

CORRESPONDENCE

THE POLITICS OF *INMATE LITIGATION*

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I feel compelled to respond to a recent student-written Note¹ that critiques my Article, *Inmate Litigation*,² published last year in the *Review*. The Note aims to expose my work as an (“at least . . . unconscious”³) exercise in left-leaning political argumentation in the guise of technocratic, quantitative data-crunching. The accusation of covert politics is puzzling. My piece employed careful quantitative and qualitative empirical techniques to evaluate a statute, the Prison Litigation Reform Act (PLRA),⁴ that restricts the legal rights of some of the most disempowered and vulnerable people in this country. The politics of that inquiry are clear, and I made no attempt to hide them: I think that the outcome of such systematic investigation matters — that it is wrong to curtail litigation rights, even of inmates, if the effect is to deny redress to victims of unconstitutional misconduct or if the policy change is based on false factual arguments. Unlike the Note, that is, I would hold Congress accountable for both the premises on which it rested inmate litigation reform and the results of that reform. The anonymous Note author’s (shocked, *shocked!*) discovery that my piece was driven by such an agenda, hidden in plain sight, hardly requires much analytic insight.

But whatever one’s politics, I believe that there is something to be said for fair and careful use of data, as well. Unfortunately, these qualities are nowhere to be found in the Note. Instead, its author engages both in egregious misreading of my piece — mischaracterizing both my arguments and the data on which they rest — and in illogical argumentation that hides rather than clarifies the meaning and effects of statutory provisions. These failings are particularly unfortunate because they obstruct serious policy debate, which is what my piece attempted to promote.

The problem begins with the Note’s frame, which asserts that I attempted but failed to establish that the PLRA’s proponents would, if only

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¹ Note, *The Indeterminacy of Inmate Litigation: A Response to Professor Schlanger*, 117 HARV. L. REV. 1661 (2004).

² Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003).

³ Note, *supra* note 1, at 1679.

⁴ Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321–66 to -77 (1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; and 42 U.S.C. §§ 1997–1997h).

they had all the evidence, view the statute as unsuccessful. But that (silly) project was not mine. Neither I nor the readers of the *Review* need a demonstration that the most conservative members of the House and Senate would embrace a statute that has shrunk the inmate litigation docket by over forty percent, regardless of that statute's impact on constitutionally meritorious cases. My Article's goals did include an evaluation — against “the terms [the PLRA's] supporters *used*”⁵ — of both the problem that the PLRA purported to solve and its success in achieving that solution. The difference between my actual project and the straw version created by the Note is crucial: mine takes seriously the policy justifications and aspirations that the PLRA's authors and supporters offered the median voter. In that context, the PLRA's proponents supported the statute's passage with calibrated claims about the prevalence of litigation abuse by inmates and the prospect of stemming that abuse without introducing obstacles to legitimate lawsuits.⁶ Whatever the statute's most ardent supporters actually believed in their hearts of hearts — and I underlined that “the constraint [that meritorious cases by inmates should remain viable] may have been entirely rhetorical”⁷ — the politicians who wrote and enacted the PLRA carefully chose the arguments they used in support of their proposal. In suggesting that abusive (as opposed to unsuccessful) lawsuits were less common than the PLRA's proponents claimed, and that the statute has failed to achieve the promised targeted litigation reform, instead making even constitutionally meritorious cases harder both to bring and to win, my Article — unlike the Note — took that rhetoric seriously.

Indeed, the Note's failure to own up to the rhetoric used to sell the PLRA is pervasive, particularly in its extended discussion of the concept of frivolous litigation. I contended that the PLRA's supporters were incorrect when they suggested that inmate litigation has typically, not only occasionally, been not just legally insufficient, indeed “not just legally frivolous[,] but actually laughable.”⁸ The Note claims that my piece is simply barking up the wrong tree in this regard; indeed, it argues, the “rock-bottom political issue”⁹ at the core of my piece is my thus-demonstrated deep misunderstanding of that omnipresent term “frivolous.” But it is the Note that garbles the concept of legal frivolousness, misconstruing its use both in general legal parlance and by the PLRA's supporters. Readers with even a

⁵ Schlanger, *supra* note 2, at 1634 (emphasis added).

⁶ See *id.* at 1634 & n.270.

⁷ *Id.* at 1634.

⁸ *Id.* at 1692.

⁹ Note, *supra* note 1, at 1680.

passing familiarity with typical legal definitions of “frivolous”¹⁰ (and the well-understood difference between frivolousness and mere legal insufficiency¹¹) will be startled by the Note’s assertion that the term, as used by the PLRA’s proponents, embraced any “cases that ‘would not stand on [their] own merits.’”¹² The Note’s internal quotation is from the 1994 House Republicans’ *Contract with America* — but that source uses simple lack of merit not to *define* frivolousness but to describe one (obvious) feature of frivolous cases. In any event, as my Article explained, the PLRA’s proponents repeatedly invoked not the Note’s idiosyncratic definition of frivolousness but the ordinary one, resting very heavy weight, rhetorically, on their characterization of inmate litigation as not merely legally meritless but utterly self-evidently so, unworthy of serious examination and therefore a complete waste of the time of prison officials and federal courts.¹³ But the Note first misdescribes the pro-PLRA rhetoric (at one point mentioning, for example, a singular list of “top-ten” frivolous inmate cases¹⁴ rather than the twenty-four such lists that dominated discussion of the proposed statute¹⁵), and then dismisses that rhetoric as professedly hyperbolic. This misreading of the statute’s legislative history impedes serious policy evaluation.

Not only does the Note blatantly mischaracterize the rhetoric employed by the PLRA’s proponents, it also fails to grapple with the real obstacles the statute has placed in the way of even legitimate cases. This failure is exemplified by the Note’s complete misunderstanding of the effect of the PLRA’s new exhaustion requirement. As I explained in my Article, an exhaustion rule will probably have a negative impact on the “quality” of the inmate docket: “The proportion of successful cases will likely decrease as courts dismiss cases for failure to exhaust.”¹⁶ The Note asserts that it is equally possible that the provision’s effect is “merit-blind, leading to a similar level of disqualification in frivolous cases.”¹⁷ Nice try, but what

¹⁰ See, e.g., *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (defining “frivolous” under 28 U.S.C. § 1915(d) as “lack[ing] an arguable basis either in law or in fact” . . . and as “embrac[ing] the inarguable legal conclusion . . . [and] the fanciful factual allegation”).

¹¹ See, e.g., *id.* at 329 (citing numerous cases in diverse contexts that distinguish frivolousness from mere absence of merit, thus marking a general “understanding that not all unsuccessful claims are frivolous”).

¹² Note, *supra* note 1, at 1665 (alteration in original) (quoting *CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION* 145 (Ed Gillespie & Bob Schellhas eds., 1994)).

¹³ I adduced a good deal of evidence, mostly from a literature review, to support my contention that the PLRA supporters’ characterizations did not represent the typical civil rights cases brought by inmates. See Schlanger, *supra* note 2, at 1570–73, 1692 & n.458.

¹⁴ See Note, *supra* note 1, at 1665.

¹⁵ See Schlanger, *supra* note 2, at 1568–69.

¹⁶ *Id.* at 1654.

¹⁷ Note, *supra* note 1, at 1675.

the Note forgets is that the exhaustion requirement operates alongside all the other applicable legal requirements — which include that frivolous cases be dismissed. As with any new obstacle to success on the merits, an exhaustion rule inevitably has more traction against meritorious cases than others because the others would have failed already.

More broadly, the Note argues that the now-declining settlement rate of the inmate docket — which I presented as confirmation that the PLRA has, indeed, made legitimate cases harder to win — may actually be evidence that the statute has simply reduced nuisance settlements,¹⁸ a less problematic effect. The Note nowhere mentions my treatment of this issue. Indeed, a reader of the Note might be forgiven for thinking that I am such a pro-plaintiff ideologue that I simply disregard the concept of nuisance value. In fact, I actually set out at some length my finding that the inmate litigation docket differs from other groups of cases in which, I expressly acknowledged, “cases frequently settle for low, ‘nuisance value’ amounts.”¹⁹ In inmate cases, I explained, nuisance value settlements are rare, because of the imbalance of information between plaintiffs and defendants, because inmate litigation is comparatively inexpensive, because settlement imposes large costs on defendants (who need to avoid developing reputations as pushovers), and because of the antagonism between officials and convicts endemic to the corrections milieu.²⁰ My inquiry into this topic was concrete rather than hypothetical; it was based on interviews and published discussions of the topic by repeat noninmate participants, many of whom supported the PLRA’s passage. For example, I cited state corrections heads who denied ever settling cases for nuisance value and judges who bemoaned the scarcity of settlements even in meritorious cases brought by inmates. Now, I may have gotten this point wrong; perhaps the statements of correctional administrators and federal judges were lies or exaggerations. But I don’t think so — and the Note does not provide any evidence whatsoever to refute my claims.

¹⁸ *Id.* at 1672–79. Even in its recitation of my factual conclusion that the inmate docket has seen a decline in the rate of both settlements and litigated victories, the Note reveals an inability to grapple with real numbers and real law, and a tendency toward the slam by innuendo. For example, the Note reports that I “surmised” that inmates “‘fare proportionately worse’ after the PLRA than they did before the PLRA.” *Id.* at 1677 (quoting Schlanger, *supra* note 2, at 1658) But I didn’t *surmise* this conclusion; I established it. Taking the success rate as the sum of the rate of settlements and of pro-plaintiff litigated outcomes, it is indisputable that inmate lawsuits have been less successful since the PLRA’s passage in 1996. My Article included five detailed figures that presented the relevant data. See Schlanger, *supra* note 2, at 1660–63. The Note never actually argues otherwise; it merely leaves the reader with the impression that my claim was unsupported.

¹⁹ Schlanger, *supra* note 2, at 1615.

²⁰ See *id.* at 1614–21.

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I could continue, but I think the point is made. I am confident that my Article (like every intellectual project) has flaws. But I am equally confident that I did not commit — either consciously or unconsciously — the kind of ideologically driven sleight-of-hand that the Note simultaneously imputes to me and itself exemplifies. By my lights, aspirations to fairness and care are not mere prattle, covering for rawer politics, but are (or ought to be) real constraints on scholarship and policy alike. Unfortunately, these appear not to be aspirations the Note shares, and the result is to impede rather than advance both legal and policy analysis.