

UNITED STATES OF AMERICA

**SUBMISSION TO THE UNITED NATIONS
UNIVERSAL PERIODIC REVIEW**

Ninth Session of the Working Group on the UPR
Human Rights Council
22 November – 3 December 2010

CLUSTER REPORT SUBMITTED BY:

American Civil Liberties Union (ACLU),¹ ACLU Foundation, over 500,000 members, and 53 affiliates²

EXECUTIVE SUMMARY:

Actions of the executive, federal legislative, and judicial branches of the United States have seriously restricted access to justice for victims of civil liberties and human rights violations, and have limited the availability of effective (or, in some cases, any) remedies for these violations. For example, federal legislation and Supreme Court decisions have greatly limited access to federal review of state court death penalty convictions. Indigent capital defendants are systematically denied access to justice, as they are often appointed attorneys who are overworked, underpaid, lacking critical resources, incompetent, or inexperienced, and the lack of a right to counsel in post-conviction proceedings leaves them with little recourse. Prisoners seeking a remedy for injuries inflicted by prison staff and others, or seeking the protection of the courts against dangerous or unhealthy conditions of confinement, also have been denied any remedy and have had their cases thrown out of court due to federal legislation that created numerous burdens and restrictions on lawsuits brought by prisoners in the federal courts.

Victims of torture and “extraordinary rendition” have been denied their day in court. The federal government has used judicially-created doctrines such as the so-called “state secrets” privilege and qualified immunity to dismiss civil suits alleging torture; cruel, inhuman, or degrading treatment; forced disappearance; and arbitrary detention, without consideration on the merits. Immigrants also are systematically denied access to justice. The U.S. government has claimed that there is no right to judicial review of diplomatic assurances when it has sought to transfer

h US [Signature]

[Signature]

i /) i îôâî:òò/ î:ò²Àî:òc

I.

little recourse when they have been denied adequate legal representation or have endured other constitutional violations. Inadequate counsel not only adversely affects the client at trial and sentencing, but substandard attorneys fail to investigate and preserve objections, resulting in an inadequate trial record. These errors vastly reduce the scope of appellate review, decreasing the possibility that errors will be corrected later. Success in challenging a death sentence on the ground that the accused's constitutional rights were violated depends on the death-sentenced inmate having quality representation in their habeas corpus appeal to the federal courts, which assesses the case for violations to the U.S. Constitution. Yet beyond the first appeal to federal court, people fighting their death sentences have no constitutional right to a lawyer, and the quality of available counsel can be even more abysmal in these appeals than at the trial level.²¹

b.

capital cases, it is imperat

technical misunderstandings rather than lack of legal merit. Third, there is a well-established practice of threatening and retaliating against prisoners who file grievances. Under some grievance regimes, prisoners are even required to obtain grievance forms from or file their grievances with the very same individuals who have abused them or violated their rights.⁴² All these factors bar prisoners' access to the courts and deny them remedies for serious violations of their rights.

The provisions of the PLRA also apply to children confined in prisons, jails, and juvenile detention facilities.⁴³ Application of the PLRA to children is especially problematic because youth are exceptionally vulnerable to abuse in institutions, such that court oversight is particularly important.⁴⁴ In addition, the PLRA's exhaustion requirement has been an especially problematic obstacle to justice for incarcerated children, particularly because some courts have ruled that efforts to pursue grievance procedures by children's parents or other adults do not satisfy the PLRA.⁴⁵ The PLRA has created a lack of oversight and accountability fo

Court of Appeals for the Fourth Circuit upheld the lower court decision that denied Mr. El-

The possibility of a federal remedy against local officials who fail to protect women from privately inflicted violence under constitutional protections was also shut out in the *Gonzales* case. Mr. Gonzales violated a restraining order against him and abducted his daughters from his ex-wife's home. Ms. Gonzales reported the abduction to the police and informed them that her husband had a history of mental instability and erratic behavior. She phoned repeatedly and pleaded with the police to search for her children. The police repeatedly refused to enforce the restraining order. Ten hours after the abduction, Mr. Gonzales opened fire outside of the police station and was immediately shot and killed. The police discovered the bodies of the three murdered Gonzales children in his truck. Ms. Gonzales filed suit alleging that the police failure to enforce the restraining order deprived her of due process. The U.S. Supreme Court refused to recognize her right to relief, holding that the government had no affirmative duty to protect its citizens from privately inflicted violence despite the existence of a valid protective order, a state law requiring arrest for any violations of a protective order, knowledge of imminent harm and opportunity to act to prevent the harm.⁶⁰

VII. Racial Justice

a. Erosion of Remedies for Victims of Racial Discrimination under the Civil Rights Act

Some of the greatest obstacles to access to courts for plaintiffs seeking judicial relief from instances of racial or ethnic injustice arise from court decisions which affect procedural requirements for bringing cases. Although these decisions do not deal specifically with the substantive coverage of individual laws, they, in effect, erect barriers to access to courts which are just as effective as substantive law in denying access to the courts.

from unlawful discrimination in the courts. Until legislation is passed reversing these decisions, or the Judicial Conference adopts changes to the rule governing motions to dismiss,

Violations of undocumented workers' employment rights: Congress should introduce and pass the Civil Rights Act of 2009, which would address the *Hoffman Plastics* decision and ensure employment protections for non-citizens regardless of their immigration status. State legislatures should strengthen protections in state anti-discrimination and workers' compensation laws for undocumented persons.

ENDNOTES:

¹ The American Civil Liberties Union

²⁴ James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 *Brooklyn L. Rev.* 411, 425 (2001).

²⁵ 28 U.S.C. § 2254(d).

²⁶ Death Penalty Information Center,

facility); ACLU of Hawai'i, HAWAII YOUTH CORRECTIONAL FACILITY TO PAY OVER HALF A MILLION DOLLARS FOR 'RELENTLESS CAMPAIGN OF HARASSMENT' OF GAY AND TRANSGENDER YOUTH, June 15, 2006 (threats of violence and physical and sexual assault), available at <http://www.acluhawaii.org/news.php?id=24>; Letter from Deval Patrick, Assistant Attorney General, Civil Rights Division of U.S. Department of Justice to Louisiana Governor Mike Foster, July 15, 1996 (describing physical and sexual assaults on youth held in secure juvenile facilities in Louisiana); American Civil Liberties Union & Human Rights Watch, CUSTODY AND CONTROL: CONDITIONS OF CONFINEMENT IN NEW YORK'S JUVENILE PRISONS FOR GIRLS, 44-56, 63-71 (2006); Gregg Jones, et al., *TYC Facilities Ruled by Fear*, DALLAS MORNING NEWS, March 18, 2007, available at <http://www.dallasnews.com/sharedcontent/dws/news/texasouthwest/stories/031807dnprotycrctaliat.3e701e5.html>.

⁴⁵ See, e.g., *McCabe ex parte Crider v. Whitcomb*, 2007 WL 854619, at *3 (S.D. Ind. 2007); *Harris v. Le Roy Baca*, 2003 WL 21384306, at *3 (C.D. Cal. 2003) (rejecting the contention that a grievance filed by counsel on prisoner's behalf satisfies the exhaustion requirement); *El'Shabazz v. City of Philadelphia*, 2007 WL 2155676, at *3 (E.D. Pa. 2007) (grievances filed by prisoner's father on his behalf did not satisfy PLRA); *Minix v. Pazera*, 2005 WL 1799538, at *7 (N.D. Ind. 2005) (efforts of detained juvenile's mother to stop ongoing abuse of her son did not satisfy PLRA); *Brock v. Kenton County, KY*, 93 Fed. Appx. 793, 795, 799 (6th Cir. 2004).

⁴⁶ See, e.g., *Rasul v. Myers*, 563 F.3d 527, 528 (D.C. Cir. 2009) (no reasonable government official would know that Guantanamo detainees had due process rights or a right to be free from "cruel and unusual punishment" as provided by the Fifth and Eighth Amendments to the U.S. Constitution); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. N.Y. 2009) (government argued qualified immunity, but court did not rule on it); *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007).

⁴⁷ See, e.g., *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009) (Alien Tort Statute claim dismissed on ground that non-state actors cannot be liable. This decision grants unwarranted immunity for private contracto

⁹⁷ *Crespo v. Evergo*, 366 N.J.Super. 391 (N.J.Super.A.D., 2004).

⁹⁸ Recognizing that, in some states, employment and labor protections under state law have been either eliminated or severely limited for undocumented workers (including basic workplace protections such as freedom from workplace discrimination and entitlement to hold an employer responsible for a workplace injury), the ACLU, along with the National Employment Law Project and the Transnational Legal Clinic at the University of Pennsylvania School of Law, filed a petition urging the Inter-American Commission on Human Rights to find the United States in violation of its universal human rights obligations by failing to protect millions of undocumented workers from exploitation and discrimination in the workplace. The petition argues that the U.S. is not in compliance with international human rights law, which requires all nations to apply their workplace