

***DOBBEY v. ILLINOIS DEPARTMENT OF
CORRECTIONS: A SMALL PIECE OF A GROWING
POLICY PUZZLE***

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INTRODUCTION

The current state of prisoner litigation in the United States is both inefficient and ineffective. Cases like *Dobbey v. Illinois Dept. of Corrections* demonstrate that adopting a broad interpretation of the right to petition is the only way to reform prisoner litigation. *Dobbey* is a curious decision handed down through the pen of Judge Richard Posner. The question was whether the plaintiff, a prisoner, failed to state a claim against individual defendants, prison employees, regarding an alleged violation of his First Amendment right to petition.¹ This was an issue which Judge Posner conceived as “difficult” because the right to petition “is little discussed either in cases or in commentaries . . . and its scope is unsettled.”² At the early procedural phase of the *Dobbey* litigation, Judge Posner did not rule or even comment on the merits of the claim but, instead, focused on the circuit split regarding the right to petition.³ On the one hand, Judge Posner argued that the Seventh Circuit interprets a prisoner’s right to

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¹ *Dobbey v. Ill. Dep’t of Corrs.*, 574 F.3d 443, 444 (7th Cir. 2009).

² *Id.* at 446.

³ *Id.*

petition under the First Amendment narrowly, contrasting the Seventh Circuit with the broader view of the Tenth Circuit.⁴ While Judge Posner attempted to distinguish between the purported narrow Seventh Circuit interpretation and the broad Tenth Circuit view, the true effect of his opinion in *Dobbey* is to expose flaws in the grievance procedures which restrict inmates' First Amendment right to petition. Judge Posner's discussion of the circuit split can be explained as an outgrowth from a larger problem: the prisoner grievance system in Illinois State Prisons. Further, *Dobbey* can be viewed as a jumping off point for a broad policy debate concerning this inmate grievance system, and why it fails to guarantee prisoners their constitutionally guaranteed right to petition. The inmate grievance system is so overly restrictive that as a consequence the inmates' right to petition is severely abridged. This abridging of the right has severely dissipated inmates' abilities to bring meritorious claims in Federal Courts. Our inquiry must be then, what should the Seventh Circuit's analysis be in order to guarantee prisoners this constitutional right?

A. *Background*

This comment will examine *Dobbey* and the effect a failed inmate grievance procedure has upon an inmate's first amendment right to petition. First, this article provides a general explanation of the right to petition, describing the right and how it fits into our judicial system. Next, a more specific background addresses the right to petition in the context of inmates such as the plaintiff in *Dobbey*. Third, an examination of the current circuit split between various Circuits, such as the Seventh and Tenth Circuits, demonstrates the difference between the broad and narrow interpretations of the right to petition. Fourth, an analysis shows how a broken prisoner grievance system coupled with a narrow interpretation of the right to petition severely handicaps prisoners attempting to bring causes of action against the prison system. Fifth, this article argues that a broad interpretation of the right to petition is the best way to secure justice for prisoners

⁴ *Id.* at 446–47.

petitioning the courts for redress. Finally, this comment will offer to the Illinois Department of Corrections and prisons alike, on how best to begin the process of redrafting their prisoner grievance systems.

The right to petition is “among the most precious of the liberties safeguarded by the Bill of Rights.”⁵ It is included in the First Amendment, which states “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, *and to petition the Government for a redress of grievances.*”⁶ The right to petition not only represents the power to speak against injustices, but also represents the tools with which to change those injustices.⁷ Essentially, a “petition” is an address directly to the government requesting it examine an alleged failure.⁸ It is important to note that the First Amendment does not protect the mere act of petitioning the government, but only extends the right to situations where an individual’s other First Amendment rights are implicated, for instance free speech.⁹ Meaningful access to the courts and the other expressive rights contained in the First Amendment must be two parts of a greater whole.¹⁰ Thus a right to petition claim must implicate some other First Amendment right.¹¹ Although the petition clause was effectively ignored for much of U.S. Constitutional history, the United States Supreme Court has held that

⁵ *United Mine Workers of Am. Dist. 12 v. Ill. State Bar Ass’n*, 389 U.S. 217, 222 (1967).

⁶ U.S. CONST. amend. I (emphasis added).

⁷ Elisia Hahnenberg, *Right to Petition Government (The), Learning to Give: Curriculum Division of the LEAGUE*, <http://learningtogive.org/papers/paper204.html> (last visited Jan. 14, 2009).

⁸ *Foraker v. Chaffinch*, 501 F.3d 231, 236 (3rd Cir. 2007) (citing the rule laid out in *Connick v. Myers*, 461 U.S. 138, 154 (1983)).

⁹ *WMX Techs., Inc. v. Miller*, 197 F.3d 367, 372 (9th Cir. 1999). It is important to note that *Dobbey* explicitly complies with this standard set out by the Court. The plaintiff in *Dobbey* implicated First Amendment free speech protections when he reported the incident to the media and voiced his concerns within the jail.

¹⁰ *Cf. id.*

¹¹ *See id.*

“[t]he very idea of government, republican in form, implies a right on the part of its citizens to . . . petition for a redress of grievances.”¹² In practice, this fundamental right has acquired considerably more attention from the courts over the past several years.¹³

B. *Historical Development*

Since its first appearance in the Magna Carta,¹⁴ the right to petition has slowly evolved into a fixture of Anglo-American law.¹⁵ In 1215, the right to petition was one of the several concessions King John extended to the English barons in adopting the Magna Carta.¹⁶ The Magna Carta states, “[i]f we or . . . any of our servants offend against anyone in any way . . . four barons shall come to us or our justiciar, if we are out of the kingdom, and shall bring it to our notice and ask that we will have it redressed without delay.”¹⁷ Under the Magna Carta, English subjects used its form of “petitioning” to communicate with the King and the early Parliament.¹⁸ In 1689, the English Bill of Rights adopted a provision stating subjects had the right to petition the King, and allowing for the redress of grievances towards parliament to be addressed frequently.¹⁹ Even though

¹² Shireen A. Barday, Comment, *FEC v. Wisconsin Right to . . . Petition? A Comment on FEC v. Wisconsin Right to Life*, 61 STAN. L. REV. 443, 445(2008) (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1875)).

¹³ Carol Rice Andrews, *After Be & K: The “Difficult Constitution Question” of Defining the First Amendment Right to Petition Courts*, 39 HOUS. L. REV. 1299, 1300 (2003).

¹⁴ *Id.* at 1303 n.14 (translating text of the Magna Carta which states: “[I]f we or . . . any of our servants offend against anyone in any way . . . four barons shall come to us or our justiciar, if we are out of the kingdom, and shall bring it to our notice and ask that we will have it redressed without delay”).

¹⁵ *Id.* at 1303

¹⁶ *Id.*

¹⁷ MAGNA CARTA, ch. 61 (1215), *translated and reprinted in* J.C. HOLT, MAGNA CARTA 333-35 (1965).

¹⁸ *Id.* at 1303.

¹⁹ BILL OF RIGHTS (1689), *reprinted in* BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 43 (1st vol. 1971).

“petitioning was legitimized through written guarantees during th[is] period, the right was not always tolerated in practice.”²⁰ From its initial adoption in the thirteenth century Magna Carta, and for 500 years thereafter, petitioning the government was not a realistic right because petitioners were frequently punished.²¹ The true right to petition was slowly accepted over time by the government in power.²²

The right to petition was first recognized in colonial America when colonists petitioned their assemblies for resolution of private disputes as well as for legislative action.²³ Petitions in Colonial America were a valuable and well-established right prior to the drafting and adoption of the First Amendment.²⁴ While colonial times marked a strong increase in petitions against legislatures, the historical context of the First Amendment allows petitions against all branches of government.²⁵ This was not the case in practice, however, and the right to petition has only recently been extended to the judicial branch of government.²⁶ This past practice dictated that the initial fight to gain court access for the redress of governmental wrongs centered primarily on due process and not the First Amendment.²⁷ Ultimately, the Court established the right to petition as applied to the courts “in two entirely different contexts—association and antitrust cases.”²⁸ The Supreme Court’s landmark decision in *NAACP v. Button* held that “litigation may well be the sole practicable avenue open for a minority

²⁰ Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 19–20 (1993) (citing Norman B. Smith, “Shall Make No Law Abridging...”: *An Analysis Of The Neglected, But Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1154 (1986)).

²¹ *Id.* at 20.

²² *Id.*

²³ Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 144–55 (1986).

²⁴ *Id.* at 155–56.

²⁵ Andrews, *supra* note 13, at 1305.

²⁶ *See id.*

²⁷ *See id.*

²⁸ *Id.* at 1306.

to petition the government for redress of grievances.”²⁹ This landmark decision was the beginning of a more broadly accepted judicial right to petition the government, which was eventually extended to prison inmates.

C. Inmates and the Right to Petition

Like all Americans, prisoners enjoy the right to petition the government for redress of grievances. This right includes inmates’ access to the courts for purposes of presenting their complaints regarding the condition of their detention.³⁰ Additionally, prisoners are guaranteed access to a law library or to someone trained in the law during incarceration.³¹ In essence, the right to petition allows inmates to bring actions in federal courts to recover for damages wrongfully inflicted upon them by prison administrators.³² The United States Department of Justice certified a formal inmate grievance procedure in 1992, officially recognizing the right.³³

While many Americans enjoy a direct path to the right to petition, inmates have been subject to harsher restrictions on their right to address our government. In reality, the process involved in an inmate’s successful right to petition can be extremely confusing for a prisoner. Adopted in 1996, the Prison Litigation Reform Act (“PLRA”) requires inmates bringing civil rights lawsuits to first file internal grievances with jailhouse authorities before contemplating suit.³⁴ The PLRA was established as a reaction to the overwhelming number of prisoner civil rights suits brought under both 42 U.S.C. § 1983 and the

²⁹ 371 U.S. 415, 430 (1963).

³⁰ *See generally* Ex parte Hull, 312 U.S. 546 (1941).

³¹ *See generally* White v. Ragen, 324 U.S. 760 (1945).

³² *See generally* Haines v. Kerner, 404 U.S. 519 (1972).

³³ FLA. ADMIN. CODE r. 33-103.001, *available at*

<https://www.flrules.org/gateway/ruleNo.asp?id=33-103.001>.

³⁴ *See* 42 U.S.C. § 1997e(a).

Constitution.³⁵ From 1990 to 1996, the number of suits filed in federal court by inmates almost doubled.³⁶ This large volume of cases imposed substantial costs on the litigation system, and in 1995 civil rights suits constituted thirteen percent of all civil cases in federal district courts.³⁷ At the core of the PLRA is its screening requirement.³⁸ In an attempt to reduce the amount of prisoner litigation, the PLRA provides that, “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal Law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”³⁹ In enacting this law, “Congress sought to curb what was perceived to be an overwhelming number of frivolous prisoner lawsuits.”⁴⁰ By definition, an action or claim is frivolous if “it lacks an arguable basis either in law or in fact.”⁴¹ Cases which are frivolous, malicious, or fail to state a claim on which relief can be granted, as well as cases that seek damages from a defendant who is immune from such damages are quickly dismissed.⁴²

Under these standards set out in the PLRA, the internal grievance process in some states is quite tedious.⁴³ Regulations often require inmates to name the officers who wronged them and write out comprehensive descriptions of the alleged wrong to avoid dismissal of their cases.⁴⁴ These requirements prove nearly impossible for many

³⁵ Kermit Roosevelt III, *Exhaustion Under The Prison Litigation Reform Act: The Consequence of Procedural Error*, 51 EMORY L.J. 1771, 1772 (2003).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ 42 U.S.C. § 1997e(a).

⁴⁰ SAVE, REFORM THE PRISON LITIGATION REFORM ACT (PLRA) 1, www.savecoalition.org/pdfs/save_final_report.pdf.

⁴¹ *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

⁴² *Id.*

⁴³ SAVE, *supra* note 40, at 2.

⁴⁴ *Id.*

inmates.⁴⁵ And under the PLRA, an inmate may exercise his First Amendment right to petition only after the inmate has completely exhausted his administrative remedies under the prison's internal grievance process.⁴⁶ From a legal perspective, the grievance process is a sound way to ensure inmate-initiated lawsuits are minimized.⁴⁷ This policy has an obvious rationale: "[T]he administrative agency must first be given an opportunity to solve its own problems; and, the administrative record developed by the appeals process is invaluable to a reviewing court in understanding the issues in controversy, and often saves the court the time and expense of an evidentiary hearing."⁴⁸ Finally, from a practical perspective, many people believe that if inmates are told the grievance process available to them requires complaints to be submitted directly to institution staff, they may not bother seeking formal redress, thus minimizing lawsuits.⁴⁹ These requirements set forth in the PLRA effectively deter many prospective prisoner plaintiffs from effectively pursuing litigation, but the obstacles for a prisoner plaintiff do not end once the administrative requirements are met. In the Seventh Circuit, precedent has established a narrow reading of the first amendment right to petition which further burdens potential inmate plaintiffs.

⁴⁵ See *Inmate Grievance Was Good Enough for Follow-Up Lawsuit*, <http://secondcircuitcivilrights.blogspot.com/2009/02/inmate-grievance-was-good-enough-for.html> (Feb. 2, 2009, 10:36 EST).

⁴⁶ *Id.*

⁴⁷ Marty Drapkin, *Does Your Inmate Grievance Policy Protect You?*, CORRECTIONSONE, June 2, 2009, <http://www.correctionsone.com/corrections/articles/1844067-Does-your-inmate-grievance-policy-protect-you/>.

⁴⁸ Tom Watson, *Prison System Part 1: Fear of Retaliation Discourages Prisoners From Filing Appeals and Other Problems*, THREE-STRIKES-LEGAL.COM, http://three-strikes-legal.com/fear_of_retaliation.htm (last visited Jan. 25, 2010).

⁴⁹ *Cf.* Drapkin, *supra* note 47.

A CIRCUIT SPLIT

Although the right to petition appears straight forward on its face, a Circuit split in the federal court system has rendered it convoluted at best. Different courts have developed clashing interpretations of the right to petition clause and which complaints qualify for its protection. Decisions in the United States Court of Appeals for the Seventh Circuit and the United States Court of Appeals for the Tenth Circuit illustrate that the former has chosen a more narrow approach, with the latter giving the right more fluidity.⁵⁰

Seventh Circuit decisions state that “dispute[s] cannot be constitutionalized merely by filing a legal action.”⁵¹ This reasoning has been followed by the Fourth Circuit and Ninth Circuit as well.⁵² The Seventh Circuit has been reluctant to construe the rule broadly, arguing that “[a]ny abridgement of the right to free speech is merely the incidental effect of observing an otherwise legitimate regulation.”⁵³ *Altman v. Hurst* narrowly defined the right to petition, holding that the Supreme Court’s interpretation of the right is limited to political expression and does not extend to the general right to bring suit in the federal courts.⁵⁴ In *Altman*, the plaintiff was a police sergeant employed in Hickory Hills, Illinois.⁵⁵ The plaintiff contended that his First Amendment rights were violated when he was punished for allegedly encouraging a fellow officer to appeal her suspension.⁵⁶ His conduct was deemed to be merely a private dispute rather than a matter of public concern, and was therefore dismissed from federal

⁵⁰ *Dobbey v. Ill. Dep’t of Corrs.*, 574 F.3d 443, 446 (7th Cir. 2009).

⁵¹ *Id.* at 446–47 (quoting *Altman v. Hurst*, 734 F.2d 1240, 1244 n.10 (7th Cir. 1984) (per curiam)).

⁵² *Kirby v. City Of Elizabeth City*, 388 F.3d 440, 448 (4th Cir. 2004) (stating, therefore, that claims must be a matter of public concern in order to be constitutionally protected); *see also Rendish v. City of Tacoma*, 123 F.3d 1216, 1221 (9th Cir. 1997).

⁵³ *Lawline v. Am. Bar Ass’n*, 956 F.2d 1378, 1386 (7th Cir. 1992).

⁵⁴ *See* 734 F.2d at 1244 n.10.

⁵⁵ *Id.* at 1244.

⁵⁶ *Id.*

court.⁵⁷ Further, the court in *Moss v. Westerman* stated that a claim must be more than a personal gripe, must present an issue affecting all prisoners, and must question a policy that affects the prison as a whole.⁵⁸ Finally, perhaps the Seventh Circuit's most deliberate pronouncement of its narrow view is *Yatvin v. Madison Metropolitan School District*. In *Yatvin*, the plaintiff, a woman, applied for an assistant superintendent position in a particular school district.⁵⁹ She was one of four candidates, the other three being men.⁶⁰ When two of the men were recommended for the position, the plaintiff claimed sex discrimination and filed charges with the appropriate agencies.⁶¹ Following this incident, she applied for a different administrative position in the same school district.⁶² Two women, including the plaintiff, and two men had applied.⁶³ The other woman was chosen for the job, prompting the plaintiff to claim this was in retaliation for her filing the sex discrimination charges.⁶⁴ The court asserted that "[t]he contention that every act of retaliation against a person who files charges of wrongdoing with a public agency denies freedom of speech or the right to petition for redress of grievances . . . is simply stated too broadly."⁶⁵ In short, the court held not every "legal gesture or pleading" is protected by the First Amendment.⁶⁶

As to the Seventh Circuit's view in the context of an inmate, *Parker v. Walker* helps define the court's narrow interpretation of the right to petition, making clear that an inmate's life is controlled by

⁵⁷ *Id.*

⁵⁸ No. 04-CV-0570-MJR, 2008 U.S. Dist. LEXIS 1481, at *8 (S.D. Ill. Jan. 9, 2008).

⁵⁹ *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412, 415 (7th Cir. 1988).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 419.

⁶⁶ *Id.*

prison officials down to the smallest detail.⁶⁷ The plaintiff had filed numerous grievances against the prison staff, after they filed a disciplinary report against him, alleging that he needed protective custody in the prison and should not have to obey the staff and go back to “general population.”⁶⁸ Ultimately, the board denied plaintiff’s grievances.⁶⁹ The Court did not “understand the Constitution as providing a remedy for every slight or petty annoyance that befalls an inmate even if done with retaliatory intent [The retaliatory act] must rise above the inconsequential and trivial.”⁷⁰ Moreover, the Court stated that occurrences lacking adverse material affect are simply part of the unpleasantness of prison life which does not give rise to a retaliation claim.⁷¹ Even if a defendant’s acts have material affected the plaintiff inmate, the complaints and grievances must be “related to matters of public concern” and not be merely a personal gripe about an incident.⁷²

In contrast, the Tenth Circuit has defined the right in an exceedingly broad manner.⁷³ Courts have stated that any form of official retaliation in response to a person utilizing their freedom of speech is actionable.⁷⁴ The court set forth a three prong test in *Worrell v. Henry* for unlawful retaliation by government officials in response to the exercise of the First Amendment right to petition.⁷⁵ The plaintiff must show

⁶⁷ See No. 08-CV-152-MJR, 2008 U.S. Dist. LEXIS 90195, at *13 (S.D. Ill. Nov. 6, 2008).

⁶⁸ *Id.* at *3–4.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at *14 (stating that minor changes in a prisoner’s life that lack a material adverse affect fit this category).

⁷² *Id.* at *16 (citation omitted).

⁷³ See *Dobbey v. Ill. Dep’t of Corrs.*, 574 F.3d 443, 447 (7th Cir. 2009).

⁷⁴ 219 F.3d 1197, 1212 (10th Cir. 2000) (stating that this includes prosecution, threatened prosecution, bad faith investigation, and legal harassment).

⁷⁵ *Id.*

(1) that [he or she] was engaged in constitutionally protected activity; (2) that the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct.⁷⁶

In *Worrell*, the plaintiff claimed his First Amendment rights were violated when he testified for the defense in capital murder case, causing the District Attorney's office to rescind a job offer to him.⁷⁷ The Court stated that the plaintiff is afforded "the benefit of all favorable inferences," and that as long as there was evidence to support the factors, he is engaging in constitutionally protected activity.⁷⁸ This broad reasoning has been adopted by the Third and Fifth Circuits.⁷⁹ However, the courts have cautioned that petitions made through informal channels may be given a lesser degree of constitutional protection than their formal counterparts.⁸⁰

This broad view was demonstrated in *Van Deelen v. Johnson*, where the Court found that a private citizen expressed a constitutionally protected First Amendment right anytime he or she petitions the government for redress.⁸¹ The court further stated claims that are minor and questionable, as well as claims that are mighty and consequential, are all welcomed.⁸² Further, the court stated that matters of public concern are not required for addressing the

⁷⁶ *Id.*

⁷⁷ *Id.* at 1202.

⁷⁸ *Id.* at 1213–1214.

⁷⁹ See *Reilly v. City of Atlantic City*, 532 F.3d 216, 230 (3d Cir. 2008); *Izen v. Catalina*, 398 F.3d 363, 367 (5th Cir. 2005).

⁸⁰ *Foraker v. Chaffinch*, 501 F.3d 231, 237 (3d Cir. 2007) (citing *San Filippo v. Bongiovanni*, 30 F.3d 424, 439–40 (3d Cir. 1994)).

⁸¹ 497 F.3d 1151, 1156 (10th Cir. 2007).

⁸² *Id.* at 1157 n.6 (citing *McCook v. Springer Sch. Dist.*, 44 F. App'x 896, 903–04 (10th Cir. 2002)).

constitutionality of a First Amendment right to petition claim.⁸³ Rather, a plaintiff's First Amendment claim can survive on the ground that at least some of the speech at issue involved public concern.⁸⁴ What's more, private citizens are considered in a broader context of free expression protected under the First Amendment in contrast to public employees.⁸⁵ In sum, the Tenth Circuit suggests that the First Amendment petition clause does not pick and choose its causes.⁸⁶

This broad interpretation of the right to petition is not without limits. In *Ellibee v. Higgins* the court stated that a plaintiff "must demonstrate an actual injury to his ability to pursue a non-frivolous legal claim."⁸⁷ This actual injury, the court reasoned, is needed in order to show that the defendant interfered with the plaintiff's First Amendment right to pursue grievances and participate in litigation.⁸⁸ Additionally, the plaintiff must demonstrate that the injury would dissuade a person of ordinary firmness from continuing to participate in that activity.⁸⁹ These commonsense limits imposed by the Tenth Circuit still focus on keeping frivolous prisoner claims out of federal courts, but do so in a way that respects prisoner's ultimate right to bring a suit under the right to petition. In the analysis that follows, flaws in the narrow interpretation of the right to petition become strikingly clear.

A. *The Facts of Dobbey v. Illinois Department of Corrections*

Turning to the case at issue, *Dobbey v. Illinois Department of Corrections* is an extraordinary illustration of the current tension in the

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ No. 4-3402-CM, 2006 U.S. Dist. LEXIS 8777, at *6 (D. Kan. Feb. 13, 2006).

⁸⁸ *Id.*

⁸⁹ *Id.* (citing *Poole v. County of Otero*, 271 F.3d 995, 960 (10th Cir. 2001)).

courts over the proper interpretation of an inmate's right to petition.⁹⁰ The plaintiff, Lester Dobbey, is a black inmate at the Menard Correctional Facility, an Illinois state prison.⁹¹ During his five years at the prison, Lester Dobbey worked as a staff janitor, and had no record of problems or altercations with the prison staff.⁹² However, signs of trouble first began while five white prison security guards were playing cards in the main control room, also called the "officers' cage."⁹³ Dobbey had just entered the breakfast room with two other black inmates and began preparing breakfast trays with them.⁹⁴ During this time, he was able to see the inside of the officers' cage. Dobbey looked into the cage and allegedly observed one of the guards who got up from the card game to hang a noose from the ceiling.⁹⁵ According to Dobbey, the guard then proceeded to swat the noose so that it swung back and forth, and sat down to watch it "looking crazy with evil eyes".⁹⁶ All three black inmates saw the swinging noose hung by the guard in the officers' cage.⁹⁷ Approximately twenty minutes later, another guard allegedly took down the noose.⁹⁸ Dobbey filed a grievance with prison authorities complaining of the guard's intimidating conduct.⁹⁹

The following day, Dobbey sent letters describing the intimidating noose incident to various media outlets and state officials.¹⁰⁰ Approximately one month later, a prison disciplinary charge was filed

⁹⁰ See generally John E. Wolfgram, *How the Judiciary Stole the Right to Petition*, 31 U. WEST L.A. L. REV. 1, 3 (2000) available at <http://www.constitution.org/abus/wolfgram/ptnright.htm>.

⁹¹ Dobbey v. Ill. Dep't of Corrs., 574 F.3d 443, 444 (7th Cir. 2009).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 445.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

against Dobbey for allegedly disobeying a guard's order. The order instructed Dobbey that he must scrape wax off a section of floor in the prison.¹⁰¹ Dobbey asserted that he was scraping diligently even though the task was demeaning, but claims the guard told him, "you're on Bullshit around here."¹⁰² As a result of the disciplinary charge, Dobbey was terminated from his janitorial job and various other sanctions were imposed upon him by prison administrators.¹⁰³ Dobbey felt that he was assigned the menial work tasks and ultimately terminated from his job because he complained of the conduct of the prison guards. When he inquired as to the denial of his grievance, Dobbey was told that his grievance regarding the noose incident was denied because "there was no evidence of the noose." Dobbey believed, however, that prison authorities were simply covering for their employees.¹⁰⁴

Dobbey then filed suit, alleging cruel and unusual punishment, as well as retaliation by the prison guards for exercising his First Amendment right to petition when he filed an internal grievance with prison authorities.¹⁰⁵ Dobbey stated that "the defendants retaliated against him for his exercising his First Amendment rights—in other words, they punished him for his speech—and if this is correct they violated the amendment and by doing so gave him a valid basis for suing them under 42 U.S.C. § 1983."¹⁰⁶ The district judge dismissed the suit before service of process, on the authority of 28 U.S.C. § 1915A, which, in regards to Dobbey, directs dismissal if the complaint fails to state a claim or if it seeks monetary relief from an immune defendant.¹⁰⁷ Judge Posner was then faced with the question of whether the district judge was correct in his belief that Dobbey's

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 445–46.

¹⁰⁶ *Id.* at 446.

¹⁰⁷ See 28 U.S.C. § 1915A(b)(1), (2); *Dobbey*, 574 F.3d at 446.

complaint failed to state a claim for violation of the First Amendment right to petition against the defendants.¹⁰⁸

B. Judge Posner's Analysis

Judge Posner reversed and remanded Dobbey's retaliation claim, as it was clear to him that the complaint contained sufficient allegations of retaliation. However, since the district court dismissed Dobbey's complaint before any discovery, no analysis of the substantive issues was possible without additional fact-finding.¹⁰⁹ Judge Posner stated, "we must assume that the plaintiff's punishment for allegedly failing to scrape wax as ordered was indeed retaliation for filing a grievance about, and for publicizing the noose incident, so that the issue to be resolved is whether the filing or the publicizing was protected by the First Amendment."¹¹⁰ Noting the lack of a developed record, Judge Posner offered "no opinion on the ultimate merits of that claim because further development of the record may cast the facts in a different light from the complaint."¹¹¹ While Judge Posner's opinion did not bring any finality to Dobbey's case, his discussion of the differing views of courts as to the right to petition opened the door to a deeper policy concern, highlighting the difficulties for inmate petitions which stem in part from the inadequacy of the inmate grievance system.

THE IMPORTANCE OF INMATES' ABILITY TO BRING A CLAIM

An examination of inmates' right to bring a cause of action is essential to an understanding of the flawed narrow view of the right to petition and is consistent with a theory that a broad interpretation of the right is required. Moreover, it sheds light on how the right to petition is severely limited and restricted, landing an inmate's exercise

¹⁰⁸ *Dobbey*, 574 F.3d at 446.

¹⁰⁹ *Id.* at 447.

¹¹⁰ *Id.* at 446.

¹¹¹ *Id.* at 447.

of the right in jeopardy. A prisoner's "right to complain in whatever form he or she chooses about government official conduct lies at the core of First Amendment freedoms."¹¹² This right clearly extends to prisoners abilities to file grievances with prison authorities, and ultimately ability to file a lawsuit. Fundamentally, public officials' actions, including prison personnel, are subject to criticism and debate.¹¹³ Prisoners and citizens alike involved in this issue should not be subjected to the threat of retaliation when they speak out on such issues.¹¹⁴ The prevention of inmate litigation through retaliation for filing grievances runs afoul of the first amendment right to petition because "stat[ing] that one class of individuals may not participate [in petitioning the government] in the same manner as all others is clearly a violation of this principle."¹¹⁵ Courts have held that even if a public officer suffers inconvenience, embarrassment, or damage to reputation as a result of public criticism akin to inmate complaints and litigation, it is simply a burden which "unfortunately all civil servants may be called upon occasionally to shoulder as part of the obligation of the job."¹¹⁶

As previously discussed, the PLRA requires inmates to file internal grievances within their prison system before suing. This requirement alone makes the PLRA problematic, causing a serious obstacle to inmates' right to petition. Not only has the Seventh Circuit noted that "[i]ts provisions have never seriously been debated," it has been accurately criticized as a product of "haste" which lacks a

¹¹² LYNNE WILSON, MALICIOUS PROSECUTION COUNTERCLAIMS AND THE RIGHT OF PETITION IN POLICE MISCONDUCT SUITS 11–12, <http://www.nlg-npap.org/html/research/LWmaliciousprosecution.pdf> (last visited Jan. 25, 2009).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Diverse Coalition of Organizations Call for White House to Rescind Rule Restricting Lobbyist Communications on Bailout Funds*, CREW, Mar. 31, 2009, <http://www.citizensforethics.org/node/38370>.

¹¹⁶ Wilson, *supra* note 112 (quoting *Greenberg v. City of N.Y. Mun. Bldg.*, 392 N.Y.S.2d 547, 550 (1977)).

committee report.¹¹⁷ Senate records indicate that there is no defined scope to the legislation, and there is no discussion of its intended effects upon meritorious First Amendment prisoner claims.¹¹⁸ As a result, more than just frivolous litigation is suppressed.¹¹⁹ If the PLRA was intended to selectively discourage the filing of frivolous or meritless lawsuits, as proponents argue, then it should follow that prisoners are winning a larger percentage of their lawsuits after the enactment of the PLRA.¹²⁰ However, “the most comprehensive study to date shows just the opposite: since the passage of the PLRA, prisoners not only are filing fewer lawsuits, but also are succeeding in a smaller proportion of the cases they do file.”¹²¹

While it appears there was little debate in Congress regarding the potential impact of § 1997e(e), there were many anecdotal references to the most notorious frivolous prisoner claims. The most touted among these included suits for an unsatisfactory haircut, disappointment at not being invited to a pizza party, having inadequate locker space, and being served chunky instead of creamy peanut butter. These cases, though purportedly examples of actual prisoner suits, are hardly representative of prisoner suits as a whole. Nor do they reflect the merits of cases brought by prisoners subjected to egregious violations of their civil rights.¹²²

¹¹⁷ Corbett H. Williams, *Evisceration of The First Amendment: The Prison Litigation Reform Act and Interpretation of 42 U.S.C. § 1997E(E) In Prisoner First Amendment Claims*, 39 LOYOLA L.A. L. REV. 859, 863 (2006).

¹¹⁸ *Id.* at 864.

¹¹⁹ *Id.*

¹²⁰ HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 35 (2009), <http://www.hrw.org/sites/default/files/reports/us0609web.pdf>.

¹²¹ *Id.*

¹²² Williams, *supra* note 117, at 860–861.

This is a strong indication that the PLRA has skewed the right to petition against prisoners.¹²³ Inmate cases remain those matters filed by individuals spurned by society, and the cases are seldom successful.¹²⁴ As a result, prisoners' cases are often presumed frivolous by the people responsible for reading and evaluating the petitions filed by those prisoners.¹²⁵ Ultimately, the empirical data objectively demonstrates that the PLRA's standards have imposed new and difficult obstacles which result in even constitutionally meritorious cases being frequently dismissed.¹²⁶

The PLRA has prevented inmates from raising legitimate claims because more cases are dismissed and fewer are settled.¹²⁷ Constitutionally meritorious cases are faced with insurmountable obstacles.¹²⁸ Inmates are consistently harmed in cases that are dismissed notwithstanding their constitutional merit, which compromises "the entire system of accountability that ensures prison and jail officials comply with constitutional mandates."¹²⁹ Serious cases, such as those involving retaliation, are dismissed because the PLRA bars even meritorious claims from court if an inmate has not accurately complied with the numerous technical requirements of the prison grievance system.¹³⁰ Furthermore, officials involved in grievance procedures, such as wardens, jailers, and sheriffs, all have a

¹²³ *Id.*

¹²⁴ Christopher E. Smith, *The Governance of Corrections: Implications of the Changing Interface of Courts and Corrections*, 2 CRIM. JUST. 113, 129 (2000).

¹²⁵ *Id.* (citing law clerks, U.S. magistrates, and district judges as responsible for "reading and evaluating petitions filed by prisoners").

¹²⁶ Williams, *supra* note 117, at 860–861.

¹²⁷ MARGO SCHLANGER & GIOVANNI SHAY, AMERICAN CONSTITUTION SOCIETY FOR LAW AND PUBLIC POLICY, PRESERVING THE RULE OF LAW IN AMERICA'S PRISONS: THE CASE FOR AMENDING THE PRISON LITIGATION REFORM ACT 3 (2007), available at <http://www.acslaw.org/files/Schlanger%20Shay%20PLRA%20Paper%203-28-07.pdf>.

¹²⁸ *Id.*

¹²⁹ *Id.* at 2.

¹³⁰ *Id.* at 9.

common interest “in avoiding adverse judgments against themselves or their colleagues.”¹³¹ Correctional administrators are largely aware of the potential benefits of effective grievance procedures, “including the provision of information with respect to existing problems and needed adjustments, the improvement of the facility’s credibility with courts, the provision of documentation in the event that inmates file suit, and the resolution of issues before they reach the courts.”¹³² However, it is still obvious, whether by failure or design, that grievance procedures are widely ineffective.¹³³

In further evaluating the flaws in prison policies behind cases such as *Dobbey*, it is appropriate to look to the system’s effect on the inmates, including their perception of the system’s ability to protect their rights. First, it is natural for an inmate to feel aggrieved because they are in the custody of state or federal prison authorities.¹³⁴ Simply put: “prisons are not intended to be pleasant places.”¹³⁵ Despite this, a prisoner has all the legal rights of an ordinary citizen with the exception of those expressly or impliedly taken by the law.¹³⁶ Grievance procedures play a key role in ensuring the protection of rights in hierarchal settings, such as prisons.¹³⁷ These correctional institutions represent one of the most rigid and authoritarian patterns of social organization.¹³⁸ While in prison, inmates are utterly subject to the coercive power of the state, acting through the institution.¹³⁹ This power is only legitimately exercised as long as the rights retained by inmates are protected.¹⁴⁰ In fact, prisoners who are not given fair

¹³¹ *Id.* at 10.

¹³² David M. Adlerstein, *The “Iron Triangle” of the Prison Litigation Reform Act*, 101 COLUM. L. REV. 1681, 1694 (2001).

¹³³ *Id.*

¹³⁴ *Id.* at 1682.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at n.8.

¹³⁹ *Id.* at 1682.

¹⁴⁰ *Id.*

grievance procedures may be further inclined to “externalize” their displeasure with the system toward other inmates, prison officials, or the general public once released.¹⁴¹ An inmate’s perception of the grievance process is a crucial and often undervalued part of the analysis.¹⁴² While the inmate grievance procedure can be a beneficial and useful tool for inmates, if they are not assured using the process will result in solving problems or addressing issues, they will forgo using the process.¹⁴³ “Many inmates regard the grievance procedure as a last resort, some because they insist that they will be labeled a complainer or a troublemaker, and believe retaliation will occur, so that problems will only increase if they use the grievance procedure.”¹⁴⁴ “Further, as evidenced by the persistence of § 1983 litigation, inmates are often dissatisfied with the disposition of grievances. Apart from the limited scope of available remedies, corrections administrators may be predisposed toward upholding institutional policy and supporting subordinate officers.”¹⁴⁵ Due to this perception of the grievance system by prisoners, many inmates attempt to have problems resolved by alternative and unfavorable means.¹⁴⁶ Many inmates even attempt in-person communication with staff members before they ever consider using the grievance procedure.¹⁴⁷

Additionally, a basic structural problem exists within grievance process’s exhaustion requirements because prison officials themselves both design the grievance system that prisoners must exhaust before filing suit and find themselves as the defendants in most lawsuits brought by prisoners.¹⁴⁸ This generates an incentive for prison officials

¹⁴¹ *Id.*

¹⁴² CORRECTIONAL INSTITUTE INSPECTION COMMITTEE, INMATE GRIEVANCE PROCEDURE REVIEW 18 (2006), available at <http://www.ciic.state.oh.us/reports/igp.pdf>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Adlerstein, *supra* note 132, at 1696.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ HUMAN RIGHTS WATCH, *supra* note 120, at 12.

to design grievance systems with short deadlines, multiple steps, and numerous technical requirements.¹⁴⁹ “Perversely, it actually undermines internal accountability as well, by encouraging prisons to come up with high procedural hurdles, and to refuse to consider the merits of serious grievances, in order to best preserve a defense of non-exhaustion.”¹⁵⁰ Unfortunately, the PLRA imposes no limits or requirements for grievance systems and allows the sky as “the limit for the procedural complexity or difficulty of the exhaustion regime.”¹⁵¹ The lack of grievance system requirements by design tends to discourage rather than facilitate compliance by prisoners.¹⁵² For instance, some prison’s systems require that the prisoner first raise the issue of which he is complaining with the staff member involved, even if the grievance entails abusive conduct or assault by that staff member.¹⁵³ Requirements like this can severely hinder a complaint’s ability to make it through the grievance process from start to finish, thus allowing the inmate to bring a claim in court. Furthermore, a prisoner’s “failure to coherently set forth the nature of a grievance, to limit grievances to one per form, and to file within a prescribed (and typically brief) period” are additional problems that may end in dismissal, forever barring a prisoner from redress.”¹⁵⁴ In instances where grievances are denied, the prisoners often do not receive adequate explanation of the reason behind the ruling against their grievance.¹⁵⁵ The rationale behind this is that most prison officials lack the education and understanding to formulate an adequate and concise grievance response.¹⁵⁶ But whatever the justification, more arduous the grievance rules mean less likelihood that a prison or its staff members will be subject to damages or have their conduct

¹⁴⁹ *Id.*

¹⁵⁰ Schlanger & Shay, *supra* note 127, at 10.

¹⁵¹ HUMAN RIGHTS WATCH, *supra* note 120, at 12 (citation omitted).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Adlerstein, *supra* note 132, at 1695.

¹⁵⁵ *Id.* at 1696

¹⁵⁶ *Id.*

enjoined in a subsequent lawsuit.¹⁵⁷ The ineffectiveness of these types of systems has led to a grievance system that may effectively remove frivolous litigation from the courts, but also frustrates the adequate redress of prisoner grievances.¹⁵⁸

A. *Illinois Department of Corrections*

Most relevant to the inquiry in this case are the policies of the Illinois Department of Corrections, which has a three-step grievance procedure. According to Illinois Administrative Code, if a prisoner has a grievance or complaint he must first seek the assistance of an inmate counselor.¹⁵⁹ Second, if the prisoner's complaint remains unremedied despite the help of a counselor, the prisoner may then file a written grievance.¹⁶⁰ The written grievance is reviewed by a grievance officer who submits a recommendation to the chief administrative officer.¹⁶¹ Finally, if the warden denies the prisoner's grievance, the prisoner has 30 days in which to appeal the warden's decision to the Director, who then may order a hearing before the Administrative Review Board.¹⁶² Only after all of these administrative hurdles are cleared can an inmate file a grievance in federal court.

Once the action is filed, under Seventh Circuit precedent a prisoner must also state a claim of constitutional dimension.¹⁶³ In other words, a state's inmate grievance procedure alone does not give the inmate a liberty interest protected by the constitution.¹⁶⁴ Since the Constitution contains no clause requiring an inmate grievance

¹⁵⁷ SCHLANGER & SHAY, *supra* note 127, at 10.

¹⁵⁸ Adlerstein, *supra* note 132, at 1696–97.

¹⁵⁹ Ill. Admin. Code tit. 20, § 504.810; *Burrell v. Powers*, 431 F.3d 282, 284 (7th Cir. 2005).

¹⁶⁰ Ill. Admin. Code tit. 20, § 504.810.

¹⁶¹ *Id.* § 504.830.

¹⁶² *Id.* § 504.850.

¹⁶³ *Bulmer v. Sutton*, No. 04-922-JPG, 2006 WL 2644942, at *2 (S.D. Ill. September 14, 2006).

¹⁶⁴ *Antonelli v. Sheahan*, 81 F.3d 1422, 1430 (7th Cir. 1996).

procedure, the failure of state prison officials to follow their own procedures does not, on its face, violate the Constitution.¹⁶⁵

However, the Seventh Circuit has held that prison officials may not retaliate against inmates for filing grievances or otherwise complaining about their conditions of confinement.¹⁶⁶ Once a complaint is successfully filed upon completion of the grievance process, an inmate need only offer the bare minimum facts necessary to put the defendant on notice of the claim so that he may file an answer.¹⁶⁷ To state a claim of improper retaliation, the inmate only has to name the suit and the act of retaliation.¹⁶⁸ Although inmates do not often navigate the grievance system effectively, those that do are rewarded by the federal system's notice pleading standard. The main problem for inmates, however, is not pleading retaliation claims, but proving them and winning them.

B. Retaliation Occurring After an Inmate Files a Grievance Cannot Be Solved by the Same Inadequate Process

Retaliation against inmates is a striking policy concern within the inmate grievance system.¹⁶⁹ The threat of retaliation makes it clear that grievance systems are not functioning correctly, and are not effectively allowing inmates to bring a claim. This problem again creates the necessity for a broad interpretation of the right to petition by courts. Generally, solidarity exists between prison officials against inmates, which not only has a chilling effect throughout the prison, but also poses a legitimate concern for retaliatory measures by these officials against the inmates.¹⁷⁰ Inmates who have experienced prison official retaliation for good faith use of the grievance process may be

¹⁶⁵ See *Maust v. Headley*, 959 F.2d 644, 648 (7th Cir. 1992).

¹⁶⁶ *Walker v. Thompson*, 288 F.3d 1005, 1009 (7th Cir. 2002).

¹⁶⁷ *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002).

¹⁶⁸ *Id.*

¹⁶⁹ CORRECTIONAL INSTITUTE INSPECTION COMMITTEE, *supra* note 142, at 19.

¹⁷⁰ Adlerstein, *supra* note 132, at 1696.

justifiably hesitant to use the procedure again to report their claim.¹⁷¹ Inmates that do file grievances with the system “may find . . . that retaliation is extremely difficult to prove. Areas of alleged retaliation are reported in areas which staff has the authority to exercise discretion.”¹⁷² A lack of evidence proving that a prison official or staff member violated the prohibition against retaliation does not allow any disciplinary or corrective action to be taken.¹⁷³ In other words, an inmate disadvantaged by a lack of resources is at a great handicap to show proof of retaliation from a correctional officer who has the prison system on his side. The presence of retaliation by correctional officials may encourage the aggrieved to refrain from bringing suit and witnesses to remain silent.¹⁷⁴ In other words, they are “[c]ompletely dependent on their institutional environments” and thus “particularly susceptible to intimidation and frequently afraid to voice their grievances.”¹⁷⁵

Dobbey is a perfect example of a case where prison officials have claimed “an unfettered right to punish prisoners who complain about abuse by prison guards.”¹⁷⁶ Legitimizing retaliatory punishment further institutionalizes a culture of impunity within prisons.¹⁷⁷ Prisons have become environments where criticism of official misconduct is wildly suppressed behind their walls.¹⁷⁸ Prisons are known for their insularity from mainstream society.¹⁷⁹ This merges with their coercive mandate, creating an environment in which abuse of authority is an ever-present, yet accountability is severely

¹⁷¹CORRECTIONAL INSTITUTE INSPECTION COMMITTEE, *supra* note 142, at 19.

¹⁷²*Id.*

¹⁷³*Id.*

¹⁷⁴Adlerstein, *supra* note 132, at 1691.

¹⁷⁵S. Rep. No. 95-1056, at 18 (1980).

¹⁷⁶Brief for Legal Aid Society of the City of New York et al., as Amici Curiae Supporting Respondents, *Shaw v. Murphy*, 532 U.S. 418 (2001) (No. 99-1613), 2000 WL 1845914, at *2.

¹⁷⁷*Id.*

¹⁷⁸*Id.* at *3.

¹⁷⁹*Id.*

diminished.¹⁸⁰ This creates “a pervasive prison culture of extreme loyalty by staff, including the rigid ‘code of silence’ by which staff and supervisors shield one another from accountability.”¹⁸¹ Inmates who do complain about abuse or criticize jailer staff are singled out and targeted by prison staff for retaliation in order to secure their silence.¹⁸² This creates a culture that ensures “impunity, . . . fosters abuse and permits cover-ups on a scale virtually impossible in free society.”¹⁸³ This retaliation is rampant in the flawed Illinois Department of Corrections procedures in place throughout the state of Illinois. Retaliation, and the inability or unwillingness of inmates to bring claims because of it, is one of the main reasons why it is necessary for the courts to move to a more broad view of the right to petition. The grievance procedures currently in place are wholly ineffective at discouraging retaliation against inmates.

C. Problematic Findings by the John Howard Association in the Cook County Department of Corrections Confirms the Need for a Broad Right to Petition

The broken system of grievance administration in Illinois which effectively denies inmates the right to petition is starkly apparent in the John Howard Association’s Duran report. The John Howard Association (“JHA”) is the oldest and toughest advocate “for fair, human, and effective incarceration and punishment practices and policies” in Illinois.¹⁸⁴ In its 21st Duran report, JHA examined the conditions of confinement at the Cook County Department of Corrections (“CCDOC”).¹⁸⁵ A review of the CCDOC’s grievance

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ JOHN HOWARD ASSOCIATION, COURT MONITORING REPORT ON CROWDING AND CONDITIONS OF CONFINEMENT AT THE COOK COUNTY DEPARTMENT OF CORRECTIONS 1 (2005) available at http://www.john-howard.org/images/execsumm_bc21.doc.

¹⁸⁵ *Id.*

procedure was conducted during March and April 2005 by JHA staff.¹⁸⁶ JHA took a sampling of ten percent of all inmate grievances from the 2004 calendar year, using a systematic random sampling procedure to select the grievances.¹⁸⁷ Data from these original grievance forms was collected, tabulated, and analyzed to provide insight into the grievance process for that calendar year.¹⁸⁸ The data revealed the following:

[D]uring 2004, nearly one-third (32.6%) of the grievances were collected within 24 hours (i.e., 0 - 1 day). This represents a significant decrease from the 24-hour collection rates of 50.0 percent in 2000, 55.0 percent in 1997 and 52.7 percent in 1996. Specifically, it represents a 17.4 percent decrease from the 2000 collection rate. This is particularly important to recognize, because the grievance procedures were modified in 2000 in order to provide inmates with a more expeditious way of handling complaints, but the data suggest that the revisions in the procedure may have had the opposite effect. Similarly, only 65.2 percent of grievances were collected within three days, showing a decrease in the timeliness of collection rates as compared to 67.9 percent in 2000, 82.5 percent in 1997 and 72.1 percent in 1996. CCDOC should look back at what circumstances were in play during 1997 that yielded faster collection rates. Over one-third (34.8%) of the grievances were significantly delayed (i.e. - 4 or more days) before collection. This is nearly a 3 percent increase from the rate of 32.1 percent in 2000. The data clearly expresses that the timeliness of grievance collection is continually decreasing.¹⁸⁹

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 15.

¹⁸⁹ *Id.* at 15–16.

Prison officials' response time to grievances was also a problematic finding in the JHA's report.¹⁹⁰ In fact, the most serious grievances, for example those involving physical contact with staff, elicited the longest average response time.¹⁹¹ Alleged verbal incidents between inmates and staff had an average of nineteen days between the filing of a grievance and the time that inmate grievant received a response, while nonverbal incidents between an inmate and staff had an average twenty one day response time.¹⁹² These numbers indicate an average response time that is almost four times longer than what the Consent Decree, which sets forth provisions for the adequate responses to grievances, requires.¹⁹³

D. The Department of Justice's 2007 Investigation of the Cook County Jail Exposes Illinois' Flawed Grievance Systems and the Need for Inmates to Have Broader Access to Court

In June and July of 2007, the United States Department of Justice ("DOJ") conducted an onsite investigation of the Cook County Jail, pursuant to the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997.¹⁹⁴ CRIPA gives the DOJ power to seek a remedy for a pattern or practice of conduct that violates the constitutional rights of inmates in adult detention and correctional facilities.¹⁹⁵ All preliminary findings were communicated to CCJ

¹⁹⁰ *Id.* at 16.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Letter from Department of Justice, Civil Rights Division, to Todd H. Stroger, Cook County Board President, & Thomas Dart, Cook County Sheriff [hereinafter DOJ Letter], at 1 (July 11, 2008), *available at* http://www.justice.gov/crt/split/documents/CookCountyJail_findingsletter_7-11-08.pdf.

¹⁹⁵ 42 U.S.C. § 1997f. CRIPA was enacted in 1980 seeks to remedy institutionalized abuses. CRIPA allows the Attorney General to sue state and local officials who operate institutions in which a pattern or practice of flagrant or egregious conditions deprives residents of their constitutional rights. *Id.*

officials, Cook County's legal counsel, and the Sheriff's Office following the close of the July 2007 visit to the CCJ.¹⁹⁶ Overall, the DOJ found that certain conditions at the CCJ violate the constitutional rights of inmates.¹⁹⁷ These onsite inspections were conducted by expert consultants in corrections, use of force, custodial medical and mental health care, fire safety, and sanitation.¹⁹⁸ All types of prison staff as well as inmates were interviewed. Before, during, and after the DOJ's visits, its staff reviewed an extensive number of "documents, including policies and procedures, incident reports, use of force reports, investigative reports, inmate grievances, disciplinary reports, unit logs, orientation materials, medical records, and staff training materials."¹⁹⁹

Since the grievance system is a vehicle for inmates to bring prison staff misconduct to light, often in the form of retaliation, as in *Dobbey*, it is important to note the DOJ's examination and findings of the CCJ's staff investigations.²⁰⁰ The DOJ stated that "to ensure reasonably safe conditions for inmates, correctional facilities must develop and maintain adequate systems to investigate staff misconduct, including alleged . . . abuse by staff."²⁰¹ Generally accepted correctional practices require clear and comprehensive policies and practices governing the investigation of staff use of force and misconduct.²⁰² The report asserted,

Adequate policies and practices include, at a minimum, screening of all grievance reports, specific criteria for initiating investigations based upon the report screening, specific criteria for investigations based upon the report screening, specific criteria for initiating

¹⁹⁶ DOJ Letter, *supra* note 194, at 1.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 20.

²⁰¹ *Id.*

²⁰² *Id.*

investigations based upon allegations from any source, timelines for the completion of internal investigations, and organized structure and format for recording and maintaining information in the investigatory file.²⁰³

Additionally, the investigation must be and appear to be unbiased.²⁰⁴ The DOJ discovered that the CCJ's investigatory practice fails on multiple levels, namely those involving timely investigations.²⁰⁵ Investigations must be undertaken promptly, or there is risk of the incident not being solved.²⁰⁶ In fact, most investigations were only undertaken once the inmate filed a lawsuit, which often occurs up to two years after the initial incident.²⁰⁷

Through the DOJ's finding, it is apparent the CCJ investigations are reactive and suffer from the appearance of bias.²⁰⁸ Investigations were often undertaken only because the CCJ was defending an inmate lawsuit.²⁰⁹ These findings revealed some of the only instances in which investigation on staff conduct was opened.²¹⁰ The CCJ's conduct clearly shows a lack of affirmative action by the jail to resolve grievances and move them through the system in an effort to redress inmate problems with institutional staff.

An inmate grievance system is a fundamental element of a functional prison system, with the purpose of providing a mechanism for allowing inmates to raise confinement-related concerns and notify the administration.²¹¹ When inmates view the system as credible, they can also serve as a source of intelligence to staff regarding potential security breaches in addition to excessive force or other staff

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 21.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 40.

misconduct.²¹² Not only should the grievance system be readily available and easily accessible to all inmates, but it should also allow prisoners to file their grievances in a secure and confidential manner, without threat of reprisal, and have them answered by staff that performs its responsibilities in a responsive and prompt manner.²¹³ Staff at the CCJ was expected to collect grievances from inmate tiers at least twice a week; however, this did not occur on a consistent basis.²¹⁴ Inmates complained of not having access to these staff members, and as a result the grievance process, often because they were locked in their cells during staff rounds.²¹⁵ Moreover, these same staff members are expected to handle the grievances of over 200 inmates each.²¹⁶ To say this is an ambitious task is to put it quite lightly.²¹⁷

Divisional policy and procedure further requires locked grievance boxes to be placed at each of the “housing units” for inmates to place their grievances in.²¹⁸ Each weekday these grievances are to be collected by the previously mentioned appointed staff members.²¹⁹ Unfortunately, the grievance system functions quite differently in practice, and varies between jail divisions and tiers.²²⁰ The prevailing policy, not found in the written policy, is for the inmates to hand their completed grievances to the staff while they are conducting rounds.²²¹ Staff reported that inmate grievances are to be inserted in confidential envelopes sealed by the inmate, another policy not included in written divisional policies.²²² Some divisions even allow inmates to give

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

completed grievances to a security supervisor who records the grievance in a log and gives it to the proper staff member.²²³ Security staff in other divisions refuses to handle grievances, citing conflict avoidance and impropriety as reasons for staying away.²²⁴ The aforementioned policies are just a few of the policies found at the CCJ, while many other versions exist.²²⁵ Even though it is apparent that the divisions were not using the required grievance boxes, many staff members, including the Program Services Administrator, were under the faulty assumption that inmates used these boxes.²²⁶ Overall, “[t]here is an extremely high level of confusion regarding the grievance policy and practice at all levels of CCJ.”²²⁷

Access to grievance forms by inmates is another universal problem.²²⁸ Often, grievances and the confidential envelopes used to carry them are unavailable on jail tiers and the grievance forms are rarely available in languages other than English, such as Spanish, which is the only language spoken, read, and understood by many inmates.²²⁹ The DOJ also found that inmates have little trust in the grievance system, believing the process to be unreliable and repeatedly complaining about its efficacy, with good cause.²³⁰ Inadequate responses are given to certain grievances, like, for example, ones concerning use of force.²³¹ Although an investigator will occasionally speak to an inmate filing these types of grievances, inmates state that they never heard back again about the grievances.²³² Furthermore, most inmates complained of never hearing back at all after filing a

²²³ *Id.*

²²⁴ *Id.* at 40–41.

²²⁵ *Id.* at 41.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* (citing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000D et seq.).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

grievance or even receiving some sort of summary denial in response to its filing.²³³ In some instances when inmates do receive grievance responses, the responses contain falsified information from the staff member involved in altercation with the inmate, a fabrication that astoundingly remains in CCJ's records as a valid grievance response, even though they are aware of its falsification.²³⁴ In one such case, the CCJ only opened an investigation, seven months later, after the inmate filed a lawsuit.²³⁵

E. Study of Two Illinois Penitentiaries: Vienna Correctional Center and Stateville Correctional Center Show that the PLRA Has Been Unsuccessful in Its Objectives

In 1982, an analysis of the grievance files in these two correctional facilities was performed by an author for the American Bar Foundation, randomly selecting inmates and staff to interview; grievance hearings and the grievance board were also observed.²³⁶ The study made it clear that prison grievance procedures are diverse from jurisdiction to jurisdiction and often from institution to institution as well.²³⁷ This finding is similar to those found in the CCJ, an investigation performed post-PLRA. The Department of Corrections' regulations made reference to "locked mailboxes" for the deposit of written grievances, but access to the procedure is much more informal and varied.²³⁸ At Vienna, grievances, usually in the form of hand-written notes rather than the requisite form, are given directly to the

²³³ *Id.*

²³⁴ *Id.* (discussing inmate Byron S. who filed a grievance after he an officer broke his jaw, but was denied an investigation in his grievance response because the officer had falsely reported that Byron had previously attacked him, such that Byron was ruled "combative").

²³⁵ *Id.*

²³⁶ Samuel Jan Brakel, *Administrative Justice in the Penitentiary: A Report on Inmate Grievance Procedures*, 7 AM. B. FOUND. RES. J. 111, 114–15 (1982).

²³⁷ *See id.* at 115.

²³⁸ *Id.* at 116.

Institutional Inquiry Board, the grievance board, or an intermediary.²³⁹ Stateville's arrangement is more random, using the IIB chairman to conduct hearings and allowing him to select random officials and counselors to sit in with him.²⁴⁰ Essentially, the grievance procedure was created to: "(1) improve institutional management and problem identification, (2) reduce inmate frustration and potential for prison violence, (3) increase the prospects of inmate rehabilitation, (4) keep down the volume of litigation, and last, but not least, (5) promote 'justice' in institutional relations and procedures."²⁴¹ Ironically, these problems persisted despite the prison grievance system, and the PLRA which was established to address part, if not all, of these issues.

The study revealed that it was often difficult to discern grievance report subject matter because of the aggregations in Stateville reports. Both Vienna and Stateville grievance forms contained grievance category options that confused inmates.²⁴² This does not appear to have improved as a result of the PLRA; the JHA and DOJ investigations disclosed confusion on the part of inmates on how to classify or file their grievances in order to receive proper review from prison administration.²⁴³

Inmates in Stateville and Vienna did not speak positively of the grievance system. Overall, inmates stated that "the procedure is 'good on paper' but that it does not work so well in practice, because the wrong people sit on the board, too little heed is paid to the inmates' side of the dispute, too little time is taken to investigate, or just the opposite (no great paradox)—that the process takes too much time."²⁴⁴ Vienna prison guards also had strong negative opinions about the grievance procedure.²⁴⁵ Essentially, they felt that "(1) the procedure wasn't needed, (2) the prisoners didn't deserve it, and (3) prisoners

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 118.

²⁴² *Id.* at 123.

²⁴³ See generally JHA, *supra* note 184; DOJ Letter, *supra* note 194.

²⁴⁴ *Id.* at 127.

²⁴⁵ *Id.*

abused it.”²⁴⁶ These views were duplicated for the most part in Stateville.²⁴⁷ Unfortunately, prison guard attitudes towards inmates filing grievance have rarely changed today, and most prison employees are still unhappy with the process.

The Vienna and Stateville investigation advised that prison grievance systems must be used beyond their day-to-day- effects, and grievances must be periodically reviewed in order to identify patterns and anticipate problems in prisons.²⁴⁸ Doing so would help formulate policies and procedures that adequately respond to them.²⁴⁹ Furthermore, grievance procedures should be more formal and oriented; an idea that will give prisoners more faith in the system.²⁵⁰ These proposals are still needed today, even in the wake of the PLRA’s enactment. Since it is apparent that it will be very difficult to restructure prison grievance systems because of the environment and attitude towards prisons, a broader interpretation of the right to petition will give inmates the ability to exercise their right and successfully bring a constitutionally protected claim to court.

CONCLUSION

It has been established that the inadequate grievance systems in Illinois prison have put inmates’ right to petition in jeopardy. Although incarceration is intended to be unpleasant punishment, “the fact that prisons will always be unattractive places does not mean that all inmate difficulties can be ignored.”²⁵¹ While, it is not suggested that inmates have an automatic right to equality with free citizens, it is going too far to strip them of all constitutional protection and prolong the acceptance of inmate mistreatment and inhumane prison

²⁴⁶ *Id.* at 127–28.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 129.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 136.

²⁵¹ Kenneth Adams, *Adjusting to Prison Life: Stress, Coping and Maladaptation*, 16 CRIME AND JUSTICE 275, 275 (1992).

conditions. Therefore, the test for an inmate's constitutionally protected claim is best asserted by courts adopting the broad interpretation of the right to petition. Using this broad view allows inmates to proficiently navigate their way toward justice for wrongs they have endured in Illinois prisons, often at the hand of prison guards.

Under the narrow view, a prisoner would have a very hard time proving that they have a right under the First Amendment to litigate in court. It will be difficult for an inmate to successfully overcome the burdensome environment and requirements of the grievance system, and giving little or no deference to the claim under the narrow interpretation makes success for inmates nearly impossible. The Department of Justice has proven this point in the aforementioned CCJ study, revealing that when grievance systems are discombobulated and lack the respect of prison administration, the result is mistreated and dissatisfied inmates who have no faith in their rights as imprisoned Americans.²⁵² Inmates who are discouraged with the grievance system, who do not understand the grievance system, or who are prevented from addressing their grievances are ultimately losers under the PLRA, which was enacted both to protect inmates and eradicate "frivolous claims."²⁵³ Investigations of Illinois state prisons prior to the enactment of the PLRA reveal grievance system policy concerns still evident in today's post-PLRA prisons. Meritorious claims disappear in Illinois prison grievances system, never to be adequately resolved by the persons in charge of addressing them, and never to be given fair review by courts adopting a narrow view of the right to petition. These internal issues in prison grievance systems demonstrate the limited ability to exercise the right to petition in prisons and the necessity for a broader scope of constitutionally protected claims to be brought to court. Until prison officials can respect that inmates have the right to seek review of prison conditions and guard conduct and a strict fair grievance procedure that can be instilled, a narrow interpretation will not suffice.

²⁵² See generally DOJ Letter, *supra* note 194.

²⁵³ See 42 U.S.C. § 1997e.

With the broad interpretation of the right to petition, courts are sufficiently bridging the gap between inadequate grievance systems and the difficulties inmates face when trying to bring a claim in courts with a narrow interpretation. When an inmate brings a claim of retaliation for exercising his right to petition, or the filing of grievances in his prison, he will have a quicker turnaround for addressing the issue if the court has given the right to petition a broader scope. This does not mean exhaustion requirements under the PLRA need to be entirely thrown out. However, it is important that the PLRA be amended to include more reasonable requirements for inmates in these secluded prison environments. If the PLRA can be redrafted to contain uniform, strict requirements of prison administrations and their employees, this could lead to a better-run grievance system and environment for people who, although are inmates, should not completely lose those rights afforded to them by the United States Constitution.

Prisons are labeled as environments where poor conditions and mistreatment can be acceptable because they are responsible for housing criminals who have committed offenses against society. “While society no longer demands that inmates leave prisons changed for the better, it is both counterproductive and inhumane for inmates to leave prisons in much worse shape than when they entered.”²⁵⁴ While the negative attitude towards inmates is hard to eradicate, a strong effort on the part of Illinois prison administrations and the legislative body can assure that the actual intentions of the First Amendment are fulfilled, and that all persons are guaranteed these rights regardless of societal standing.

²⁵⁴ Adams, *supra* note 251, at 275.