Testimony of:

Pat Nolan, Vice President of Prison Fellowship

The Subcommittee on Crime, Terrorism, and Homeland Security

"Review of the Prison Litigation Reform Act: A Decade of Reform or and Increase in Prison Abuses?"

November 8, 2007

Mr. Chairman and members, I am grateful for this opportunity to discuss the impact of the Prison Litigation Reform Act, now that we have had a decade of experience with it. My name is Pat Nolan. I am a Vice President of Prison Fellowship, and lead their criminal justice reform arm, Justice Fellowship. I also serve as a member of the Prison Rape Elimination Commission and the Commission on Safety and Abuse in America's Prisons.

I bring a unique background to this work. I served for 15 years as a member of the California State Assembly, four of those as the Assembly Republican Leader. I was a leader on crime issues, particularly on behalf of victims' rights. I was one of the original sponsors of the Victims' Bill of Rights (Proposition 15) and was awarded the "Victims Advocate Award" by Parents of Murdered Children. I was prosecuted for a campaign contribution I accepted, which turned out to be part of an FBI sting. I pleaded guilty to one count of racketeering, and served 29 months in federal custody.

Prior to serving in the legislature, I was an attorney with Kinkle, Rodiger and Spriggs. We represented Orange, San Bernardino and Riverside counties, as well as

virtually every city and special district within them. So, I am very familiar with the burden and frustration that accompanies nuisance suits against government entities.

Congress passed the Prison Litigation Reform Act to restrict the ability of prisoners with too much time on their hands from clogging the courts with ridiculous claims. And it has largely worked well to reduce the number of vexatious prison litigants. However, in the years since the PLRA became law it has become clear that two classes of prisoners are affected by PLRA that were never intended by Congress to be prevented from accessing the courts: inmates who have been prevented from practicing their religion and victims of prison rape.

First, we would assume that prison officials, even atheists would encourage prisoners to become involved in religion. An increasing number of academic studies have demonstrated, that offenders who actively practice their faith inside prison are less likely to cause trouble, and more likely to become law-abiding citizens after their release. If you were a corrections officer at work in a prison, and six inmates were walking toward you across the yard, would it make a difference if they were coming from choir practice? You bet it would.

You don't have to be a believer to acknowledge what the scientific research has shown – religion reduces recidivism, and that costs taxpayers less and makes our communities safer.

And while many prison officials encourage religious participation, there are also many who routinely interfere with religious programs in prison. This hindrance of religion is motivated not because they are against religion. Instead, it results from a more basic instinct - lethargy. Volunteers coming into the prison causes more work for the staff. If all you care about is having less work, then you would naturally discourage the volunteers from coming into the prison and you would discourage inmates from participating in religious activities. However, if you care about the safety of the public after the inmates are released, you would do all you could to encourage volunteers who

can mentor inmates and help them live law-abiding lives after they return home. This is the situation that religious volunteers find: there are many prison officials who are open to our work, but there are also many others who discourage it.

For instance, in some cases prison officials have denied Bibles to inmates, refused kosher meals to orthodox inmates, and rejected requests from Muslim inmates to have their Ramadan meals after sundown. In my own case, the chaplain of the California Legislature sent me an NIV Study Bible. He complied with federal regulations in every way – the Bible was sent from the publisher, shrink-wrapped and sent through the US postal service. But it was rejected and returned with a form that said it "does not comply with BOP regulations", with no explanation of how it had not met the regulations. This happened not once, but three times! Why would the mail room prevent an inmate from having a Bible? In prison, the inmates say, "Why do they do it? Because they can."

If inmates who were denied Bibles, kosher meals or Ramadan meals after dark seek help from the courts, they would be prevented from doing so, because none of these actions by the prison officials resulted in a "physical injury", a requirement of the PLRA. Prison Fellowship believes that inmates' ability to practice their faith should not hinge on being able to show that they have sustained a physical injury. And my hunch is that Congress didn't think of this when they put that requirement in the PLRA.

When a specific religious holy day is involved, another requirement of the PLRA prevents relief in the courts: the "exhaustion" of administrative remedies. If a prisoner is prevented from attending Christmas Mass, or is forced to work on Yom Kippur, it usually only a day or two ahead of time that they find out. Even if they file the grievance immediately, the holy day has come and gone before they even get a hearing n their grievance.

When the LA County Women's Jail announced that they were canceling Christmas Mass (but allowing it for the men's jail), Sister Susanne Jabro asked the Lieutenant why women's Mass had been canceled it. He told her that most of the staff

wanted the day off, and therefore they would be "short-staffed" and were canceling all inmate activities in the women's jail. The jail's actions are problematic in a couple of aspects. First, the Lieutenant equated sacred Mass with other "inmate activities" such as a ping pong tournament and Toastmasters. And to accommodate the convenience of the staff, Catholic inmates were being prevented from celebrating a holy day of obligation, a day of great joy in honor of the day God sent his Son to save us. Fortunately, when Sister Susanne appealed to Sheriff Block, he reinstated Christmas Mass immediately, and reassigned the Lieutenant. However, had Sheriff Block not intervened, the administrative process would have dragged on long past Christmas and into the New Year.

In another case a California inmate was told he had to work on Easter, even though the Muslims were allowed days off of work for Ramadan. He found out on Monday that he would have to work the next Sunday, Easter. The administrative process hadn't even addressed his complaint by the time Easter arrived. So, the inmate was forced to work, and was prevented from attending Easter services. I don't think Congress intended that result when it passed the PLRA.

Of course, there is another important reason why inmates should be free to practice their faiths. The Constitution requires it, and Congress has reinforced prisoners' religious freedom by passing the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act.

However, the PLRA has served to neuter RFRA and RLUIPA by denying access to the courts for inmates who have been prevented from practicing their faith. The physical injury and exhaustion requirements have resulted in dismissal of otherwise valid claims such as:

1. Prison officials confiscated two Bibles from an inmate. The inmate properly filed grievances complaining that the bibles were missing and in one letter to the Warden, mentioned that the officials were "bordering" on a free exercise of religion violation. When the Bibles were not returned, he filed a *pro se* suit

alleging that officials had unlawfully withheld religious materials. The court dismissed the suit, finding that he had failed to exhaust administrative remedies only because his grievances did not explicitly state that the deprivation of his bibles impeded his ability to practice his religion. Dye v. Kingston, 2005 WL 1006292 (7th Cir. Apr. 27, 2005) (Nonprecedential Disposition) (42 U.S.C. 1997e(a)).

2. A man was denied the kosher diet required by his Jewish beliefs. After a trial, the jury awarded the man damages for the denial of his right to practice his religion. But the appellate court threw out the award because forcing a man to violate his religious beliefs does not meet the PLRA's "physical injury" requirement. Searles v. Van Bebber, 251 F.3d 869 (10th Cir. 2001) (42 U.S.C. 1997e(e)).
3. A Christian prisoner alleged that a prison rule prohibiting outgoing funds of more than $30 impeded him from practicing his religious belief in tithing. The court dismissed his *pro se* suit for injunctive relief because he had pursued administrative remedies, but had not submitted a specific Religious Accommodation Request Form. Timly v. Nelson, 2001 WL 309120 (D. Kansas Feb. 16, 2001) (42 U.S.C. 1997e(a)).
4. A Jewish inmate who had been prohibited from participating in Jewish services won his suit before a jury in the district court. The court found that non-exhaustion was excusable because prison officials had effectively prevented the inmate from pursuing the grievance process. Prison officials had repeatedly told him that special "Jewish consultants" were responsible for deciding who could participate in Jewish services and holidays, not the officials who adjudicated the grievance process. Nevertheless, the court of appeals threw out the award, finding that the inmate had failed to exhaust his administrative remedies as required by the PLRA. Lyon v. Vande Krol, 305 F.3d 806 (8th Cir. 2002) (42 U.S.C. 1997e(a))
5. An Orthodox Jew alleged in a *pro se* complaint that prison officials refused to allow him to attend Jewish services and celebrate Passover because he was, "not Jewish enough." He had properly filed a special religious accommodation form, which subsequently went missing from his file. The court held that he had not

exhausted his administrative remedies only because he did not re-file the special form that he had correctly filed in the first place. Wallace v. Burbury, 305 F.Supp.2d 801 (N.D. Ohio 2003). (42 U.S.C.A. 1997e(a)).

There is another type of prisoner the PLRA has inadvertently effectively blocked from access to the courts: victims of prison rape. As I mentioned earlier, I am a member of both the Prison Rape Elimination Commission and the Commission on Safety and Abuse in America's Prisons. Both commissions heard heart-rending testimony from inmates
who have been savagely raped and beaten. Most were too traumatized and terrified to report it while they were in prison.

If their assailant were a correctional officer, they were at risk of retaliation. If they were attacked by another inmate, their life would be at risk for being a "snitch." Yet, the PLRA prevents them from going to court unless they have exhausted their administrative remedies. In most prisons, that means reporting the rape within 15 days; in some, it's as few as two days. Despite the physical and mental trauma of being raped, the inmate must file a report in a very narrow window of time.

The Prison Rape Elimination Commission recently heard testimony that children in the custody of the Texas Youth Commission (TYC) were repeatedly raped and molested by high TYC officials. How did they get away with it? One of the officials had a key to the complaint box and simply threw away complaints that incriminated him and his friends. The children had no chance to "exhaust" their administrative remedies because their rapist was the administrative remedy. Under the PLRA, these children would have no recourse in federal courts.

Through my work on the commissions, I have met many victims of prison rape. I'd like to tell you a little about them so you can understand how the PLRA has victimized them a second time. Keith was a securities dealer, Marilyn owned a car-repair

shop with her husband, TJ was in high school, and Garrett and Hope were college students. Keith and TJ were violently raped by fellow prisoners. Marilyn, Hope and Garrett were violently raped by correctional officers. Yet, federal law prevents them from filing suit to be compensated for the trauma they endured. Why? Because they were in prison when they were raped, and they ran didn‘t meet either or both the physical injury or the exhaustion prerequisite.

Keith testified to the Prison Rape Elimination Commission about the practical reasons that the exhaustion requirement of the PLRA effectively barred him from court. Keith had informed his counselor that he felt threatened by another inmate. Incredibly, the counselor placed that inmate in Keith's cell, and Keith was beaten and raped by the inmate, as he had predicted. Keith told the commission why he hadn't filed a grievance:

"*…in many institutions that informal complaint is going to go to the individual you're complaining of, whether it be -- in my case it was the counselor who moved the assailant into my cubicle, knowing that I was already reporting that I felt threatened by him. But, that's the procedure that allows you to be able to even go into court for civil action.*

The Prison Litigation Reform Act requires you to have exhausted your administrative remedies, which that informal complaint by policy becomes the first step. I'm not going to go to a person that I've already been threatened by to hand him an informal complaint and say, you know, I'm about to start a process against you and you're the person who's supposed to protect me now as I go through this process. It is not going to happen."

Marilyn was brutally raped at the hands of prison guard. Afterward he taunted her, "Don't even think of telling, because it's your word against mine, and you will lose." The authorities simply sloughed off her claims at the time. But Marilyn had hidden her sweatpants—with DNA evidence of the officer's attack—and took them to the FBI after her release. Even then, for three years nothing happened. Finally the case went to trial, and a jury convicted the officer of several counts of sexual assault. He is now in prison. The justice system cannot wipe away the degradation and abuse Marilyn suffered, but it

at last held the contemptible guard accountable. However, the state of Texas refuses to pay for Marilyn's medical and mental health treatment, and the PLRA prevents her from going to federal court to seek justice because she didn't exhaust her remedies.

Then, we come to the requirement of physical injury. As incredible as it seems, some courts have held that forced oral sex does not meet the physical injury requirement of the PLRA, and other courts have held that sexual activity without tearing is not a physical injury. These applications of the PLRA are within the plain meaning of the statute, but they clearly deny justice to these prisoners.

I have given you just a few examples of where the PLRA has denied justice to victims of prison rape and inmates denied their religious practices. Congress never intended that such inmates be barred from court. The reforms suggested by Congressman Scott address these horrible injustices while leaving intact the screening provision of PLRA, which allows the courts to dismiss frivolous cases before the case is served on defendants or entered into the docket. The Scott amendments to PLRA will allow the to dispense with the chunky peanut butter cases without also barring the serious cases of religious interference and prison rape.

When the opponents of these reforms offer up the old chestnuts about peanut butter and cold food, please remember the children in Texas, the Christian, Jewish and Muslim inmates denied access to practice their faith, and Marilyn, Garrett, Keith, TJ, Hope and thousands of others raped in prison and denied the ability to practice their faith. The least Congress can do is give them access to justice. Thank you.