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Death Through Administrative Indifference: The Prison Litigation Reform Act Allows Women to Die in California's Substandard Prison Health Care System

Amy Petré Hill*

"Sherrie," a prisoner at the Central California Women's Facility ("CCWF"), started experiencing painful breast lumps in 1991.¹ When she reported her symptoms to a prison doctor, he refused to take action.² Nothing was done until 1993, when Sherrie finally received a mammogram.³ The results were inconclusive, and the radiologist recommended a follow-up mammogram be performed in one year.⁴

Although Sherrie was still in pain, the prison's medical staff did nothing about the problem until late 1994, when Sherrie received a follow-up mammogram.⁵ This mammogram also proved inconclusive for cancer.⁶ Even though the two mammograms did not rule out the possibility of cancer, the prison doctor treating Sherrie refused to order any further tests.⁷

In July of 1995, Sherrie was able to receive the attention of a new prison doctor who examined her charts and immediately scheduled a bi-

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1. LEGAL SERVICES FOR PRISONERS WITH CHILDREN, *Evaluation of Breast Lumps, in REPORT FOR LEGISLATIVE HEARINGS ON THE CONDITION OF CONFINEMENT FOR CALIFORNIA WOMEN PRISONERS ("REPORT FOR LEGISLATIVE HEARINGS")* (2000) (on file with LEGAL SERVICES FOR PRISONERS WITH CHILDREN and the author) (comparing the community standard of medical care for the evaluation of breast lumps and the level of care afforded women prisoners).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. LEGAL SERVICES FOR PRISONERS WITH CHILDREN, *supra* note 1.

opsy.⁸ Cancer was found and on August 23, 1995, Sherrie's right breast and four cancerous lymph nodes were removed.⁹ Almost eighteen months later, Sherrie went under the knife again for a mastectomy of her left breast.¹⁰ In August 2000, Sherri was told that her breast cancer had metastasized and moved to a lump in her neck.¹¹ Her chances for survival are uncertain.

"Rosemary" was diagnosed with Hepatitis C before entering CCWF in 1998.¹² Although prison medical staff knew of her condition, they did not respond when she complained of nosebleeds and swelling of the legs and feet, two common symptoms of liver failure.¹³ She repeatedly asked prison officials – both directly and through administrative channels – to let her see a liver specialist, but she was consistently refused.¹⁴ Her Hepatitis C went untreated despite mounting evidence of serious liver disease, such as painful abdominal swelling that made it difficult for her to breathe.¹⁵

In October 1999, she collapsed and was rushed from the prison to a community hospital.¹⁶ It was only then that Rosemary received care from a liver specialist who immediately began treatment, but by that time, the damage to her liver was fatal.¹⁷ Because prison officials did not notify her family of her collapse until it was too late, her children were not able to reach the hospital in time and Rosemary died alone.¹⁸

I. INTRODUCTION

At the very heart of the American justice system stands the belief that punishment should be proportionate to the crime.¹⁹ Even in today's pro-capital-punishment political environment, a death sentence is issued only to an individual who intentionally commits an unconscionable act of vio-

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. JUSTICE NOW, *Treatment of Hepatitis C*, in REPORT FOR LEGISLATIVE HEARINGS (2000) (on file with JUSTICE NOW and the author) (comparing the community standard of medical care for the treatment of Hepatitis C and the level of care afforded women prisoners).

13. *Id.*

14. *Id.*

15. *Id.* See also Corey Weinstein, M.D., *Hepatitis C Behind Bars*, at <http://www.prisons.org/hep-c.htm> (Dec. 26, 2001).

16. JUSTICE NOW, *supra* note 12.

17. *Id.*

18. Letter from Beverly Henry, Inmate W72830 at the Central California Women's Facility, to her attorneys, in REPORT FOR LEGISLATIVE HEARINGS (2000) (on file with LEGAL SERVICES FOR PRISONERS WITH CHILDREN and the author) (describing Henry's observation of Rosemary as she fell terminally ill).

19. MODEL PENAL CODE § 1.02(2)(C). See also CAL. PENAL CODE § 1170(a)(1) (West 2000).

lence.²⁰ Statistics indicate that the majority of California's 23,597 women prisoners are serving time for non-violent crimes²¹ – offenses which the common law does not see fit to punish with a sentence of death.²² However, despite the legal truism that the punishment should fit the crime, the California Department of Corrections (“CDC”) currently condemns female prisoners to de facto death sentences by denying them basic medical care.

Although the CDC is not strapping these women onto gurneys and injecting them with heart-stopping chemicals, it is rendering them just as dead with a lethal combination of inadequate medical care and an administrative appeal process that allows ill women to languish and die while prison officials dicker over necessary medical procedures.²³ Federal and state research bureaus have amassed an impressive body of empirical and anecdotal data demonstrating that California runs one of the most expensive yet least effective penal health care systems in the nation. This fact makes the painful, unnecessary suffering and ultimate deaths of women like Sherrie and Rosemary even more tragic.

Unfortunately, egregiously bad penal health care is not a new phenomenon. Since the late 1960s, civil rights lawyers have sued prison systems in federal courts and successfully argued that conditions in prisons across the nation violate the Eighth Amendment's prohibition against “cruel and unusual punishment.”²⁴ By 1984, complex consent decrees and intricate injunctions overseen by special masters placed prisons in forty-three states and the District of Columbia under the supervision of district court judges.²⁵ Similar suits have been brought by prisoner rights lawyers in California in order to improve basic living conditions and health care for incarcerated women. In 1995, a consortium of women prisoners and their

20. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 40 (2d ed. 1995). See also *Coker v. Georgia*, 433 U.S. 584, 595 (1977) (White, J. concurring) (contending that death is an unconstitutional penalty for rape because the crime “does not compare with murder”).

21. Erin McCormick, *Number of State Prisoners Soared in 90's*, S.F. CHRON., Aug. 9, 2001, at A1.

22. *Id.*

23. Nancy Stoller, *Improving Access to Health Care for California's Women Prisoners* 73 (Jan. 2001) (report submitted to California Policy Research Center, University of California). “Pat” came to prison doctors seeking help when she began to experience night sweats and a persistent, dry cough. *Id.* She was given a tuberculosis test, which came back negative, and an X-ray which revealed a large mass in her right lung. *Id.* A biopsy performed the following week showed that she had large-cell lung cancer. *Id.* In spite of her deteriorating health, the prison tumor board spent eight weeks deliberating over whether she should receive chemotherapy. *Id.* A private doctor who later reviewed her case opined that she should have been treated with chemotherapy within two weeks of her initial biopsy because her cancer was clearly getting worse. *Id.* By the time treatment was finally approved, Pat was so sick she had to receive a blood transfusion in order to survive the chemotherapy. Stoller, *supra*, at 73.

24. U.S. CONST. amend. XIII. See also MALCOLM FEELEY & EDWARD RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 39-46 (1998).

25. Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2004 (1999) (book review).

advocates filed *Shumate v. Wilson* in the Northern District of California.²⁶ The plaintiff sought an injunction that would “reform the prison system’s ‘knowing and deliberately indifferent failure to provide necessary care for serious medical needs’” in the California Correctional Women’s Facility and the Valley State Prison for Women (“VSPW”).²⁷ The California Department of Corrections settled the lawsuit in 1997, promising consistent medication and care for inmates with chronic conditions, such as HIV or lupus, and emergency medical treatment for women in dire medical need.²⁸

Under the terms of the *Shumate* settlement, a court-appointed team of five medical experts monitored the prisons’ compliance for two eight-month periods.²⁹ The initial report in November 1998 revealed that the facilities were not in compliance with state standards in eleven key medical areas, but the prisons passed the second assessment, and medical care to the women in these institutions appeared to improve.³⁰ However, a series of scandals in 2000, including sham medical test results and accusations of medical record tampering by administrators, called these improvements into question.

By this time, the plaintiff’s counsel in *Shumate* were unable to use the power of a federal court injunction to cure the ills in the CDC’s health care system for women.³¹ The district court judge overseeing the case refused to reopen the case,³² and the lawyers were unable to bring a new suit for injunctive relief in federal court. In 1996, the United States Congress, supposedly sick of “frivolous” suits by prisoners,³³ passed the Prison Litigation Reform Act (“PLRA” or “the Act”), drastically curtailing a prisoner’s ability to bring suit in federal court.³⁴ Under the PLRA, inmates could file an individual or class action suit in district court only after they had exhausted all avenues of administrative relief within the prison system.³⁵

In many states, this legislation has been a serious impediment to prisoners seeking remedies from federal courts, but in California, the Act has proven an insurmountable obstacle for women who need immediate access to medical care that the CDC does not wish to provide. California’s administrative relief process – commonly known to prisoners as a “602 appeal” –

26. LEGAL SERVICES FOR PRISONERS WITH CHILDREN, *Summary Report on Shumate v. Wilson*, in REPORT FOR LEGISLATIVE HEARINGS (2000) (on file with LEGAL SERVICES FOR PRISONERS WITH CHILDREN and the author).

27. *Id.*

28. *Id.*

29. Nina Sigal, *Death Behind Bars*, S.F. BAY GUARDIAN, Feb. 5, 1997, available at <http://www.sfbg.com/News/31/19/Features/death.html>.

30. *Id.*

31. *Id.*

32. *Id.*

33. Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles In Haystacks*, 62 BROOK. L. REV. 519, 519-22 (1996).

34. 141 CONG. REC. S14, 413 (daily ed. Sept. 27, 1995).

35. 42 U.S.C. § 1997e(a).

places no time limits on the CDC's response to an application for relief.³⁶ Prison officials can keep California's women inmates out of federal court indefinitely simply by choosing not to resolve these appeals. With seeming disregard for due process, the PLRA has inadvertently granted the California Department of Corrections the power to sentence non-violent female offenders to death by keeping their pleas for medical aid tied up in red tape until they die.

This note attempts to show how California's prison system, the nation's largest,³⁷ developed a health care policy that is deliberately indifferent to the medical needs of women while still spending significantly more per prisoner for health care than other large states, such as Texas and New York.³⁸ It then examines the legal and legislative tools that can be used at the federal and state level to stop the needless deaths of California's female inmates. A general examination is made of problems with the entire CDC medical system, followed by a focused look at the specific problems plaguing the state's care of its female inmates. Part III examines how the PLRA interacts with California's prison administrative law to prevent women inmates from seeking emergency injunctive relief from the federal courts. In Part IV, the focus shifts to possible solutions provided involving the federal courts and state courts. Finally, Part V presents a blueprint for short- and long-term reform of the CDC's health care system for women. The note ultimately concludes that the courts are unlikely to offer relief to women dying in California's state prisons and that the best solution is strong action by the California legislature; the prison health care system must be taken out of the hands of the CDC and placed under the supervision of a state health organization, such as the University of California.

II. THE CALIFORNIA DEPARTMENT OF CORRECTION'S HISTORY OF SUBSTANDARD HEALTHCARE

In 1992, the threat of court intervention led to the creation of a Health Care Services Division within the California Department of Corrections.³⁹ This division is charged with providing the state's entire prison population with medical care that meets the current penal health care standards.⁴⁰ In order to fulfill its duty in all thirty-three state prisons, the division manages four hospitals that provide twenty-four hour critical care, a nursing facility that offers twenty-four hour care for prisoners requiring extended medical

36. CAL. CODE REGS. tit. 15, § 3084 (2000).

37. DEBORAH LAMB-MECHANICK & JULIANNE NELSON, NATIONAL INSTITUTE OF CORRECTIONS NIC-015999, PRISON HEALTH CARE SURVEY: AN ANALYSIS OF FACTORS INFLUENCING PER CAPITA COSTS 38 (2000) available at <http://199.117.52.250/pubs/2000/015999.pdf>.

38. *Id.* at 38.

39. BUREAU OF STATE AUDITS, CALIFORNIA DEPARTMENT OF CORRECTIONS: UTILIZING MANAGED CARE PRACTICES COULD ENSURE MORE COST-EFFECTIVE AND STANDARDIZED HEALTH CARE 31 (2000); see also Sigal, *supra* note 29.

40. BUREAU OF STATE AUDITS, *supra* note 39, at 5.

treatment, sixteen correctional treatment centers that service those needing short-term inpatient care, and twelve outpatient centers.⁴¹ All medical personnel working in these facilities are employees of the CDC. Specialized care not available within this system is provided via contracted care with physicians and nearby community hospitals.⁴²

California spends fourteen percent more money for health care per prisoner than the national average; yet, as of 1999, only two of the correctional treatment centers had met the minimal standards required for licensing by the state.⁴³ Because these centers often serve as a patient's gateway to more comprehensive care in a twenty-four hour facility, inadequacies at these facilities can prevent effective treatment of inmates with critical or chronic health care problems.⁴⁴ Further, California is one of only six states that do not meet the standards required for accreditation by any organization that specializes in assuring care standards for prison health services.⁴⁵

A variety of problems plague the CDC's health care system, but two overarching issues – a lack of access to care and an inadequate quality control system – prevent the delivery of acceptable medical care to both male and female prisoners. In addition to these problems, women face a number of obstacles ranging from the disregard of their specific health care needs to sexual harassment by doctors and medical staff. In this section, the CDC's larger problems are first explored, followed by an analysis of the way these problems tie into women inmates' health care challenges and how these problems interact to condemn California's women inmates to health care so bad it kills.

A. SYSTEM WIDE PROBLEMS WITH CDC'S MEDICAL CARE

For most California prisoners, the most difficult part of obtaining treatment from medical staff is gaining access to a doctor. A co-payment requirement and the system's use of Medical Technical Assistants ("MTAs") – guards with vocational nursing skills – serve as obstacles that keep genuinely sick prisoners from accessing needed medical care.⁴⁶ Once inmates do gain access to the CDC health care system, poor file maintenance and the lack of a statewide reporting system make it impossible to ensure that patients receive needed follow-up care.⁴⁷ These factors keep CDC administrators conveniently ignorant of the overall quality or cost of

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 21.

45. Stoller, *supra* note 23, at 12-13. The American Public Health Association, the National Commission on Correctional Health Care, the American Correctional Association, and U.N. have all established standards for penal health care. *Id.* The National Commission on Correctional Health Care was created by the American Medical Association and is the leading national organization whose aim is improving and accrediting health care in jails and prisons across the country. *Id.*

46. *Id.* at 9-10.

47. *Id.* at 9.

health care to prisoners.

In November 1994, the California legislature passed a law allowing the CDC to charge inmates a five dollar co-pay for each medical visit they request, even if the visit is for preventative care.⁴⁸ If an inmate does not have the five dollars in her prison account at the time of service, the money is withdrawn when the balance reaches five dollars.⁴⁹ The goal of the legislation was to reduce by fifty percent the number of inmate visits by eliminating frivolous medical requests, while generating additional revenue for the state.⁵⁰ However, from 1996 to 2000, this program has only brought in an average of \$645,000 per year, while the system appears to cost \$3.2 million to administer annually.⁵¹ The system's fiscal failure is only a small part of co-pay program's problems. Because California does not apply the state minimum wage requirements to prison labor, inmates who work within the prison make approximately fifteen cents an hour, and many prisoners lack a "pay number" so they cannot earn any money while incarcerated.⁵² When combined with the above-market prices prisoners must pay for basic personal hygiene products, such as soap and shampoo, the cost of the co-pay is a strong disincentive, even for truly sick individuals, to seek medical care.⁵³ This system is especially hard on women, who are forced to pay two to three times the market rate in prison for female hygiene products, such as sanitary pads; those who have less than five dollars in their account receive only five free pads per month.⁵⁴

More problematic than the required co-pay are the Medical Technical Assistants who make life and death decisions regarding inmates' health and their access to medical care. MTAs are essentially guards with limited vocational nurse training.⁵⁵ Although their medical duties should be limited to dispensing medication and taking vital signs or medical histories,⁵⁶ they actually provide the bulk of medical care when a prison infirmary is closed.⁵⁷ In fact, several reports of bad, and sometimes even deadly, medical judgments made by MTAs have been brought to public attention.⁵⁸

48. CAL. PENAL CODE § 5007.5 (West 1994).

49. BUREAU OF STATE AUDITS, *supra* note 39, at 30.

50. CAL. PENAL CODE § 5007.5.

51. *Id.*

52. SENATE COMMITTEE ON PUBLIC SAFETY, BILL ANALYSIS SENATE BILL, 2001 Sen., Reg. Sess., at 5 (Cal. 2001), available at http://info.sen.ca.gov/pub/bill/sen/sb_0351-0400/sb_396_cfa_20010508_150052_sen_coomm.htm (last visited Mar. 28, 2002).

53. *Id.*

54. JUSTICE NOW, *Women in California Prisons 3*, in REPORT FOR LEGISLATIVE HEARINGS (2000) (on file with JUSTICE NOW and the author).

55. Sigal, *supra* note 29.

56. BUREAU OF STATE AUDITS, *supra* note 39, at 26.

57. SENATE COMMITTEE ON PUBLIC SAFETY, *supra* note 52, at 6.

58. Jim Davis, *Three Prison Deaths Questioned*, FRESNO BEE (Cal.), Dec. 20, 2000, at A1. See also Eric Baily, *Deaths of Women in State Prison Probed*, L.A. TIMES, Dec. 20, 2000, at A5; Sabin Russell, *Two More Die at Women's Prison in Chowchilla: Three of Seven Recent Deaths Under Investigation*, S.F. CHRON., Dec. 20, 2000, at A4. The December 2000 deaths of seven CCFW inmates persuaded the CDC officials to allow an independ-

California is one of only six states in the country that assigns formal medical responsibilities to members of its security staff.⁵⁹ Because conflicts arise when individuals in these roles are forced to weigh the security needs of the prison against the medical needs of inmates, the National Commission on Correction Health Care ("NCCHC") and all other national organizations promoting national standards of penal healthcare require a total separation of medical and custodial roles.⁶⁰ California's use of MTAs in prisoner medical care roles has prevented the state's accreditation by any correctional health organization.⁶¹ A 1999 United Nations report also singled out the CDC as a problem prison system because of its use of MTAs in place of full-time medical staff:

The Special Rapporteur has a general concern with regard to health services in California correctional facilities [M]edical Staff in California Prisons are employed by the Department of Corrections and not by the health authorities. In an increasingly conservative prison management climate in the state, where more and more resources are being spent on security, health services are neglected

⁶²

Beyond providing questionable medical care, the use of MTAs rather than fully accredited medical staff costs the CDC money.⁶³ Because of the MTA union contract, an MTA position can only be filled by another MTA, despite the amount of overtime this may involve.⁶⁴ As a result, positions

ent team of medical doctors to review the women's records. Davis, *supra*. The deaths of three of these women remain unexplained. *Id.* Eve Vallario, 33, collapsed outside a visiting room and died in the prison emergency room minutes later. *Id.* Dr. Kathleen Clonan, a professor at University of California at San Francisco medical school and a member of the independent review team, reported that Vallario apparently died after choking on her own vomit and that she believed better treatment might have saved the prisoner's life. *Id.* Stephanie Hardie, 34, died in the arms of her cellmate, Bobbie Smith, one week after unsuccessfully seeking medical attention for chest pain, stomach pain, and shortness of breath. *Id.* Smith reported that it took fifteen minutes for an MTA to respond to her cries for help. *Id.* Pamela Coffey, 46, complained for weeks of a large, painful knot in her side but was denied any treatment other than tablets of Benedryl, an over-the-counter antihistamine. Davis, *supra*. On December 2, 2000, she collapsed in her cell, but was not taken to the prison's emergency room. *Id.* Instead, an MTA checked her vital signs, decided that her situation was not critical, and left Coffey alone in her prison cell. *Id.* Coffey collapsed again. *Id.* This time it took twenty to thirty minutes for an MTA to respond, and Coffey died four hours later. *Id.*

59. LAMB-MECHANICK & NELSON, *supra* note 37, at 40. Only five states other than California have senior medical staff – doctors and nurses – responsible for security. *Id.*

60. Corey Weinstein, *Major Changes Required for CDoC Medical Services*, in REPORT FOR LEGISLATIVE HEARINGS (2000), available at <http://www.prisons.org/valley.htm>.

61. *Id.*

62. *Integration of the Human Rights of Women and the Gender Perspective, Violence Against Women. Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. ESCOR, 55th Sess., Agenda Item 12(a), at 43, U.N. Doc. E/CN.4/1999/68/Add.2 (1999).

63. BUREAU OF STATE AUDITS, *supra* note 39, at 27.

64. *Id.* at 26.

that could be filled by better qualified Registered Nurses are staffed exclusively by the less trained MTAs, and fifty-four percent of the health system's overtime goes to MTAs, even though they make up only twenty-two percent of the system's payroll.⁶⁵

System wide problems were outlined in 2000, when the State Auditor reported that "the California Department of Corrections has just begun to develop an infrastructure that is standard for managed care organizations The [CDC] can perform limited analyses and reviews of health care services, but it does not conduct comprehensive reviews that are systematic and proactive."⁶⁶ The CDC's own deputy director of the health care services division admitted that his division "is crippled by the lack of data and staff to analyze the data."⁶⁷

The lack of review comes from the CDC's reliance upon paper files rather than a system-wide computer database. This antiquated paper system is not capable of tracking individual cases and ensuring that needed follow-up care occurs, leaving the department blind to problems until a serious incident occurs.⁶⁸ Assessment of the CDC's medical records for 1998-1999 by the State Auditor revealed 1770 patients who visited the infirmary for care at some point during the year had incomplete charts.⁶⁹ Allegations have been made that a lack of oversight allowed medical personnel to tamper with California Correctional Women's Facility and Valley State Prison for Women inmate files in order to appear in compliance with the *Shumate* settlement.⁷⁰ In addition, the CDC's dearth of knowledge about the health care system results in higher costs. As of 2000, the CDC spent \$442 million in health care costs, but only purchased forty percent of its drugs on contract.⁷¹ By not conforming to basic managed care organization information collection, the CDC allows poor medical care to continue undetected and bad purchasing policies drive up costs indefinitely.

B. WOMEN FACE ADDITIONAL MEDICAL CARE HARDSHIPS IN THE CDC SYSTEM

The number of women in California's jails and prisons quadrupled from 4432 in 1980, to 23,597 in 2000.⁷² Because women entering the criminal justice system suffer from multiple illnesses, drug dependency, and a variety of mental and physical ailments arising directly from sexual and physical abuse, female inmates are at a higher risk for a variety of dis-

65. *Id.* at 27.

66. *Id.* at 14.

67. *Id.*

68. *Id.*

69. BUREAU OF STATE AUDITS, *supra* note 39, at 16.

70. *Prison watchdog groups claim state tampered with medical records*, ASSOCIATED PRESS, July 31, 2000, at <http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2000/07/31/state2135EDT0262.DTL>.

71. BUREAU OF STATE AUDITS, *supra* note 39, at 39.

72. McCormick, *supra* note 21. Although this number includes both jail and prison statistics, overall impact shows a trend that has been recorded by the CDC.

eases than the public at large.⁷³ Despite these facts, the CDC has continued to employ medical protocols and allocate health care resources using a healthy, young male as its model prisoner. According to Dr. Corey Weinstein, past Chair of the Jail and Prison Health Committee and present member of the Governing Council of the American Public Health Association, this model cannot work:

The sick call system [in which prisoners only receive care when they request it for illness] was developed for the military, where most of the people are healthier than the norm. It works for the military because if you have chronic problems, you won't be in the military to begin with. Here you have the opposite. You have a population of women who are expected to be at risk and to have chronic problems. [CDC officials] cannot meet the challenge of women with chronic illnesses, and they have no backup.⁷⁴

Furthermore, as a result of California's "three strikes" legislation, a larger number of crimes with mandatory minimum sentences, and a crack-down on drug offenses,⁷⁵ women are aging behind bars. Numbers of women are passing through menopause and experiencing the natural effects of growing older in prison. Women suffering from chronic diseases such as HIV, Hepatitis C, and breast cancer will remain under the CDC's care longer.⁷⁶

There is evidence that the CDC does spend more money on health care for female inmates than male prisoners – approximately \$1100 more per inmate in 1994.⁷⁷ CDC spokespeople have proclaimed that "the average amount of money we [the CDC] spend on women exceeds what we spend on male inmates. We make every effort to provide quality care for all our inmates."⁷⁸ However, given the evidence that spending by the CDC does not translate into better health care, the additional funds spent on women inmates' health care needs do not mean that women prisoners are receiving adequate care.

The first problem for women prisoners is access to health care. In addition to the problems that co-pays cause for all prisoners, women must contend with sexual harassment by both guards and doctors. A 2000 study of 1200 women inmates found that at least nineteen percent of them suffered some form of sexual harassment by prison staff.⁷⁹ This abuse ranged from inappropriate remarks by MTAs and health care staff to male doctors performing unnecessary pelvic exams on women only seeking medical help

73. Sigal, *supra* note 29.

74. *Id.*

75. McCormick, *supra* note 21.

76. Stoller, *supra* note 23, at 34.

77. *Id.*

78. *Id.*

79. *Id.*

for a headache.⁸⁰ Given that approximately eighty percent of female inmates have already suffered physical or sexual abuse before entering the prison system,⁸¹ even the fear of potential sexual harassment proves a serious obstacle for women attempting to seek medical attention.

Second, the level of preventative health care provided to women for gender specific diseases such as cervical cancer is substandard. On July 6, 2000, the *San Francisco Chronicle* revealed that the laboratory contracted by the CDC to process medical tests, B.C.L. Clinical Labs ("B.C.L.") had falsified thousands of test results for diseases such as cervical cancer since the early 1990s.⁸² Health officials closed B.C.L. in 1997.⁸³ However, even after the CDC was informed of the problem at the lab, little time or effort was made to retest inmates or even notify them of their questionable test results until the *San Francisco Chronicle* broke the story three years later.⁸⁴ Incidents like these pose an immediate and serious health risk to the entire female inmate population in California. According to the Centers for Disease Control, an estimated 4400 women in the United States died of cervical cancer in 2001.⁸⁵ A disproportionate number of those women stricken with cervical cancer come from racial and ethnic minority and low-income groups, the same populations that make up a majority of the female inmate population.⁸⁶ When detected early, cervical cancer is among the most treatable types of cancer.⁸⁷ By refusing to provide California's women inmates with accurate yearly cervical cancer screenings through a quick and easy pap smear, the CDC places these inmates at unnecessary risk.

The CDC also fails to meet basic health care standards regarding yearly checkups and diagnosis for breast cancer. Approximately one in eight women in the United States will fall prey to this disease during her lifetime. Good medical practice requires yearly mammograms for women over the age of 40.⁸⁸ According to the National Institute of Health, if any woman exhibits breast lumps that a mammogram cannot rule benign, a doctor should perform further tests with either an ultrasound or a biopsy of breast lumps in order to rule out cancer.⁸⁹ Despite acknowledgment by the Cen-

80. *Nightline: Crime and Punishment, Women in Prison* (ABC television broadcast, Nov. 2, 1999).

81. Terry Kupers, M.D. & JUSTICE NOW, *Women in California Prisons: Mental Health*, in REPORT FOR LEGISLATIVE HEARINGS (2000) (on file with JUSTICE NOW and the author).

82. Sabine Russell, *State Fumbles Prison Lab Testing: Company's Fake Results May Never Have Been Corrected*, S.F. CHRON., Dec. 20, 2000, at A1.

83. *Id.*

84. *Id.*

85. U.S. CENTERS FOR DISEASE CONTROL, *Breast and Cervical Cancer Screening: Preventing Deaths Among Women*, at <http://www.cdc.gov/cancer/nbccedp/about.htm> (last visited Feb. 7, 2002).

86. *Id.* See also McCormick, *supra* note 21.

87. See U.S. CENTERS FOR DISEASE CONTROL, *supra* note 85.

88. NATIONAL CANCER INSTITUTE, *Questions and Answers About Screening Mammograms*, at http://cis.nci.gov/fact5_28.htm (Dec. 26, 2000).

89. NATIONAL CANCER INSTITUTE, *Improving Methods for Breast Cancer Detection and Diagnosis*, at http://cis.nci.nih.gov/fact/5_14.htm (Dec. 26, 2001).

ters for Disease Control and the National Institute for Health that women need gynecological and breast cancer testing to determine their baseline level of health, the CDC performs no such tests when women are first admitted to prison.⁹⁰

Third, the CDC fails in the diagnosis and treatment of chronic diseases. Although there are a variety of illnesses that affect women, the lack of adequate care is especially visible with diseases like HIV and Hepatitis C. According to the CDC, forty percent of California's inmates are infected with Hepatitis C,⁹¹ but the prison system fails to perform blood tests for the disease during intake processing of either male or female inmates.⁹² Because Hepatitis C, like HIV, is spread through contact with bodily fluids, the CDC places prisoners at risk for both diseases when it places unknowingly infected women in tight quarters with other inmates without informing them of their health status or explaining to them how they can prevent the spread of the disease.⁹³ Hepatitis C often develops into chronic hepatitis, which in turn may lead to cirrhosis, liver cancer, and ultimately liver failure, but thirty percent of individuals suffering from Hepatitis C can be cured of the virus through medical treatment.⁹⁴ By neglecting to test these women and then incarcerating them beyond the reach of community health programs, the CDC limits women's ability to receive treatment for this virus until symptoms have arisen and irreversible damage to the liver has already occurred.⁹⁵

Once a woman has been diagnosed, she finds it a constant struggle to receive her daily doses of HIV or Hepatitis C medications on time, even though an essential aspect of successful treatment for either disease is consistent medication and frequent follow-up care.⁹⁶ The Stoller report found that twenty-two percent of women prisoners had missed necessary medications at least once and many stated they missed them repeatedly.⁹⁷

These stories and statistics demonstrate an alarming, systemic lack of care in the CDC health care system for all inmates, particularly women. Yet, they only reflect part of the picture. The results of bad care are not mere percentage points in a government audit, but the maiming and death of real women who are serving time for nonviolent crimes. The calamity of these women's deaths extends beyond the loss of their lives, for approximately eighty percent of women in California's prisons are single

90. LAMB-MECHANICK & NELSON, *supra* note 37, at 63.

91. JUSTICE NOW, *supra* note 12.

92. LAMB-MECHANICK & NELSON, *supra* note 37, at 63.

93. NATIONAL CENTER FOR INFECTIOUS DISEASES, *Viral Hepatitis C Fact Sheet*, at <http://www.cdc.gov/ncidod/diseases/hepatitis/c/fact.htm> (last visited Feb.1, 2002).

94. NATIONAL CENTER FOR INFECTIOUS DISEASES, *Viral Hepatitis C FAQ*, at <http://www.cdc.gov/ncidod/diseases/hepatitis/c/chronic.htm> (last visited Feb.1, 2002).

95. *Id.* Because Hepatitis C does not necessarily have symptoms, individuals can suffer damage before knowing that they even suffer from the disease or pass the disease along to someone else.

96. Stoller, *supra* note 23, at 4.

97. *Id.*

mothers; when the CDC indifferently allows women to die, it not only needlessly takes lives, it destroys families and creates orphans.⁹⁸

III. THE PLRA'S DEADLY INTERACTION WITH CALIFORNIA'S PRISON ADMINISTRATION LAWS

Throughout most of this country's history, prisoners have been treated as "slaves of the state" – individuals without rights and beneath the notice of the federal courts.⁹⁹ This changed radically during the Warren Court in response to litigation brought by civil rights lawyers during the 1960s and 1970s.¹⁰⁰ Prisoners were transformed from "slaves" into persons retaining some constitutional rights worthy of protection by the federal courts.¹⁰¹ In response to increasing prisoners' complaints of inhumane treatment in state and federal prisons, the Supreme Court expanded prisoners' substantive rights and the types of remedies the courts could provide to them.¹⁰² Congress did not object and allowed the courts to actively intervene in state prison systems for nearly twenty years.¹⁰³ However, in 1980, Congress became concerned about the number of suits being filed by prisoner litigants, as well as the effect federal judicial activism was having on the state penal system.¹⁰⁴ In response, Congress passed the Civil Rights of Institutionalized Persons Act ("CRIPA").¹⁰⁵

CRIPA was a well-researched, extensively debated piece of legislation¹⁰⁶ that tried to balance "systematic deprivations of the constitutional and [f]ederal statutory rights" with what it considered an overflow of cases into the federal court system.¹⁰⁷ In order to ensure that states could not treat prisoners inhumanely, CRIPA empowered the U.S. Attorney General to litigate against unconstitutional prison conditions on behalf of the incar-

98. JUSTICE NOW, *Women in California Prisons: Children & Families*, in REPORT FOR LEGISLATIVE HEARINGS (2000) (on file with Justice NOW and author).

99. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) (1871) (holding a prisoner is "for the time being a slave, in a condition of penal servitude to the State, and subject to such laws and regulations as the State may choose to prescribe."). See also FEELEY & RUBIN, *supra* note 24, at 30-34.

100. *Id.*

101. *Id.*

102. See, e.g. *United States v. Muniz*, 374 U.S. 150, 153 (1963) (holding that federal prisoners have the right to sue under the Federal Tort Claims Act for injuries they receive while in federal custody); *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (holding that a prisoner's right to access the courts means that prison authorities must assist prisoners with the filing of "meaningful legal papers" by providing adequate law libraries); *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977) (holding that when the state attempts to punish prisoners, the state cannot impose punishment without granting the defendant his Fourteenth Amendment due process rights).

103. FEELEY & RUBIN, *supra* note 24, at 30-34.

104. *Id.*

105. 42 U.S.C. § 1977 (2001).

106. Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn From It*, 86 CORNELL L. REV. 483, 501 (2001).

107. S. REP. No. 96,416, at 1 (1980), reprinted in 1980 U.S.C.C.A.N. 787, 788.

cerated.¹⁰⁸ At the same time, it attempted to place power over the day-to-day running of prisons back in the hands of the state by requiring prisoners to exhaust a state's administrative procedures before turning to the federal courts. These procedures were to meet a number of standards set by the Attorney General.¹⁰⁹

Congress hoped states would take the initiative and create effective grievance procedures that would allow most problems to be resolved by the states and within the prison system.¹¹⁰ Unfortunately, few states made the effort to create effective grievance procedures and judges were free to use discretion in deciding whether to allow prisoner complaints into federal court, regardless of how prisoners had utilized any existing administrative procedures.¹¹¹ Although this act attempted to reduce the number of inadequate lawsuits by placing limits on the ways prisoners could sue, Congress never stated or implied that prisoners did not have legitimate complaints deserving the attention of the federal courts.¹¹²

This respect for legitimate prisoner litigation faded rapidly in the 1990s as Congress members of both parties jumped on the "tough on crime" political wave.¹¹³ In 1996, this wave crested and crashed into the federal court system with the passage of the Prison Litigation Reform Act. Unlike the carefully crafted CRIPA, the PLRA was hurriedly passed by Congress as a rider to the Balanced Budget Downpayment Act of 1996.¹¹⁴ Senate leaders, such as Kansas Senator Robert Dole, told horror stories of prisoners bringing suits over trifles such as being served crunchy or smooth peanut butter.¹¹⁵ The fact that these stories were patently untrue,¹¹⁶ and that

108. *Id.* at 3.

109. 42 U.S.C. § 1977.

110. *Id.* at § 1271.

111. *Id.*

112. *Id.*

113. *GOP's Contract With America*, CHI. SUN-TIMES, Nov. 10, 1994, at 24. During the Republican Party's campaign in 1994, Republican legislators committed themselves to "get[ting] tough with an effective, believable and timely death penalty for violent offenders." *Id.* They also sought to "reduce crime by building more prisons, making sentences longer and putting more police on the streets." *Id.*

114. Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1277 (1998).

115. 141 CONG. REC. S14,413 (daily ed. Sept. 27, 1995).

116. Hon. Newman, *supra* note 33, at 519-22. The Honorable Jon Newman, Chief Judge, United States Court of Appeals, Second Circuit, was concerned about the descriptions of frivolous lawsuits filed by *pro se* prison litigants and discovered the following:

I was skeptical of the description of these . . . cases. I obtained the court documents on these three cases [the peanut butter, salad bar, and beige rather than white towel cases] and learned the following. In the "salad bar" case, forty-three prisoners filed a twenty-seven page complaint alleging major prison deficiencies including overcrowding, forced confinement of prisoners with contagious diseases, lack of proper ventilation, lack of sufficient food, and food contaminated by rodents. The prisoners' reference to salads was part of an allegation that their basic nutritional needs were not being met, and they mentioned, in passing, that at their prison a salad bar is available for prison guards and, at other state prisons, is available for prisoners.

the Judiciary Committee had not even issued a report on the issue, did not deter Congress and the bill became law.¹¹⁷ The Act passed so quickly and with so little research that some of its provisions conflicted with laws already on the books. Furthermore, the title was not changed from the Prison Litigation Reform Act of 1995, even though it passed in 1996.¹¹⁸ This section lays out what limitations were passed in the PLRA and how these restrictions interact with California's ineffective administrative laws to make it almost impossible for a desperately ill woman inmate to seek a federal court injunction that could save her life.

A. AN OVERVIEW OF THE PLRA

The PLRA attempts to use both financial and non-financial disincentives to keep prisoners from filing suits pursuant to 42 U.S.C. section 1983. First, the Act states that if a prisoner files her suit *in forma pauperis*, the court can review the merits of the claim while it reviews the prisoner's affidavit of indigence.¹¹⁹ The court has always had the right to dismiss such a claim *sua sponte* if it appeared to be frivolous or malicious, however, the PLRA forces courts to dismiss complaints rather than allow prisoners to amend their complaint if the prisoner fails to properly state a claim or if the

The complaint concerned dangerously unhealthy prison conditions, not the lack of a salad bar.

In the "beige towel" case, the suit was not brought because of a color preference. The prisoner's claim was that the prison had confiscated the towels and a jacket that the prisoner's family had sent him, and then disciplined him with loss of privileges for receipt of the package from his family. As he stated, the confiscation "caused a burden on my family who work hard and had to make sacrifices to buy me the items mentioned in this claim."

In the "chunky peanut butter" case, the prisoner did not sue because he received the wrong kind of peanut butter. He sued because the prison had incorrectly debited his prison account \$2.50 under the following circumstances. He had ordered two jars of peanut butter; one sent by the canteen was the wrong kind, and a guard had quite willingly taken back the wrong product and assured the prisoner that the item he had ordered and paid for would be sent the next day. Unfortunately, the authorities transferred the prisoner that night to another prison, and his prison account remained charged the \$2.50 for the item that he ordered but never received.

The "chunky peanut butter" case has become the favorite canard of those who wish to ridicule prisoner litigation. Many journalists have reported it, using the inaccurate description of the case popularized by the attorneys' general. Their misleading characterization of the case was repeatedly cited during congressional consideration of proposals to limit prisoner litigation.

I readily acknowledge that \$2.50 is not a large sum of money, and there is a substantial argument that lawsuits for such sums should be relegated to the forums other than federal district courts. But such a sum is not trivial to the prisoner whose limited prison funds are improperly debited. *The more important point is that those in positions of responsibility should not ridicule all prisoner lawsuits by perpetuating myths about some of them.*

Id. (emphasis added).

117. Herman, *supra* note 114, at 1277.

118. *Id.*

119. 28 U.S.C. § 1915(d) (2001).

defendants appear entitled to raise an immunity defense.¹²⁰

This may seem an innocuous requirement until one considers the incredibly high standards that must be met by prisoner-plaintiffs using the Eighth Amendment to seek injunctive or monetary relief. In order to make a successful complaint of inadequate medical care, a plaintiff's case must pass the two-prong test stated in *Farmer v. Brennan*.¹²¹ First, there must be a "sufficiently serious" deprivation of items considered "the minimal civilized measure of life's necessities," or "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm."¹²² Second, the prisoner must show that the official's state of mind was one of deliberate indifference; in other words, the prison official is only liable if he had actual knowledge of danger to the prisoner and was deliberately indifferent to that danger.¹²³ This subjective second prong makes it extremely hard to prove a single occurrence of mistreatment. How would a female inmate in a California prison demonstrate that a nurse who failed to hand out needed AIDS medication was in fact deliberately indifferent to her needs? Individual female inmates making sexual harassment claims against guards pursuant to 42 U.S.C. section 1983 have faced similar problems, and some legal scholars argue that class action suits may be the only way to prove deliberate, systematic indifference by prison officials.¹²⁴

Even if a prisoner manages to state a proper claim, she is then faced with filing fees that must be paid despite her indigent status.¹²⁵ Additionally, if a prisoner brings more than three suits that are dismissed as frivolous or lacking in a valid claim, she cannot file a fourth suit *in forma pauperis* unless she is in imminent danger.¹²⁶

While lawyers could conceivably help prisoners overcome these obstacles, the PLRA's severe restrictions on attorneys' fees ensure that most lawyers cannot find it viable to do so. Attorneys only receive fees if their client's case is successful, and these fees must be "proportionally related" to any prospective relief provided by the court.¹²⁷ If a prisoner is awarded damages, twenty-five percent of that award must go to the attorney's fees.¹²⁸ The prisoner-plaintiff must pay the attorney's entire fee award if that award is no more than one hundred and fifty percent of the total award.¹²⁹

120. *Id.* § 1915(e)(2)(B)(iii)

121. 511 U.S. 825 (1994).

122. *Id.* at 832.

123. *Id.*

124. Amy Laderberg, Note, *The "Dirty Little Secret": Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse*, 40 WM. & MARY L. REV. 323, 329 (1998).

125. 28 U.S.C. § 1915(b).

126. *Id.* § 1915(g).

127. 42 U.S.C. § 1997e(d)(B)(i).

128. 42 U.S.C. § 1997e(d)(2).

129. *Id.* See also *Matin v. Hadix*, 527 U.S. 343, 353 (1998).

If these financial disincentives were not enough for a sick woman who already has to work for days to pay for a bar of soap, the PLRA can directly affect a prisoner's term of incarceration. If a federal court finds that a suit was filed with malicious purpose or to harass a defendant, or if the prisoner is deemed to have provided false information to the court, the prisoner will lose good time credit.¹³⁰

The amount of remedial relief a court can offer is small; a court can only provide the amount of prospective relief needed to remedy the violation of a federal right.¹³¹ That remedy must be "narrowly drawn" and use the "least intrusive means" of fixing the violation.¹³² If a court grants preliminary injunctive relief, the order will automatically expire ninety days after it is issued, unless the court makes the injunction permanent within those ninety days.¹³³ If a busy court does manage to make the findings necessary to issue a permanent injunction within the three month time frame, any party or intervener can file for immediate termination of the order if the injunction does not utilize the least intrusive means or the remedy is not the most narrowly drawn solution possible.¹³⁴ Upon this filing, a stay of thirty days is put in place so the federal court can rule on the motion, and the injunction is terminated if the court cannot do the fact finding required to rule on the motion within this time limit.¹³⁵ The court can extend the stay an additional sixty days "for good cause," but ironically, "[n]o postponement shall be permissible because of general congestion of the court's calendar."¹³⁶

Finally, and most deadly, the PLRA demands that inmates "exhaust" all of a state's administrative remedies before they can bring suit in federal court; all complaints that cannot clearly demonstrate the use of every possible prisoner grievance procedure are summarily dismissed.¹³⁷ This is a significantly more punitive approach to prisoner litigation than Congress took while crafting the well-drafted CRIPA. The PLRA dismantled three mechanisms that existed within CRIPA to ensure that legitimate prisoner suits were not lost in the effort to sift out the chaff of frivolous inmate lawsuits. First, rather than allowing judges to stay cases as prisoners work through their state's grievance procedure, the PLRA mandated that judges dismiss cases that do not clearly demonstrate the exhaustion of all administrative remedies.¹³⁸ Second, it eliminated any constraints on the amount of time a state's prison system could take to process a prisoner's grievance; under CRIPA a court could only force a prisoner to seek administrative re-

130. 28 U.S.C. § 1932.

131. 18 U.S.C. § 3626(a)(1)(A).

132. *Id.* § 3626(e)(2). See also *French v. Miller*, 530 U.S. 327, 333 (2000).

133. *Id.* § 3626(a)(2).

134. *Id.* § 3626(b)(2).

135. *Id.* § 3626(e)(2)(A)(i).

136. *Id.*

137. 42 U.S.C. § 1997e(a).

138. *Id.* § 1997e(a)(2).

dress for 180 days before being allowed to move forward on a suit.¹³⁹ Third, all federal oversight of the state's prison grievance procedures was eliminated. In CRIPA, Congress demanded that before requiring a prisoner to exhaust a state's administrative remedies, the administrative process must be "appropriate and in the interests of justice;" "plain, speedy, and effective;" and either meet five "minimum" standards set out by the Act or be "fair and effective."¹⁴⁰ However, under the PLRA, all a state had to do was make a grievance system available – any kind of grievance system.¹⁴¹

B. THE PLRA'S ELIMINATION OF PRISONER GRIEVANCE PROCEDURE STANDARDS HANDS THE CDC CARTE BLANC TO KILL WOMEN THROUGH ADMINISTRATIVE INDIFFERENCE

When the PLRA was first passed in 1996, judges had discretion to allow cases into federal court even if a prisoner had not exhausted each and every grievance procedure provided by the State.¹⁴² This changed with the PLRA's amendment in 1997, which ordered courts to dismiss all complaints when the prisoner could not demonstrate that she had exhausted each possible grievance procedure; "failure of a State to adopt or adhere to an administrative grievance procedure" was deemed irrelevant to a judge's weighing of a prisoner's suit.¹⁴³ This amendment to the PLRA has allowed the states to play a waiting game with sick inmates; until the prison system completes its handling of the grievance, the prisoner cannot seek relief from a federal court. All a prison administrator has to do is sit on a request for medical care long enough such that the problem goes away when the prisoner dies. Although not all prison systems use this PLRA loophole to essentially end their administrative grievance system, the CDC has taken advantage of the situation to perpetuate the employment of inadequately trained MTAs, allow inadequate medical testing by its contractors, and, in some cases, essentially execute physically ill women prisoners through administrative apathy.

At first glance, California's grievance procedure may appear adequate. According to *Barry v. Ratelle*:

The State of California provides its prisoners and parolees the right to appeal administratively "any departmental decision, action, condition or policy perceived by those individuals as adversely affecting their welfare." In order to exhaust available administrative remedies within this system, a prisoner must proceed through several levels of appeal: (1) informal resolution, (2) formal written appeal on a CDC 602 inmate appeal form, (3) second level appeal to the institution head or designee, and (4) third level appeal to the

139. *Id.* § 1997e(a)(1).

140. *Booth v. Churner*, 532 U.S. 731, 739-40 (2001).

141. *Id.*

142. *Id.*

143. *Id.*

Director of the California Department of Corrections. A final decision from the Director's level of review satisfies the exhaustion requirement under § 1997e(a).¹⁴⁴

However, this simple review of the steps in California's grievance policy leaves out an essential element: the amount of time the state has to complete each step of the process. The current system demands that any inmate wanting to appeal an administrative health care decision must submit a 602 appeal form to designated prison staff within fifteen working days of the questioned decision or event.¹⁴⁵ Inmates are supposed to receive an informal response within ten days, but formal responses can take up to thirty days.¹⁴⁶ Second level appeal responses can take up to twenty days; and third level appeals need not be responded to for sixty days.¹⁴⁷ These time limits can also be extended by CDC officials "in the event of . . . complexity of the decision, action or policy."¹⁴⁸ Further, the CDC is not required to inform an inmate of the status of her claim unless "an exceptional delay prevents completion of the review within the specific time limits [in which case] the appellant shall be informed in writing of the reasons for the delay and estimated completion date."¹⁴⁹

An exception to the appeals process provides for a response within five days "when circumstances are such that the regular appeal time limits may result in a threat to the appellant's safety or cause other serious and irreparable harm."¹⁵⁰ However, medical tests such as biopsies of breast lumps and tests for diseases such as Hepatitis C do not seem to qualify for the exception.¹⁵¹ In essence, there are no teeth to the appeal time limits, and CDC officials can effectively ignore prisoner appeals for health care for as long as they want, with deadly results for women inmates.¹⁵²

144. *Barry v. Ratelle*, 985 F. Supp. 1235, 1237-38 (S.D. Cal. 1997), citing CAL. CODE REGS. tit. 15, § 3084.1(a) (2000).

145. CAL. CODE REGS. tit. 15, § 3084.4.

146. *Id.* § 3084.6.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* § 3084.7.

151. *Stoller*, *supra* note 23, at 60-96. This observation is based upon extensive anecdotal evidence gathered by Nancy Stoller that women prisoner's appeals for diagnostic tests are not quickly addressed by the five day expedited appeal process.

152. See generally LEGAL SERVICES FOR PRISONERS WITH CHILDREN, *Summary Report on Shumate v. Wilson*, in REPORT FOR LEGISLATIVE HEARINGS (2000) (copy on file with LEGAL SERVICES FOR PRISONERS WITH CHILDREN and the author). This administrative problem takes on even more poignancy when the death from cancer of Valley State Women Prison inmate Tina Balagno is considered. Balagno had a breast lump that was discovered by the prison physician during her intake exam in June 1998. *Id.* at 2-3. She did not receive a needed mastectomy until November 4, 1998, because of a five month delay in diagnostic procedures. *Id.* By then her cancer had metastasized and was eating away at her bones. *Id.* She was granted compassionate release on February 3, 1999, and died a week later. *Id.* Although it is unclear whether problems with the 602 appeals process were the cause of the diagnostic procedure delay, Balagno's death demonstrates how deadly a time delay in medical treatment can be. A full appeal through the CDC's process can take almost four months

In contrast, an inmate in New York who files a grievance form will receive either an informal resolution to the problem within seven days or a hearing in which "all direct parties to the grievance, and any witnesses, if any, shall be afforded an opportunity to appear."¹⁵³ After the hearing, the grievance council must provide the inmate a written decision within two days.¹⁵⁴ An inmate can immediately appeal this decision and a superintendent will render an answer within ten days.¹⁵⁵ If an inmate decides to again appeal the decision, it is forwarded to the top correctional supervisory board and an answer must be given within twenty days.¹⁵⁶ Furthermore, the regulations mandate that "time limit extensions may be requested at any level of review, but such extensions *may be granted only with the written consent of the grievant. Absent such an extension, a matter not decided within the time limits may be appealed to the next step.*"¹⁵⁷ A dispute whose resolution California would typically deal with in three months – but which could possibly be in limbo forever – is handled by New York in only a month and a half.

To put this into perspective, there are pregnant women who will carry and deliver their babies inside the walls of California prisons. Being forced to wait three days, much less three months, for adequate care during pregnancy condemns both the prisoner and an innocent child to unnecessary injury or death. It is irrefutable that there are specific and vital issues concerning women's health care that are intimately time sensitive. In its haste to enact the PLRA, Congress failed to consider how this legislation would interact with poorly written or poorly enforced administrative grievance procedures by state prison systems. As a result, Congress has inadvertently given the CDC the power to kill women inmates and their unborn children through administrative indifference.

IV. FEDERAL AND STATE COURTS OFFER LITTLE HOPE TO SICK WOMEN INMATES SEEKING NECESSARY MEDICAL CARE

In the 1960s and 1970s the federal and state courts played an essential role in improving inhumane prison conditions.¹⁵⁸ Even the more conservative justices of that period, such as Justice Stewart, recognized that the courts play an especially important part in assuring that prisoners' constitutional rights are not violated:

The relationship of state prisoners and the state officers who super-

if no time extensions are granted owing to the "complexity" of the issue. Meanwhile, it took only five months for cancer to move from Balagno's breast into her bones. *Id.*

153. N.Y. COMP. CODES R. & REGS. tit. 7, §701.7 (1998).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* § 701.8 (emphasis added).

158. FEELEY & RUBIN, *supra* note 24, at 36-49.

vise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State.¹⁵⁹

During the heyday of the Warren Court, prisoners were viewed as disempowered individuals and federal courts were responsible for ensuring that the States did not violate the constitutional rights prisoners retained in spite of their incarceration.¹⁶⁰ However, under Justice Rehnquist, the Supreme Court has taken a very different approach to prisoner litigation: concern for upholding prisoners' constitutional rights has been replaced by a commitment to states' rights.¹⁶¹ This devotion to federalist principles, combined with the harsh requirements of the PRLA, has transformed the federal courts from a place prisoners can go to seek relief into a protector of states' administrative policies regardless of the effects on individual inmates.

Despite the obstacles presented by the PLRA and the Supreme Court's federalist outlook, prisoners have consistently filed suits regarding violations of the Eighth Amendment in federal court rather than state court. Unfortunately, this has kept the California state courts from developing case law regarding prisoners' rights under either the United States or California Constitutions. Thus, today neither the federal nor the California state courts provide a direct and efficient way for women prisoners to obtain injunctions that will force the CDC to address these women's essential medical needs. This section explains why the federal and California state courts are unlikely to provide a solution, but, it nevertheless provides an avenue that an inmate could try to exploit, and thusly, break the PLRA stranglehold. In addition, this section offers a possible place from which inmates can start if they wish to bypass the federal court system and seek a remedy under the California Constitution.

159. *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973).

160. *Herman*, *supra* note 114, at 1242.

161. *Bell v. Wollfish*, 441 U.S. 520, 562 (1979). Chief Justice Rehnquist provided his view on the federal court's treatment of prisoner civil rights litigation as author of the majority opinion, stating:

In recent years, however, these courts largely have discarded this "hands-off" attitude and have waded into the complex arena Many of these courts have, in the name of the Constitution, bec[o]me increasingly enmeshed in the minutiae of prison operations But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government the authority to initially devise the plan.

Id. See also Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 431-38, 464-77 (2000) (discussing the federalist jurisprudence of the Rehnquist Court and its focus on protecting state autonomy).

A. SLIM RAY OF HOPE: A FEW LOWER FEDERAL COURTS ARE HOLDING PRISONS TO THE PLRA STRICT STANDARDS

When presented with situations in which the statute was unclear regarding the extent of the federal courts' remedial discretion under the PLRA, the Court has followed an interpretation of the Act that restricts the role of the federal judiciary in prison litigation.¹⁶² As discussed in Part IA, under the Act, federal courts must work within strict time limits and their injunctions can be challenged by any intervener. Despite this unprecedented limitation on the federal courts' discretion, the Supreme Court has held that the PLRA's automatic stay provision is not a violation of separation-of-powers principles.¹⁶³ In 2001, the Court unanimously held that the PLRA requires a prisoner to exhaust all of her state's administrative remedies when seeking damages, *even though damages were not recoverable through the state's administrative process*.¹⁶⁴ Given this trend in PLRA jurisprudence and the current clamor for law and order in the wake of the September 11, 2001 attacks, it is unlikely that either the Supreme Court or Congress will rethink the PLRA in the near future. However, small glimmers of hope for California's women prisoners can be found in a couple of sentences in the Supreme Court's *Miller v. French* decision, as well as in a handful of cases arising from the lower federal courts. Justice Breyer's dissent in *Miller v. French* hints that there could be a due process challenge to the PLRA while appellate courts in the Ninth and Eleventh Circuits and district courts in northern California, Delaware, and New Jersey have begun to look closely at a prison's *actual* grievance system when determining whether or not a prisoner has exhausted her administrative remedies.

In 1997, William Barry filed a complaint in a southern California district court under 42 U.S.C. section 1983, seeking damages for deliberate indifference to his medical needs.¹⁶⁵ Barry alleged that he was diagnosed with a hernia in early 1996 and was told by prison doctors that he would require a truss to alleviate the pain of the hernia until surgery could be performed.¹⁶⁶ He received neither the truss nor the surgery, and after ten months he filed what prisoners call a "602," a grievance form requesting medical treatment.¹⁶⁷ CDC officials approved the surgery in December of that year, but Barry was told that security issues made it impossible for them to provide him with a date for the procedure.¹⁶⁸ Three months later, after hearing nothing further about his surgery, he requested a second level review of his 602 appeal.¹⁶⁹ The CDC did not respond within the required ten days and did not provide Barry any written reason why they would need

162. Massey, *supra* note 161 at 431-38, 464-77.

163. *Miller v. French*, 530 U.S. 327, 335-52 (2000).

164. *Booth v. Churner*, 532 U.S. 731, 734 (2001).

165. *Barry v. Ratelle*, 985 F. Supp. 1235, 1236-37 (S.D. Cal. 1997).

166. *Id.*

167. *Id.* at 1237-38.

168. *Id.* at 1238

169. *Id.*

more than the typical time period to respond.¹⁷⁰ On June 6, 1997, Barry finally appealed to the highest level, the Director's Level Review, but again heard nothing.¹⁷¹ In August 1997, more than one year after his diagnosis, he finally filed suit in federal court.¹⁷²

Although the suit was ultimately dismissed because of the plaintiff's failure to name the proper individuals in the complaint, the district court did find that "[b]ecause Plaintiff has attempted to appeal the prison officials' inaction with regard to his treatment to every level of the prison grievance system, it does not appear (and the moving party has not attempted to show) that Plaintiff has failed to exhaust his administrative remedies within the prison system."¹⁷³ In other words, the CDC was not allowed to hold a prisoner's appeal hostage simply by not responding to legitimate 602 appeals within a reasonable amount of time.

The Ninth Circuit Court of Appeals used similar logic when addressing the issue of the CDC's unresponsiveness to prisoner grievances in *Bishop v. Lewis*.¹⁷⁴ Bishop filed a 602 form with prison officials on March 6, 1994, complaining about bad air quality in the prison; he simultaneously filed a section 1983 suit in federal court.¹⁷⁵ The district court initially ordered him to exhaust all administrative remedies and then file a "Notice of Exhaustion of Administrative Remedies" to the court.¹⁷⁶ Bishop tried to get a response from prison officials and filed the necessary exhausting form, but received no response to his 602 appeal.¹⁷⁷ The district court held that he had not met the exhaustion requirement.¹⁷⁸ The Court of Appeals disagreed.¹⁷⁹ Even though Bishop had not appealed through the CDC's administrative levels, the court found that "[u]nder the circumstances, Bishop's failure to file the Form was understandable – he had already filed with the court a petition showing that he had unsuccessfully attempted resolution of his complaint through the grievance procedure."¹⁸⁰

Both of these cases were decided *before* Congress passed the PLRA language that "failure of a State to adopt or adhere to an administrative grievance procedure" was deemed irrelevant to a judge's weighing of a prisoner's suit.¹⁸¹ Thus, these courts had the ability to hold that a prisoner had met the requirements by substantially completing the exhaustion re-

170. *Id.*

171. *Barry v. Ratelle*, 985 F. Supp. at 1238.

172. *Id.* at 1236.

173. *Id.* at 1238.

174. *Bishop v. Lewis*, 155 F.3d 1094 (9th Cir. 1998).

175. *Id.* at 1096.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Bishop*, 155 F.3d at 1096.

181. 42 U.S.C. § 1997e(b). In fact, because *Bishop* was filed in 1994, it did not fall under PRLA, but functioned under CRIPA, which was only modified, not completely rewritten, by the PLRA.

quirement, thereby allowing the suit into federal court if it "would be appropriate and in the interests of justice."¹⁸² Although these case holdings are no longer good law, they do articulate the understanding that courts should examine whether a grievance system was actually effective when deciding what a prisoner can practically be expected to do when faced with completely unresponsive jailers.

Since the passage of section 1997e(a) of the PLRA, some lower courts have continued to look at real, rather than theoretical workings of a prison's grievance procedure in deciding what "exhaustion" really means when applied to that particular prison system. However, instead of looking at whether or not a prisoner substantially met the exhaustion requirement, courts now examine whether there was any further real grievance system the prisoner could utilize. If not, the prisoner could not and need not take any steps before bringing her suit to federal court.

In *Concepcion v. Morton*, a New Jersey district court held that if a prison system does not have a formally recognized grievance system, but only an informal procedure developed and run by individual wardens, there is no administrative procedure as recognized by 42 U.S.C. section 1997e(a).¹⁸³ Although this holding does not directly apply to California, because California possesses a formal, codified administrative procedure, this case demonstrates the lower courts' willingness to find that prisoners do meet the stricter requirements of section 1997e(a) when a prison system's administrative inadequacies make exhaustion virtually impossible.

A ruling by the Eleventh Circuit Court of Appeals supports this practical approach to the PLRA's exhaustion requirement. In *Miller v. Tanner*, the plaintiff stated that upon arriving at a Georgia state prison on April 18, 1996, he was dragged out of a van and beaten by the guards.¹⁸⁴ Miller was taken to the prison's infirmary, but the on-duty doctor refused to treat him, despite the fact that he was a paraplegic as a result of an earlier injury.¹⁸⁵ In addition to receiving no medical care, he was placed on the concrete floor of a cell lacking the accommodations a disabled inmate requires. Because the guards denied him use of a wheelchair or leg braces, he was unable to care for himself and became covered with his own waste.¹⁸⁶

Miller filled out a grievance form on April 25, 1996, but did not sign his name or put the date on it because the form did not specifically ask for these pieces of information.¹⁸⁷ On May 22, he received a memo from a grievance administrator informing him that his grievance had been denied because of the missing signature and date and that he could not appeal the matter because the complaint had been terminated at the institutional

182. 42 U.S.C. § 1997e(a).

183. *Concepcion v. Morton*, 125 F. Supp. 2d 111, 121 (D.N.J. 2000).

184. *Miller v. Tanner*, 196 F.3d 1190, 1191 (11th Cir. 1999).

185. *Id.*

186. *Id.* at 1191-92.

187. *Id.*

level.¹⁸⁸ The Eleventh Circuit, unlike the New Jersey district court in *Concepcion v. Morton*, determined that Georgia did make administrative remedies available to prisoners.¹⁸⁹ However, Georgia's grievance policy did not require that an inmate actually sign anything until a response to a complaint was issued by the warden or grievance supervisor, at which time the inmate must sign a form indicating that he received a response to his complaint.¹⁹⁰ Because the form had to be turned in to a grievance counselor who then confirmed its receipt, administrators would be able to track the complaint with or without his signature.¹⁹¹

The prison system attempted to argue that a signature on a complaint is a "common sense procedural requirement," but the court was unmoved by this argument stating: "If the [Georgia Department of Corrections] thought signing and dating the form was a common sense requirement, it should have included the requirement in its grievance [procedure]."¹⁹² The court also found that a prisoner should be able to rely on the advice of an appropriate prison official when attempting to comply with a prison's grievance procedure.¹⁹³

This holding, when combined with the *Concepcion* decision, indicates that some federal courts are allowing prisoners with legitimate claims to overcome the strict exhaustion requirements of the PLRA by holding states to a similarly strict standard of compliance in the development and enforcement of their own administrative procedures. If a prison system does not have a real administrative system, then the inmate can bring her claim directly to court; if the system does have a real administrative system, then prisoners must follow this procedure, but they are not expected to read the minds of their jailers when attempting to follow these procedures. Nor is the inmate expected to continue the administrative process when definitely told by a prison official that their administrative appeal has been denied. The approach bypasses the recent *Booth* case – which held that a prisoner must exhaust all of her state's administrative remedies even when the state's administrative process could not provide the relief she sought¹⁹⁴ – because the court is not focusing on what the prisoner requests, but on inadequacies in the grievance process that would render it practically impossible for the prisoner to request any relief.

Using the above cases, it may be argued that under *Miller v. Tanner* a prison must abide by its own procedures. If the CDC did not offer any response to a prisoner within the statutory time limits that its administrative procedure prescribed, then it could be argued that a California inmate who tries to take 602 appeals up to the highest level in the CDC has fulfilled the

188. *Id.*

189. *Id.* at 1193.

190. *Miller v. Tanner*, 196 F.3d at 1193.

191. *Id.*

192. *Id.* at 1194.

193. *Id.*

194. *Booth v. Churner*, 532 U.S. 731, 734 (2001).

exhaustion requirement and should be allowed to seek relief in federal courts. Because there is not yet a ruling on point in the Ninth Circuit regarding this issue, the outcome of such a case is unclear. But this point can be strongly argued when this issue does inevitably arise. Even if precedent could be made requiring that the CDC abide by its own guidelines, under the best case scenario, a prisoner may wait up to ninety days to have her complaint appealed through the highest level of review in the CDC. Given that many of California's women inmates suffer from serious diseases, such as HIV and Hepatitis C, three months can simply be too long.

Another argument California women inmates could make in federal court comes from a few sentences in *French v. Miller*. Although the majority declared the PLRA's automatic stay provision constitutional, it recognized that a due process claim against the Act is possible:

[W]hether the time [of the automatic stay] is so short that it deprives litigants of a meaningful opportunity to be heard is a due process question, an issue that is not before us. We leave open, therefore, the question whether this time limit, particularly in a complex case, may implicate due process concerns.¹⁹⁵

If the Act could be found to violate a prisoner's due process rights because the automatic stay provision kept her from effectively being heard in court, then it seems that a PLRA provision that allows California, through its ineffective grievance process, to keep women prisoners from litigating their claims for long periods time – time during which the complaint can become moot because the individual dies as a result of inadequate health-care – could be found in violation of due process. This author is not optimistic that the Court will be swayed by such an argument given the recent holding in *Booth*; however, a due process argument against the CDC's handling of 602 appeal forms is an avenue prisoners can try to use in an attempt to lessen the PLRA's chokehold on legitimate prisoner suits.

B. ATTEMPTING A ROUNDABOUT WAY: POTENTIAL SOLUTIONS USING CALIFORNIA STATE LAW

Article I, section twenty-four of the California Constitution prohibits "cruel or unusual punishment" of its citizens.¹⁹⁶ Although the language of this article is similar to the wording found in the Eighth Amendment of the U.S. Constitution, the California Supreme Court held that there is a substantive difference between the two clauses and a separate constitutional analysis is required for each constitution.¹⁹⁷ Unfortunately, this author was

195. *French v. Miller*, 530 U.S. 327, 350 (2000).

196. CAL. CONST. art. I, § 24 (2001) (emphasis added).

197. *Raven v. Deukmejian*, 52 Cal. 3d 336 (1990). Proposition 115, passed by statewide ballot in 1990, purported to amend Article I, section 24 of the California Constitution so that certain enumerated criminal law rights, such as the prohibition against cruel or unusual punishment, would be consistent with the U.S. Constitution. *Id.* at 342-43. The California Su-

unable to discover any cases that directly address whether an inmate can seek an injunction for immediate medical care using the prohibition against cruel or unusual punishment; all cases that even strayed close to this issue are declared unpublishable by the California Supreme Court.¹⁹⁸ It appears that both the California Supreme Court and the inmates involved believe the federal courts are the best place for this type of litigation. The reason for the California Supreme Court's reticence on this matter is unclear, but a case could easily be made that maiming and killing incarcerated women through inadequate health care constitutes cruel or unusual punishment under the California constitution. Further, because the *Farmer v. Brennan* holding is not precedent for an analysis by the California Supreme Court, women inmates would not have to show prison officials' "deliberate indifference" to substandard health care in order to prove that the CDC's health care violates the California Constitution.¹⁹⁹ Such an argument may prove to be a way for women prisoners to sidestep the PLRA in their quest to procure the medical procedures they need.

Another way around the PLRA using California state law can be found in California Government Code section 845.6.²⁰⁰ The statute makes a public entity liable for damages "where the employee is acting within the scope of his employment [and] if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take rea-

preme Court determined that this provision constituted an invalid constitutional revision rather than an amendment and struck it down. *Id.* at 355.

198. The author did an exhaustive search on this subject for all California constitutional case law on LEXIS NEXIS and could not find a case from the California Supreme Court or Appeals Courts that directly addressed this issue. The closest instance found was *Brignac v. Hudson*, No. D037386, 2001 Cal. App. LEXIS 3609 (4th Dist. Dec. 20, 2001), but in this case the plaintiff had filed a 42 U.S.C. section 1983 claim in state court. The California Supreme Court did not allow official publication of the decision.

199. *Farmer v. Brennan*, 511 U.S. 825 (1994) (holding that prisoners must meet both prongs of a two prong test to prove a 42 U.S.C. section 1983 claim for inadequate health care). First, there must be a "sufficiently serious" deprivation of items considered "the minimal civilized measure of life's necessities," or "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." *Id.* at 834. Second, the prisoner must show that the official's state of mind was one of deliberate indifference; in other words, the prison official is only liable if he had actual knowledge of danger to the prisoner. *Id.*

200. CAL. GOV'T CODE § 845.6 (West 2001):

Neither a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody; but, except . . . where the employee is acting within the scope of his employment, is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care. Nothing in this section exonerates a public employee who is lawfully engaged in the practice of one of the healing arts under any law of this state from liability for injury proximately caused by malpractice or exonerates the public entity from its obligation to pay any judgment, compromise, or settlement that it is required to pay under subdivision (d) of Section 844.6.

Id.

sonable action to summon such medical care.”²⁰¹ In other words, the state can be liable for damages to prisoners if an MTA or any prison official does not respond to women inmates in serious medical distress. This statute has the advantage over a section 1983 claim because the statute’s phrase “reason to know” is considered an objective standard. This is much easier to prove than the subjective “deliberate indifference” criterion set forth in *Farmer v. Brennan*.²⁰² Regrettably, liability is strictly confined to serious and obvious medical conditions requiring immediate care, and the liability only goes as far as summoning appropriate medical care.²⁰³ Furthermore, a 1963 Law Revision Commission comment to section 845.6 clearly put forth the intent of the legislature when it stated:

This section limits the duty to provide medical care for prisoners to cases where there is *actual or constructive knowledge* that the prisoner is in need of *immediate* medical care. The standards of medical care to be provided to prisoners involve basic governmental policy that should not be subject to review in tort suits for damages. The immunity from liability for damages that is provided by this section exists where some other statute might be construed to impose a mandatory duty to provide medical care to prisoners under other circumstances. In cases where another statute is so construed, the prisoner is left to the other remedies provided by law to compel public employees to perform their duties.²⁰⁴

Many of the accounts by prisoners in Stoller’s report show that there are numerous circumstances in which MTAs and other prison staff do not provide any care to inmates in obvious medical distress.²⁰⁵ However, using section 845.6 to try to change the CDC’s treatment of women with serious but not “immediately” dangerous conditions, such as breast cancer or AIDS, would prove a struggle. Bringing suits involving pregnancy related medical problems may be a good way to start expanding the notion of what “immediately” means when applied to medical care of women inmates. This note is not broad enough in scope to go through all of the potential legal arguments that could be used to try to demonstrate why failure to provide basic preventative care to women prisoners – such as ordering a mammogram when a woman reports an obvious breast lump – might fall under this statute. However, the class action injunction approach suggested by Amy Landenberg for combating sexual harassment of women prisoners by guards may be a good long-term solution.²⁰⁶

California’s women prisoners face overwhelming obstacles when seek-

201. *Id.*

202. *Farmer v. Brennan*, 511 U.S. 825.

203. *Watson v. California*, 21 Cal. App. 4th 836, 841 (1993).

204. *Id.*

205. Stoller, *supra* note 23, at 60-96.

206. Laderberg, *supra* note 124, at 329.

ing relief for the lack of health care in either California or federal courts. The combination of the PLRA and California prisons' own lethargic grievance system make it possible for the CDC to deny women inmates access to the federal courts by simply not responding to a 602 appeal form. Because the PLRA sets such high legal standards of proof and places such harsh limitations on a judge's discretion, most women prisoners will never be able to meet the legal requirements in their complaints, regardless of the merit of their claims. At present, California courts offer no better solution. The California Supreme Court has made few publishable rulings explaining what the state's Constitution means by "cruel or unusual punishment" when the term is applied to prison healthcare. Prisoners' legal advocates should file suits that force the California Supreme Court to develop this area of California constitutional law. Unless another sick female prisoner denied health care by CDC finds a way to blow Gideon's trumpet and transform the law, the courts can do little. It is up to the California legislators.

V. LEGISLATIVE LEADERSHIP IS THE ANSWER

The United States Congress, as presently constituted, is unlikely to soften its position on prison litigation. The current Supreme Court's federalist stance places states' rights before individual prisoner's rights, and California case law addressing the medical mistreatment of prisoners is almost nonexistent. This leaves the California legislature as the remaining source of hope for sick women bound in CDC red tape. Fortunately, the California legislature has taken responsibility for these women and is attempting to bring about change.

The legislature's clear commitment to improving medical care for prisoners began on July 6, 2000, when the *San Francisco Chronicle* reported that the California laboratory responsible for medical tests for thousands of inmates falsified the test results for serious diseases such as AIDS, hepatitis and cervical cancer.²⁰⁷ A surprise inspection of B.C.L. Clinical Laboratories in December 1996 revealed that B.C.L. used equipment that did not work and that the laboratory lacked the chemicals needed to perform blood and urine tests; the lab's operators were apparently just making up results and entering them into the computers.²⁰⁸ In March 1997, federal regulators informed seven prisons – including the Northern California's Women's Facility and Central California Women's Facility – of B.C.L.'s highly questionable results and warned that affected prisoners could be in "immediate jeopardy."²⁰⁹ Despite these warnings, the CDC did not retest inmates, nor did they even inform prisoners that their original results might be incorrect.²¹⁰ The day after the story broke in the *Chronicle*, Assemblywoman

207. Russell, *supra* note 82.

208. *Id.*

209. *Id.*

210. *Id.*

Carole Migden of San Francisco announced that state lawmakers would “demand of [the CDC] a full response and request corrective action. This will shake up a wobbly and inconsistent department.”²¹¹ On October 11 and 12, 2000, lawmakers followed up on their promise when seven members of the Joint Legislative Committee on Prison Construction and Operations held full-day hearings in two of California’s largest women’s prisons.²¹² At the end of the first day of testimony, Senator Cathie Wright exclaimed, “What I heard today curdled my stomach.”²¹³

California Senator Sheila Kuehl took up the torch for prisoners and introduced Senate Bill No. 396 on February 21, 2001, a piece of legislation that incorporated the suggestions brought out in the October 11 and 12 hearings.²¹⁴ First, the bill eliminated the MTA position by stating that as of January 1, 2003, “no peace officer employee of the Department of Corrections . . . shall provide the services of either a licensed vocational nurse or a registered nurse.”²¹⁵ Second, the bill placed important medical decisions back into the hands of qualified medical professionals rather than the less trained licensed vocational nurses:

Licensed vocational nurses shall not make any decision concerning access to care and the kind of care or treatment an inmate should receive. Neither shall a licensed vocational nurse make any decision as to whether an inmate should be examined by a clinician unless that decision is necessary to provide emergency care and is within the scope of the nurse’s license. Licensed vocational nurses may collect subjective and objective patient data and convey that information to either a registered nurse or medical staff member of a higher professional status than a registered nurse, including a physician who may then make appropriate treatment decisions based on that information.²¹⁶

In other words, Senator Kuehl’s proposal ensured that in response to patients’ complaints, lower level medical staff would no longer be allowed to decide when or if to act on a prisoner’s medical complaints. Third, the bill required that the department have all of its medical facilities accredited by the National Commission on Correctional Health Care by January 1,

211. Janet Wells, *Probe Sought in Lab-Test Scandal: Inmate Medical Results Found to be Falsified*, S.F. CHRON., July 7, 2000, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2000/07/07/MN95326.DTL>.

212. Sabine Russell, *Female Inmates Beg State Lawmakers for Better Health Care*, S.F. CHRON., Oct. 12, 2000, at A3, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2000/10/12/MN643.DTL>.

213. *Id.*

214. S.B. 396, 2001 Sen., Reg. Sess. (Cal. 2001), available at http://info.sen.ca.gov/pub/bill/sen/sb_0351-0400/sb_396_bill_20010221_introduced.html (last visited Mar. 28, 2002).

215. *Id.*

216. *Id.* at § 1(d).

2005.²¹⁷ Finally, it eliminated the five-dollar fee prisoners were required to pay in order to see a doctor.²¹⁸

On September 13, a bill very similar to the one introduced by Kuehl went through both the Senate and Assembly and then went before Governor Gray Davis. Davis vetoed the bill on October 12, stating that, "it would result in General Fund costs for the Department of Corrections that are not budgeted in the 2001 Budget Act."²¹⁹ The irony was that fiscal research of Senate Bill 396 by the Senate Appropriations Committee demonstrated the co-pay requirement brought in an average of \$645,000 per year but cost \$3.2 million to administer annually.²²⁰ If the co-pay requirement was eliminated the money saved *in just one year* would have covered the \$450,000 it would cost to initially accredit all of the facilities, pay for re-accrediting all facilities on a yearly basis for the next three years at a cost of \$220,000 a year, and leave over two million additional dollars to the CDC's medical facilities.²²¹

There is no clear explanation behind Governor Davis' veto of a bill that would bring about humane health care while costing tax payers nothing. It is interesting to note that one of the organizations strongly opposed to the original bill – the California Correctional Peace Officers Association – was one of Davis' largest contributors during his 1998 gubernatorial run, providing him with cash and in-kind contributions of at least \$2.3 million.²²² However, regardless of the reasons why the bill failed to become law, and despite the fact that the media coverage of women prisoners has since waned, it is important that the Legislature not give up its commitment to this issue. Passing a bill like Senate Bill 396 is an important first step that will not only bring humane health care to the prisons, but will also make the entire CDC health care system more cost-effective.

The legislature should not stop there. In order to ensure that the CDC will provide adequate health care to all inmates, California's administrative procedure for 602 appeals must be changed. In addition, the entire prison health care system should be removed from the CDC's already extremely tainted hands and turned over to a medical organization with the experience and resources necessary to offer women prisoners adequate health care and address their particular medical issues.

217. *Id.* at § 4.

218. *Id.*

219. S.B. 369 veto (Oct. 12, 2001) available at http://info.sen.ca.gov/pub/bill/sen/sb_0351-0400/sb_396_vt_20011012.html.

220. SENATE APPROPRIATIONS COMMITTEE, APPROPRIATIONS COMMITTEE FISCAL SUMMARY OF BILL 396, 2001 Sen., Reg. Sess., (Cal. 2001) available at http://info.sen.ca.gov/pub/bill/sen/sb_0351-0400/sb_396_cfa_20010524_150826_sen_comm.html.

221. *Id.*

222. Greg Lucas & Lynda Glenhill, *Governor Race Spending Clobbered 1994 Record*, S.F. CHRON., Feb. 5, 1999, at A19.

A. BRINGING THE CDC TO HEEL THROUGH THE FEDERAL COURTS

Assemblywoman Carole Migden has described the California Department of Corrections as “difficult to rein in.”²²³ Given that CDC guards belong to a union that gave tremendous amounts of money to Governor Davis during his campaign and also contributed \$1.9 million to state legislators that same year, it makes sense that the California Correctional Peace Officers Association would feel entitled to lobby against legislation making their jobs harder. The current grievance procedure stated in California Regulations Code Title 15, section 3084 gives CDC administrators tremendous amounts of leeway in deciding when they will act upon an inmate’s 602 appeal. Changing this grievance procedure statute will place the CDC under the purview of the federal courts because it will force CDC officials to respond to 602 appeals within a specific amount of time. If they miss that deadline, the argument presented in this section could be used to show that, in that particular instance, there was no administrative procedure for the inmate to follow because the CDC had shut it down.

It may seem strange for a state to make itself more vulnerable to suit in federal court, but California’s legislators have already recognized that there is something wrong with the way health care is provided by the CDC. Allowing women inmates to actually exhaust the state’s administrative procedures within a reasonable amount of time, meet the PLRA requirement, and perhaps receive relief from a district court is the right thing to do, and it will place pressure on the CDC to do its job better. A complaint only reaches the federal courts when the prison system does not take care of the problem itself.

As for the form these reformulated grievance procedures should take, New York’s grievance policy, described above in Section III.B., offers a good example.²²⁴ It requires the state to respond to grievances within a reasonable amount of time and it places the responsibility to meet these time limits directly on the shoulders of the prison officials. The New York statute states that “time limit extensions may be requested [by the state] at any level of review, but such extensions *may be granted only with the written consent of the grievant. Absent such an extension, a matter not decided within the time limits may be appealed to the next.*”²²⁵ If a similar requirement was instituted in California, a woman prisoner’s 602 request for medical aid, regardless of whether or not CDC officials respond to that request, would continue to move through the system and into federal court. The CDC could no longer just sit on 602 appeals and remain silent until the woman died or became too sick to further pursue her claim.

223. Wells, *supra* note 211.

224. See *supra* notes 153-157 and accompanying text.

225. N.Y. COMP. CODES R. & REGS., tit. 7, § 701.8 (emphasis added).

B. THE ULTIMATE SOLUTION: PUTTING INMATE HEALTH CARE INTO THE HANDS OF REAL HEALTH PROFESSIONALS

In order to effect lasting change in the level of health care provided to California's prisoners, the entire prison health system must be removed from the purview of jailers and placed into the hands of health care professionals. This note is highly critical of the CDC's health care system, pronouncing it ineffective and occasionally deadly. The CDC has violated its prescribed duty to provide adequate health care to all prisoners, including women inmates. Furthermore, Congress has aided the CDC in violating policies by passing legislation in a fit of law and order righteousness and based largely on misinformation.

In all fairness, however, it may be unreasonable to expect a prison system to provide quality health care, as the purposes of incarceration and healing are almost diametrically opposed. By taking the Hippocratic Oath, a doctor promises to do no harm to her patients, but a warden in our current criminal justice system is duty-bound to punish individuals. Geoff Long, long-time chief of staff for the Assembly Appropriations Committee, explains, "[t]he mission of the Department of Corrections is to lock people up and keep them away from the public. They're pretty good at that. What they're not good at is medical treatment, substance-abuse programs, things that make it safer for the public when they get out."²²⁶

This might appear to be merely another prison system problem that can be fixed with further efforts on the part of the CDC, but Long points out the large scale effects of the CDC's medical care problems have on all Californians: "[w]e release 100,000 of these (prisoners) a year. They are not out there wearing little face masks . . . If they've got hepatitis or TB (tuberculosis), they are spewing them around. They are out in the mall."²²⁷ For women prisoners, this point is especially poignant, because more than eighty percent of these women are mothers and a large number of these mothers are single parents; when they are released from prison they will be the caretakers of their children, and when they die, their children are left parentless.²²⁸ Ignoring serious health care problems in the state's prison population, such as the Hepatitis C epidemic which infects at least forty percent of women prisoners, not only puts these women at risk, but also puts large numbers of innocent children and the public at risk.²²⁹

Because the effect of inadequate health care extends beyond the walls of our prisons, the California legislature and the public must be willing to look beyond the CDC for answers. Luckily, there are already respected state institutions in place that are dedicated to providing health care to large numbers of people – the University of California Health Care System ("UCHS") and the California Department of Health Services ("CDHS").

226. Wells, *supra* note 211.

227. *Id.*

228. Justice NOW, *supra* note 90.

229. *Id.*

Dr. Corey Weinstein and Nancy Stoller, Ph.D., agree that this state's prison health care problems are beyond the scope of the CDC's ability.²³⁰ Both advocate these institutions as qualified providers of health care to California's prisoners.²³¹ As Dr. Weinstein explained in his testimony before the Joint Legislative Committee on Prison Construction and Operations:

It is critical to remove medical and psychiatric care from the [CDC] completely and transfer those responsibilities to an independent nonprofit agency. Two possibilities should be explored. Care services could be organized by the California Department of Health Services or by the University of California School of Medicine. . . . A well-trained and competent staff all are [sic] likely to come along with an independent nonprofit agency. Also, a noncustodial provider brings with it a commitment to the guiding principles of care so necessary to successful penal medicine: independence of medical authority, unfettered access to health care as a right, and integration of care into the public health effort and general medical community.²³²

The CDHS can offer experience with the handling of large-scale health issues, but this solution also comes with potential problems. The CDHS could not provide health care services directly, and instead, would provide oversight to various agencies serving the different prisons.²³³ The U.S. Bureau of Prisons ("BOP"), in conjunction with the U.S. Public Health Service, currently uses a similar system.²³⁴ Doctors and nurses work within BOP facilities and report to the BOP's Health Care Division, but they are guided by the Public Health Service's principles and have no security responsibilities.²³⁵ A few services are contracted out to private contractors.²³⁶ This option will get doctors and other medical staff out from under the direct oversight of the CDC, but offers few other advantages.

A program developed and run by the University of California ("U.C.") would offer much more, despite the initial disruption this might cause within the U.C. system.²³⁷ The UCHS has an international reputation for excellent health care and exceptional medical training. Tapping into this resource would instantly provide the prison system with a wealth of medical, health care information management, and medical cost containment experience. But, perhaps more importantly, involving the University of California in the state's prison system would bring interns, residents, and academics into contact with penal system health care. The advantages of

230. Weinstein, *supra* note 50; Stoller, *supra* note 23, at 40-42.

231. Weinstein, *supra* note 50; Stoller, *supra* note 23, at 40-42.

232. Weinstein, *supra* note 50.

233. Stoller, *supra* note 23, at 40-42.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

this are two-fold. First, prisoners would be granted access to the newest medical information and the most modern standards of care.²³⁸ For women inmates, this would be of extreme importance; the CDC has little experience successfully treating an aging female population, but UCHS hospitals have been providing care and conducting medical research on breast cancer, osteoporosis, cervical cancer, and other health issues of special importance to women for years.²³⁹ Second, bringing one of the nation's premier university systems into the prison health care arena would break down the walls of silence surrounding penal health care and its faults.

A key weakness of the CDC medical system is its insularity. The system is completely reactive, rather than proactive, because its individual prison staffs do not work with one another or with other doctors within the penal health community. Lack of accreditation by any national penal health care organization means that the CDC's medical staff does not have the same opportunities to exchange information or gather advice which forty-four other state prison systems receive from these organizations.²⁴⁰ Department medical staff do not work together to create treatment protocols – a standard practice in hospitals – and there is no method of determining if certain medical facilities are having problems providing adequate care.²⁴¹ The B.C.L. debacle provides a harrowing example.²⁴² In July 1995, only eleven days after B.C.L. began working on its yearlong medical testing contract for California prisons, administrators at the Robert J. Donovan Correctional Facility in San Diego became concerned when a doctor reported finding twenty spelling mistakes in a form returned with test results.²⁴³ The prison dropped the contract only a month later when test results were continually late.²⁴⁴ By October 1995, the California State Prison in Sacramento ended its contract with B.C.L. for the same reason.²⁴⁵ Doctors at another CDC facility, Chuckawhala Valley State Prison, had B.C.L. results rechecked regularly at local hospital labs because they found the B.C.L. results unreliable.²⁴⁶ Despite these obvious problems, the CDC made no system-wide changes, and seven prisons did not cancel their contracts with B.C.L. until the lab was shut down by federal health regulators in January 1997.²⁴⁷

In fact, most major changes within the CDC's health system have come

238. *Id.*

239. *See, e.g.*, U.C. DAVIS DEPT. OF EPIDEMIOLOGY AND PREVENTATIVE MEDICINE, *Research Projects*, at <http://www-epm.ucdavis.edu/Projects/Active.htm>; U.C.L.A. CENTER FOR HEALTH POLICY, *Research*, at <http://www.healthpolicy.ucla.edu/research.html>; UCSF.

240. Weinstein, *supra* note 50.

241. *Id.*

242. *See supra* notes 82-83 and accompanying text.

243. Russell, *supra* note 82.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

as a result of lawsuits.²⁴⁸ One stark example cited by the Bureau of State Audits is the extremely different levels of care diabetic inmates receive at different prisons. As a result of the *Shumate* suit – a suit filed before the PLRA became law – at least ninety-five percent of diabetic women sampled at the Central California Women's Facility have the recommended blood glucose testing twice a year.²⁴⁹ By contrast, only fifteen percent of diabetic men sampled at the California State Prison in Los Angeles County received the same necessary tests.²⁵⁰ The CDC has had a chance to run its health care system with a free hand since 1992, when the Health Care division was set up; ten years later, lawsuits, bad publicity, and inmate deaths have made no difference.

By contrast, a penal medicine system run by the UCHS would not only be more accessible to the public and a national audience of medical professionals, it would also expose the state's problems to ambitious medical students already devoted to improving health care, as well as to academics willing to examine and research difficult health care issues. Internships or clinical rotations by future doctors might inspire them to choose penal medicine as a career. The fact that Nancy Stoller, a professor of Community Studies at the University of California of Santa Cruz, had her extremely influential report published and supported by a program sponsored the California Program on Access to Care²⁵¹ demonstrates that great minds at the University of California are already interested in the problems of penal health care.²⁵²

Further, there is substantial evidence that partnerships between university health care systems and prisons can work together to improve health care for inmates. The University of Connecticut runs a managed care system for that state's penal system.²⁵³ In Texas, a state second only to Cali-

248. BUREAU OF STATE AUDITS, *supra* note 39, at 17-18.

249. *Id.* at 48.

250. *Id.*

251. The California Program on Access to Care is a subsection of the California Policy Research Center, which, in turn, receives its funding from the University of California's Office of the President

252. This Note offers a much less illustrious example of how the cross-pollination of ideas in an academic setting can result in original work on prison health care policies. Although the University of California Hastings College of the Law is obviously not a medical school, it does hold classes attended by forensic psychiatric residents at the University of California at San Francisco. These medical residents have taken numerous law students on tours of the clinic at San Quentin in which they practice. Law students who might never have appreciated the mental health issues inherent in prisons saw the challenges doctors face first hand. Similarly, through the federal work-study programs administered by the University of California, Hastings students are able to spend summer and school hours working for non-profit organizations such as the Prison Law Office and Legal Services for Prisoners with Children. As a result, students gain hands-on experience with the legal challenges inherent in prison administration that could not be imparted in a lecture class. This Note stems directly from experiences the University of California fostered by providing this author the opportunity to meet with medical students, professors, and legal professionals working on the legal aspects of prison health care issues.

253. Stoller, *supra* note 23, at 40-42.

fornia in prison population,²⁵⁴ the University of Texas has a special branch in Galveston devoted to the care of the state's sickest prisoners.²⁵⁵ Working together with Texas Tech University, the schools run a penal medical system that provides managed care to all Texas inmates.²⁵⁶ Although the University of Texas is a non-profit institution, it has been able to run its Galveston branch as a for-profit enterprise so successfully that the university hopes to expand its medical services to prison systems in nearby states.²⁵⁷

Implementation of such large changes within the University of California and the California Department of Corrections will be neither easy nor swift, and they are unlikely to prove immediately cost-effective for California taxpayers. But, the price of keeping the state's prison health care system in its current condition is higher still. Data from the state's own Bureau of Auditors shows that this state can afford to start taking steps that improve the care prisons provide their inmates. The California legislature has already proven it has the integrity and the will to pass legislation through both houses in order to bring humane treatment to some of society's least popular and powerful members – its prisoners – in the face of lobbying by a powerful and rich union, the California Correctional Peace Officers Association. The California legislature should continue its commitment to this cause. As a first step, it can, again, try to pass legislation like the 2001 Senate Bill 396, while simultaneously improving the state's prisoner grievance procedure statute. Then an overhaul of the system can commence with a reputable institution of medicine – like the University of California Health System – bringing better care and new ideas into the state's penal health care arena.

Unfortunately, these changes will come too late to save women like Sherrie and Rosemary, women with children and families, who are dead or dying as a result of blatant medical neglect by the CDC. However, by taking action now, California can save the lives of women inmates, who were never sentenced to death, and end this state's shameful practice of killing sick women prisoners due to an administrator's indifference.

254. LAMB-MECHANICK & NELSON, *supra* note 37, at 40.

255. Stoller, *supra* note 23, at 40-42.

256. *Id.*

