

WHY NEBRASKA NEEDS PRISON LITIGATION REFORM

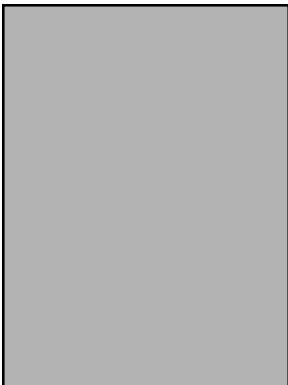
By Laurie Smith Camp

The Prison Litigation Reform Act (PLRA), passed by Congress on April 26, 1996,² has reduced frivolous and recreational inmate litigation in federal courts. At the same time, the Act appears to have diverted inmate litigation to state courts. This article presents arguments in favor of state legislation, similar to PLRA, to reduce inmate litigation in Nebraska state courts.

The Federal Prison Litigation Reform Act Is a Success

In 1995, inmates in state prisons filed more than 40,000 civil rights actions in federal courts.³ Nebraska inmates were responsible for 323 of those cases.⁴ These figures do not include actions brought by inmates in federal prisons, other types of civil actions such as petitions for *habeas corpus* or *mandamus*, or actions filed by inmates in state courts.⁵

On April 26, 1996, PLRA took effect. It included provisions designed to reduce frivolous and recreational inmate litigation.⁶ First, inmates must pay the full filing fee in all civil actions. PLRA provides a mechanism for the collection of the fee in installments and does not prevent inmates from bringing civil actions or appealing civil judgments because of indigence.⁷ Second, PLRA mandates that federal courts must dismiss inmate civil rights actions that are frivolous, malicious, or fail to state a claim.⁸ Finally, inmates who have had an action dismissed as frivolous, malicious, or failing to state a claim on three or more prior occasions while incarcerated may not file another federal civil rights action unless the inmate is in imminent danger of serious physical injury.⁹



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In 1996, the number of civil rights actions filed by Nebraska inmates in federal court decreased to 146, and continued to fall to only 109 in 1997.¹⁰ Likewise, inmate federal civil rights actions referred to the Nebraska Attorney General's Office dropped by two-thirds in 1996, and continued to decline in 1997.¹¹

While PLRA has reduced inmate federal civil litigation in Nebraska, it has had a less desirable side effect: an increase in inmate lawsuits in Nebraska state courts.¹² State legislation patterned after PLRA is needed to reduce frivolous and recreational inmate litigation in Nebraska's state courts.

Inmate Litigation Is Costly

In 1964, the United States Supreme Court found that inmates could avail themselves of the federal civil rights statute, 42 U.S.C. § 1983,¹³ to challenge the conditions of their confinement under the United States Constitution or federal law.¹⁴ In 1977, the Supreme Court held that inmates have a constitutional right of access to the courts, which must be adequate, effective, and meaningful.¹⁵ According to the Supreme Court, the right requires prison authorities to assist inmates in the preparation and filing of pleadings by providing prisoners with adequate law libraries or assistance from persons trained in the law.¹⁶ Following these decisions, inmate federal civil rights actions increased from fewer than 10,000 in 1978, to more than 40,000 in 1995.¹⁷

Inmate litigation has a cost. In Nebraska, the Attorney General's Office employs five lawyers and two secretaries who devote most of their time to challenging inmate's claims. The Department of Correctional Services has employees in all Nebraska prison institutions who devote much of their time to the preparation of litigation reports and discovery documents. When a case goes to trial, state employees who are named as defendants or as witnesses must appear. The inmate plaintiffs and inmate witnesses have to be transported and supervised by state employees. Moreover, the transportation of the inmates may create potential security risks. Judges and other court personnel must review the complaints filed by the inmates and devote substantial time to ruling on motions, holding pretrial conferences, and conducting trials. Taxpayers bear the burden of those costs. Beyond the inmate context, other litigants and their lawyers bear the burden of delays in court proceedings caused by the glut of inmate litigation.

Frivolous and recreational inmate litigation also hurts the inmates themselves. Inmates, who should be learning respect for the court system, may come to view it as an easily manipulated game. Resources that could be spent on programs helping to rehabilitate inmates are devoted instead to litigation. Doctors, dentists, psychologists, and other professionals who otherwise would be willing to work in a correctional system refuse to jeopardize their careers, reputations, professional insurance, and financial security by working with inmates.¹⁸

Nebraska Inmates Are "Frequent Filers"

Nebraska has a relatively small inmate population,¹⁹ but the Nebraska inmates are among the most frequent filers of lawsuits.²⁰ Five factors may contribute to Nebraska's status as a state with one of the highest number of claims filed by inmates.

First, Nebraska has succeeded in providing inmates with access to courts. All secure Nebraska correctional institutions housing adult inmates are equipped with law libraries. Inmate legal aides are given comprehensive training through a course developed in consultation with the Nebraska Law College.²¹

Second, inmate idleness may contribute to recreational litigation. Moreover, a rapid increase in Nebraska's inmate population has exacerbated the idleness problem.²²

Third, Nebraska's correctional institutions are not located in remote rural areas, as is the case in many states. Most of Nebraska's adult inmate population is in Lincoln and Omaha, the two largest cities in Nebraska. This has placed Nebraska inmates in close proximity to lawyers and courts.²³

Fourth, with respect to federal filings, Nebraska is in the jurisdiction of the United States Court of Appeals for the Eighth Circuit.²⁴ The Eighth Circuit has been one of the most aggressive circuits with respect to appointment of counsel for inmates in civil cases.²⁵

Fifth, with respect to state filings, Nebraska statutes encourage inmate litigation. Statutes of limitations are tolled for inmates;²⁶ state employees may be called as witnesses without receiving witness fee payments;²⁷ the Administrative Procedure Act has been



applied to appeals of inmate disciplinary actions;²⁸ *in forma pauperis* statutes make no allowance for partial filing fees or collection of fees in installments;²⁹ and Nebraska Courts are not authorized to dismiss *in forma pauperis* filings *sua sponte* for failing to state a claim.³⁰ Inmates most frequently initiate civil litigation in Nebraska state courts under the Administrative Procedure Act,³¹ the State Tort Claims Act,³² and statutes relating to civil rights,³³ declaratory judgments,³⁴ and writs of mandamus.³⁵

Nebraska's Efforts To Control Inmate Litigation Have Succeeded Only When Addressing The Inmates' Underlying Motivation

Prior to the enactment of PLRA, Nebraska initiated several programs in an attempt to resolve inmate complaints and to reduce inmate litigation. In 1976, the position of "Deputy Public Counsel for Corrections" was created to investigate complaints regarding Nebraska's prison system and to propose methods for the resolution of the complaints.³⁶

In 1987, the inmate grievance procedure of the Nebraska Department of Corrections was certified by the United States Department of Justice under the Civil Rights of Institutionalized Persons Act.³⁷ Under the grievance system, inmates' complaints are investigated by prison staff, and inmates receive written responses from the warden. If dissatisfied, an inmate can appeal a grievance to the Director of the Department of Corrections.³⁸

Undoubtedly, the Deputy Public Counsel and the grievance procedures have succeeded in resolving many sincere complaints and concerns raised by inmates. Nevertheless, those systems have done little to deter inmates from filing frivolous and recreational litigation. If an inmate's motivation is to harass a prison employee or to create a general nuisance, the inmate will proceed to court. If the inmate can prepare a pleading that appears to state a cause of action, the inmate may subject prison employees to burdensome discovery. If the case proceeds to trial, the inmate not only may cause significant expense and inconvenience for the state, defendants, and other prison employees, but the inmate also will reap the reward of spending a day or more outside of the institution. Friends and family of the inmate may appear in court,

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and the inmate may return to the institution as a celebrity among other inmates.

In 1989, the Nebraska federal district court adopted a local rule requiring inmates with funds to pay a partial fee when filing a civil rights action.³⁹ The new rule reduced the rate of federal inmate litigation in Nebraska by one-half between 1989 and 1991.⁴⁰

The new rule demonstrated a principle of logic: if inmates must choose, as other citizens must, between the filing of a lawsuit and the purchase of consumer goods, then frivolous and recreational cases are unlikely to be filed. Serious cases brought by sincere plaintiffs will proceed to court.

The rate of federal inmate litigation did increase again between 1991 and 1995, as the increase in inmate population created more idle time for inmates to file claims in federal court.⁴¹ Only after the enactment of PLRA did the rate of inmate litigation in Nebraska's federal court plummet.⁴² As PLRA diverts more inmate litigation into state courts, it is imperative that Nebraska statutes be amended to deter inmates from filing frivolous or recreational litigation in state courts.

Conclusion

To address the problem of frivolous state inmate litigation, state legislation similar to PLRA is needed. The bill should (1) require inmates to pay court filing fees in the same manner now provided under PLRA; (2) preclude inmates from filing civil actions if while incarcerated the inmates have on three or more prior occasions had actions dismissed as frivolous, malicious, or for failing to state a claim unless the inmates are in imminent danger of serious physical harm; (3) require courts to dismiss actions filed in *forma pauperis* if the courts find the allegation of poverty is untrue or that the action is frivolous, malicious, or fails to state a claim; (4) eliminate the tolling of statutes of limitations for inmates; and (5) eliminate the statutory provision now used by inmates to cause state employees to appear as witnesses in court proceedings without the payment of witness fees.⁴³

Such legislation would benefit not only the Nebraska court system, the Department of

Corrections, Nebraska taxpayers, and prison employees who are bombarded with litigation, but such reform would benefit the inmates themselves. It generally is recognized that one purpose of incarceration is rehabilitation. The rehabilitation process requires a structure that encourages responsible choices and provides consequences for irresponsible actions. State legislation patterned after PLRA would encourage inmates to use the court system sparingly and respectfully, as free citizens are expected to do.⁴⁴

Footnotes

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2. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§801-810, 110 Stat. 1321 (1996)(to be codified as amended in scattered sections).

3. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, PRISONER PETITIONS FILED IN THE U.S. DISTRICT COURT BY STATE INMATES, 1978-95 (1997)[hereinafter STATE INMATES].

4. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, PRISONER PETITIONS FILED IN U.S. DISTRICT COURT BY FEDERAL AND STATE INMATES, 1995 [hereinafter FEDERAL AND STATE INMATES].

5. STATE INMATES, *supra* note 2.

6. In addition, PLRA also limits prospective relief to extend no further than necessary to correct a specific violation, and provided for termination of prospective relief (injunctions and consent decrees). 18 U.S.C. § 3626 (Supp. 1997). Prisoner release (population cap) orders likewise were limited. *Id.* The Act also required the inmate to exhaust all available administrative remedies (grievance procedures) prior to filing inmate civil actions. 42 U.S.C. § 1997e(a) (Supp. 1997). Attorney fee awards were limited in inmate cases to insure that any award would be proportionate to the relief obtained. *Id.* § 1997e(d). The inmate now must show he has suffered some physical injury before he can sue for mental or emotional injuries suffered while in custody. *Id.* § 1997e(e). The same was true under the Federal Tort Claims Act. 28 U.S.C. § 1346(b) (Supp. 1997). In an attempt to reduce costs and burdens, PLRA provided for pretrial proceedings to be conducted by telephone. 42 U.S.C. § 1997e(f) (Supp. 1997). As a punitive measure, PLRA authorized the revocation of earned good time credit for federal inmates who file malicious claims or present false evidence. 28 U.S.C. § 1932 (Supp. 1997).

7. 28 U.S.C. § 1915(b) (Supp. 1997). Filing fee requirements were held constitutional. See *Henderson v. Norris*, 129 F.3d 481 (8th Cir. 1997); *Williams v. Roberts*, 116 F.3d 1126 (5th Cir. 1997); *Nicholas v. Tucker*, 114 F.3d 17 (2nd Cir. 1997); *Morgan v. Haro*, 112 F.3d 788 (5th Cir. 1997); *In re Tyler*, 110 F.3d 528 (8th Cir. 1997); *Hampton v. Hobbs*, 106 F.3d 1281 (6th Cir. 1997); *Ayo v. Bathey*, 106 F.3d 98 (5th Cir. 1997)(applying filing fee requirement retroactively); *Strickland v. Rankin County Correctional Facility*, 105 F.3d 972 (5th Cir. 1997)(applying filing fees requirement retroactively); *Covino v. Reopel*, 89 F.3d 105 (2nd Cir. 1997)(applying filing fee requirement retroactively); *Jackson v. Stimmitt*, 102 F.3d 132 (5th Cir. 1996); *Duamutef v. O'Keefe*, 98 F.3d 22 (2nd Cir. 1996)(declining to apply filing fee requirement retroactively); *Thurman v. Gramley*, 97 F.3d 185 (7th Cir. 1996); *McGann v. Commissioner*, 96 F.3d 28 (2nd Cir. 1996); *Ramsey v. Coughlin*, 94 F.3d 71 (2nd Cir. 1996)(declining to apply filing fees retroactively); *White v. Gregory*, 87 F.3d 429 (10th Cir. 1996)(declining to apply filing fee requirement retroactively); *Copley v. Henderson*, 980 F. Supp. 322 (D. Neb. 1997);

Rodgers v. Deboe, 950 F. Supp. 1024 (S.D. Cal. 1997)(declining to apply filing fee requirements retroactively).

8.28 U.S.C. § 1915(e)(2) (Supp. 1997); *id.* § 1915A(b); 42 U.S.C. § 1997e® (Supp. 1997). See *Marks v. Solcum*, 98 F.3d 494 (9th Cir. 1996)(finding PLRA requirement to dismiss inmate claims that are frivolous, malicious, or fail to state a claim applies to all cases pending on effective date of act); *Gindrow v. Dendlap*, 967 F. Supp. 833 (E.D. Pa. 1997)(same)

9.28 U.S.C. § 1915(g) (Supp. 1997). The “3-strikes-and-you’re-out” provision in PLRA was upheld as constitutional. See *Tierney v. Kupers*, 128 F.3d 1310 (9th Cir. 1997); *Keaner v. Pennsylvania Board of Probation & Parole*, 128 F.3d 143 (3rd Cir. 1997); *Duwall v. Miller*, 122 F.3d 489 (7th Cir. 1997); *Gibbs v. Roman*, 116 F.3d 83 (3rd Cir. 1997); *Arvie v. Lastrapes*, 106 F.3d 1230 (5th Cir. 1997); *Green v. Nottingham*, 90 F.3d 415 (10th Cir. 1996); *Witzke v. Hiller*, 972 F. Supp. 426 (E.D. Mich. 1997). See also *Lyon v. Krol*, 127 F.3d 763 (8th Cir. 1997)(applying the three-strikes rule, but reserving judgment on the issue of whether an indigent inmate might raise an equal protection challenge to the rule).

10. BUREAU OF JUSTICE STATISTICS, PRISONER PETITIONS IN THE FEDERAL COURTS, 1980-97 (forthcoming 1998). Nationwide, the number of civil rights actions filed by state inmates in federal courts decreased from 40,659 in 1995, to 27,661 in 1997. *Id.*

11. In 1995, the Nebraska Attorney General’s Office received 68 new inmate federal civil rights actions against state employees. In 1996, only 22 new inmate federal civil rights actions were referred to the Attorney General’s Office for defense. In 1997, the number fell to 17.

12. In 1995, inmates initiated 219 lawsuits in state court that were referred to the Attorney General’s Office for defense. The number rose to 263 in 1996, and to 346 in 1997. See *supra* note 10.

13. 42 U.S.C. § 1983 (1994). Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. *Id.*

14. *Cooper v. Pate*, 378 U.S. 546 (1964).

15. *Bounds v. Smith*, 430 U.S. 817 (1977).

16. *Id.* At 828. See also *Lewis v. Casey*, 116 S. Ct. 2174 (1996).

17. STATE INMATES, *supra* note 2.

18. In 1992, the Nebraska Legislature authorized the Attorney General to represent medical and dental service providers sued by inmates. Further, the Legislature provided indemnification for those medical and dental professionals in an effort to retain medical and dental services for inmates. NEB. REV. STAT. § 81-8,239.08 (Reissue 1996).

19. Nebraska’s total inmate population was 3626 in 1996. See NEB. DEPT. OF CORRECTIONAL SVCS., FY 96 ADULT STATISTICAL REPORT #2. Forty states and the District of Columbia have larger inmate populations. DARRELL K. GILLIARD & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, BULLETIN, PRISON AND JAIL INMATES AT MIDYEAR 1996 (1997).

20. See Note, *Resolving Prisoners’ Grievances Out of Court*: 42 U.S.C. § 1997e, 104 HARV. L. REV. 1309, 1329 & tbl.1 (1991). In 1991, when Nebraska’s rate of inmate litigation (federal civil rights actions filed per 1,000 inmates) was at a 10-year low, Nebraska still ranked tenth in the nation in the rate of inmate litigation. BUREAU OF JUSTICE STATISTICS, DISCUSSION PAPER, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS tbl.1

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(1995)[hereinafter DISCUSSION PAPER]. In 1995, Nebraska prisons held only .27% of the inmates confined in this country's state prisons, yet those Nebraska inmates filed .8% of the civil rights action filed in federal courts by state inmates. GILLIARD & BECK, *supra* note 18. See also STATE INMATES, *supra* note 2.

21. NEB. DEPT. OF CORRECTIONAL SERVS., FY95 ANNUAL REPORT 17.

22. From June 30, 1995, until June 30, 1996, Nebraska's inmate population rose at the highest rate in the nation—16%. GILLIARD & BECK, *supra* note 18, at 3.

23. In 1996, the Nebraska Department of Corrections held 2716 adult inmates in the cities of Lincoln and Omaha, and 300 in the cities of Hastings and York. NEB. DEPT. OF CORRECTIONAL SERVS., *supra* note 18.

24. In 1991, when the Bureau of Justice Statistics ranked each state according to its rate of inmate litigation (federal civil rights actions filed per 1,000 inmates), four of the ten highest ranking states were in the Eighth Circuit: Iowa (1), Missouri (4), Arkansas (8) and Nebraska (10). DISCUSSION PAPER, *supra* note 19.

25. See, e.g., *Abdullah v. Gunter*, 949 F.2d 1032 (8th Cir. 1991); *Williams v. White*, 897 F.2d 942 (8th Cir. 1990). Contrast other jurisdictions that hold appointment of counsel in a civil case as a privilege justified only under exceptional circumstances. See *Fowler v. Jones*, 899 F.2d 1088, 1096 (11th Cir. 1990); *Archie v. Christian*, 812 F.2d 250, 253 (5th Cir. 1987); *Ulmer v. Chancellor*, 691 F.2d 209 (5th Cir. 1982); *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980). In *Mallard v. United States District Court*, 490 U.S. 296 (1989), the United States Supreme Court found that the Eighth Circuit had overstepped its bounds under 28 U.S.C. § 1915(d) by requiring an unwilling attorney to represent an inmate in a civil action. As a result of the decision, district judges in the Eighth Circuit must request lawyers to represent inmate plaintiffs in civil rights cases, but are without power or resources to pay the lawyers unless the judges find some liability on the part of a defendant. 42 U.S.C. § 1998 (1994). The significance of this pressure on the trial court is not lost on the defendants in inmate civil rights cases. See, e.g., *Klinger v. Department of Correctional Servs.*, 909 F. Supp. 1329, 1342 (D. Neb. 1995), *rev'd*, 107 F.3d 609 (8th Cir. 1997).

26. NEB. REV. STAT. § 25-213 (Reissue 1995). Note, however, the Nebraska Supreme Court's requirement of a "recognizable legal disability" separate from imprisonment. See *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722 (1996); *Scott v. Hall*, 241 Neb. 420, 488 N.W.2d 549 (1992).

27. NEB. REV. STAT. § 33-139.01 (Reissue 1993).

28. *Id.* § 83-4,123 (Reissue 1994). Section 93-4,123 was amended in 1988 by L.B. 673 in reaction to the Nebraska Supreme Court's finding that the Nebraska Administrative Procedure Act was inapplicable to inmate disciplinary actions. *Reed v. Parratt*, 207 Neb. 796, 301 N.W.2d 343 (1981). See also Josephine R. Potuto, *Prison Disciplinary Procedures and Judicial Review Under the Nebraska Administrative Procedure Act*, 61 NEB. L. REV. 1 (1982).

29. NEB. REV. STAT. § 25-2301 (Reissue 1995).

30. NEB. REV. STAT. § 25-2308 (Reissue 1995). Section 25-2308 provides that "[t]he court may dismiss the case or permit the affiant to proceed upon payment of costs if the allegation of poverty is untrue, or if the court is satisfied that the action is frivolous or malicious." *Id.* (emphasis added).

31. *Id.* §§ 83-4,123 & 84-917 (Reissue 1994).

32. *Id.* § 81-8,209 (Reissue 1996).

33. *Id.* § 20-148 (Reissue 1991).

34. *Id.* § 25-21,149 (Reissue 1995).

35. *Id.* § 25-2156 (Reissue 1995).

36. L.B. 687, 1976, amending NEB. REV. STAT. § 81-8,244 (Reissue 1996).

37. Note, *supra* note 19, at 1314 n.30 (1991). See also Donald P. Lay, *Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act*, 71 IOWA L. REV. 935 (1986).

38. 68 NEB. ADMIN. R. & REGS. 2 (1994).

39. NELR 52 (1989), now NELR. 3.5 (1996). The local rule does not deter all "frequent filers" because the partial filing fees are calculated on a percentage of average balance in an inmate's account during either the six months preceding the filing or of the balance at the time of filing. Inmates who are without funds or who may anticipate receiving funds after filing are unaffected by the rule.

40. See Figure 2, *supra* note 19.

41. The adult inmate population of the Nebraska Department of Correctional Services increased from less than 3000 in 1991, to 3626 in 1996. This increase represents more than a 20% increase in five years. See Figure 2, *supra* note 19, for an explanation of the increase in rate of litigation.

42. See Figure 2, *supra* note 19.

43. Senator Curt Bromm introduced L.B. 508. The Bill was cosponsored by Senators Engel, Hudkins, Jensen, Maurstad, Pedersen, Schrock, and Witek. The Bill contains those provisions and was pending in the Nebraska Judiciary Committee as of the date of this writing.

44. For a general discussion of the frivolous nature of inmate litigation, see, e.g., *The Best & Worst of Everything*, PARADE MAGAZINE, Dec. 31, 1995, at 7. ■