ___ F.3d ___, 2007 WL 2826759 at *11-12 (11th Cir. 2007); *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998). In any case, punitive damages are not a substitute for compensatory damages, the usual remedy for violations of personal (including constitutional) rights. The threshold for punitive damages is demanding, *see Smith v. Wade*, 461 U.S. 30, 46-52 (1983), and in my observation they are rarely awarded in prison cases.

Cases presenting an "imminent risk of serious physical harm" are exempted from this section, but there are many serious constitutional violations that either do not threaten serious *physical* harm, such as violation of religious freedom or other First Amendment rights. Further, cases seemingly presenting such a risk are nonetheless dismissed under this provision. *See, e.g.*, *Watley v. Collins*, 2006 WL 3422996 (S.D.Ohio, Nov. 28, 2006) (holding a prisoner did not meet the "imminent danger" standard even though he alleged that he has mental illness and has been placed in "supermax" conditions, which in turn aggravates his mental illness and therefore worsens his misbehavior; he has attempted suicide and engages in deranged behavior disturbing other inmates, resulting in confrontations and their throwing urine and feces at him; he has been maced to control him).

[5] *Allah v. al-Hafeez*, 226 F.3d 247 (3d Cir. 2000) ("Allah seeks substantial damages for the harm he suffered as a result of defendants' alleged violation of his First Amendment right to free exercise of religion. As we read his complaint, the only actual injury that could form the basis for the award he seeks would be mental and/or emotional injury."); *accord*, *Massingill v. Livingston*, 2006 WL 2571366 at *2-3 (E.D.Tex., Sept. 1, 2006) (holding claims asserting various religious restrictions were subject to mental/emotional injury provision); *Daniels v. Waller*, 2006 WL 763115 at *2 (S.D.Miss., Mar. 24, 2006) (holding claim of refusal to acknowledge Muslim name was one for mental or emotional injury).

[6] *Layne v. McDonough*, 2007 WL 2254959 at *4 (N.D.Fla., Aug. 6, 2007) (claim of 25 days' wrongful incarceration); *Scott v. Belin*, 2007 WL 2390383 at *4 (W.D.Ark., Aug. 2, 2007) (detention for 76 days without being brought before a court), *report and recommendation adopted*, 2007 WL 2416408 (W.D.Ark., Aug. 20, 2007).

for constitutionally protected speech.[7] Thus, in one recent case a jury found that an Illinois prisoner had been subjected to a year's confinement under the oppressive and restrictive conditions of a "supermax" prison in retaliation for his First Amendment-protected complaints about prison conditions. However, the court refused to allow the jury to consider an award of compensatory damages for that unconstitutional treatment, holding that under the PLRA he was entitled only to $1.00 in nominal damages, and a federal appeals court agreed.[8]

Courts have held similarly in cases involving confinement under inhumane and disgusting, but not physically injurious, conditions. Thus, another federal appeals court held that a prisoner could who alleged that he had been repeatedly placed in filthy cells formerly occupied by psychiatric patients, and surrounded by such patients and subjected to their deranged behavior which made sleep impossible, could not pursue damages for confinement under those conditions.[9] In addition, courts have held that physical injury must be "more than *de minimis*" to pass muster under this provision, and have dismissed some cases reflecting significant physical abuse on that ground.[10] Some courts have held

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[7] *Royal v. Kautzky*, 375 F.3d 720, 724 (8th Cir. 2004) (declining to award a prisoner who spent 60 days in segregation "some indescribable and indefinite damage allegedly arising from a violation of his constitutional rights"), *cert. denied*, 544 U.S. 1061 (2005).

[8] *Pearson v. Welborn*, 471 F.3d 732, 745 (7th Cir. 2006).

[9] *Harper v. Showers*, 174 F.3d 716, 719-20 (5th Cir. 1999); *see Lopez v. S.C.D.C.,* 2007 WL 2021875 at *3 (D.S.C., July 6, 2007) (dismissing allegations of week-long confinement without a toilet, sink, bed, mattress, soap, toothbrush, hot or cold running water, or opportunity to shower, with nowhere to urinate or defecate except the floor, Styrofoam serving trays, or cups); *Vega v. Hill*, 2005 WL 3147862 at *3 (N.D.Tex., Oct. 14, 2005) (holding allegations of "exposure to mold, mildew, dead bugs, dirty showers, and spoiled food" failed to establish required physical injury); *Starnes v. Gillespie*, 2004 WL 1003358 at *7-8 (D.Kan., Mar. 29, 2004) (holding allegation that segregated prisoner was denied showers, drinking water, and water for cleaning and personal hygiene and prevented from communicating with lawyer and family, was barred by § 1997e(e)).

[10] *Rawls v. Payne*, 2006 WL 2844563 at *5 (S.D.Miss. Sep 11, 2006) (dismissing the claim of a prisoner who alleged that he suffered "scratches, bruises, a busted lip, and a sprained ankle" in an assault, asserting injuries were *de minimis*); *Wallace v. Brazil*, 2005 WL 4813518 at *1 (N.D.Tex., Oct. 10, 2005)

that sexual abuse is no more than "mental or emotional injury," or is *de minimis*, under this statute.[11]

It is fair to say that many of the degradations imposed at Abu Ghraib—those which were merely painful and humiliating but did not cause physical damage—would be treated as mere "mental or emotional injury" under this statute, and their victims could not be compensated for their abusive treatment. Thus, in one recent case, a prisoner complained that he was forced to stand in a two-and-a-half-foot square cage for about 13 hours, naked for the first eight to ten hours, unable to sit for more than 30 or 40 minutes of the total time, in acute pain, with clear, visible swelling in a portion of his leg that had previously been injured, during which time he repeatedly asked to see a doctor.[12] A federal appellate court affirmed the dismissal of his case on summary judgment, without trial, stating the injury was *de minimis*.[13]

Another example of this statute's application is the case of a prisoner held in Santa Clara County, California, who complained that he was kept in solitary

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(dismissing a claim that an officer hit the prisoner in the head with an iron bar, punched his back, and twisted his neck; asserting a soft knot on his head and an abrasion on his leg were *de minimis*).

[11] *See Hancock v. Payne*, 2006 WL 21751 at *1, 3 (S.D.Miss., Jan. 4, 2006) (holding plaintiffs' allegations of abuse including that a staff member "sexually battered them by sodomy," were barred by § 1997e(e)); *see also Cobb v. Kelly*, 2007 WL 2159315 at *1 (N.D.Miss., July 26, 2007) (holding allegation that staff member reached between prisoner's legs and rubbed his genitals did not meet physical injury requirement). While some courts have reached the opposite conclusion, *see Kemner v. Hemphill*, 199 F.Supp.2d 1264, 1270 (N.D.Fla.2002), it is questionable whether their holdings are more consistent with the statutory language than is *Hancock*.

[12] *Jarriett v. Wilson*, 2005 WL 3839415 at *8 (6th Cir., July 7, 2005) (dissenting opinion). The claim was dismissed under § 1997e(e) as *de minimis* on the ground that the prisoner did not complain about his leg upon release or shortly thereafter when he saw medical staff. *Id*. at *4. (This decision was initially published, but Westlaw has removed the opinion from its original citation and replaced it with a note stating that it was "erroneously published." *Jarriett v. Wilson*, 414 F.3d 634 (6th Cir. 2005).)

[13] *Id*. at *4. The court justified its claim on the dubious ground that the prisoner did not complain about his leg upon release or shortly thereafter when he saw medical staff. Ordinarily—that is, without the PLRA—such a judgment about the seriousness of the injury and the significance of facts such as those the court cited would be made by a jury. This decision was initially published, but Westlaw has removed the opinion from its original citation and replaced it with a note stating that it was "erroneously published." *Jarriett v. Wilson*, 414 F.3d 634 (6th Cir. 2005).

confinement, his hands and feet were shackled, and he was subjected to body cavity strip searches and allowed out of his cell only three hours a week. The court held that under the PLRA, he could not seek compensatory damages for this treatment, however unjustified it might have been, because he did not allege actual physical injury.[14] Yet another is that of a Texas prisoner who alleged that an officer hit him in the head with an iron bar, punched his back, and twisted his neck; the federal district court dismissed his case on the grounds that his injuries, characterized as a soft knot on his head and an abrasion on his leg, were *de minimis*.[15]

This provision should be repealed because it obstructs court remediation of plainly unconstitutional conditions, and serves no useful function. The above described provisions for initial screening and dismissal of frivolous prisoner cases have proven effective at disposing of truly frivolous lawsuits.

2. Amend the administrative exhaustion provision of 42 U.S.C. § 1997e(a) to ensure that complaints are first addressed at the prison level, without precluding subsequent judicial review).

The PLRA requires prisoners to exhaust "such administrative remedies as are available" before filing suit, in the hope that many disputes will be resolved before they get to court. The Supreme Court has held that this requires "proper exhaustion," *i.e.*, "compliance with an agency's deadlines and other critical procedural rules."[16]

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[14] *Adnan v. Santa Clara County Dept. of Corrections,* 2002 WL 32058464 at *3 (N.D.Cal., Aug. 15, 2002).

[15] *Wallace v. Brazil*, 2005 WL 4813518 at *1 (N.D.Tex., Oct. 10, 2005).

[16] *Woodford v. Ngo*, ___ U.S. ___, 126 S.Ct. 2378, 2386 (2006). This "proper exhaustion" rule contrasts sharply with the treatment of other civil rights litigants in federal court. Concerning the administrative filing requirement of Title VII of the Civil Rights Act of 1964, the Court said that "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process," *Love v. Pullman*, 404 U.S. 522, 526 (1972), and it refused to allow violation of a state administrative time limit to bar the litigant from proceeding in federal court.

Over the past decade, hundreds, even thousands, of claims of serious and unconstitutional abuse of prisoners have been forever barred for lack of "proper exhaustion,"[17] with no inquiry into truth of the prisoner's substantive claims.[18] Thus, a Wisconsin prisoner alleged that he was denied testing for symptoms of cancer until the disease had become terminal and untreatable; his lawsuit was dismissed because his complaint to the director of the bureau of health services did not comply with the inmate grievance policy.[19]

Prisoners – many of whom have little education, read poorly or not at all,[20] or have mental illness or mental retardation[21] – are ill-equipped to comply with technical

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A more recent Supreme Court decision concerning the exhaustion requirement was decided in the prisoners' favor. *See Jones v. Bock*, ___ U.S. ___, 127 S.Ct. 910 (2007). However, that decision addressed several extreme interpretations of the PLRA adopted in the Court of Appeals for the Sixth Circuit, which required prisoners to plead exhaustion in their complaints with specificity and documentary support and to have named all the defendants in their lawsuits in their prison grievance. That court also required "total exhaustion," meaning that if any aspect of the prisoner's complaint (including the naming of a defendant) had not been exhausted, the entire complaint must be dismissed. The Supreme Court's correction of these aberrant rules did not cure the problems discussed in this testimony.

[17] Dismissal for non-exhaustion is usually without prejudice, meaning that in theory the prisoner can exhaust the claim properly and return to court. *See, e.g., Berry v. Kerik*, 366 F.3d 85, 87-88 (2d Cir. 2004). Reality is more like *Catch-22*: by the time a case is dismissed for a mistake in exhaustion, the brief time limit for filing a grievance will inevitably have passed, so under the "proper exhaustion" rule, the prisoner can never satisfy the exhaustion requirement. (Some prison systems have provisions for late grievances at officials' discretion, but it is unlikely that that discretion will be exercised in favor of prisoners who clearly are seeking to sue prison personnel.)

[18] *See, e.g.*, *Mingilton v. Wright*, 2007 WL 1732388 (N.D.Tex., June 14, 2007) (dismissing claim of prisoner who had boiling water mixed with cleaning agent thrown in his face, and then was beaten in the head with a pot, by his cellmate, about whom he had complained to prison officials; his complaint was previously dismissed because he did not file a grievance, and when he tried to file a grievance after that first dismissal, it was dismissed as untimely); *Minix v. Pazera*, 2005 WL 1799538 at *4 (N.D.Ind., July 27, 2005) (dismissing for non-exhaustion because the 15-year-old prisoner, who had been repeatedly beaten and raped, did not file a grievance, even though his mother had made repeated complaints to numerous officials while the abuse was ongoing).

[19] *Gerrard v. Daley*, 2000 WL 34229777 (W.D.Wis., July 24, 2000), *subsequent determination*, 2000 WL 34231492 (W.D.Wis. Aug. 21, 2000); *see Minix v. Pazera*, 2005 WL 1799538 at *4 (N.D.Ind., July 27, 2005) (dismissing for non-exhaustion because the 15-year-old prisoner, who had been repeatedly beaten and raped, did not file a grievance, even though his mother had made repeated complaints to numerous officials while the abuse was ongoing). The *Minix* case is discussed further below.

[20] The National Center for Education Statistics reported in 1994 that seven out of ten prisoners perform at the lowest literacy levels. Karl O. Haigler et al., U.S. Dept. of Educ., *Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey* xviii, 17- 19 (1994) (available at http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=94102).

rules under short deadlines and without the assistance of legal counsel. Unlike most federal administrative remedies, prison and jail grievance systems tend to have extremely short time deadlines, mostly 30 days or less, many as short as a week or two,[22] or even shorter. Thus, in the case of a juvenile prisoner who complained of repeated assault and of rape, and of a lack of protection by facility staff, which was dismissed without consideration of the merits because of non-exhaustion, the child plaintiff would have had to have filed grievances within *48 hours* of these traumatizing occurrences.[23]

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[21] Prisoners with mental illness are subject to the same exhaustion requirement as other prisoners. *See Hall v. Cheshire County Dept. of Corrections*, 2007 WL 951657 at *1-2 (D.N.H., Mar. 27, 2007) (dismissing for non-exhaustion even though plaintiff's claim was failure to treat his mental illness resulting in conduct such as cutting himself repeatedly and swallowing glass; no inquiry into whether his mental condition could have affected his ability to exhaust); *Williams v. Kennedy*, 2006 WL 18314 at *2 (S.D.Tex., Jan. 4, 2006) (dismissing despite prisoner's claim he didn't know of the exhaustion requirement and a prior brain injury made it difficult for him to remember things); *Bakker v. Kuhnes*, 2004 WL 1092287 (N.D.Iowa, May 14, 2004) (rejecting plaintiff's argument that his medication doses were so high they "prohibited him from being of sound mind to draft a grievance"; noting that he failed to submit a grievance after his medication was corrected, and he filed other grievances during the relevant period.

Another court addressing a claim by a prisoner with mental illness also felt constrained to dismiss for non-exhaustion. It did direct prison officials to appoint someone to assist the plaintiff in exhausting. *Ullrich v. Idaho*, 2006 WL 288384 at *3 (D.Idaho, Feb. 6, 2006). However, it is not clear that a court has the power to direct such relief in a case that must be dismissed. In any case, such an order would likely be ineffectual, since the prisoner's claim would almost always be time-barred under the short deadlines characteristic of prison grievance systems.

There is very little law on this subject despite the well-known concentration of persons with mental illness in prison. We suspect that many prisoners with mental illness are not capable of adequately framing an argument that their mental condition has prevented them from strictly complying with grievance procedures as the Supreme Court has directed.

[22] *Woodford v. Ngo*, ___ U.S. ___, 126 S.Ct. 2378, 2389 (2006). The Court noted that the 15-day deadline the plaintiff missed is not unusual; grievance deadlines are typically 14 to 30 days according to the United States and even shorter according to the plaintiff. *Woodford*, 126 S.Ct. at 2389.

[23] *Minix v. Pazera*, 2005 WL 1799538 at *2 (N.D.Ind., July 27, 2005). The dissenting opinion in the Supreme Court's *Woodford v. Ngo* decision cited this case as an illustration of the injustice of the "proper exhaustion" requirement of that decision. *Woodford,* 126 S.Ct. at 2403.

Further, many prison grievance systems have unclear rules[24] or are inconsistently administered,[25] and some prisoners are misinformed by staff about proper procedures.[26]

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[24] Even prison officials sometimes can't get their own rules straight. In *Giano v. Goord*, 380 F.3d 670 (2d Cir. 2004), New York State prison officials argued that the plaintiff's claim that evidence in a disciplinary hearing had been falsified was not exhausted by appealing his disciplinary conviction, but that he should have filed a separate grievance on the subject. The court held that the plaintiff had shown special circumstances justifying his failure to exhaust, since any misunderstanding he had of the rule was entirely reasonable. In a later case presenting the same fact situation under the same rules, prison officials made precisely the opposite argument, claiming that a prisoner who had filed a separate grievance about false disciplinary charges should instead have pursued his claims through a disciplinary appeal. *Larkins v. Selsky*, 2006 WL 3548959 at *9 (S.D.N.Y., Dec. 6, 2006). In the years after *Giano*, the prison system did nothing to clarify its rules to distinguish between the scope of disciplinary appeals and that of grievances. *See also Westefer v. Snyder*, 422 F.3d 570, 580 (7th Cir. 2005) (observing prison policies did not "clearly identif[y]" the proper administrative remedy and there was no "clear route" to administrative review of certain decisions); *Abney v. McGinnis*, 380 F.3d 663, 668-69 (2d Cir. 2004) (noting the lack of instruction in the grievance rules for instances where a favorable grievance decision is not carried out).

[25] *Warren v. Purcell*, 2004 WL 1970642 at *6 (S.D.N.Y. Sept. 3, 2004) (holding "baffling" grievance response that left prisoner with no clue what to do next was a special circumstance); *Kendall v. Kittles*, 2004 WL 1752818 at *2 (S.D.N.Y., Aug. 4, 2004) (noting that Grievance Coordinator's affidavit said that plaintiff needed a physician's authorization to grieve medical concerns; no such requirement appears in the New York City grievance policy); *Livingston v. Piskor*, 215 F.R.D. 84, 86-87 (W.D.N.Y. 2003) (holding that evidence that grievance personnel refused to process grievances where a disciplinary report had been filed covering the same events created a factual issue precluding summary judgment); *Casanova v. Dubois*, 2002 WL 1613715 at *6 (D.Mass., July 22, 2002) (finding that, contrary to written policy, practice was "to treat complaints of alleged civil rights abuses by staff as 'not grievable'"), *remanded on other grounds*, 304 F.3d 75 (1st Cir. 2002).

[26] *See Jackson v. District of Columbia*, 254 F.3d 262, 269-70 (D.C.Cir. 2001) (holding that a plaintiff who complained to three prison officials and was told by the warden to "file it in the court" had not exhausted); *Chelette v. Harris*, 229 F.3d 684, 688 (8th Cir. 2000) (holding that a plaintiff who complained to the warden and was told the warden would take care of his problem, but the warden didn't, was not excused from exhausting the grievance system), *cert. denied*, 531 U.S. 1156 (2001); *U.S. v. Ali*, 396 F.Supp.2d 703, 707 (E.D.Va. 2005) (holding that a prisoner who received a response that "[a]s these issues are addressed by your attys [sic] and the government you will be informed" and did not appeal failed to exhaust); *Thomas v. New York State Dep't of Correctional Services*, 2003 WL 22671540 at *3-4 (S.D.N.Y., Nov. 10, 2003) (dismissing case where prison staff told the prisoner a grievance was not necessary; this was "bad advice, not prevention or obstruction," and the prisoner did not make sufficient efforts to exhaust).

In other cases, the courts have allowed claims to go forward where prisoners were misled. *See, e.g.*, *Brown v. Croak*, 312 F.3d 109, 112-13 (3d Cir. 2002) (holding that if security officials told the plaintiff to wait for completion of an investigation before grieving, and then never informed him of its completion, the grievance system was unavailable to him); *Scott v. California Supreme Court*, 2006 WL 2460737 at *7 (E.D.Cal., Aug. 23, 2006) (holding that a prisoner who had relied on officials' misinformation and sought relief in state court had exhausted, notwithstanding officials' subsequent issuance of an untimely decision which he did not appeal); *Beltran v. O'Mara*, 405 F.Supp.2d 140, 154 (D.N.H. 2005) (holding, where a grievance was rejected on the ground that incidents which were the subject of disciplinary proceedings could not be grieved, "a reasonable inmate in [the plaintiff's] position" would believe the grievance process was not an available remedy and his claims should be raised in the disciplinary process), *on reconsideration*, 2006 WL 240558 (D.N.H., Jan. 31, 2006); *O'Connor v. Featherston*, 2003 WL 554752 at *2-3 (S.D.N.Y., Feb. 27, 2003) (holding allegation that prison Superintendent told a prisoner to complain via the Inspector General rather than the grievance procedure presented triable factual issues).

Thus, in one New York case, a prisoner's property, including important legal documents, disappeared when he was transferred. First, prison officials erroneously advised him that his lost property was not the responsibility of the prison he had been transferred to, which resulted in a failure to investigate. Then, another official advised him to abandon his lost property claim and pursue a grievance instead, resulting in loss of the ability to appeal the property claim.[27] That court allowed the claim to go forward because of the problems created by prison staff, but other courts would likely have reached the opposite result under the Supreme Court's "proper exhaustion" rule. Indeed, another appeals court did *not* allow the claim to go forward in a case where federal prison authorities gave the prisoner "misleading" information suggesting that the prison administrative system had no jurisdiction over his problem.[28]

In some cases, prisoners are subjected to threats or retaliation by prison staff[29] that impede them from exhausting properly.[30] Some prisoners' grievances simply

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[27] *Brownell v. Krom*, 446 F.3d 305, 311-12 (2d Cir. 2006).

[28] *Yousef v. Reno*, 254 F.3d 1214, 1221-22 (10th Cir. 2001).

[29] There is a well-known pattern in American prisons of threats and retaliation against prisoners who file grievances and complaints. *See Pearson v. Welborn*, 471 F.3d 732, 745 (7th Cir. 2006) (affirming jury verdict that prisoner was sent to a "supermax" facility for a year in retaliation for First Amendment-protected complaints about conditions); *Dannenberg v. Valadez*, 338 F.3d 1070, 1071-72 (9th Cir. 2003) (noting jury verdict for plaintiff on claim of retaliation for assisting another prisoner with litigation); *Walker v. Bain*, 257 F.3d 660, 663-64 (6th Cir. 2001) (noting jury verdict for plaintiff whose legal papers were confiscated in retaliation for filing grievances), *cert. denied*, 535 U.S. 1095 (2002); *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir.) (affirming injunction protecting prisoners who were the subject of retaliation for filing grievances and for litigation), *cert. denied*, 534 U.S. 1066 (2001); *Trobaugh v. Hall*, 176 F.3d 1087 (8th Cir. 1999) (directing award of compensatory damages to prisoner placed in isolation for filing grievances); *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997) (affirming jury verdict for plaintiff subjected to retaliation for filing grievances), cert. denied, 524 U.S. 936 (1998); *Cassels v. Stalder*, 342 F.Supp.2d 555, 564-67 (M.D.La. 2004) (striking down disciplinary conviction for "spreading rumors" of prisoner whose mother had publicized his medical care complaint on the Internet); *Atkinson v. Way*, 2004 WL 1631377 (D.Del., July 19, 2004) (upholding jury verdict for plaintiff subjected to retaliation for filing lawsuit); *Tate v. Dragovich*, 2003 WL 21978141 (E.D.Pa., Aug. 14, 2003) (upholding jury verdict against prison official who retaliated against plaintiff for filing grievances); *Hunter v. Heath*, 95 F.Supp.2d 1140 (D.Or. 2000) (noting prisoner's acknowledged firing from legal assistant job for sending "kyte" (officially sanctioned informal complaint) to the Superintendent of Security concerning the confiscation of a prisoner's legal papers), *rev'd on other grounds*, 26 Fed.Appx. 754, 2002 WL 112564 (9th Cir. 2002); *Maurer v. Patterson*,

disappear.[31] In a remarkable number of cases, prisoners receive no response whatsoever to their grievances,[32] and prison officials have gotten many cases dismissed by arguing

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197 F.R.D. 244 (S.D.N.Y. 2000) (upholding jury verdict for plaintiff who was subjected to retaliatory disciplinary charge for complaining about operation of grievance program); *Gaston v. Coughlin*, 81 F.Supp.2d 381 (N.D.N.Y. 1999) (awarding damages for trumped-up disciplinary charge made in retaliation for prisoner's complaining about state law violations in mess hall work hours), on reconsideration, 102 F.Supp.2d 81 (N.D.N.Y. 2000); *Alnutt v. Cleary*, 27 F.Supp.2d 395, 397-98 (W.D.N.Y. 1998) (noting jury verdict for plaintiff who was subject to verbal harassment, assault, and false disciplinary charges in retaliation for his work as an Inmate Grievance Resolution Committee representative).

[30] Results have been mixed in cases involving claims of failure to exhaust because of threats or intimidation. Some courts have simply dismissed such claims. *See, e.g,, Enright v. Heine*, 2006 WL 2594485 at *2 (D.Mont., Sept. 11, 2006) ("Even a prisoner's fear of retaliatory action could not excuse her from pursuing administrative remedies."); *Broom v. Engler*, 2005 WL 3454657 at *3 (W.D.Mich., Dec. 16, 2005) (stating, where plaintiff recounted threats he received, "[t]he PLRA does not excuse exhaustion for a prisoner . . . who is afraid to complain"). Others have held that retaliation and threats can make a remedy unavailable or excuse the failure to exhaust. *See, e.g.*, *Hemphill v. New York*, 380 F.3d 680, 688 (2d Cir. 2004); *accord*, *Kaba v. Stepp*, 458 F.3d 678, 684-86 (7th Cir. 2006). But even where courts hold the latter view, it will ultimately be a prisoner's word against that of prison staff members who will be accused of covert misconduct to which there are unlikely to be witnesses.

[31] *See Dole v. Chandler*, 438 F.3d 804, 811-12 (7th Cir. 2006) (holding a prisoner had exhausted when he did everything necessary to exhaust but his grievance simply disappeared, and he received no instructions as to what if anything to do about it); *Williams v. Burgos*, 2007 WL 2331794 (S.D.Ga. Aug 13, 2007) (dismissing for non-exhaustion where prisoner said he mailed his appeal, but it never arrived; federal regulations define filing an appeal as its being received).

[32] See, for example, these cases, which courts have allowed to go forward in spite of the protracted failure to respond to grievances or appeals. *Brown v. Koenigsmann*, 2003 WL 22232884 at *4 (S.D.N.Y., Sept. 29, 2003); *accord*, *Levi v. Briley*, 2006 WL 2161788 at *3 (N.D.Ill., July 28, 2006) (declining to dismiss where the prisoner had waited two years for a final decision); *Jones v. Blanas*, 2005 WL 1868826 at *3 (E.D.Cal., Aug. 3, 2005); *White v. Briley*, 2005 WL 1651170 at *6 (N.D.Ill., July 1, 2005); *Casarez v. Mars*, 2003 WL 21369255 at *6 (E.D.Mich., June 11, 2003) (holding that prison officials' lack of response to a Step III grievance did not mean failure to exhaust); *John v. N.Y.C. Dept. of Corrections*, 183 F.Supp.2d 619, 625 (S.D.N.Y. 2002) (rejecting argument, three years after grievance appeal, that plaintiff must continue waiting for a decision).

This response by the courts is far from universal. Some courts have stated categorically that exhaustion is not completed until the prisoner receives a decision, even if the prisoner has taken all necessary steps to exhaust. *See Petrusch v. Oliloushi*, 2005 WL 2420352 at *4 (W.D.N.Y., Sept. 30, 2005) (dictum); *Rodriguez v. Hahn*, 209 F.Supp.2d 344, 347-48 (S.D.N.Y. 2002). That view would let prison officials keep prisoners out of court just by failing to decide grievances. Other courts have said that exhaustion is complete once the time for a decision on the final appeal has passed. *See, e.g.*, *Powe v. Ennis*, 177 F.3d 393, 394 (5th Cir. 1999). However, that view is not necessarily followed in practice. In *Wyatt v. Doe*, 2006 WL 1407636 at *1 (S.D.Tex., May 19, 2006), the court said that a prisoner whose grievance had remained "under exhaustion" for eight months and whose appeal had been ignored "[did] not establish that the investigation has been delayed unreasonably," even though the grievance process in Texas is supposed to be completed within 90 days. *See Pugh v. Braneff*, 2006 WL 1408392 at *2 (E.D.Tex., May 19, 2006); s*ee also Mendez v. Artuz*, 2002 WL 313796 at *2 (S.D.N.Y., Feb. 27, 2002) (dismissing for non-exhaustion where a prisoner's grievance appeal had not been initially processed as a result of "administrative oversight").

Some grievance systems do not even have deadlines for responses, so the prisoner must engage in guesswork as to whether enough time has passed that the court will think he has waited long enough. See *Ford v. Johnson*, 362 F.3d 395, 400 (7th Cir. 2004) (holding prisoner who waited six months to file suit in

that the prisoner failed to appeal the officials' *failure* to respond.[33] There is no exception to the exhaustion rule for immediate threats to health or safety.[34]

Thus, the chief result of the exhaustion requirement is that prisoner litigation has turned into a game of "gotcha"[35] in which prisons' lawyers and the federal courts scour

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a system that called for appeals to be decided within 60 days "whenever possible" had not waited long enough); *compare Olmsted v. Cooney*, 2005 WL 233817 at *2 (D.Or., Jan. 31, 2005) (holding prisoner who waited seven weeks after filing last appeal was not shown to have failed to exhaust).

[33] *See Cox v. Mayer*, 332 F.3d 422, 425 n.2 (6th Cir. 2003); *Donahue v. Bennett*, 2004 WL 1875019 at *6 n.12 (W.D.N.Y., Aug. 17, 2004); *Bailey v. Sheahan*, 2003 WL 21479068 at *3 (N.D.Ill., June 20, 2003); *Sims v. Blot*, 2003 WL 21738766 at * 3 (S.D.N.Y., July 25, 2003); *Larry v. Byno*, 2003 WL 1797843 at *2 n.3 (N.D.N.Y., Apr. 4, 2003) ("This Court's decision should not be seen as condoning" the failure to follow procedure by not rendering a decision); *Harvey v. City of Philadelphia*, 253 F.Supp.2d 827, 830 (E.D.Pa. 2003) (holding that failure to use a procedure permitting sending a grievance directly to the Commissioner if the prisoner believes he is being denied access to the process was a failure to exhaust); Croswell v. McCoy, 2003 WL 962534 at *4 (N.D.N.Y., Mar. 11, 2003); *Mendoza v. Goord*, 2002 WL 31654855 at *3 (S.D.N.Y., Nov. 21, 2002) (dismissing for failure to appeal a non-response even though the plaintiff "tried many avenues to seek relief from prison authorities"); *Petty v. Goord*, 2002 WL 31458240 at *4 (S.D.N.Y., Nov. 4, 2002); *Graham v. Cochran*, 2002 WL 31132874 (S.D.N.Y., Sept. 25, 2002); *Reyes v. Punzal*, 206 F.Supp.2d 431, 432-33 (W.D.N.Y.2002); *Martinez v. Dr. Williams R.*, 186 F.Supp.2d 353, 357 (S.D.N.Y. 2002); *Saunders v. Goord*, 2002 WL 1751341 at *3 (S.D.N.Y., July 29, 2002); *Jorss v. Vanknocker*, 2001 WL 823771 at *2 (N.D.Cal., July 19, 2001), *aff'd*, 44 Fed.Appx. 273, 2002 WL 1891412 (9th Cir. 2002); *Smith v. Stubblefield*, 30 F.Supp.2d 1168, 1174 (E.D.Mo. 1998); *Morgan v. Arizona Dept. of Corrections*, 976 F.Supp. 892, 895 (D.Ariz. 1997).

[34] *See, e.g. Jones v. Oaks Correctional Facility Health Services*, 2005 WL 3312562 at *2 (W.D.Mich., Dec. 7, 2005) (stating even a case that presents imminent danger of serious physical harm must be exhausted); *Calderon v. Anderson*, 2005 WL 2277398 at *5 (S.D.W.Va., Sept. 19, 2005) (stating exhaustion was required despite the prisoner's claim of "life-or-death situation"); *Drabovskiy v. U.S.*, 2005 WL 1322550 at *2 (E.D.Ky., June 2, 2005) ("To the extent the plaintiff's motion for emergency appeal is intended to be a request for the Court to forgive the exhaustion requirement necessary [sic], he provides no factual or legal grounds therefor."); *Joseph v. Jocson*, 2004 WL 2203298 at *1 (D.Or., Sept. 29, 2004) ("Plaintiff contends he should not be required to exhaust available remedies because delay may result in irreparable harm. Exhaustion is mandatory.") While one court has suggested that preliminary relief may be granted pending exhaustion, *see Jackson v. District of Columbia*, 254 F.3d 262, 267-68 (D.C.Cir. 2001), we are not aware of cases in which that argument has actually been applied. One court did decline to dismiss for non-exhaustion where the prisoner was shortly to be executed and exhaustion was not complete. *Evans v. Saar*, 412 F.Supp.2d 519, 527 (D.Md. 2006).

[35] In addition to cases cited in the previous notes, another example of PLRA "gotcha" is cases where prisoners fail to exhaust out of fear or other justifiable circumstances, and courts then hold that they should have filed grievances when those conditions ceased to apply—even though, given the short deadlines for prison grievances, the grievance filing deadlines would generally have long passed and their grievances would be untimely. The result of a prisoner's failure to appreciate this point, as with other failures to exhaust, is dismissal of the prisoner's case, however meritorious it might be. A good illustration is the acknowledged pattern of physical abuse of prisoners by staff at the Rogers State Prison in Georgia, which resulted in the termination of a number of employees and lesser discipline to others, as well as a "series of prisoner-beating cases" in the federal district court. *See Priester v. Rich*, 457 F.Supp.2d 1369, 1371 & n.1 (S.D.Ga. 2006). In one of these cases, the plaintiff said he did not file a grievance because of his fear of violent retaliation, but the court said he should have filed a grievance when conditions changed, i.e., the administration was replaced and several officers were suspended and eventually terminated.

the record for mistakes in exhausting, while the merits are forgotten,[36] often on the most hair-splitting of grounds. For example, one Indiana prisoner brought suit alleging that he had been subject to adverse disciplinary and classification action in retaliation for constitutionally protected activity. He did not file a grievance because the grievance system excludes disciplinary and classification matters. However, the defendants said, and the court agreed, that his claim was really about retaliation, not about classification and discipline, and he should have filed a grievance. Mr. Marshall's case was dismissed because he followed a common-sense interpretation of the prison's own grievance policy,

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Stanley v. Rich, 2006 WL 1549114 at *3 (S.D.Ga., June 1, 2006). Similarly, in *Langford v. Rich*, 2006 WL 1549120 at *2 (S.D.Ga., June 1, 2006), a prisoner who complained of threats of retaliation at Rogers should have filed an out-of-time grievance upon being transferred to another prison. Although these prisoners' claims were dismissed without prejudice, as a practical matter they would be unable to exhaust and then refile their claims under the "proper exhaustion" rule of *Woodford v. Ngo*, *supra,* because any new attempt to exhaust would be untimely. *Accord, Hemingway v. Lantz*, 2006 WL 1237010 at *2 (D.N.H., May 5, 2006) (holding a prisoner who said he did not grieve for fear of staff retribution should have done so once transferred to the "safety" of another state); *Haroon v. California Dept. of Corrections and Rehabilitation*, 2006 WL 1097444 at *3 (E.D.Cal., Apr. 26, 2006) (holding that a prisoner who was in a coma during the usual time limit should have filed afterwards), *report and recommendation adopted*, 2006 WL 1629123 (E.D.Cal., June 9, 2006); *Isaac v. Nix*, 2006 WL 861642 at *4 (N.D.Ga., Mar. 30, 2006) (holding prisoner who said he couldn't get grievance forms within a five-day time limit should have filed a grievance within five days of getting the forms); *Brazier v. Maricopa County Sheriff's Office*, 2006 WL 753157 at *4 (D.Ariz., Mar. 22, 2006) (holding that a prisoner who was physically traumatized and unable to file a grievance within the 48-hour time limit was required to exhaust them later, even untimely), *reconsideration denied*, 2006 WL 1455569 (D.Ariz., May 22, 2006); *Ming Ching Jin v. Hense*, 2005 WL 3080969 at *3 (E.D.Cal., Nov. 15, 2005) (holding a prisoner informed that there was no record of his appeal was obliged to take steps to pursue the appeal), *report and recommendation adopted*, 2006 WL 177424 (E.D.Cal., Jan. 20, 2006).

[36] As one court put it, once suit is filed, "the defendants in hindsight can use any deviation by the prisoner to argue that he or she has not complied with 42 U.S.C. § 1997e(a) responsibilities." *Ouellette v. Maine State Prison*, 2006 WL 173639 at *3 n.2 (D.Me., Jan. 23, 2006), *aff'd*, 2006 WL 348315 (D.Me., Feb. 14, 2006). Other courts have expressed similar concerns. *See, e.g., Campbell v. Chaves*, 402 F.Supp.2d 1101, 1106 n.3 (D.Ariz. 2005) (noting danger that grievance systems might become "a series of stalling tactics, and dead-ends without resolution"); *LaFauci v. New Hampshire Dept. of Corrections*, 2005 WL 419691 at *14 (D.N.H., Feb. 23, 2005) ("While proper compliance with the grievance system makes sound administrative sense, the procedures themselves, and the directions given to inmates seeking to follow those procedures, should not be traps designed to hamstring legitimate grievances."); *Rhames v. Federal Bureau of Prisons*, 2002 WL 1268005 at *5 (S.D.N.Y., June 6, 2002) ("While it is important that prisoners comply with administrative procedures designed by the Bureau of Prisons, rather than using any they might think sufficient, . . . it is equally important that form not create a snare of forfeiture for a prisoner seeking redress for perceived violations of his constitutional rights.").

and as noted, any attempt by him to exhaust after the dismissal would have been untimely.[37]

One of many examples of facially meritorious and serious claims dismissed under the administrative exhaustion requirement is that of an Arizona prisoner who alleged that he had been raped. He said he did not exhaust because he had been told by prison staff that his rape complaint could not be grieved through the facility's formal grievance process. The court dismissed his case, stating that "futility" was not an excuse for failing to exhaust, even though he followed the directions of prison staff.[38]

The purpose and value of exhaustion can be preserved by requiring that claims be presented to responsible prison officials before filing suit. Where a prisoner has not done so, the court should stay the case for up to 90 days and return it to prison officials for whatever administrative consideration they deem appropriate. Some cases will be resolved; those that are not will go forward, and the courts' time will not be wasted on satellite litigation about the adequacy of the prisoner's grievances.

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[37] *Marshall v. Knight*, 2006 WL 3714713 (N.D.Ind., Dec. 14, 2006). In *Scarborough v. Cohen*, 2007 WL 934594 (N.D.Fla., Mar. 26, 2007), the prisoner plaintiff sought to get married, but his grievance was rejected because the rules required the prior filing of an "informal" grievance; Mr. Scarborough had filed a request to marry, but prison officials said that this did not qualify as an informal grievance, and the court agreed that he had failed to exhaust and his case had to be dismissed. In *Aguirre v. Dyer*, 2007 WL 1541327 (5th Cir., May 24, 2007), the prisoner filed a Step 1 grievance but failed to file a Step 2 grievance because his Step 1 grievance was referred to the Inspector General's office. The court wrote: "Aguirre's ignorance of the rules requiring a Step 2 grievance does not excuse his noncompliance." *Id.* at *1. In *Dunbar v. Jones*, 2007 WL 2022083 at *7-8 (M.D.Pa., July 9, 2007), the prisoner omitted a required piece of information from his grievance because he did not have the information; the court dismissed for non-exhaustion because, having obtained it, he did not add it to the appeal of the denial of his grievance. There is no indication by the court that prison rules require or permit grievances to be supplemented on appeal or that the plaintiff was on notice of any such obligation.

[38] *Mendez v. Herring*, 2005 WL 3273555, at *2 (D.Ariz., Nov. 29, 2005).

3. Exempt youth detained in juvenile facilities from the PLRA by amending 42 U.S.C. § 1997e(h).

The PLRA presently applies to all prisoners, regardless of age or status. Its provisions should not apply to minors. Historically, youth confined in juvenile facilities have filed a very small amount of litigation,[39] so the concerns expressed by Congress about large volumes of frivolous litigation simply do not apply.

Detained youth are among the most vulnerable to some constitutional violations.[40] They are also far less sophisticated about legal and administrative processes than adults, and are more at risk of losing their rights if required to comply with the PLRA's extensive requirements. This is particularly true for youth in juvenile facilities, who generally lack access to even the meager legal resources available in adult prisons, and are ill-equipped to use them anyway.[41]

An example of the application of the PLRA to juvenile prisoners is *Minix v. Pazera*,[42] in which a child detainee alleged that he had been raped and repeatedly

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[39] As of 1998, there were fewer than a dozen reported opinions directly involving challenges to conditions in juvenile detention centers, and around two dozen cases with unreported opinions or settlements. Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F. L. Rev. 675, 681-98 (1998). This figure contrasts strongly with the much larger number of reported and unreported opinions arising from challenges to adult prison conditions. I am generally familiar with institutional litigation and can confirm that this large disparity persists.

[40] For example, detained youth have higher rates of sexual assaults than adult prisoners. *See* Allen J. Beck & Timothy A. Hughes, Bureau of Justice Statistics, *Sexual Violence Reported By Correctional Authorities, 2004* (2005) (finding that the rate of reported sexual violence was nearly ten times higher in juvenile facilities than adult prisons). A more recent BJS survey, which focused solely sexual violence reports filed in adult facilities confirmed that young inmates are also more likely to be victimized when in adult prisons. Allen J. Beck & Paige M. Harrison, Bureau of Justice Statistics, *Sexual Violence Reported By Correctional Authorities, 2005* (2006).

[41] *See Alexander S. v. Boyd*, 876 F. Supp. 773, 790 (D.S.C. 1995) (holding that juvenile detainees had no constitutional right to a law library because, in light of their limited capacity, they "would not benefit in any significant respect from a law library, and the provision of such would be a foolish expenditure of funds"); *accord*, *Shookoff v. Adams*, 750 F.Supp. 288 (M.D.Tenn. 1990), *aff'd in pertinent part, reversed in part on other grounds sub nom. John L. v. Adams*, 969 F.2d 228 (6th Cir. 1992).

[42] 2005 WL 1799538 (N.D.Ind. 2005).

assaulted in a juvenile institution. The boy's lawsuit was thrown out of court because he had not filed a formal grievance, even though he feared further abuse if he reported the incidents, and even though his mother repeatedly contacted prison and juvenile court officials to try to get them to stop the abuse. To satisfy the PLRA's exhaustion requirement, he would have had to file his formal grievance within 48 hours of any incident that he complained about.

The *Minix* case clearly illustrates why it is necessary to change the definition of "prisoner" to exclude detained youth.

4. Repeal the "prospective relief" provisions of 18 U.S.C. § 3626.

The PLRA contains a number of provisions restricting the equitable powers of federal courts to enter orders remedying prison conditions that violate the law. These restrictions are unjustified. Judges should be empowered with the same range of remedies in prisoners' civil rights actions that they possess in other civil rights cases. While prisoners' legal rights are diminished by the fact of their incarceration, those limited rights that they do retain are as worthy of judicial protection as anyone else's legal rights. This is not merely a question of prisoners' rights; it goes to the meaning of a society of laws and of the separation of powers**.** We all benefit when corrections systems are required to comply with the Constitution.

Rather than limit prisoner lawsuits, the most harmful of the prospective relief provisions encourage more civil trials and constant judicial review where they are otherwise not needed. For example, a judge may only approve a consent decree if it meets the standard for injunctive relief – i.e., that it is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least

intrusive measure necessary to correct the violation of the Federal right." Because of this requirement, government officials must stipulate that they have violated federal law in order to agree to a consent judgment.[43] One of the primary reasons litigants settle cases is to avoid findings that they have violated the law. By creating a disincentive to settle, the consent decree provision increases the burden on courts, which are forced to conduct otherwise unnecessary trials.

The PLRA's framework for monitoring injunctive relief is similarly problematic. Where a court has found that injunctive relief is necessary to remedy a constitutional violation, the PLRA provides that after the passage of two years, and every year thereafter, prison officials can seek to terminate the injunctive order, and the court must terminate the order unless it finds that there is a "continuing and ongoing" violation of Federal rights. That is, the plaintiffs are required to prove their case again and again. In addition to posing an extreme burden on the public interest organizations that generally handle these cases, it burdens the courts with complicated proceedings that rehash issues the courts have previously addressed. It is also counter-productive. If it has taken an injunction to bring a constitutional violation under control, then terminating the

[43] It remains possible under the PLRA for parties to enter into "private settlement agreements" that are treated as contracts in state court. However, these agreements are enormously wasteful and duplicative because they cannot be enforced in federal court. In one recent decision approving a private settlement of claims of physical abuse of prisoners by jail staff, the federal judge noted that "it makes little sense that, if a perceived problem with compliance should arise, short of seeking reinstatement of this action, plaintiffs can seek relief only in state court under state law. In view of the time and effort I have spent on this case, including countless hours discussing not only the substantive terms of the Agreement but also its language, it would be a tremendous waste of resources for the parties to have to go to state court to seek relief from a state court judge wholly unfamiliar with the case." *Ingles v. Toro*, 438 F.Supp.2d 203, 215 (S.D.N.Y. 2006).

Further, it is inappropriate as a matter of federalism to force litigants seeking an enforceable order to protect federal rights to go to state courts for that purpose. State courts are already overburdened—in many cases, much more so than the federal courts—and the federal government should not slough off this responsibility onto them. When litigants seek to enforce federal rights in federal courts, those courts should remain open to them when litigation is settled.

injunction is bound to cause future violations. When the PLRA was enacted, the Supreme Court had already addressed when to terminate injunctions against public agencies: before a court may terminate a decree, the public agency defendant must show (a) that it has fully and satisfactorily complied with the decree for a reasonable period of time; (b) that it has exhibited a good-faith commitment to the decree and the legal principles that warranted judicial intervention, and (c) that it is "unlikely to return to its former ways."[44] There is no reason injunctions against prisons' constitutional violations should be treated any differently from injunctions against other civil rights violations.

Finally, the PLRA's "automatic stay" section provides that prison officials' mere filing of a motion to terminate an injunction or consent decree suspends the operation of the decree until the court rules on the motion. 18 U.S.C. § 3626(e)(2). During the period of the stay, which may be months or even years, the prisoners are deprived of any protection under the decree. At the same time, the existence of the decree bars the prisoners from filing a new lawsuit to protect their rights.

The consequences of this provision are illustrated by litigation over conditions at the Maricopa County Jail in Phoenix, Arizona, the nation's fourth largest jail, which is supervised by the well-known Sheriff Joe Arpaio, and which is one of the only American jails to have its own special report from Amnesty International.[45] In 1995, the Sheriff

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[44] *Board of Educ. of Oklahoma v. Dowell*, 498 U.S. 237, 247-50 (1991); *accord*, *Freeman v. Pitts*, 503 U.S. 467, 491 (1992). Courts have the discretion to make this assessment on an issue-by-issue basis. *Freeman*, 503 U.S. at 489. While the decree is in effect, the court may address any operational problems by modifying it if there is a "significant change in circumstances" in either fact or law, and the proposed modification is "suitably tailored to the changed circumstance." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992).

[45] Amnesty International, *Ill-Treatment of Inmates in Maricopa County Jails, Arizona* (August 1997) (http://web.amnesty.org/library/pdf/AMR510511997ENGLISH/$File/AMR5105197.pdf) (citing excessive force, inappropriate and inhumane use of restraint chairs, confinement of prisoners in outdoor tents). The jail's "Tent City" was described by Amnesty International as posing "serious environmental

and other county officials agreed to settle a class action lawsuit that alleged dangerous and life-threatening conditions in the jail,[46] and agreed to entry of a federal court consent decree. In September 2001, the officials moved to terminate the decree under the PLRA; thus, the protections of the decree were automatically stayed. More than five years later, the court still has not ruled on the termination motion, and as a result of the automatic stay, continuing allegations of inadequate medical care and unsafe and inhumane conditions of confinement, affecting thousands of prisoners, remain unaddressed in judicial limbo under the PLRA.

5. Repeal the restrictions on attorneys' fees of 42 U.S.C. § 1997e(d).

In general, federal civil rights litigants who prove their cases are entitled to recover a reasonable attorneys' fee from the defendants. The purpose of this fee-shifting provision is to encourage counsel to represent persons whose civil rights have in fact been violated, even if the resulting economic harm is insufficient to pay lawyers a contingency fee.

The PLRA, however, imposed severe restrictions on the recovery of attorneys' fees in prisoner cases. The statute restricts compensation to 150% of the rates paid defense counsel under the Criminal Justice Act (CJA), which are drastically lower than market rates in most jurisdictions. While CJA lawyers are paid regardless of outcome, counsel representing civil rights litigants are compensated only if they prevail, which

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hazards which make [it] unsuitable for inmate housing" and serious security and safety risks to prisoners and staff. An illustration of the latter is a decision of the Arizona Supreme Court upholding over $600,000 in compensatory and punitive damages to a prisoner severely injured in an assault; the court held that "[t]he history of violence, the abundance of weaponry, the lack of supervision, and the absence of necessary security measures" at Tent City support a finding of deliberate indifference to prisoner safety. *Flanders v. Maricopa County*, 203 Ariz. 368, 377, 54 P.2d 837 (2002).

[46] *Hart v. Arpaio*, No. CIV-77-479-PHX-EHC (D.Ariz.)

presents an enormous risk when representing unpopular clients like prisoners. The restriction to below-market rates is a severe disincentive for private counsel to take even the most meritorious prisoner case. The statute also restricts compensation to 150% of damages awarded. This presents another major disincentive, since juries often award minimal damages to plaintiffs they disapprove of even when they are persuaded of liability. Moreover, it is fairly common for both judges and juries to be unable to place a dollar value on substantial constitutional rights and to award nominal damages of $1.00 – leaving the attorney who has proved a constitutional violation with compensation of $1.50.[47] That will also be the outcome if the court holds that a constitutional claim is for "mental or emotional injury" under 42 U.S.C. § 1997e(e), discussed above, and only nominal damages may be awarded.

These restrictions are illustrated by the case of an Illinois prisoner who, a jury found, had been subjected to a year's unjustified confinement in a "supermax" prison in retaliation for his complaints about prison conditions, which were of course protected by the First Amendment. The jury, however, awarded him only $1.00 in damages pursuant to the judge's instructions, and under the PLRA, the court could award no more than $1.50 in attorneys' fees for the exposure of this constitutional violation.[48]

These provisions should be repealed. Since only "prevailing parties" recover fees under any circumstances, these restrictions do not affect frivolous cases—they affect only meritorious ones. Discouraging attorneys from representing prisoners with meritorious cases is quite counterproductive, since prisoners (or any other litigants) who try to

[47] *See Boivin v. Black*, 225 F.3d 36 (1st Cir. 2000) (awarding $1.00 and $1.50 fees where pre-trial detainee was bound into a restraint chair with a towel over his mouth and lost consciousness).

[48] *Pearson v. Welborn*, 471 F.3d 732 (7th Cir. 2006).

represent themselves not only are much less likely to succeed even in the most meritorious litigation, but also present significant management problems for the courts because they are often unable to understand and comply with court rules and procedures.

6. Amend the filing fees provisions of 28 U.S.C. § 1915(a,b) to avoid penalizing indigent prisoners who file complaints that state a valid claim.

The PLRA provides that indigent prisoners seeking to proceed *in forma pauperis*, unlike other indigent persons, must pay the full filing fee. An initial fee is calculated based on a percentage of the prisoner's resources (if any), and the remainder of the fee is collected in installments out of the prisoner's institutional account as funds are available. The theory behind this provision was to make prisoners "stop and think" before filing cases that might not be meritorious. But filing fees of $150 and $100 in the trial and appellate courts respectively (as they were when the PLRA was enacted) were even then an extremely steep price to charge for a chance at justice for indigent people who have meritorious claims of civil rights violations. Worse, those fees have been drastically increased, to $350 and $450 respectively.[49] These are grossly excessive for indigent prisoners who *do* "stop and think" and get it right. The filing fee should therefore be imposed only on those prisoners whose cases are dismissed at the initial merits screening. Prisoner cases that are found to state a valid claim at that stage should go forward in the same manner as other indigent litigants' cases.

[49] The Deficit Reduction Act of 2005, P.L. 109-171, 120 Stat. 183, increased the filing fees to $350 in district court and to $450 in the Court of Appeals. *See* 28 U.S.C. §§ 1913, 1914.

7. Amend the "three strikes" provision of 28 U.S.C. § 1915(g) by limiting "strikes" to cases that are dismissed as malicious and that are reasonably proximate in time.

Under the PLRA, a prisoner who has had three complaints or appeals dismissed as "frivolous, malicious, or fail[ing] to state a claim on which relief may be granted," is barred from using the *in forma pauperis* provisions at all, even on the installment basis applied to other prisoners. If the prisoner cannot pay $350 up front—and most prisoners cannot—he cannot file his case, no matter how meritorious it may be. This provision was intended to address a real problem –the "frequent filer" who consciously abuses the court system by persistently filing multiple meritless cases – but it is grossly overbroad in operation. First, the prohibition is permanent; a prisoner who files three ill-considered lawsuits in his first year of incarceration will be barred from filing *in forma pauperis* fifteen years later if he is still in prison, no matter how meritorious his case may be and how seriously his rights may have been violated. (The provision also counts as "strikes" cases that were filed even before the PLRA was enacted.) Second, the provision counts as "strikes" not just frivolous or malicious cases, but those that fail to state a claim on which relief can be granted. Since the Justices of the Supreme Court often sharply disagree whether a complaint states a claim on which relief can be granted, such cases can hardly be labeled as abusive.[50] The provision also counts as strikes cases that involve mistakes of law by uneducated litigants rather than any attempt to abuse the court system.

[50] For example, in *Olim v. Wakinekona*, 461 U.S. 238 (1983), the federal district court held that a prisoner who complained that he was transferred from Hawai'i to the mainland without due process failed to state a claim; two out of three judges on the Ninth Circuit held that his allegation did state a claim; and the Supreme Court held by a 6-3 vote that it did not state a claim and was properly dismissed. In *Helling v. McKinney*, 509 U.S. 25, 35 (1993), the Supreme Court held that a prisoner alleging danger to his future health from exposure to second-hand tobacco smoke stated a cause of action under the Eighth Amendment; the vote was 7-2.

The extremity of the three strikes provision is illustrated by the case of a Texas prisoner who filed a lawsuit alleging excessive force. He was assisted in preparing the suit by another prisoner, but was transferred to another prison (and his legal papers confiscated) before he could file the suit. The other prisoner filed the complaint on his behalf, without the required signature of the plaintiff (who was now in another prison) but within the statute of limitations. The plaintiff then submitted a signed copy, but after the limitations period. Despite these attempts to comply with all legal requirements without the assistance of counsel, the court declared the lawsuit frivolous based on this technical error, and it will count as a strike against the plaintiff if he ever needs to resort to the judicial system again.[51] Under the three strikes provision, it is far from unusual that prisoners acting without legal assistance are penalized for such legal errors.[52]

While this provision addresses a genuine problem, it is grossly overbroad and excessive in its present form. It should be amended to limit "strikes" to cases that are dismissed as malicious and therefore constitute genuine abuses of the court, and also to apply the provision only to litigants who have accumulated three qualifying dismissals within the preceding five years. This proposal would cure the overbreadth of the present

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[51] *Gonzales v. Wyatt*, 157 F.3d 1016, 1019-22 (5th Cir. 1998).

[52] In *Monroe v. Lewis*, 165 F.3d 27 (Table), 1998 WL 537562 (6th Cir., Aug. 7, 1998), the prisoner's medical care claim was dismissed as frivolous because the court found it time-barred: it was timely relative to the date the prisoner had learned of the seriousness of his injury, but the court held that the claim accrued earlier, when he was first denied care. The prisoner was charged a strike for not appreciating this technical point. Cases are often declared frivolous because the prisoner has raised a claim in a civil rights action that must properly be pursued via writ of habeas corpus. *See Hassler v. Carson County*, 111 Fed.Appx. 728 (5th Cir. 2004) (affirming dismissal as frivolous of allegation of failure to credit jail time served); *Ballesteros v. Vasquez*, 161 F.3d 11 (Table), 1998 WL 537008 (9th Cir., August 21, 1998) (affirming dismissal as frivolous of allegation of falsified evidence in disciplinary proceeding); *Grant v. Sotelo*, 1998 WL 740826 at *1 (N.D.Tex., Oct. 17, 1998) (citing cases). The United States Supreme Court has grappled for three decades with the difficulty of drawing the line between habeas corpus and civil rights actions. *See Preiser v. Rodriguez*, 411 U.S. 475, 494 (1973); *Heck v. Humphrey*, 512 U.S. 477 (1994); *Edwards v. Balisok*, 520 U.S. 641 (1997); *Muhammad v. Close*, 540 U.S. 709 (2004) (per curiam); *Wilkinson v. Dotson*, 544 U.S. 74 (2005).

provision, while continuing to address the problem of the persistently abusive prisoner litigant.