NOT BEHIND BARS, NOT A PRISONER: AN ANALYSIS OF GUARDIANS, CONSERVATORS, AND PROTECTION & ADVOCACY ORGANIZATIONS UNDER THE PRISON LITIGATION REFORM ACT

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INTRODUCTION

The Prison Litigation Reform Act (PLRA),[1] enacted in 1996, was designed to reduce the number of frivolous[2] prisoner lawsuits.[3] All prisoner suits regarding prison incidents or conditions are subject to the PLRA.[4] Commentators have noted, however, that the PLRA makes litigation by prisoners more difficult overall[5] and critics have argued that the PLRA poses serious obstacles to meritorious litigation, resulting in the government's ability to violate the rights of those who are incarcerated without consequences.[6]

Congress did, in fact, succeed in reducing the number of prisoner lawsuits by enacting the PLRA.[7] The main obstacles[8] to filing a suit

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1 18 U.S.C. § 3626 (2012); 28 U.S.C. § 1932 (2012); 42 U.S.C. § 1997e (2012).

2 See *infra* note 40 for examples of frivolous lawsuits filed by prisoners.

3 The legislative history of the PLRA indicates that its goal was to reduce the number of frivolous lawsuits filed by prisoners. In introducing the Bill, Senator Orrin Hatch stated:

> This landmark legislation will help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits. Jailhouse lawyers with little else to do are tying our courts in knots with an endless flood of frivolous litigation. . . . It is time to stop this ridiculous waste of the taxpayers' money. The huge costs imposed on State governments to defend against these meritless suits is another kind of crime committed against law-abiding citizens.

141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch).

4 Porter v. Nussle, 534 U.S. 516, 520 (2002).

5 John Boston, *Chapter 14: The Prison Litigation Reform Act*, *in* A JAILHOUSE LAWYER'S MANUAL 288, 310 (9th ed. 2011).

6 Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 140 (2008). Schlanger and Shay argue that the PLRA's "obstacles to meritorious lawsuits are undermining the rule of law in our prisons and jails." *Id.*

7 William C. Collins, *Bumps in the Road to the Courthouse: The Supreme Court and the Prison Litigation Reform Act*, 24 PACE L. REV. 651, 669 (2004) ("To the extent that Congress wanted to reduce the number of inmate lawsuits . . . there is no question that the PLRA succeeded in dramatic fashion."). Statistics regarding prison litigation reveal the reduction in the number of prisoner lawsuits filed in federal courts since the PLRA was enacted:

under the PLRA include the exhaustion requirement,[9] the filing fees provision,[10] the three strikes provision,[11] and the physical injury requirement.[12] The exhaustion requirement provides that prior to bringing a lawsuit in court, an inmate must attempt to resolve the problem through the grievance system in prison, often by filing a grievance and following the appeals procedure.[13] This is a major hurdle for many prisoners, as the grievance process is often extremely difficult to navigate in most prison and jail systems.[14] Accordingly, the exhaustion provision has been subject to a significant amount of litigation.[15] Failure to exhaust is an affirmative defense[16] that closes the door on a large number of prisoner suits. Because failure to exhaust is an affirmative defense and the prisoner suit will be dismissed if the suit is subject to the PLRA and the prisoner failed to exhaust—even if the suit is meritorious—this Note will focus on the exhaustion requirement as the major impediment to bringing a suit under the PLRA.

The PLRA applies to suits brought by "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program."[17] While suits brought by prisoners are subject to the PLRA, the question remains whether suits brought by groups or individuals who stand in for prisoners who are unable to represent themselves—

> In the year 2000, just four (4) years after the PLRA's passage, the total number of section 1983 lawsuits brought by inmates in federal court had dropped over 40%. By 2005, nearly a decade after enactment of the PLRA, the number of new inmate civil rights filings had fallen even more dramatically, from nearly 40,000 in 1996 to just 14,993 in 2005. The number of cases surviving beyond initial filing has also been significantly curtailed. In the year 2005, only 2,653 inmate civil rights cases were appealed to our nation's 13 circuit courts of appeal, and only 1% of those cases were granted *certiorari* to be heard by the United States Supreme Court.

Mariah L. Passarelli, *Broken Gate? A Study of the PLRA Exhaustion Requirement: Past, Present, and Future*, 47 CRIM. L. BULL. 1, 10–11 (2011) (citations omitted).

8 For further background information on the obstacles to bringing a suit, see Boston, *supra* note 5.

9 42 U.S.C. § 1997e(a) (2012). See *infra* Part I.B.1 for a discussion of the exhaustion requirement.

10 28 U.S.C. § 1915(b)(1) (2012). See *infra* Part I.B.2 for a discussion of the filing fees provision.

11 28 U.S.C. § 1915(g). See *infra* Part I.B.2 for a discussion of the three strikes provision.

12 42 U.S.C. § 1997(e). See *infra* Part I.B.2 for a discussion of the physical injury requirement.

13 42 U.S.C. § 1997e(a).

14 *See* BARBARA BELBOT & CRAIG HEMMENS, THE LEGAL RIGHTS OF THE CONVICTED 223 (2010).

15 *See infra* Part I.B.1.

16 Jones v. Bock, 549 U.S. 199, 216 (2007).

17 42 U.S.C. § 1997e(h).

specifically, guardians, conservators,[18] or protection and advocacy organizations[19]—are "brought by prisoners" and therefore subject to the PLRA.[20]

The District Court of Puerto Rico stated that the language of the statute does not include "the family members or legal guardians of a prisoner."[21] However, in *Braswell v. Corrections Corp. of America*,[22] the District Court for the Middle District of Tennessee applied the PLRA to a suit by a guardian where the guardian did not file an independent claim in addition to the claim on behalf of the prisoner.[23] Similarly, in *Villescaz v. City of Eloy*,[24] the District Court for the District of Arizona dismissed a suit brought by the guardian of an intellectually disabled inmate for failure to exhaust the administrative remedies, as required by the PLRA.[25] In contrast, at least one court has ruled that protection and advocacy groups with statutory standing[26] to bring a suit under the Protection and Advocacy for Individuals with Mental Illness Act[27] are not subject to the PLRA.[28]

This Note argues that the PLRA definition of "brought by prisoners" should be interpreted strictly to mean only persons currently incarcerated, as defined in the statute, and should not be interpreted to mean guardians, conservators, or protection and advocacy groups bringing a case on behalf of a prisoner who is incompetent or incapacitated and unable to represent himself.[29] Given that failure to exhaust is an affirmative defense, if "brought by prisoners" is interpreted to mean guardians, conservators, or protection and advocacy groups bringing a suit on behalf of a prisoner, those cases would be subject to the PLRA, leading to dismissal if the prisoner had not exhausted.[30]

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18 A guardian acts for another person who has been deemed legally incompetent, and a conservator acts as an agent in managing a conservatee's property. 39 AM. JUR. 2D *Guardian and Ward* § 1 (2013). See Part II.B for background information on guardians and conservators.

19 See Part II.A for background information on protection and advocacy groups.

20 Hereinafter, guardians, conservators, and protection and advocacy groups will often be referred to as groups who stand in for prisoners for the purpose of this Note.

21 Rivera-Rodriguez v. Pereira-Castillo, No. 04–1389(HL), 2005 WL 290160, at *5 (D.P.R. Jan. 31, 2005).

22 No. 3-08-0691, 2009 WL 2447614 (M.D. Tenn. Aug. 10, 2009), *rev'd on other grounds*, 419 F. App'x 622 (6th Cir. 2011).

23 *Id.* at *5.

24 No. CV-06-2686-PHX-FJM, 2008 WL 1971394 (D. Ariz. May 2, 2008).

25 *Id.* at *5.

26 *See infra* Part II.A (explaining that protection and advocacy groups have standing to bring an action on behalf of an inmate under the Protection and Advocacy for Individuals with Mental Illness Act).

27 42 U.S.C. § 10802 (2012). See *infra* Part II.A for a discussion of the Act.

28 Ala. Disabilities Advocacy Program v. Wood, 584 F. Supp. 2d 1314, 1316 (M.D. Ala. 2008).

29 Inmates who are incarcerated and bringing a suit pro se will not be affected by this argument. They are "prisoners" as defined by the statute and must comply with the provisions of the statute.

30 See *infra* Part I.B.1 for a discussion of failure to exhaust as an affirmative defense.

Exhaustion is something that may be out of the control of those bringing the suit on behalf of the prisoner, as required time deadlines in the grievance procedures may have already passed before the group standing in for the prisoner found out about the constitutional rights violation, and some jurisdictions[31] require that the inmate personally submit the grievance.[32] The inmate may have already failed to comply with the grievance procedures before the protection and advocacy group, guardian, or conservator even learns about the rights violation and if these groups standing in for the prisoner are subject to the statute, the case will be dismissed for failure to exhaust.[33]

In looking at the scope of this problem, it is important to note that a person who has a guardian, conservator, or a protection and advocacy group bringing a suit on his behalf is typically someone who would not be able to navigate the grievance system on his own. The Supreme Court has made it clear that the PLRA is not going anywhere[34] and, therefore, the meaning of "prisoner" under the statute should be interpreted strictly; thus, conservators, guardians, and protection and advocacy groups should not be subject to the statute.

This Note will proceed in three Parts. Part I of this Note will provide background to the Prison Litigation Reform Act, including the reasons for its enactment, key requirements of the PLRA, and settled case law on certain types of prisoners under the PLRA. Part II will analyze the current state of the law regarding protection and advocacy

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31 Submission of the grievance would not be an issue in jurisdictions where a group standing in for a prisoner would be allowed to submit the grievance for the inmate.

32 The City of New York Department of Correction Directive on the Inmate Grievance and Request Program demonstrates that the inmate must submit the grievance himself. *See infra* note 98. While a guardian, conservator, or protection and advocacy group could assist the inmate with filling out the grievance, the directive makes it clear that the inmate must submit the grievance. The directive does state that if needed, "staff shall assist the inmate in filling out the form if necessary." CITY OF N.Y. DEP'T OF CORR., INMATE GRIEVANCE AND REQUEST PROGRAM IV.D.4 (2008), *available at* http://www.nyc.gov/html/doc/downloads/pdf/Directive_3376_Inmate_Grievance_Request_Program.pdf. However, this might be unrealistic or difficult given the circumstances of incarceration. *See* Doss v. Gilkey, 649 F. Supp. 2d 905, 913–14 (2009) (holding that where a wife and husband were both incarcerated and brought a complaint about their inability to correspond with each other, the husband's grievance did not satisfy the wife's exhaustion requirement, even where it would be "redundant and futile"). There are exceptions to the requirement that an inmate personally exhaust, and "vicarious exhaustion" has been allowed in class actions where a "single class member [is permitted] to exhaust on behalf of a class." *Id.* at 912–13. In allowing vicarious exhaustion in a class action, the court found that "the objectives of the PLRA were satisfied . . . by that approach, since prison officials were permitted to address the issues common to the class." *Id.* (citation omitted).

33 See *infra* Part I.B.1 for a discussion of the requirement that the inmate properly exhaust the administrative remedies.

34 Barbara Belbot, *Report on the Prison Litigation Reform Act: What Have the Courts Decided So Far?*, 84 PRISON J. 290, 312 (2004) (explaining that since the Supreme Court has held many of the provisions of the PLRA constitutional, the PLRA will be in effect unless Congress takes action: "[i]t is apparent by now that the restrictions imposed by the PLRA are here to stay until such time as Congress significantly amends the act or repeals it").

groups, guardians, and conservators as prisoners under the PLRA. Finally, Part III will provide an analysis of the issues involved in holding that these groups who stand in for prisoners are prisoners within the meaning of the PLRA. Part III will compare these groups who stand in for prisoners to the cases establishing settled law on the meaning of prisoner under the PLRA in other contexts, and will review the purpose and intent of the statute as applied to protection and advocacy groups, guardians, and conservators. Using that analysis, Part III will then propose that these groups who stand in for prisoners who are unable to represent themselves should not be considered prisoners within the meaning of the PLRA and should not be subject to the requirements of the PLRA in order to avoid dismissal of meritorious litigation and limit the reach of the PLRA.

I. BACKGROUND TO THE PRISON LITIGATION REFORM ACT

A. *Reasons for the Enactment of the PLRA*

The United States has seen a significant rise in the prison population in recent decades.[35] With this rise in the prison population came an increase in the number of lawsuits filed by prisoners.[36] Congress passed the PLRA to reduce the amount of prisoner litigation[37] by making it difficult for an inmate to bring a claim in federal court.[38] The PLRA applies to any "civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison."[39]

In introducing the Bill, Senator Bob Dole made it abundantly clear in his testimony in support of the statute that Congress was focused on

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35 *See* THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS (2014), *available at* http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf. The United States has seen a 500% increase in incarceration rates over the past forty years. *Id.* In 1952, there were fewer than 200,000 people in state and federal prisons. As of 2012, that figure had grown to 1,571,010. *Id.*

36 *See infra* note 40.

37 Philip White, Jr., Annotation, *Construction and Application of Prison Litigation Reform Act—Supreme Court Cases*, 51 A.L.R. FED. 2d 143 (2010) ("The Prison Litigation Reform Act (PLRA) was passed by Congress and signed into law by President Clinton in 1996 to reduce the burdens on the federal courts from what was perceived as a tidal wave of lawsuits—many of them frivolous—brought by imprisoned individuals.").

38 AM. CIVIL LIBERTIES UNION, KNOW YOUR RIGHTS: THE PRISON LITIGATION REFORM ACT (2011), *available at* https://www.aclu.org/files/assets/kyr_plra_aug2011_1.pdf.

39 18 U.S.C. § 3626(g)(2) (2012).

reducing the number of frivolous prisoner lawsuits.[40] He later testified that legal resources would be better spent prosecuting violent criminals, rather than wasting money on frivolous prisoner litigation.[41]

The National Association of Attorneys General also supported the bill and sent a letter to Senator Dole in support, stating that "the issue of frivolous inmate litigation has been a major priority of this Association for a number of years."[42] Senator Orrin Hatch also testified about the bill, focusing on the costs to society of frivolous prisoner litigation.[43] However, Senator Hatch also remarked that he did not believe that the PLRA would prevent meritorious civil rights claims from being litigated.[44] Senator Jon Kyl testified that the provisions in the PLRA are based on similar provisions in Arizona, which reduced state prisoner cases by fifty percent, with the goal of the PLRA to do the same.[45]

Marc I. Soler, president of the Youth Law Center, testified in a hearing before the Committee on the Judiciary of the U.S. Senate regarding his reservations about the PLRA and the goal to prevent

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40 Senator Dole stated:

> Over the past two decades, we have witnessed an alarming explosion in the number of lawsuits filed by State and Federal prisoners. According to enterprise institute scholar Walter Berns, the number of 'due-process and cruel and unusual punishment' complaints filed by prisoners has grown astronomically—from 6,600 in 1975 to more than 39,000 in 1994. As Chief Justice William Rehnquist has pointed out, prisoners will now 'litigate at the drop of a hat,' simply because they have little to lose and everything to gain. Prisoners have filed lawsuits claiming such grievances as insufficient storage locker space, being prohibited from attending a wedding anniversary party, and yes, being served creamy peanut butter instead of the chunky variety they had ordered.

141 CONG. REC. S7524 (daily ed. May 25, 1995) (statement of Sen. Dole).

41 141 CONG. REC. S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) ("These legal claims may sound far-fetched, almost funny, but unfortunately, prisoner litigation does not operate in a vacuum. Frivolous lawsuits filed by prisoners tie up the courts, waste valuable legal resources, and affect the quality of justice enjoyed by law-abiding citizens. The time and money spent defending these cases are clearly time and money better spent prosecuting violent criminals, fighting illegal drugs, or cracking down on consumer fraud.").

42 141 CONG. REC. S14417–18 (daily ed. Sept. 27, 1995) (Letter to Sen. Dole from the National Association of Attorneys General).

43 *See supra* note 3.

44 141 CONG. REC. S18136–37 (daily ed. Dec. 7, 1995) (statement of Sen. Hatch) ("I do not want to prevent inmates from raising legitimate claims. While the vast majority of these claims are specious, there are cases in which prisoners' basic civil rights are denied. Contrary to the charges of some critics, however, this legislation will not prevent those claims from being raised.").

45 141 CONG. REC. S19114 (daily ed. Dec. 21, 1995) (statement of Sen. Kyl) ("These provisions are based on similar provisions that were enacted in Arizona. Arizona's recent reforms have already reduced state prisoner cases by 50 percent. Now is the time to reproduce these common sense reforms in Federal law. If we achieve a 50-percent reduction in bogus Federal prisoner claims, we will free up judicial resources for claims with merit by both prisoners and nonprisoners.").

frivolous litigation.[46] Soler argued that federal judges have the ability to dismiss meritless lawsuits and the PLRA provisions only create hurdles in lawsuits where prisoner plaintiffs have the right to relief.[47]

Nevertheless, the PLRA was enacted. The Supreme Court has articulated that the main purpose of the PLRA is to manage the large number of lawsuits filed by prisoners each year through a variety of provisions "to bring this litigation under control."[48] Those provisions refer to key requirements under the PLRA, as discussed in the following section.

B. *Key Requirements Under the PLRA*

As previously stated, the main obstacles to a prisoner bringing a suit under the PLRA are the exhaustion requirement, the physical injury requirement, the requirement that prisoners pay the filing fee, and the three strikes provision.[49] This Note focuses on the exhaustion requirement as the major hurdle to bringing a suit for these groups who are standing in for a prisoner who is unable to represent himself and will provide general background information on the other obstacles in order to provide a broader sense of the statute.

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46 *The Role of the U.S. Department of Justice in Implementing the Prison Litigation Reform Act, Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 57–64 (1996) (statement of Mark I. Soler, President, Youth Law Center).

47 *Id.* at 59. Elaborating, from his own personal experience, on the idea that the PLRA provisions are not about controlling frivolous litigation:

> It should be noted that none of this is about controlling frivolous lawsuits by prisoners. I saw such lawsuits when I clerked for the chief judge of the U.S. District Court in Connecticut 23 years ago and they continue today. I particularly dislike frivolous lawsuits because they undermine the credibility of the meritorious actions that my colleagues and I bring to prevent institutional abuse of children. But Federal judges have always had the authority to dismiss frivolous lawsuits and the provisions of the act discussed today have nothing to do with such actions. They only create difficulties to lawsuits where the plaintiffs actually are entitled to relief. . . . [T]he Prison Litigation Reform act poses serious barriers to litigation to protect children from abuse or to end the most egregious violations of basic rights.

Id.

48 Woodford v. Ngo, 548 U.S. 81, 84 (2006) (citations omitted).

49 *See supra* note 8.

1. The Exhaustion Requirement

The exhaustion requirement[50] functions to reduce the amount of prisoner litigation filed each year.[51] Before an inmate is permitted to file a lawsuit, he must attempt to resolve the issue through the grievance system[52] in the prison.[53]

In *Booth v. Churner*,[54] the Supreme Court reviewed the exhaustion requirement and the meaning of the phrase "administrative remedies . . . available."[55] The Court analyzed whether an inmate filing a suit and seeking only monetary damages must exhaust his administrative remedies prior to bringing a suit, where the grievance process could not provide monetary relief but could provide some form of relief.[56] The Supreme Court held that the inmate must still exhaust his administrative remedies prior to filing suit.[57] The Court reasoned that an inmate must exhaust a *process*, rather than a form of relief,[58] and that by enacting the PLRA, Congress mandated that exhaustion was required, regardless of the type of relief potentially available through the administrative process.[59]

In holding that exhaustion is mandatory under the PLRA, the Court also considered a futility argument in *Booth*.[60] The exhaustion requirement is not unique to the PLRA; courts have often followed the general rule in many types of cases that a plaintiff must exhaust the administrative remedies where potential relief is obtainable from an administrative agency prior to filing in court.[61] In cases prior to the

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50 The exhaustion requirement states that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (2012).

51 *Woodford*, 548 U.S. at 84 ("A centerpiece of the PLRA's effort 'to reduce the quantity . . . of prisoner suits' is an 'invigorated' exhaustion provision." (citation omitted)).

52 See *infra* note 98 for an example of the grievance procedures in the New York City Department of Correction.

53 AM. CIVIL LIBERTIES UNION, *supra* note 38.

54 532 U.S. 731 (2001).

55 *Id.* at 736 (internal quotation marks omitted).

56 *Id.* at 734. In *Booth*, the inmate sought a transfer to another facility, in addition to monetary relief. *Id.* Other forms of relief available through the grievance system could include, for example, a transfer to a different prison facility or medical treatment.

57 *Id.*

58 *Id.* at 739.

59 *Id.* at 741.

60 *Id.* at 731 n.6.

61 Eugene Novikov, *Stacking the Deck: Futility and the Exhaustion Provision of the Prison Litigation Reform Act*, 156 U. PA. L. REV. 817, 820–21 (2008) ("[W]here relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed." (internal quotation marks omitted) (citing Reiter v. Cooper, 507 U.S. 258, 269 (1993)).

enactment of the PLRA, a "futility exception"[62] argument could be used in certain contexts, such as where an administrative remedy could not provide the relief sought and, therefore, exhaustion would be futile.[63] *Booth*, however, made a futility argument unavailable[64] in future litigation under the PLRA by making it clear that exhaustion is mandatory.[65]

One year after *Booth*, the Supreme Court held in *Porter v. Nussle* that the exhaustion requirement applies to all prisoner suits "seeking redress for prison circumstances or occurrences."[66] Without exhausting his administrative remedies, the plaintiff, Ronald Nussle, brought a claim directly to federal court, stating that corrections officers had intimidated and harassed him while incarcerated.[67] The Court of Appeals for the Second Circuit reversed the district court dismissal for failure to exhaust, holding that the exhaustion requirement only applies to conditions that affect inmates generally, and does not apply to single incidents.[68] The Supreme Court reversed, however, and held that the PLRA's exhaustion requirement applies to all prisoner suits about life in prison, regardless of whether the suit is about general circumstances or a particular individual episode.[69] Therefore, if an incident occurs while the inmate is incarcerated, it is highly likely it will be found to be a "prison condition," and, therefore, will be subject to the exhaustion requirement in the PLRA.[70]

The Supreme Court has also held that the exhaustion requirement demands *proper* exhaustion before a case is filed in court.[71] In *Woodford v. Ngo*, the Court analyzed whether an inmate could satisfy the PLRA's exhaustion requirement by filing a grievance or appeal that did not comply with procedural requirements or was untimely.[72] The Court held that proper exhaustion is required,[73] and to exhaust properly, prisoners must follow the administrative procedural rules, including time deadlines,[74] as defined by the prison grievance process.[75]

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62 Passarelli, *supra* note 7, at 5.

63 *Id.*

64 Justice Souter wrote in a footnote that Congress has "mandated exhaustion" and that the Court "will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Booth*, 532 U.S. at 741 n.6.

65 Passarelli, *supra* note 7, at 6.

66 534 U.S. 516, 520 (2002).

67 *Id.* at 519–20.

68 *Id.* at 520.

69 *Id.* at 532.

70 Boston, *supra* note 5, at 310.

71 Woodford v. Ngo, 548 U.S. 81, 93 (2006).

72 *Id.* at 83–84.

73 *Id.* at 84.

74 *Id.* at 91.

75 Proper exhaustion depends upon the requirements of each individual jail or prison. Therefore, prison litigation specialists recommended that prisoners obtain a copy of the prison or

In finding that proper exhaustion is required, the *Woodford* court articulated the two main reasons for the exhaustion requirement in the PLRA. First, the exhaustion requirement gives the prison or agency an opportunity to resolve the issue on its own before a lawsuit is filed.[76] Second, the exhaustion requirement promotes efficiency by resolving claims within the agency[77] rather than proceeding to court.[78] Therefore, it reduces the number of prisoner suits in court.[79]

Finally, the Supreme Court held in *Jones v. Bock*[80] that failure to exhaust the administrative remedies is an affirmative defense.[81] Therefore, inmates are not required to demonstrate that they have exhausted the administrative remedies, but rather defendants must raise failure to exhaust as a defense.[82] The Court reasoned that since the PLRA itself does not require that plaintiffs demonstrate and plead exhaustion,[83] the Court must instead look to the Federal Rules of Civil Procedure. Rule 8(a) simply requires "a short and plain statement of the claim,"[84] while Rule 8(c)[85] provides a list of potential affirmative defenses that a defendant must plead in response.[86] Together, these cases demonstrate that proper exhaustion is mandatory in all suits regarding prison life and conditions.[87] If the inmate fails to comply with the grievance procedures, the defendants can raise failure to exhaust as an affirmative defense and the case will be dismissed.[88]

While the Supreme Court has not spoken on situations in which the administrative remedies may be unavailable, the Second Circuit has held that where an inmate filed a grievance and received a favorable response,[89] but the promised remedy was never implemented, that inmate will have satisfied the exhaustion requirement if the prison regulations do not provide a way for appealing a failure of

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jail grievance policy and adhere to it as closely as possible in order to properly exhaust the administrative remedies prior to filing a suit. AM. CIVIL LIBERTIES UNION, *supra* note 38.

76 *Woodford*, 548 U.S. at 89 ("[The exhaustion requirement] protects 'administrative agency authority.' [It] gives an agency 'an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court[]' . . . ." (citations omitted)).

77 The agency referred to here would be the individual prison or prison system of that particular prisoner.

78 *Woodford*, 548 U.S. at 89.

79 *Id.* at 94.

80 549 U.S. 199 (2007).

81 *Id.* at 216.

82 *Id.*

83 *Id.* at 217.

84 FED. R. CIV. P. 8(a)(2).

85 FED. R. CIV. P. 8(c).

86 *Jones*, 549 U.S. at 212.

87 *Id.* at 199; Woodford v. Ngo, 548 U.S. 81, 81 (2006); Booth v. Churner, 532 U.S. 731, 731 (2001).

88 *Jones*, 549 U.S. at 216.

89 A favorable response means that the inmate received a response to his grievance indicating that his request would be fulfilled.

implementing the promised remedy.[90] The Second Circuit has also interpreted the exhaustion requirement to allow "special circumstances" to justify a failure to follow the procedural requirements of the grievance system where administrative remedies were available,[91] but did not attempt to define what "constitutes justification"[92] in such a case. The court stated that justification can only be determined by looking at the circumstances of a particular case that caused the inmate to fail to comply with the procedural requirements of the grievance system.[93]

a. Criticism of the Exhaustion Requirement

The exhaustion requirement has received extensive criticism from prison litigation and civil rights advocates. The grievance system is often extremely difficult to navigate[94] and "[c]ritics argue that it is quite possible for prisoners who are illiterate, have limited intelligence, or are mentally ill to make mistakes and fail to comply with the grievance system's mandates."[95] Grievance systems often contain many steps, including the opportunity for an investigation, hearing, and appeals.[96] In addition, there may be very short time deadlines within a grievance system and the grievance system may require a significant amount of administrative appeals in order to comply with the requirements of that system.[97] Within the City of New York Department of Correction, just

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90 Abney v. McGinnis, 380 F.3d 663, 669 (2d Cir. 2004).

91 Giano v. Goord, 380 F.3d 670, 677 (2d Cir. 2004). The *Giano* court cites *Rodriguez v. Westchester County Jail Correctional Department*, where a prisoner was excused from exhausting due to special circumstances. The prisoner-plaintiff claimed that he did not believe exhaustion was required for a single incident, as opposed to "continuing prison conditions." Rodriguez v. Westchester Cnty. Jail Corr. Dep't, 372 F.3d 485, 486 (2d Cir. 2004). This was prior to the Supreme Court's decision in *Porter v. Nussle* that clarified that all prisoner complaints require exhaustion, whether it be for a single incident or continuing conditions. Porter v. Nussle, 534 U.S. 516, 520 (2002). The inmate in *Rodriguez* went on to claim that he had been transferred from the Westchester facility prior to the *Porter* decision, and, therefore, the "administrative remedies were no longer available to him." *Rodriguez*, 372 F.3d at 486. The *Rodriguez* court found that the prisoner plaintiff was excused from the exhaustion requirement in such a situation. *Id.* at 488.

92 *Giano*, 380 F.3d at 678.

93 *Id.*

94 The grievance system procedures are difficult to follow and the requirements are often almost impossible to satisfy. BELBOT & HEMMENS, *supra* note 14, at 223 ("Prisoner grievance systems have their own procedural and deadline requirements. Most of them have one or two levels of review, each level with its own requirements. . . . [F]ailures [to comply with the grievance system requirements] may be as simple as completing the wrong grievance form or submitting it to the wrong office. An internal grievance system deadline can pass even before the error is brought to the prisoner's attention.").

95 *Id.*

96 *See, e.g.*, CITY OF N.Y. DEP'T OF CORR., *supra* note 32. This directive is thirty-three pages long, and contains the grievance system procedure for the New York City Department of Correction.

97 Schlanger & Shay, *supra* note 6, at 147.

submitting a grievance can be complicated, and the inmate must submit the grievance himself.[98] In addition, if the inmate does not receive a response, the inmate must resubmit the grievance, which may be counterintuitive for an inmate who might think the request has just been ignored or has not yet been reviewed.[99] In addition, while some courts have recognized an exception for exhaustion based on special circumstances,[100] other courts have refused, and this can be an issue if the inmate feared retaliation[101] and, therefore, did not submit a grievance or did not comply with the system's requirements.

Critics have also argued that the exhaustion requirement "grant[s] constitutional immunity"[102] to prison officials after a violation of rights has occurred because the case will be dismissed if the prisoner made reasonable mistakes in trying to comply with a grievance system where the rules are often extremely unclear.[103] Due to the fact that the failure to exhaust is an affirmative defense, if an inmate does not exhaust or fails to comply with the grievance system procedures, the suit will be

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98 The "Procedure" section on the City of New York Department of Correction Directive on the Inmate Grievance and Request Program (IGRP) is itself twenty-four pages long. CITY OF N.Y. DEP'T OF CORR., *supra* note 32, at IV. Just submitting the grievance can be quite complicated for an inmate, especially given the circumstances of incarceration. For example, the City of New York Department of Correction requires the following to submit a grievance:

> 1. Within ten business days from the date the alleged condition or issue relating to his/her confinement took place, an inmate must complete an IGRP Statement form . . . with his/her name, book and case number, NYSID number (optional), . . . date submitted by the inmate, a description of the grievance or request, a specific action requested, and information regarding whether the inmate filed a grievance or request with a court or other agency. The inmate shall also confirm whether he/she wants his statement edited for clarification by IGRP staff or requires that the IGRP staff write the grievance or request on his/her behalf. . . .
>
> 3. Inmates are required to use the IGRP Statement Form to submit his/her request or grievance. Upon completion of the IGRP Statement Form, the inmate shall: (1) deposit the form into a "grievance and request box," located in the inmate's housing area or other common area, (2) personally deliver it to the IGRP Office, or (3) for inmates who cannot directly access a grievance and request box or the IGRP office, give it to IGRP staff during IGRP staff visits to housing areas (punitive or administrative segregation, hospital wards, mental observation units, or other special population housing areas without a grievance and request box).
>
> 4. If the inmate does not use the IGRP Statement Form to submit his/her grievance or request, IGRP staff shall provide the inmate with a blank copy of the IGRP Statement Form within five business days after receipt of a submission and direct the inmate to re-submit the grievance or request on that form.

Id. at IV.D.

99 In the City of New York Department of Correction, for example, if an inmate files a completed grievance form and deposits the form in the grievance box and does not receive a receipt within two business days, the inmate must resubmit the form. *Id.* at IV.D.8.

100 The Second Circuit recognized such an exception in *Abney v. McGinnis*, 380 F.3d 663 (2d Cir. 2004), discussed in Part I.B.1.

101 Schlanger & Shay, *supra* note 6, at 147.

102 *Id.* at 148.

103 *Id.*

dismissed, even if it is meritorious.[104] In addition, because exhaustion is mandatory under the PLRA, critics claim that this incentivizes prison systems to create high procedural hurdles and obstacles in the grievance system so they are later able to use the defense of failure to exhaust and can avoid an unfavorable judgment in court.[105]

2. The Other Main Obstacles: The Physical Injury Requirement, the Requirement that Prisoners Pay the Filing Fee, and the Three Strikes Provision

The PLRA mandates that to file a lawsuit for emotional or mental injury, a prisoner must also have a physical injury.[106] This requirement of the PLRA has also received intense criticism. Critics argue "that the PLRA makes it possible for officials to engage in unconstitutional conduct with impunity in cases where prisoners cannot establish physical injuries."[107]

In addition, the PLRA requires that prisoners pay the filing fee. In focusing on the desire to reduce the number of lawsuits filed by prisoners, Senator Dole testified that prisoners who claim indigent status should still be required to pay the filing fee when bringing a suit in order to discourage frivolous litigation.[108] Senator Dole proposed a garnishment procedure to take funds from the prisoners' accounts to pay the filing fees until they are fully paid off.[109] Under the PLRA, all prisoners must pay the filing fees "in full."[110] If the prisoner cannot pay the filing fee when filing the suit, the fee will not be waived and the

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104 *Id.*

105 Schlanger and Shay argue that while a grievance system can ideally be used to resolve problems internally, "the PLRA's grievance provision instead encourages prison and jail officials to use their grievance systems in another way—not to solve problems, but to immunize themselves from future liability." *Id.* at 151.

106 The physical injury requirement as stated in the PLRA requires that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e) (2012).

107 BELBOT & HEMMENS, *supra* note 14, at 223.

108 141 CONG. REC. S7525 (daily ed. May 25, 1995) (statement of Sen. Dole) ("The bottom line is that prisons should be prisons, not law firms. That's why the Prison Litigation Reform Act would require prisoners who file lawsuits to pay the full amount of their court fees and other costs. Many prisoners filing lawsuits today in Federal court claim indigent status. As indigents, prisoners are generally not required to pay the fees that normally accompany the filing of a lawsuit. In other words, there is no economic disincentive to going to court.").

109 *Id.*

110 AM. CIVIL LIBERTIES UNION, *supra* note 38. Currently, the filing fee to bring a lawsuit in federal district court is $350. *See Frequently Asked Questions*, UNITED STATES COURTS, http://www.uscourts.gov/Common/FAQS.aspx (last visited Nov. 1, 2014).

prisoner can pay the fee through installments.[111] The formula[112] for paying the filing fee is articulated in the statute.[113]

Finally, the PLRA includes a three strikes provision.[114] The three strikes provision means that if an inmate has had three previous suits dismissed as frivolous while incarcerated, the inmate may not bring another civil suit under "this section . . . unless the prisoner is under imminent danger of serious physical injury."[115]

C. *Suits "Brought by Prisoners"—Settled Law on Certain Types of "Prisoners"*

Given that the PLRA restricts litigation to that brought by prisoners,[116] the question of who counts as a prisoner under the PLRA is extremely important in determining who is subject to its requirements. Courts typically agree on various types of people who may or may not be subject to the PLRA,[117] including immigrants in immigration detention,[118] sexually violent predators civilly committed under a sexually violent predators law,[119] juveniles,[120] individuals released to halfway houses,[121] and estates bringing an action on behalf of a deceased inmate.[122]

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111 AM. CIVIL LIBERTIES UNION, *supra* note 38.

112 *Id.* ("A complex statutory formula requires the indigent prisoner to pay an initial fee of 20% of the greater of the prisoner's average balance or the average deposits to the account for the preceding six months. After the initial payment, the prisoner is to pay monthly installments of 20% of the income credited to the account in the previous month until the fee has been paid.").

113 *See* 28 U.S.C. § 1915 (2012).

114 28 U.S.C. § 1915(g) ("In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.").

115 *Id.* If the guardian, conservator, or protection and advocacy group bringing the suit is not found to be a prisoner under the PLRA and, therefore, is not subject to the PLRA, this provision, along with the other provisions of the PLRA, will not apply.

116 This Note focuses on the exhaustion requirement as the major hurdle under the PLRA for suits brought by prisoners. The language of the exhaustion requirement specifically states that "[n]o action shall be brought with respect to prison conditions . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (2012). The definition of prisoner in the PLRA applies to the exhaustion requirement. 42 U.S.C. § 1997e(h).

117 *See generally* JOHN BOSTON, THE PRISON LITIGATION REFORM ACT 2–10 (2013) (on file with author; February 28, 2009 version of this training manual is available at https://www.prisonlegalnews.org/media/publications/john_boston_plra_training_2009.pdf).

118 *See infra* Part I.C.1.

119 *See infra* Part I.C.2.

120 *See infra* Part I.C.3.

121 *See infra* Part I.C.4.

122 *See infra* Part I.C.5.

1. Immigrants

Courts have held that immigrants detained civilly are not subject to the PLRA requirements because deportation is a civil procedure and not criminal.[123] The Ninth Circuit has held that aliens are not subject to the filing fee requirements of the PLRA.[124] This also logically leads to the conclusion that an immigrant detained civilly would not be subject to the exhaustion requirement of the PLRA. In determining that an alien detained by the Immigration and Naturalization Service (INS) was not subject to the filing fee requirements of the PLRA, the court focused on the fact that deportation is a civil procedure, as opposed to a criminal procedure.[125] However, the court noted that if the alien detainee was also facing criminal charges, the suit would be subject to the filing fee provisions of the PLRA.[126] The Ninth Circuit stated that under the PLRA, "the term 'prisoner' does not encompass a civil detainee,"[127] and went on to state that deportation is not a punishment for a crime.[128] Because the deportation proceeding is a civil procedure as opposed to criminal, the court held that "an alien detained by the INS pending deportation is not a 'prisoner' within the meaning of the PLRA."[129]

The Ninth Circuit has also held that the three strikes provision does not apply to a plaintiff in the custody of INS, as long as the detainee was not also being held on criminal charges.[130] Finally, the Tenth Circuit has held that alien detainees in immigration custody are not subject to the PLRA.[131] However, it is important to note that an inmate with an immigration detainer is required to meet the exhaustion requirement of the PLRA if he is serving a sentence for a criminal violation.[132]

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123 *See* BOSTON, *supra* note 117, at 3 (collecting cases).

124 Agyeman v. INS, 296 F.3d 871, 875 (9th Cir. 2002) ("[T]he filing fees provisions of the Prison Litigation Reform Act . . . do not apply to INS detainees."). In addition, the U.S. Court of Appeals District of Columbia Circuit has also held that an alien facing deportation is not a "prisoner" within the meaning of the PLRA and, therefore, the fee requirements of the PLRA do not apply. LaFontant v. INS, 135 F.3d 158, 165 (D.C. Cir. 1998).

125 *Agyeman*, 296 F.3d at 886 ("Consistent with the principle that deportation is a civil rather than a criminal procedure, we hold that an alien detained by the INS pending deportation is not a 'prisoner' within the meaning of the PLRA.").

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 Andrews v. King, 398 F.3d 1113, 1121–22 (9th Cir. 2005).

131 Cohen v. Delong, 369 F. App'x 953, 955 n.2 (10th Cir. 2010).

132 *See* Galeas v. Neely, No. 3:10cv599, 2010 WL 4975497, at *1 n.2, (W.D.N.C. Dec. 1, 2010).

2. Sexually Violent Persons

In addition, the Ninth Circuit held in *Page v. Torrey*[133] that a person civilly committed under a Sexually Violent Predators Act[134] was not a prisoner within the meaning of the PLRA.[135] Again, the Ninth Circuit focused on the fact that the detainee was civilly committed, and not detained for a criminal conviction.[136]

The *Page* court also focused on a strict reading of the text of the statute. It stated that if the definition of prisoner is read broadly, it could be argued that individuals, such as a person civilly committed under a Sexually Violent Predators Act who is currently detained and has in the past been "accused of, convicted of, or sentenced for a criminal offense,"[137] could be included in the definition of "prisoner" under the PLRA. However, the court stated that "the natural reading of the text is that, to fall within the definition of 'prisoner,' the individual in question must be currently detained as a result of accusation, conviction, or sentence for a criminal offense."[138] Therefore, the court found that Page, who was civilly committed under California's Sexually Violent Predators Act, was not a "prisoner" within the meaning of the PLRA.[139]

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133 201 F.3d 1136 (9th Cir. 2000).

134 *See* CAL. WELF. & INST. CODE § 6600(a)(1) (West 2014) (defining a sexually violent predator as "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior").

135 *Page*, 201 F.3d at 1137 ("Page, who is civilly committed under California's Sexually Violent Predators Act is not a 'prisoner' within the meaning of the PLRA." (citation omitted)).

136 *Id.* at 1139.

137 *Id.* (footnote omitted).

138 *Id.* (citations omitted).

139 *Id.* at 1137; *see also Cooke v. U.S. Bureau of Prisons*, 926 F. Supp. 2d 720, 726 (E.D.N.C. 2013) (stating that persons confined civilly as sexually dangerous persons under a federal statute are not "'prisoners' as defined in the PLRA"); BOSTON, *supra* note 117, at 3 (collecting cases). Note, however, that an inmate held under a sexually violent predators law on pending criminal charges may be a "prisoner" within the meaning of the PLRA. In *Kalinowski v. Bond*, 358 F.3d 978 (7th Cir. 2004), the Seventh Circuit held that Kalinowski, who was held under the Illinois Sexually Dangerous Persons Act, was a prisoner within the meaning of the PLRA. *Kalinowski*, 358 F.3d at 979. The court explained that everyone held under the Illinois Sexually Dangerous Persons Act "is a pretrial detainee: a person charged with a felony, whose criminal proceedings are held in abeyance during treatment for mental illness," and therefore, since Kalinowski was being "held on unresolved criminal charges," he was a "prisoner" under the PLRA. *Id.* (citations omitted); *see also* Bramlett v. Ligget, No. 12-cv-1128-JPG, 2013 WL 766312, at *1 n.1 (S.D. Ill. Feb. 28, 2013) (stating that "[c]ivilly committed sex offenders in Illinois are subject to the PLRA," explaining that persons "civilly committed under the . . . Act are deemed to be pretrial detainees, not convicted prisoners" (citations omitted)).

3. Juveniles

On the other hand, juveniles are prisoners within the meaning of the PLRA and are subject to the statute's requirements.[140] In *Alexander S. v. Boyd*,[141] the Fourth Circuit held that the meaning of prison within the PLRA was not limited to adult prisoners and that juveniles in detention centers are subject to the attorney's fees limitations of the PLRA.[142] The Fourth Circuit focused on Congress' goals in enacting the PLRA, and found nothing in the statute to indicate an intent to exclude juveniles from the PLRA.[143]

In *Lewis v. Gagne*,[144] the U.S. District Court for the Northern District of New York focused on the plain meaning of the text of the PLRA and similarly found that the PLRA applies to a juvenile adjudicated delinquent and detained in a correctional facility.[145] Plaintiffs argued that the PLRA applies only to those in criminal custody and juveniles adjudicated delinquent are detained civilly.[146] However, according to the court, the definition of "prisoner" in the PLRA[147] includes those who are "adjudicated delinquent"[148] and, therefore, the "plain meaning of this language clearly includes juveniles."[149] The court went on to state that in using the phrase "adjudicated delinquent," Congress intended to include juveniles within the PLRA.[150] In sum, it is relatively settled that juveniles are subject to the PLRA.[151]

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140 *See* BOSTON, *supra* note 117, at 2 (collecting cases).

141 113 F.3d 1373 (4th Cir. 1997).

142 *Id.* at 1385 ("[W]e hold that a limitation of the phrase 'jail, prison, or other correctional facility' to adult prison facilities in § 803 of the PLRA would be inconsistent with other language within the section, other sections of the Act, and the plain and usual meanings of the relevant terms. As a result, we conclude that Plaintiffs are subject to the attorney's fees limitations of the PLRA because they are 'prisoner[s] . . . confined to any jail, prison, or other correctional facility.'" (alteration in original) (citation omitted)).

143 *Id.* at 1384 ("In enacting the PLRA, Congress had far-reaching goals, and nothing in the Act indicates an intent to omit juveniles confined in juvenile facilities from its impact.").

144 281 F. Supp. 2d 429 (N.D.N.Y. 2003).

145 *Id.* at 433.

146 *Id.*

147 See 42 U.S.C. § 1997e(h) (2012) for the definition of "prisoner" under the PLRA.

148 *Lewis*, 281 F. Supp. 2d at 433.

149 *Id.*

150 *Id.*

151 In *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, Margo Schlanger and Giovanna Shay argue that the PLRA should be amended to specifically exempt juveniles. They focus on the intent to reduce prisoner litigation and contend that juveniles do not file many lawsuits. *See* Schlanger & Shay, *supra* note 6. Schlanger and Shay explain why juveniles should not be subject to the PLRA:

> Incarcerated children and youths do not clog the courts with lawsuits, frivolous or otherwise. Though they are often incapable of complying with the tight deadlines and complex requirements of internal correctional grievance systems, their lack of capacity should not immunize abusive staff from the accountability that comes with court oversight. Those under eighteen do not file many lawsuits, and are not the source of

4. Individuals Released to Halfway Houses

In addition, the Fifth Circuit has held that an individual who was released from prison to a privately operated halfway house[152] under mandatory supervision was a prisoner within the meaning of the PLRA and, therefore, subject to the requirements of the PLRA.[153]

The Seventh Circuit has held that a halfway house is the type of reformatory or "other correctional facility" that was intended to be covered by the PLRA.[154] The court focused on the text of the statute and reasoned that "[r]estricting the PLRA's application to persons confined in jail or prison would render the term 'other correctional facility' superfluous."[155] Therefore, the court found that a drug rehabilitation halfway house was clearly the type of facility intended by the term "other correctional facility."[156]

5. Estates on Behalf of a Deceased Inmate

Finally, in a case where the inmate was deceased and his estate was bringing an action for damages, claiming that one or more of the defendant officers caused the inmate's death through the use of force, the U.S. District Court for the District of New Jersey called the defendants' argument that the case should be dismissed for failure to exhaust "preposterous."[157] The court stated that "the PLRA does not apply to non-prisoners"[158] and that the plaintiff, "as representative of [the] estate, cannot be considered a 'prisoner' under the Act."[159]

> any problem the PLRA is trying to solve. And they are particularly poorly positioned to deal with its limits. They should be exempted from its reach.

Id. at 154.

152 A halfway house is a "transitional housing facility designed to rehabilitate people who have recently left a prison or medical-care facility, or who otherwise need help in adjusting to a normal life." BLACK'S LAW DICTIONARY 781 (9th ed. 2009).

153 Jackson v. Johnson, 475 F.3d 261, 267 (5th Cir. 2007) ("Because Jackson is 'detained in any facility' for a criminal conviction, he is a 'prisoner' as that term is defined by the PLRA.").

154 Witzke v. Femal, 376 F.3d 744, 753 (7th Cir. 2004).

155 *Id.*

156 *Id.* For a collection of cases, see BOSTON, *supra* note 117, at 2 (collecting cases).

157 Anderson v. County of Salem, No. 09–4718 (RMB/KMW), 2010 WL 3081070, at *2 (D.N.J. Aug. 5, 2010) ("The Court notes at the outset that Defendants' argument that Plaintiff's federal claims cannot proceed because Rodriguez failed to exhaust his administrative remedies, as required by the Prisoner Litigation Reform Act . . . lacks merit. To the extent Defendants argue that Plaintiff has failed to show that the decedent, Rodriguez, failed to exhaust his administrative remedies, it is a preposterous argument. His death prevented him from doing so." (citations omitted)).

158 *Id.*

159 *Id.*

In addition, the U.S. District Court for the District of Puerto Rico held that an estate is not a prisoner under the PLRA because the estate cannot be accused, convicted, sentenced, or imprisoned for a violation of criminal law.[160]

As demonstrated by the previous examples, the meaning of prisoner within the PLRA has wide ranging implications, and many of the cases filed that are subject to the PLRA are often dismissed due to the stringent requirements of the statute.[161]

II. STATE OF THE LAW FOR PROTECTION & ADVOCACY ORGANIZATIONS, GUARDIANS, AND CONSERVATORS

A. *The Protection and Advocacy for Individuals with Mental Illness Act in the Context of Prisons*

The Protection and Advocacy for Individuals with Mental Illness Act (PAIMI)[162] gives protection and advocacy groups the ability to advocate and pursue legal action on behalf of a person with mental illness or emotional impairment.[163] Recognizing that the mentally ill are susceptible to abuse and ill-treatment, Congress provided the states with federal funding to create these protection and advocacy systems.[164]

PAIMI gives protection and advocacy groups the ability to take legal action on behalf of mentally ill people.[165] Under PAIMI, protection and advocacy groups have statutory standing to take this action.[166] The Act was amended in 1991 to clarify that prisons are facilities subject to PAIMI.[167] It is imperative that protection and advocacy groups are able

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160 Torres Rios v. Pereira Castillo, 545 F. Supp. 2d 204, 206 (D.P.R.) (2007) ("In this case, because Hernandez was deceased at the time the complaint was filed, he was no longer considered a prisoner for purposes of the PLRA . . . . Even if Hernandez's estate is considered a person under the PLRA, the act also requires that the person, in this case the estate, be imprisoned and be either accused, convicted, or sentenced for a violation of criminal law. Because an estate cannot be imprisoned nor accused, convicted, or sentenced for a criminal violation, it is not, thus, a prisoner under the PLRA."); *see also* BOSTON, *supra* note 117, at 9 (collecting cases).

161 See *supra* Part I.B.1 for a discussion of the exhaustion requirement and criticism of the effects it has had on prisoner litigation.

162 42 U.S.C. §§ 10801–10807 (2012).

163 *See* 42 U.S.C. §§ 10804(c), 10802(4); *see also* Deborah Buckman, Annotation, *Validity, Construction, and Operation of Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C.A. §§ 10801 et seq.*, 191 A.L.R. FED. 205, 217 (2004).

164 Buckman, *supra* note 163, at 217.

165 *Id.*

166 42 U.S.C. § 10805(a)(1)(B) states that protection and advocacy groups have the authority to "pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State."

167 42 U.S.C. § 10802(3) ("The term 'facilities' may include, but need not be limited to, hospitals, nursing homes, community facilities for individuals with mental illness, board and care homes, homeless shelters, and jails and prisons.").

to take action on behalf of an individual with mental illness who is in prison, as there are a significant number of mentally ill inmates in prison populations.[168] A study by the Bureau of Justice Statistics concluded that "[a]t midyear 2005 more than half of all prison and jail inmates had a mental health problem."[169]

A Senate Report from 1991 regarding amendments to the Act demonstrates the importance of protection and advocacy systems in the prison context.[170] Elisabeth Rukeyser, Chair of the Board of the National Mental Health Association, testified in support of an amendment to clarify the Act to include prisoners in state jails and prisons[171] and federal facilities. Rukeyser stated "that jails and prisons have become the 'dumping grounds for individuals with mental illness who behave in a bizarre manner or commit a petty crime while acting out their illness.'"[172]

Research indicates that "America's lockups are its new asylums."[173] As many state mental institutions were closed beginning in the 1970s, few alternatives were available and many of the mentally ill ended up in jail.[174] A comparison of the three largest jail systems in the United States to the three largest state-run mental hospitals reveals a far larger number of mentally ill in prison than in state run mental hospitals.[175] Even with a reduction in the prison population, New York City has seen an increase in the number of mentally ill prisoners, with the percentage of mentally ill prisoners growing from twenty-four percent to thirty-seven percent since 2005.[176]

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168 1 FRED COHEN, THE MENTALLY DISORDERED INMATE AND THE LAW 1–8 (2d ed. 2008).

169 *Id.* at 1–9.

170 S. REP. No. 102–114 (1991).

171 *Id.* at 2.

172 *Id.*

173 Gary Fields & Erica E. Phillips, *The New Asylums: Jails Swell with Mentally Ill*, WALL ST. J., Sept. 26, 2013, at A1.

174 *Id.* (attributing the increase in percentage of mentally ill in jail or prison to the closing of mental institutions beginning in the 1970s and stating that "[a]fter scores of state mental institutions were closed beginning in the 1970s, few alternatives materialized. Many of the afflicted wound up on the streets, where, untreated, they became more vulnerable to joblessness, drug abuse and crime").

175 *Id.* ("With more than 11,000 prisoners under treatment on any given day, [the three largest jail systems: Cook County in Illinois, Los Angeles County, and New York City] represent by far the largest mental-health treatment facilities in the country. By comparison, the three largest state-run mental hospitals have a combined 4,000 beds. Put another way, the number of mentally ill prisoners the three facilities handle daily is equal to 28% of all beds in the nation's 213 state psychiatric hospitals, according to the National Association of State Mental Health Program Directors Research Institute Inc.").

176 *Id.* ("New York City's total prison population has fallen to 11,500, down from 13,576 in 2005. Yet the number of mentally ill prisoners has risen, to 4,300 from 3,319, says Dora Schriro, commissioner of corrections for the city. That means the city's percentage of mentally ill prisoners grew from 24% to 37%.").

Responses from twenty-two states to a survey of all fifty states regarding mental health issues in the prison populations of each state indicated that "mental-health patient ratios ranged from one in 10 inmates to one in two."[177] Few of the prison facilities are able to adequately handle the severely mentally ill.[178] This leads to a "revolving door"[179] situation, where "[u]pon their release, the mentally ill tend to find scant resources and often quickly fall back into the system."[180] "[T]he highest recidivism rates are among mentally ill inmates."[181]

This goes to show that the reason for enacting PAIMI, to ensure the protection and advocacy of the rights of the mentally ill, is more important now than ever. A 2008 case from the Middle District of Alabama, *Alabama Disabilities Advocacy Programs v. Wood*,[182] held that a protection and advocacy group was not a prisoner within the meaning of the PLRA.[183] This favorable ruling means that the protection and advocacy group would not be subject to the PLRA exhaustion requirement in the prison litigation context.[184]

In *Wood*,[185] the plaintiff Alabama Disabilities Advocacy Program (ADAP) was authorized to monitor and investigate the Alabama Department of Youth Services (DYS) under PAIMI.[186] The complaint alleged that DYS denied ADAP "access to DYS residents, facilities, facility staff, and records,"[187] and that the denial prevented the protection and advocacy group from "fully exercising the monitoring and investigatory mandates"[188] given to it under PAIMI. The parties in

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177 *Id.*

178 *Id.* ("Some facilities have attempted to cope by hiring psychiatric staff and retraining prison officers. Few, however, claim to be adequately equipped to handle some of the nation's most mentally frail.").

179 *Id.*

180 *Id.*

181 *Id.*

182 584 F. Supp. 2d 1314 (M.D. Ala. 2008).

183 *Id.* at 1316.

184 There are circumstances where a protection and advocacy system must exhaust administrative remedies on its own prior to instituting legal action. However, that would not be applicable in the case of a prison. Section 10807(a) states that "[p]rior to instituting any legal action in a Federal or State court on behalf of a individual with mental illness, an eligible system, or a State agency or nonprofit organization which entered into a contract with an eligible system under section 10804(a) of this title, shall exhaust in a timely manner all administrative remedies where appropriate." 42 U.S.C. § 10807(a) (2012) (footnote omitted). Under Section 10804(a), the protection and advocacy group may "enter into contracts with State agencies and nonprofit organizations which operate throughout the State." 42 U.S.C. § 10804(a). It does not appear that the protection and advocacy group would be entering into such a contract with a prison or jail facility, and therefore Section 10807(a) regarding exhaustion by the protection and advocacy system would not apply.

185 *Wood*, 584 F. Supp. 2d 1314.

186 *Id.* at 1315.

187 *Id.* (citation and internal quotation marks omitted).

188 *Id.* (citation and internal quotation marks omitted).

the case reached a settlement, and the court approved it after determining that the PLRA did not apply in the case.[189]

The court determined that the prisoner suit provisions of the PLRA did not apply to ADAP because ADAP was not a prisoner within the meaning of the statute.[190] ADAP was not incarcerated or detained in a facility, as the definition of prisoner in the PLRA requires.[191] However, the court also found that the prospective-relief provisions of the PLRA did not apply in the case because the case did not concern "prison conditions."[192] The court noted that ADAP did not bring a claim concerning the lives of persons held in the Alabama Department of Youth Services (DYS).[193] Even though the court in *Disabilities Advocacy Program v. Wood* stated that ADAP is "clearly not a 'prisoner' under the statute,"[194] this favorable ruling is easily distinguishable in a future case. There is potential for a future court to find that the protection and advocacy group in *Disabilities Advocacy Program v. Wood* was not subject to the PLRA because the suit did not concern the lives of prisoners and hold that the protection and advocacy group is subject to the statute in a future case concerning prison life.

Disabilities Advocacy Program v. Wood was not the first time that the question of whether a protection and advocacy group is subject to the PLRA was briefed and argued in a case brought by a protection and advocacy group against a youth detention center or, more broadly, a department of corrections. In 2004, Vermont Protection and Advocacy, Inc. (VP&A) brought a case against the Vermont Department of Corrections under PAIMI.[195] The defendants filed a motion to dismiss on numerous grounds, arguing in part that the PLRA applies to claims brought by VP&A and that VP&A failed to exhaust the administrative

189 *Id.*

190 *Id.* at 1316 ("The provisions respecting prisoner suits also do not apply because ADAP is clearly not a 'prisoner' under the statute. The PLRA defines 'prisoner' as 'any person incarcerated or detained in any facility.' 42 U.S.C. § 1997e. As ADAP is not a 'person' and has neither been incarcerated nor detained, the prisoner-litigation sections of the PLRA do not apply.").

191 *Id.* at 1316.

192 *Id.* (internal quotation marks omitted). The court also determined that the PLRA did not apply because the action did not concern prison conditions. Explaining the applicability of the prospective relief conditions of the PLRA in this case: "The prospective-relief provisions of the PLRA do not apply because this action does not concern 'prison conditions.' The PLRA defines 'civil action with respect to prison conditions' as 'any civil proceeding arising under federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison.' 18 U.S.C. § 3626(g)(2). In the matter at hand, ADAP seeks to enforce its own right of access under federal law and brings no claim concerning the conditions at DYS or the lives of persons confined there. Therefore, the prospective-relief provisions of the PLRA do not apply." *Id.*

193 *Id.*

194 *Id.*

195 Complaint, Vt. Prot. & Advocacy, Inc. v. Gold, No. 2:04-CV-245 (D. Vt. Sept. 23, 2004), ECF No. 1.

remedies.[196] VP&A argued that the PLRA does not apply to its claims because it is not a prisoner.[197] Ultimately, the U.S. District Court for the District of Vermont denied the motion to dismiss.[198]

B. *Guardians and Conservators*

Guardians and conservators are not explicitly included in the definition of "prisoner" under the PLRA.[199] A guardianship is a relationship in which one person "acts for another."[200] In this relationship, the "guardian" acts for the "ward," a person who is found to be legally unable to take care of his affairs.[201] Courts appoint a guardian to care for another person's life and property.[202] As opposed to a guardian, where the court has deemed the ward legally incompetent to handle his affairs, a court appoints a conservator to act as the "conservatee's agent" in managing his property.[203] However, some jurisdictions have replaced adult guardianships with conservatorships in order to "reduce the stigma"[204] of being labeled mentally incompetent that has been ascribed to elderly people in need of help handling their personal affairs. The goal of the guardian and conservator system is to protect the incapacitated person's best interests[205] and courts have the responsibility of ensuring that the rights of the incapacitated person are protected. Generally, statutes govern the appointment of conservators or guardians for the physically disabled or mentally ill.[206]

Courts have come to different conclusions as to whether a court-appointed conservator or guardian is subject to the PLRA when bringing a case on behalf of an inmate. In *Rivera-Rodriguez v. Pereira-Castillo*,[207] the U.S. District Court for the District of Puerto Rico held that exhaustion requirements of the PLRA do not apply to legal guardians of prisoners.[208]

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196 *See* Defendants' Reply Memorandum of Law in Support of Their Motion to Dismiss at 4, *Gold*, No. 2:04-CV-245, 2005 WL 1033970.

197 *Id.*

198 *See* Minutes Entry, *Gold*, No. 2:04-CV-245, ECF No. 24 ("Minute entry for proceedings held before Judge William K. Sessions III: Motion hearing held on 2/17/2005 . . . Motion to Dismiss filed by Vermont Department of Corrections, Steve Gold denied.").

199 42 U.S.C. § 1997e(h) (2012).

200 39 AM. JUR. 2D *Guardian and Ward* § 1 (2013).

201 *Id.* (internal quotation marks omitted).

202 *Id.*

203 *Id.*

204 *Id.*

205 *Id.*

206 *Id.* § 21.

207 No. 04-1389(HL), 2005 WL 290160 (D.P.R. Jan. 31, 2005).

208 *Id.* at *5–6.

In *Rivera-Rodriguez*, a minor and former pretrial detainee, along with his parents and sister, filed a claim against nineteen defendants from the Puerto Rico Department of Corrections alleging that they were aware of security lapses and the potential for inmate-on-inmate assaults, did not provide adequate security to plaintiff, failed to enforce "acceptable correctional practices at the institution," and did not take action to deter or respond to the risk of inmate on inmate violence in the institution.[209] Plaintiff I.N.R. was a minor, held in custody at Ponce Young Adults Institution as a pretrial detainee.[210] Plaintiff I.N.R. was being treated for a mental health condition and was housed in an area "intended for young adult inmates with psychiatric disorders or mental illness."[211] The complaint alleges that I.N.R. was sexually assaulted by at least four other inmates who were housed in his housing area, that there were no officers in the area during the assault, and that no officers intervened to stop the assault as it was occurring.[212] It also alleges that the inmates who sexually assaulted I.N.R. had mental disorders and had previously engaged in violent assaults.[213]

The defendants filed a motion to dismiss, claiming in part that the plaintiffs failed to exhaust the administrative remedies as required by the PLRA.[214] Regarding the claim that the plaintiffs failed to exhaust the administrative remedies, plaintiffs asserted that they were not required to exhaust under the PLRA, arguing that the exhaustion requirements do not apply to the legal guardians of the minor.[215] The court found that the plaintiffs correctly argued that legal guardians are not subject to the exhaustion requirement of the PLRA.[216]

While the court focused on the fact that the minor plaintiff was no longer held in the corrections facility when denying the motion to dismiss, the court also stated that the PLRA language[217] "does not encompass the family members or legal guardians of a prisoner."[218]

Rivera-Rodriguez v. Pereira-Castillo exemplifies why the PLRA prisoner suit provisions should not be applied to guardians bringing a case on behalf of an inmate. In no way was *Rivera-Rodriguez* a frivolous case, the type that the PLRA sought to prevent. If the court found that

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209 *Id.* at *1.

210 *Id.*

211 *Id.*

212 *Id.*

213 *Id.*

214 Other arguments for the motion to dismiss include the claims that the complaint fails "(a) to state a claim against the appearing defendants; (b) to allege an Eighth Amendment claim; [and] (c) that there is no supervisory liability." *Id.* at *2.

215 *Id.* at *5.

216 *Id.*

217 *Id.* at *6 (Focusing on the language of the statute: "[T]he plain language of the statute makes it clear that the PLRA does not apply to I.N.R.'s guardians and/or family members.").

218 *Id.*

the PLRA did apply to guardians and family members of prisoners, this meritorious case about a sexual assault could have been dismissed for failure to exhaust the administrative remedies.

However, in *Villescaz v. City of Eloy*,[219] the U.S. District Court for the District of Arizona dismissed a case brought by a court-appointed guardian on behalf of a former prisoner for failure to exhaust the administrative remedies.[220] Mary Villescaz brought the case as guardian on behalf of Francisco Javier Villescaz. Francisco Villescaz was "mentally retarded and claims to suffer from a seizure disorder."[221] The court found that he was incompetent to stand trial and appointed Mary Villescaz as his guardian.[222]

Francisco Villescaz was housed in the Pinal County Jail awaiting trial. He did not exhaust his administrative remedies before filing the suit claiming that Pinal County failed to provide adequate medical treatment, including medication, and failed to train staff to care for persons with disabilities.[223] His guardian brought this case on behalf of Francisco Villescaz after he was released, and the court dismissed the case holding that Francisco Villescaz, although no longer detained as a prisoner, was subject to the PLRA exhaustion requirement.[224] While the court focused the dismissal on the premise that a former prisoner is subject to the exhaustion requirement,[225] the court in effect dismissed a case brought by a guardian of a mentally incompetent inmate who failed to exhaust his administrative remedies while housed in jail.

In addition to guardians, conservators have also been found to be subject to the PLRA. In *Braswell v. Corrections Corporation of America*,[226] plaintiff Mary Braswell, acting as conservator on behalf of Frank Horton, filed suit against Corrections Corporation of America (CCA), alleging violations of the First and Eighth Amendments, as well as intentional infliction of emotional distress.[227] Braswell is Horton's maternal grandmother and was appointed conservator for Horton by the Seventh Circuit (Probate) Court of Davison County.[228] During the time at issue in the case, Horton was incarcerated at the Metro Davison County Detention Facility and had previously been diagnosed with

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219 No. CV-06-2686-PHX-FJM, 2008 WL 1971394 (D. Ariz. May 2, 2008).

220 *Id.* at *5.

221 *Id.* at *1 n.1.

222 *Id.*

223 *Id.* at *1.

224 *Id.* at *5.

225 This is contrary to other circuits that have held that the PLRA does not apply to suits filed by former prisoners. *See, e.g.*, Norton v. City of Marietta, 432 F.3d 1145 (10th Cir. 2005); Grieg v. Goord, 169 F.3d 165 (2d Cir. 1999); Kerr v. Puckett, 138 F.3d 321 (7th Cir. 1998).

226 No. 3:08-0691, 2009 WL 2447614 (M.D. Tenn. Aug. 10, 2009), *rev'd on other grounds*, 419 F. App'x 622 (6th Cir. 2011).

227 *Id.* at *1.

228 *Id.* at *3.

Bipolar Disorder and Attention Deficit Hyperactivity Disorder.[229] While Horton was physically functional and was able to speak and communicate in a clear manner, he was most often housed in a segregation unit and was considered to be an inmate with special needs.[230] During Horton's incarceration, he was involved in fights with other inmates and sustained injuries.[231] There was testimony that Horton did not leave his cell to get a haircut or take a shower for nine consecutive months, was unable to communicate, and that his cell was filthy, "with several food plates on the floor and bacteria growing inside the toilet."[232]

Horton was transferred to another facility, and his mental condition was diagnosed as Schizophrenia and Poly-Substance Dependence. Horton's overall mental health and ability to communicate improved after he was transferred, and a doctor testified that this was evidence that he was not receiving the same degree of mental health treatment, if any at all, while housed in the Metro Davison County Detention Facility.[233]

CCA filed a motion to dismiss, which was treated as a motion for summary judgment by the court. The U.S. District Court for the Middle District of Tennessee immediately found Braswell's claims subject to the PLRA.[234] Plaintiff Braswell argued that she was not subject to the PLRA, as she filed the action and was not a "prisoner" as defined by the PLRA.[235] However, the court found that plaintiff Braswell was subject to the PLRA, as she sued on behalf of Horton, and Horton was a prisoner within the meaning of the PLRA.[236] The district court granted summary judgment, but was later reversed by the Sixth Circuit Court of Appeals on other grounds, including that a factual issue existed as to whether the administrative remedies were available to Horton.[237] The Sixth Circuit still found that the PLRA applied to Braswell's suit.[238]

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229 *Id.* at *1.

230 *Id.*

231 *Id.* at *2.

232 *Id.*

233 *Id.* at *3.

234 *Id.* at *4 (finding the claims subject to the PLRA "[a]s a threshold matter").

235 *Id.*

236 *Id.* at *5.

237 Braswell v. Corr. Corp. of Am., 419 F. App'x. 622, 623 (6th Cir. 2011).

238 In addition to the factual issue related to whether the administrative remedies were available to Horton, the Sixth Circuit found that the record "does not support a conclusion that the physical injuries allegedly sustained by Horton were de minimis." *Id.* at 626 (citation omitted). The court reversed, stating that factual issues existed as to "whether the allegedly inhumane conditions of Horton's confinement exceed the PLRA's de minimis threshold for legitimate Eighth Amendment claims" and "as to whether a CCA policy or custom was responsible for the alleged violation of Horton's Eighth Amendment rights." *Id.* at 627.

III. NOT BEHIND BARS, NOT A PRISONER UNDER THE STATUTE: APPLICATION OF SETTLED LAW AND PROPOSAL

A. *The Plain Meaning of the Word Prisoner—Application of a Strict Interpretation of the Statute to Protection & Advocacy Organizations, Guardians, and Conservators*

A strict reading of the statute and textual analysis demonstrates that guardians, conservators, and protection and advocacy groups are in no way mentioned or included in the statute, which defines a prisoner as someone who is incarcerated.[239] The definition of the term "prisoner" in the PLRA is straightforward and clear, and nowhere are these groups who stand in for prisoners mentioned in the statute. Courts have previously used a strict textual interpretation of the statute in the context of sexually violent persons, juveniles, and individuals released to halfway houses in the context of the PLRA. That reasoning should be followed with regard to protection and advocacy groups, guardians, and conservators.

When analyzing sexually dangerous persons in the context of the PLRA, the *Page* court emphasized that while a broad reading of the statute is possible, the natural reading of the statute should be used.[240] The *Page* court found that the natural reading of the text of the statute lends itself to those who are currently detained as a result of a criminal offense, and Page was civilly committed, meaning he was not a "prisoner" under the definition in the PLRA.[241] The definition of prisoner in the PLRA does not include any reference to a person or group bringing a suit on behalf of an inmate who is incapable of representing himself, and only refers to "any person incarcerated or detained."[242]

In analyzing whether juveniles are prisoners within the meaning of the PLRA, the *Lewis* court also used a textual interpretation of the PLRA. The *Lewis* court looked at the definition of "prisoner" within the PLRA and used the plain meaning of "adjudicated delinquent" to find

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239 The PLRA defines prisoner as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 42 U.S.C. § 1997e(h) (2012).

240 Page v. Torrey, 201 F.3d 1136, 1139 (9th Cir. 2000) ("[T]he natural reading of the text is that, to fall within the definition of 'prisoner,' the individual in question must be currently detained as a result of accusation, conviction, or sentence for a criminal offense. As this plain language reading of the text produces a plausible result, we need not look further." (citations omitted)).

241 *Id.*

242 42 U.S.C. § 1997e(h).

that Congress intended to include juveniles in the PLRA.[243] This is an example of yet another court using a textual approach in order to find that juveniles should be included in the PLRA.

Finally, the Seventh Circuit also used a textual approach to find that halfway houses are included under the PLRA.[244] The Seventh Circuit used the term "other correctional facility" to hold that halfway houses fall within the PLRA.[245] There is no such "other" term in the definition of "prisoner" in the PLRA that could be interpreted to hold that these groups standing in for a prisoner should be included in the definition of prisoner. Had the courts in *Villescaz*[246] and *Braswell*[247] used a strict interpretation of the word "prisoner," those courts would have been able to reach the merits in cases where constitutional violations had occurred.

Future courts should apply this strict textual interpretation of the text of the PLRA to find that guardians, conservators, and protection and advocacy groups are not prisoners within the meaning of the PLRA and, therefore, are not subject to the requirements of the statute when bringing a case on behalf of an inmate. Protection and advocacy groups, guardians, and conservators bringing a suit on behalf of an incapacitated or incompetent inmate are not mentioned within the definition of "prisoner"[248] in the PLRA. Had Congress intended to include such groups standing in for a prisoner within the PLRA, Congress would not have drafted the statute to limit the definition of prisoner to "any person incarcerated or detained."[249] Furthermore, there is a doctrinal difference in the literal name of cases brought by protection and advocacy groups, guardians, and custodians—in those cases, the case is often brought in the name of the guardian, conservator, or protection and advocacy group[250] on behalf of the prisoner, as opposed to brought by the prisoner himself. This Note recommends

243 Lewis v. Gagne, 281 F. Supp. 2d 429, 433 (N.D.N.Y. 2003).

244 See *supra* Part I.C.4 for a further analysis of halfway houses within the PLRA.

245 Witzke v. Femal, 376 F.3d 744, 753 (7th Cir. 2004).

246 Villescaz v. City of Eloy, No. CV-06-2686-PHX-FJM, 2008 WL 1971394 (D. Ariz. May 2, 2008).

247 Braswell v. Corr. Corp. of Am., No. 3:08-0691, 2009 WL 2447614 (M.D. Tenn. Aug. 10, 2009), *rev'd on other grounds*, 419 F. App'x 622 (6th Cir. 2011).

248 42 U.S.C. § 1997e(h) (2012).

249 *Id.*

250 For example, in *Villescaz v. City of Eloy*, No. CV-06-2686-PHX-FJM, 2008 WL 1971394 (D. Ariz. May 2, 2008), the plaintiff on the case caption is listed as "Mary Villescaz, guardian of Francisco Javier Villescaz, Plaintiff." In addition, in *Braswell v. Corrections Corp. of America*, 419 F. App'x 622 (6th Cir. 2011), the case caption lists the plaintiff as "Mary Braswell, as conservator of Frank D. Horton, individually, Plaintiff-Appellant." Finally, in *Alabama Disabilities Advocacy Program v. Wood*, 584 F. Supp. 2d 1314 (M.D. Ala. 2008), Alabama Disabilities Advocacy Program is the plaintiff.

that courts limit the reach of the PLRA by applying it only to the currently incarcerated inmates who are subject to the statute.[251]

Admittedly, recommending that Congress amend the PLRA to specifically exclude these groups who stand in for prisoners is an unworkable argument. The Supreme Court has upheld provisions of the PLRA as constitutional, and it is highly unlikely that Congress will amend the statute.

There have been efforts to amend the PLRA, but they have not been successful as of yet. On February 12, 2007, the American Bar Association (ABA) House of Delegates approved a resolution to amend the PLRA.[252] One aspect of the resolution urged Congress to hold hearings and amend the exhaustion requirement "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."[253] In recommending this amendment, the ABA recognized that prisoners are often illiterate, fear retaliation, and might not recognize when their constitutional rights have been violated.[254] While the ABA was successful in passing the resolution calling for changes to the PLRA, "[the PLRA] remains in place."[255] Therefore, courts must work with the statute as-is to limit its reach with regard to meritorious litigation by defining "prisoner" narrowly under the statute.

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251 A potential counterargument is that Congress did not have to explicitly include these groups in the text of the statute because these groups are standing in for the prisoner and are therefore automatically included in the statute. However, given that the protection and advocacy group, guardian, or conservator may not be informed of the constitutional violation until grievance system deadlines have passed, and that many prison facilities require that the inmate personally exhaust the administrative remedies, the groups are unable to actually stand in for inmate to satisfy the exhaustion requirements. *See supra* note 32.

252 AM. BAR ASSOC. CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION 102B (2007), *available at* https://www.prisonlegalnews.org/media/publications/aba%20resolution%20on%20amending%20plra%2C%202007.pdf.

253 *Id.* at 1.

254 *Id.* at 4–5.

255 AM. BAR ASSOC. CRIMINAL JUSTICE SECTION, RESOLUTION 103B (2014), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fwww.americanbar.org%2Fcontent%2Fdam%2Faba%2Fdirectories%2Fpolicy%2F2014_hod_midyear_meeting_103b.docx&ei=hNXrU9mTD8__yQT6oYKQCA&usg=AFQjCNFzsg3yzDUZW-QAxzYiyhkURngd0A&sig2=QDx1L9OIxBIXhIqVv6paAg&bvm=bv.72938740,d.aWw. Other advocates have also recommended amending the PLRA. *See, e.g.*, HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES (2009), *available at* http://www.hrw.org/sites/default/files/reports/us0609web.pdf.

B. *The Intent and Purpose of the PLRA Require Exclusion of Protection & Advocacy Organizations, Guardians, and Conservators*

In analyzing the history and reasons for enactment of the PLRA,[256] it is apparent that these groups that stand in for prisoners were never intended to be seen as "prisoners" within the meaning of the statute and should not be subject to the statute when bringing a case on behalf of an inmate.

While there was a rise in prisoner litigation with the rise of incarceration rates leading to the enactment of the statute,[257] Congress focused on avoiding the "frivolous" suits filed by so many inmates while incarcerated.[258] Many of these suits can be remedied through the grievance system within the correctional system, and should be remedied there in order to avoid using judicial resources when unnecessary.[259]

However, suits brought by protection and advocacy groups, guardians, and conservators are not the types of "frivolous" suits that Congress intended to limit when enacting the statute.[260] Protection and advocacy groups[261] receive federal funding to advocate on behalf of mentally ill individuals[262] and are not using limited resources to take

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256 *See supra* note 3.

257 *See supra* note 35.

258 Belbot, *supra* note 34, at 291 ("The legislative history of the PLRA indicates that concern about frivolous lawsuits dominated Congress's consideration of the statute.").

259 *See supra* note 40. The issues that Senator Dole referenced, such as a lack of storage locker space, or being served the wrong kind of peanut butter, can quickly and easily be remedied through the grievance system in the correctional facility.

260 For example, the guardian in *Braswell v. Corrections Corp. of America* brought a suit regarding a serious deficiency in mental health treatment while inmate Horton was incarcerated. *See* No. 3:08-0691, 2009 WL 2447614 (M.D. Tenn. Aug. 10, 2009), *rev'd on other grounds*, 419 F. App'x 622 (6th Cir. 2011). The guardian in *Villescaz v. City of Eloy* brought a suit regarding a failure to provide adequate medical care for an inmate with severe disabilities. No. CV-06-2686-PHX-FJM, 2008 WL 1971394 (D. Ariz. May 2, 2008). These are not like the frivolous cases brought by inmates regarding peanut butter or storage space, referenced in note 259.

261 This Note has argued that a protection and advocacy group will have difficulty satisfying the exhaustion requirement if subject to the PLRA. A counterargument exists that protection and advocacy groups are comprised of lawyers and could easily navigate the grievance process, even if the client is mentally ill and is unable to navigate the process himself. However, in some prison systems, exhaustion must be done personally and even if the protection and advocacy group could assist the mentally ill inmate in filling out the grievance, the inmate must submit the grievance himself to comply with the procedural requirements of the process. See *supra* note 32 for a discussion of the requirement that an inmate personally exhaust in the City of New York Department of Correction. In addition, even if the protection and advocacy group is capable of navigating the grievance system and is able to exhaust for the inmate, deadlines may have already passed and the inmate may have failed to comply with the procedural requirements of the grievance system before the protection and advocacy group even learns of the constitutional rights violation.

262 See *supra* Part II.A for a discussion of the funding that protection and advocacy groups receive from the federal government in order to advocate for the mentally ill.

"frivolous" cases.[263] The wording of the statute specifically makes it clear that protection and advocacy groups are to use funding to represent individuals who are mentally ill.[264] In addition, guardians and conservators are appointed by a court to assist an incapacitated individual with managing his affairs.[265] There has been a significant rise of mentally ill inmates in prison who often do not receive the care they need or have a right to under the Constitution, and they often end up back in the criminal justice system shortly after release.[266] These inmates need protection and need an advocate, whether that is a protection and advocacy group, guardian, or conservator.

The District Court for the District of New Jersey in *Anderson v. County of Salem*[267] found that exhaustion was not required in the context of estates bringing a case on behalf of a deceased inmate. The court in *Anderson* stated that the PLRA does not apply to non-prisoners and found that an estate could not be considered a prisoner under the PLRA.[268] The court reasoned that the decedent, on whose behalf the estate was bringing a case, could not exhaust his administrative remedies, as his death clearly prevented him from being able to do so.[269] Guardians, conservators, and protection and advocacy groups have an argument based on similar reasoning—the inmate who the group standing in for is also incapable of exhausting the administrative remedies given that he is incompetent, incapacitated, or mentally ill.[270]

A counterargument exists in that these groups who stand in for prisoners could be required to comply with the PLRA and, if the affirmative defense is raised, could argue that the administrative remedies were unavailable to the inmate as he was too mentally ill or incapacitated to comply with the exhaustion requirements.[271] The

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263 For example, in *Advocacy Center v. Stalder*, the protection and advocacy system received a complaint from a mentally ill inmate that he was not receiving his medication. 128 F. Supp. 2d 358 (M.D. La. 1999). After being denied access to the inmate's medical records, the protection and advocacy group brought an action in court for access to the inmate's medical records, in order to look into his complaint and "advocate on his behalf." *Id.* at 362.

264 *See* 42 U.S.C. §§ 10804(c), 10802(4) (2012).

265 *See supra* Part II.B.

266 See *supra* Part II.A for a discussion of the rise of mentally ill inmates in prison, and the "revolving door."

267 No. 09-4718 (RMB/KMW), 2010 WL 3081070 (D.N.J. Aug. 5, 2010).

268 *Id.* at *2.

269 *Id.*

270 An alternative way to deal with this issue could be that if the guardian, conservator, or protection and advocacy group is acting as an agent on behalf of the inmate, that person should be able to exhaust the administrative remedies for the inmate. However, it appears as of now that the prisoner must exhaust the administrative remedies himself in some jurisdictions. *See supra* note 32.

271 In *Hoover v. West*, 93 F. App'x. 177 (10th Cir. 2004), the court found that "a prisoner is only required to exhaust those procedures that he or she is reasonably *capable* of exhausting." *Id.* at 181. As an example, the court stated that if a prisoner is denied grievance forms or the prison officials do not respond to a grievance "within the time limits contained in the grievance policy,"

burden would be on the defendant to prove that the administrative remedies were actually available to the inmate.[272]

However, this is not an efficient use of a court's resources in cases where a protection and advocacy group, guardian, or conservator is bringing a case on behalf of an incapacitated or incompetent inmate. In appointing a conservator or guardian, the court will already have determined that the inmate is incapacitated.[273] In addition, a protection and advocacy group acting under PAIMI is acting for an inmate with a mental illness.[274] This will leave too much discretion to individual trial courts to determine whether the inmate was in fact capable of exhausting and will result in dismissal of cases if a court finds that inmate could have navigated the grievance system and failed to exhaust.[275]

Judicial resources were a significant concern when Congress enacted the PLRA.[276] However, in cases where there is a question as to

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the administrative remedies would be found to be unavailable. *Id.* (citation and internal quotation marks omitted). In addition, if "prison officials prevent or thwart a prisoner from utilizing an administrative remedy," the administrative remedy will therefore also be found to be unavailable. *Id.* (citations omitted).

272 As previously discussed in Section II.B, on appeal to the Sixth Circuit in *Braswell v. Corrections Corp. of America*, the court did find there was a factual issue relating to whether the administrative remedies were available to the prisoner, Horton, and "whether Horton was capable of availing himself of those remedies given his mentally impaired condition." The court went on to state that given that failure to exhaust is an affirmative defense, the defendant has to prove that the administrative remedies were available, meaning that the inmate had access to the grievance system and was capable of filing a grievance. 419 F. App'x 622, 625 (6th Cir. 2011).

273 *See supra* Part II.B.

274 *See* 42 U.S.C. §§ 10804(c), 10802(4) (2012); *see also* Buckman, *supra* note 163, at 217.

275 In *Johnson-Ester v. Elyea*, No. 07-cv-4190, 2009 WL 632250 (N.D. Ill. Mar. 9, 2009), the court found that because of the plaintiff's "serious physical and mental impairments," the defendants did not carry "their burden of establishing that Plaintiffs failed to exhaust *available* administrative remedies" and allowed the case to proceed. *Id.* at *1. In *Johnson-Ester*, the plaintiffs argued that Johnson, the inmate, was unable to exhaust given that he was unable to write or ambulate, and that he "increasingly could not make himself understood, and may even have been irrational or delusional at times." *Id.* at *6. In addition, Ms. Johnson-Ester and plaintiffs' lawyers sent letters regarding Mr. Johnson's care and his serious medical issues and claimed they invoked the administrative remedies on his behalf. Even though the court denied the defendants' motion for judgment as a matter of law under the PLRA for failure to exhaust and allowed the case to proceed, this could have resulted in a different outcome if this case was adjudicated in a different court or before a different judge. While it is true that the defendant must prove that the remedies were actually available, this simply demonstrates that the decision is left to the discretion of the court and a case could proceed or be dismissed depending on the specific court. This Note instead argues for uniformity in cases brought by a protection and advocacy group, guardian, or conservator, as it is evident that if one of these three groups is standing in for the inmate, the inmate's mental disability or incapacity makes the inmate unable to utilize the grievance process.

276 It is clear from the legislative history that Congress was primarily concerned with reducing frivolous prisoner lawsuits. Many of these cases are filed pro se, and the three strikes provision works to prevent a prisoner from filing more than three frivolous suits while incarcerated. 28 U.S.C. § 1915(g) (2012). It is true that prisoners do file frivolous suits pro se while incarcerated. For example, the Sixth Circuit noted in *Wilson v. Yaklich* that Wilson, an inmate of the Ohio correctional system, had filed a combined total of over seventy cases, with at least eight cases dismissed as frivolous prior to the enactment of the PLRA, and an additional six dismissed since

whether the inmate was capable of exhaustion, requiring the defendant to prove that the inmate was actually capable of exhausting when the defendant raises failure to exhaust as an affirmative defense would be redundant and a waste of judicial resources—a court has already determined that inmates represented by guardians or conservators are incompetent or incapacitated, and inmates represented by a protection and advocacy group are mentally ill.

CONCLUSION

Mentally ill inmates and those deemed incapacitated or incompetent by courts are in need of an advocate when a constitutional violation has taken place while they are incarcerated. The PLRA has succeeded in reducing prisoner lawsuits by a significant number since it was enacted. However, a finding that protection and advocacy groups, guardians, and conservators are "prisoners" under the PLRA and subject to the statute when bringing a case on behalf of an inmate will result only in the dismissal of meritorious litigation. These inmates need a voice when there has been an alleged violation of constitutional rights during incarceration. Courts should strictly interpret the PLRA to find that these three groups that stand in for inmates are not "prisoners" and, therefore, not subject to the obstacles of the PLRA when bringing a suit on behalf of an incompetent or incapacitated inmate who is incapable of representing himself.

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the PLRA was enacted. 148 F.3d 596, 599–600 (6th Cir. 1998). A court must use judicial time and system resources to screen these cases in order to dismiss the frivolous ones. This does support a broad reading of the statute in order to prevent frivolous litigation that could be resolved within the correctional system. However, as previously indicated, cases brought by protection and advocacy groups, guardians and conservators are not "frivolous" cases.