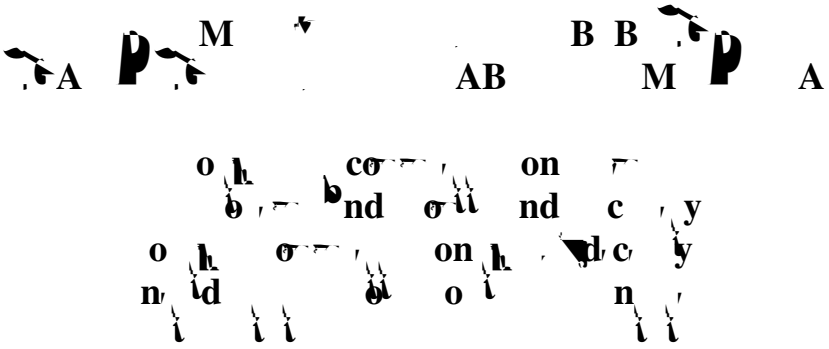

April 22, 2008

who are incarcerated in this country are not member

• Men forced to sort through garbage on a conveyer belt containing hepatitis- and AIDS-infected needles and other medical waste without protective clothing at a “recycling” plant within a prison. One of many resulting injuries was permanent injury to a man’s eye after a piece of glass flew into it.

These are not trivial matters. But the exhaustion requirement of the PLRA bars access to the federal courts for even the most egregious violations of the Constitution if people held in prisons and jails do not comply with the hyper-technical requirements of complicated grievance systems – some of them procedural mazes which would challenge many lawyers. People who are mentally ill, mentally retarded, or illiterate may be unaware of the two or three deadlines that may apply at various stages of the process, unable to find the right form to fill out or the right person to give it to, and unaware of what to do if no action is taken on the grievance for weeks or months.

Recovery for even the most degrading treatment – even the universally condemned practices at Abu Ghraib – is barred if there is no physical injury. A federal court threw out a suit we brought for such conduct.

Beyond that, we waste a lot of time and precious j

Prison Abuse Remedies Act would permit), but the district court dismissed the case instead.[7]

These are not isolated examples.[8] And they do not begin to tell how many cases are not brought because it is clear that they will be dismissed for failure to

[illegible]

People in this country and around the world were horrified by images of Abu Ghraib, as undoubtedly were all the members of this Subcommittee. What few people know is that if such conduct occurs in a prison or jail in this country, those subject to it would have no redress in the federal courts due to the "physical injury" requirement of the PLRA.[9]

We had such a case. Officers who hid their identity by not wearing or by covering their badges rampaged through a prison – swearing at inmates, calling some of them "faggots"; destroying their property; hitting, pushing and kicking them; choking some with batons; and slamming some to the ground. The male inmates were ordered to strip and subjected to full body cavity searches in view of female staff. Some were left standing naked for 20 minutes or more outside their cells, while women staff members pointed and laughed at them. Some were ordered to "tap dance" while naked – to stand on one foot and hold the other in their hands, then switch, and rapidly go from standing on one foot to the other. The Court of Appeals for the Eleventh Circuit held that this conduct did not satisfy the physical injury requirement of the PLRA.[10]

Other courts ... ment was not satisfied by ... (h)55 ot badglusical injury require

• a "bare allegatio203.87(o)3.32624(t)3 of sexual assault" ... male prisoner who alleged that a correctio203.87(o)3.3.32728(s)-4.91304( )1.66312(o)-5.23605(f)7.59327(f)-0.970065(i)-4.590[11]

• a prisoner being forced to stand in a 2 ½-foot wide cage for 13 hours, naked for the first 10 hours, in acute pain, with clear, visible swelling in leg that had been previously injured in car accident,[13]

• a prisoner who complained of suffering second-degree burns to the face.[14]

There are far more cases that are never brought or promptly dismissed because of the physical injury requirement. Prior to enactment of the PLRA, we brought suit on behalf of women who were constantly splattered with bodily waste as a result of being housed with severely mentally ill women. Our clients could not sleep at night because the mentally ill women shrieked and carried on loud conversations, often with themselves. We would not bring that suit today. Our clients were degraded, they were deprived of sleep, but they suffered no physical injury.

Recently, we have concluded that suits could not be brought by men who complained of being chained to a bed in one case and a grate in the floor in

The Prison Litigation Reform Act

The PLRA is applied to juveniles.[15] All of its problems are magnified when it is applied to children. Incarcerated minors account for very little prison litigation, and are even less equipped to navigate technical areas like exhaustion. At the same time, incarcerated juveniles are at-risk for abuse and may be

Despite all of Mrs. Minix's efforts to notify state officials of the abuse, when she and S.Z. filed suit, it was dismissed for failure to comply with the PLRA grievance requirement. The grievance policy then in effect in Indiana juvenile facilities had numerous steps, the first one requiring that grievances be filed within two business days. The Court noted that although Mrs. Minix had made "heroic efforts" to help her son, it could not replace the requirement that he personally file a grievance. Among other things, it noted, "[h]er communications didn't comply with the general time constraints built into the grievance process."

After the Minix family suit was dismissed from federal court, the Department of Justice investigated the Indiana juvenile facilities in which S.Z. had been held. It concluded that these facilities failed "to adequately protect the juveniles in its care from harm," in violation of the Constitution. The Department specifically noted that the grievance system in the Indiana juvenile facilities – the same grievance system that resulted in the dismissal of S.Z.'s suit – was

At one time people in Georgia's prisons had access to lawyers from federal legal services programs as well as lawyers and law students from a program operated by the law school at the University of Georgia. These programs not only helped prisoners bring meritorious suits regarding truly egregious practices and conditions, they also advised prisoners when there was no basis for bringing a suit. This is the most effective way to prevent frivolous suits. But all that is long gone. Since 1996, legal services programs which receive federal funding have been prohibited from representing prisoners. Many states stopped providing legal assistance to prisoners at some time after that.

Today, a few states like California, Massachusetts and New York, have small programs that provide legal services to a small percentage of the many prisoners who seek their help. A few national and regional programs, like the National Prison Project and our program, are able to take cases in a few states. But in some states there is not a single program or lawyer who provides legal representation to prisoners. In the part of the country where I practice, private lawyers were never very interested in responding to prisoner complaints even before the PLRA's restriction on attorney fees. Responding to prisoners' pleas for legal representation because of beatings, rapes, sexual harassment, denial of medical care or other egregious, even life threatening denial of rights is not attractive to lawyers in private practice.

For a lawyer in private practice, just seeing the potential client for an initial interview may involve a long drive to a remote part of the state where many prisons are located, submitting to a search, hearing heavy doors slam as he or she is led to a place in the prison for the interview, waiting – sometimes for hours – for the potential client to be brought up for the interview, and conducting a semi-private interview in a dingy room. The potential client may be mentally ill, mentally retarded, illiterate, or inarticulate. The lawyer will not know until he or she gets there. Investigation of the case is immensely difficult because most, if not all, of the witnesses are other prisoners or corrections officers. It is easier to get information from the Kremlin than from many departments of corrections. The lawyer may discover that no suit can be filed because the prisoner did not file a grievance or suffered no physical injury. And then there is the long drive back. This is not the way to develop a law practice that pays the bills and supports a family.

The exhaustion requirement, the physical injury requirement, the limits on the power of the federal courts and other aspects of the PLRA before you today