



Theodore A. Levine  
*President*

Steven Banks  
*Attorney-in-Chief*

John Boston  
*Project Director*  
*Prisoners' Rights Project*

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**BY FAX**

Karen J. Mathis, President  
American Bar Association  
321 N. Clark St.  
Chicago, IL 60610  
FAX: (312) 988-5100

Dear President Mathis:

I am writing in support of the resolution of the ABA's Criminal Justice Section (CJS) endorsing repeal or amendment of the Prison Litigation Reform Act (PLRA). A decade's experience has shown that this statute has in practice become an instrument of injustice, barring from judicial relief a myriad of meritorious claims of violation of the Constitution and of federal statutes.

As the director of the Prisoners' Rights Project of the New York City Legal Aid Society, I have become highly familiar with the terms and practical consequences of the PLRA, having litigated cases involving its application in the Court of Appeals for the Second Circuit<sup>1</sup> and in federal district courts and having collaborated on *amicus* briefs in the United States Supreme Court.<sup>2</sup> I am the author of a regularly updated Continuing Legal Education guide to the PLRA<sup>3</sup> and conduct annual training on the PLRA for the staff attorneys of the Second Circuit. In the course of this work I have followed the day-to-day application of the statute in the federal district courts as well as its formal interpretation at the appellate level.

This experience convinces me that each element of the Criminal Justice Section's resolution is correct and should be adopted by the ABA, as set out in more detail below. More generally, the primary concern articulated by the PLRA's sponsors was to eliminate frivolous prisoner suits, in part so the courts could focus on the meritorious ones. (Senator Kyl stated: "If we achieve a 50-percent reduction in bogus Federal prisoner claims, we will free up judicial resources for claims with merit by both prisoners and nonprisoners." 141 Cong. Rec. S 7523,

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<sup>1</sup> See, e.g., *Ortiz v. McBride*, 380 F.3d 649 (2d Cir. 2004), *cert. denied*, 543 U.S. 1187 (2005) (rejecting "total exhaustion" rule); *Mojias v. Johnson*, 351 F.3d 606 (2d Cir. 2003) (requiring court to establish existence and applicability of administrative remedies before dismissing for non-exhaustion); *Benjamin v. Fraser*, 343 F.3d 35 (2d Cir. 2003) (interpreting PLRA provision re special masters, assessing prospective relief under PLRA standards).

<sup>2</sup> See *Jones v. Bock*, Nos. 05-7058, 05-7142, 2006 WL 2364683, Brief of Amici Curiae American Civil Liberties Union, The Legal Aid Society, *et al.* (Aug. 14, 2006); *Woodford v. Ngo*, No. 05-416, 2006 WL 284226, Brief of the American Civil Liberties Union, Legal Aid Society of the City of New York, *et al.* (Feb. 2, 2006).

<sup>3</sup> Last year's version of this guide is available on-line at [http://www.law.yale.edu/documents/pdf/Boston\\_PLRA\\_Treatise.pdf](http://www.law.yale.edu/documents/pdf/Boston_PLRA_Treatise.pdf)

\*S7526.) This purpose is served directly—and, the case law shows, very effectively—by the PLRA’s provisions for screening and dismissal. These appear in several statutory provisions<sup>4</sup> which, collectively, extend the pre-filing screening process previously applicable only to cases filed *in forma pauperis* to include all prisoner cases, and expand the bases for *sua sponte* dismissal without service of process—formerly limited to complaints that are frivolous or malicious—to include complaints that fail to state a claim or that seek monetary relief from an immune defendant. Every week, federal district courts apply the screening provisions vigorously, dismissing numerous prisoner cases on one or more of the specified grounds.

***1. The physical injury requirement, 42 U.S.C. § 1997e(e).***

The CJS appropriately recommends repeal of the prohibition on actions for mental or emotional injury sustained in custody without physical injury. The physical injury requirement has essentially immunized a wide range of abusive treatment as well as violations of those civil liberties that prisoners retain.<sup>5</sup> A few examples of many include:

- *Jarriett v. Wilson*, 2005 WL 3839415 (6th Cir., July 7, 2005), in which a prisoner complained that he was forced to stand in a two-and-a-half-foot square cage for about 13 hours, naked for the first eight to ten hours, unable to sit for more than 30 or 40 minutes of the total time, in acute pain, with clear, visible swelling in a portion of his leg that had previously been injured in a motorcycle accident, during which time he repeatedly asked to see a doctor. *Id.* at \*8 (dissenting opinion). The claim was dismissed under § 1997e(e) as *de minimis*<sup>6</sup> on the ground that the prisoner did not complain about his leg upon release or shortly thereafter when he saw medical staff. *Id.* at \*4. (This decision was initially published, but Westlaw has removed the opinion from its original citation and replaced it with a note stating that it was “erroneously published.” *Jarriett v. Wilson*, 414 F.3d 634 (6th Cir. 2005).) *See also Adnan v. Santa Clara County Dept. of Corrections*, 2002 WL 32058464 at \*3 (N.D.Cal., Aug. 15, 2002) (holding that prisoner who complained that he was unjustifiably kept in solitary confinement, his hands and feet were shackled, and he was subjected to body cavity strip searches and allowed out of his cell only three hours a week, could not seek compensatory damages because he did not allege physical injury.

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<sup>4</sup> 28 U.S.C. § 1915(e)(2); 28 U.S.C. § 1915A; 42 U.S.C. § 1997e(c)(1).

<sup>5</sup> Although courts have held that injunctive relief is available notwithstanding § 1997e(e), prisoners without counsel are rarely able to get their claims into court quickly enough and to litigate effectively enough to obtain injunctive relief while violations are occurring, especially short-lived violations like being beaten or raped, or confined temporarily under degrading conditions. Nor will prisoners be able to show sufficient likelihood of recurrence to merit injunctive relief after a particular violation is concluded. Given the high threshold for recovering punitive damages, the unavailability of compensatory damages deprives the affected prisoner of any meaningful remedy, and society at large of any accountability for such unacceptable conduct.

<sup>6</sup> Courts have held that not only must there be a physical injury, it must be more than *de minimis*. *See, e.g., Mitchell v. Horn*, 318 F.3d 523, 534-35 (3d Cir. 2003). As the cases cited herein show, *de minimis* covers some rather substantial trauma in some courts’ decisions.

- *Hancock v. Payne*, 2006 WL 21751 at \*1, 3 (S.D.Miss., January 4, 2006), which holds that plaintiffs' allegations of abuse, including that a staff member "sexually battered them by sodomy," were barred by § 1997e(e).<sup>7</sup>
- *Harper v. Showers*, 174 F.3d 716, 719-20 (5th Cir. 1999), which held that § 1997e(e) barred damage claims for the plaintiffs' placement in filthy cells formerly occupied by psychiatric patients and exposure to the deranged behavior of those patients.
- *Rawls v. Payne*, 2006 WL 2844563 at \*5 (S.D.Miss., Sept. 11, 2006), which dismissed the claim of a prisoner who alleged that he suffered "scratches, bruises, a busted lip, and a sprained ankle" in an assault, asserting that his injuries were *de minimis*; see also *Wallace v. Brazil*, 2005 WL 4813518 at \*1 (N.D.Tex., Oct. 10, 2005) (dismissing a claim that an officer hit the prisoner in the head with an iron bar, punched his back, and twisted his neck; asserting a soft knot on his head and an abrasion on his leg were *de minimis*).
- *Pearson v. Welborn*, 471 F.3d 732 (7th Cir. 2006), which affirmed the denial of compensatory damages where a jury found that prison employee had inflicted a year's "supermax" confinement on prisoner in retaliation for his First Amendment-protected complaints about prison conditions.
- *Allah v. al-Hafeez*, 226 F.3d 247 (3d Cir. 2000), which held that a prisoner complaining about violation of his right to the free exercise of religion could only be asserting "mental and/or emotional injury."

The physical injury requirement not only forces the dismissal of substantial constitutional claims, but also fails to contribute to the PLRA's purpose of reducing frivolous cases. As shown, there is no necessary correlation between frivolousness and the absence of physical injury. Further, every case to which § 1997e(e) would be applied is also subjected to preliminary screening on the merits, so those cases involving no injury that are frivolous will be screened out anyway. Absent any useful purpose, this provision should be repealed.

## **2. *The administrative exhaustion requirement, 42 U.S.C. § 1997e(a).***

The PLRA exhaustion requirement has caused the dismissal of more meritorious cases than any other provision of the statute. It has turned much prison litigation into a game of "gotcha" played against litigants many of whom are incapable of understanding the rules. It has also generated a mind-numbing and hair-splitting avalanche of satellite litigation over exhaustion. This tendency has been reinforced by the Supreme Court's recent decision holding

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<sup>7</sup> Courts are not unanimous that sexual assault claims are barred by § 1997e(e). See *Kemner v. Hemphill*, 199 F.Supp.2d 1264, 1270 (N.D.Fla.2002). However, the language of the statute provides little support for *Kemner's* interpretation.

that the PLRA requires “proper exhaustion” and that procedural errors by prisoners in the prison grievance process mean procedural default and forfeiture of the claim,<sup>8</sup> no matter how serious and meritorious.<sup>9</sup> Many of the errors for which prisoners’ claims are procedurally defaulted are utterly trivial or utterly understandable and, in any rational scheme, would be curable.

Here is an example from last month. In *Johnson v. Henson*, 2007 WL 135973 (E.D.Cal., Jan. 17, 2007), the prisoner filed a grievance and appealed the adverse decision to the second level. He did not get a timely response and tried to appeal to the third and final level, but his appeal was returned to him unprocessed. Reasonably concluding that he had no further remedies available, he filed suit *pro se*. However, after he filed suit, he received a belated decision on his second level appeal. In an apparent effort to be sure he had exhausted, he withdrew his complaint and filed a new administrative appeal, but missed the deadline, so it was rejected as untimely. He then re-filed his action, but it was dismissed for non-exhaustion. The court held that as of the rejection of his *first* appeal, he had apparently satisfied the exhaustion requirement. However, it held, because he tried to do more, and botched it, he lost the benefit of his earlier efforts—even though his subsequent actions were precipitated by the prison system’s failure to comply with its own time limits in rendering decisions. *Id.* at \*5. Since his grievance appeal was dismissed as untimely, his claim is now procedurally defaulted under the Supreme Court’s decision in *Woodford v. Ngo*.

Here is another very recent example. In *Marshall v. Knight*, 2006 WL 3714713 (N.D.Ind., Dec. 14, 2006), the plaintiff alleged that he had been subjected to unconstitutional retaliation in the form of disciplinary and classification decisions, and did not file a grievance because discipline and classification are excluded from the purview of the grievance system. However, prison officials argued—and the court agreed—that the grievance system permitted complaints of retaliation, so Mr. Marshall’s claim was dismissed for failure to exhaust, despite the fact that he had apparently relied on a common-sense lay person’s understanding of the grievance policy. Since the Indiana grievance policy’s deadline is 20 days, any grievance he

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<sup>8</sup> *Woodford v. Ngo*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 2378, 2387 (2006). As one court put it, once suit is filed, “the defendants in hindsight can use any deviation by the prisoner to argue that he or she has not complied with 42 U.S.C. § 1997e(a) responsibilities.” *Ouellette v. Maine State Prison*, 2006 WL 173639 at \*3 n.2 (D.Me., Jan. 23, 2006), *aff’d*, 2006 WL 348315 (D.Me., Feb. 14, 2006).

<sup>9</sup> One example of an extremely serious claim dismissed for non-exhaustion is *Minix v. Pazera*, 2005 WL 1799538 at \*4 (N.D.Ind., July 27, 2005), in which the 15-year-old prisoner, who had been repeatedly beaten and raped, did not file a grievance. The case was dismissed even though his mother had made repeated complaints to numerous officials while the abuse was ongoing, thus satisfying the statutory purpose of giving prison officials an opportunity to solve problems before they appear in federal court. The grievance deadline in the *Minix* case was *two days*. Another example is *Gerrard v. Daley*, 2000 WL 34229777 (W.D.Wis., July 24, 2000), *subsequent determination*, 2000 WL 34231492 (W.D.Wis., Aug. 21, 2000), dismissing for non-exhaustion the claim of a prisoner who was denied testing for symptoms of cancer until the disease had become terminal. He did not file a grievance within the 14-day deadline upon learning that he was going to die, and the court held that his complaint to the director of the bureau of health services, pursuant to Wis. Admin. Code § DOC 310.08(4), did not comply with the inmate grievance policy specified in Wis. Admin. Code § DOC 310.04.

filed after the dismissal would be untimely<sup>10</sup> and procedurally defaulted under *Woodford*.

Such arbitrary and draconian results are a disgrace to the administration of justice, and they are inherent in the PLRA exhaustion requirement. The Supreme Court said many years ago that “technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process.” *Love v. Pullman*, 404 U.S. 522, 526 (1972) (addressing Title VII administrative charge-filing requirement). But that is exactly the result imposed where prisoners—most of them poorly educated, many of them with mental illness or retardation—must act under exceptionally short deadlines in a regime where trivial errors result in irrevocable forfeiture of claims regardless of merit.

The CJS’s proposal solves this problem while preserving the central purpose of the exhaustion requirement, to allow prison officials to resolve problems before courts address them. If there is a question about the adequacy of the prisoner’s exhaustion, the case will be stayed for 90 days to allow prison officials to conduct whatever procedures or investigation they choose and to seek to resolve the problem if they choose; the lawsuit will then proceed if the claim remains unresolved. Thus technical errors in exhaustion by the prisoner can be remedied and will not bar a meritorious claim.

It has been argued that the CJS proposal removes any incentive of prisoners to follow the prison administrative procedure. That is not true; a prisoner who comes to court having failed to exhaust will have his case stayed for 90 days to allow prison officials whatever administrative consideration of his claim they prefer or prison procedures provide. Further, prisoners have no incentive *not* to use the prison grievance process, since it will be faster and less difficult to use than litigation.<sup>11</sup> It is true that the CJS proposal will allow consideration of claims that were not completed and correctly exhausted within the time limits set by grievance policies, but this is not unreasonable, given that those time limits are usually a month or less and sometimes as short as

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<sup>10</sup> The Indiana grievance policy is on line at [http://www.law.yale.edu/documents/pdf/Indiana\\_Grievance\\_Policy.pdf](http://www.law.yale.edu/documents/pdf/Indiana_Grievance_Policy.pdf). The deadline is at page 14. The exclusion of classification and disciplinary matters is at page 5. The policy does not inform prisoners that retaliation complaints about classification and disciplinary matters are an exception to this exclusion.

<sup>11</sup> There is one exception to this statement. Prisoners are sometimes subject to the threat of retaliation if they use prison complaint mechanisms. Numerous such complaints, many of them detailed and credible, have surfaced in PLRA exhaustion litigation. *See, e.g., Kaba v. Stepp*, 458 F.3d 678 (7<sup>th</sup> Cir. 2006); *Hemphill v. New York*, 380 F.3d 680 (2d Cir. 2004). There are also numerous instances where claims of retaliation for grievances and complaints have been proven. *See, e.g., Walker v. Bain*, 257 F.3d 660, 663-64 (6<sup>th</sup> Cir. 2001) (noting jury verdict for plaintiff whose legal papers were confiscated in retaliation for filing grievances); *Gomez v. Vernon*, 255 F.3d 1118 (9<sup>th</sup> Cir. 2001) (affirming injunction protecting prisoners who were the subject of retaliation for filing grievances and for litigation); *Trobaugh v. Hall*, 176 F.3d 1087 (8<sup>th</sup> Cir. 1999) (directing award of compensatory damages to prisoner placed in isolation for filing grievances); *Hines v. Gomez*, 108 F.3d 265 (9<sup>th</sup> Cir. 1997) (affirming jury verdict for plaintiff subjected to retaliation for filing grievances).

two days.<sup>12</sup> While prison officials understandably desire to investigate complaints as early as possible, forfeiture of valid constitutional claims because of failure to meet such short deadlines is a grossly disproportionate response. By comparison, plaintiffs in Title VII litigation, who are required to file complaints with state anti-discrimination agencies, do not have their cases dismissed for failure to meet those agencies' time limits as long as they have actually put their claims before the agencies. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761 (1979). There is no reason why prisoners with meritorious claims of civil rights violation should not have the benefit of a similar rule to non-prisoners claiming unlawful discrimination.

These points take on added force from the fact that, a decade-plus after the PLRA's enactment, exhaustion controversies tend not to concern prisoners who have bypassed administrative remedies, but prisoners who have tried and failed to exhaust: the prisoner is said to have used the wrong remedy, to have missed the short deadline, to have sent a document to the wrong place or person, to have failed to appeal, attach a necessary document to an appeal, etc. Thus it will be the rare case where prison officials will not have had some notice of the problem before suit is filed.

The CJS's proposal would substitute for the present rule, which promotes the forfeiture of claims based on lay persons' technical mistakes, a rule that in effect makes defects in exhaustion curable without sacrificing the requirement that prison officials have an opportunity to resolve conflicts before a federal court acts upon them. It fully reconciles the competing values of promoting internal resolution of prison disputes and of preserving access to courts, and for that reason it merits adoption by the ABA.

### ***3. The restrictions on courts' equitable authority, 18 U.S.C. § 3626.***

The CJS proposal to repeal these provisions is well taken. There is not and has never been a reason to treat civil rights injunctions on behalf of prisoners any differently from any other civil rights injunctions, *i.e.*, subjecting them to standard equitable principles of restraint and least necessary intrusion. Those principles had already been adopted in prison litigation before the PLRA, and were enforced by the circuits as well as by the Supreme Court.<sup>13</sup> The Supreme Court had made clear that courts can modify such injunctions to reflect unforeseen conditions and should terminate them when they have served their purposes.<sup>14</sup> To the extent that there are special problems in operating prisons that are different from those in civilian institutions and settings, those concerns are reflected in the Supreme Court's decisions limiting

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<sup>12</sup> *See Woodford v. Ngo*, 126 S.Ct. at 2389 (noting that the United States said deadlines were generally from 14 to 30 days, and the prisoner's counsel said they were even shorter). *Minix v. Pazera*, cited in note 9 above, involved a system with a two-day deadline.

<sup>13</sup> *See, e.g., Lewis v. Casey*, 518 U.S. 343, 361-64 (1996); *Dean v. Coughlin*, 804 F.2d 207, 213 (2d Cir. 1986); *Duran v. Elrod*, 760 F.2d 756, 760-61 (7th Cir. 1985).

<sup>14</sup> *See Freeman v. Pitts*, 503 U.S. 467, 491 (1992); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992); *Board of Educ. of Oklahoma v. Dowell*, 498 U.S. 237, 247-50 (1991).

the substantive rights of prisoners.<sup>15</sup>

The provisions concerning settlements are of particular concern. *See* 18 U.S.C. § 3626(a)(1), 3626(c). They require that consent judgments be supported by the same findings of violation of law that are required to support an injunction that is the product of contested litigation. Requiring such findings is a major disincentive to settlement, since avoiding a finding of legal violation is a significant reason for settling, and many governmental agencies are unwilling to agree to such findings for reasons including the possibility of liability in unrelated litigation. Discouraging settlement is damaging to the administration of justice under any circumstances, but especially in prison litigation, where reducing the adversarial character of disputes is of great importance. Alternatively, prison litigation may be resolved by private settlement, enforceable only in state court. But this approach is a waste of judicial resources, since enforcement will require a state court with no prior familiarity with the litigation to become familiar with it, and will waste the experience of the federal judge who may have been supervising the litigation for years.<sup>16</sup> More fundamentally, the enforcement of federal rights is a basic responsibility of the federal courts, and a statute that redirects it into state court is simply misguided as a matter of federalism.

The provisions for termination of judgments, 18 U.S.C. § 3626(b), are similarly flawed. As noted, the Supreme Court had already set out standards for the termination of civil rights injunctions. The PLRA's provision for termination of prospective relief as long as there is no "current and ongoing violation" of federal law—a circumstance which may exist only because of the injunction itself—forbids courts to make reasoned judgments about the extent to which unlawful practices have been reliably extirpated, or merely temporarily suppressed under the immediate pressure of judicial scrutiny. The "automatic stay" provision of 18 U.S.C. § 3626e(2) similarly displaces the reasoned judgment of courts applying established equitable principles and requires that, without exception, upon the mere filing of a motion to terminate a judgment, a stay goes into effect and remains in effect, without regard to the merits of the controversy or to the length of time it takes the court to resolve the case.<sup>17</sup>

#### ***4. Attorneys' fees, 42 U.S.C. § 1997e(d).***

The PLRA's restrictions on attorneys' fees to prevailing parties in prison litigation are unjustifiable and are completely disconnected from the supposed purpose of reducing frivolous

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<sup>15</sup> *See, e.g., Overton v. Bazzetta*, 539 U.S. 126 (2003); *Turner v. Safley*, 482 U.S. 78 (1987) (both stating and applying deferential standard of review for prisoners' constitutional claims).

<sup>16</sup> *See Ingles v. Toro*, 438 F.Supp.2d 203, 215 (S.D.N.Y. 2006) (approving private settlement but criticizing its state court enforcement feature).

<sup>17</sup> In *Hart v. Arpaio*, 2 Fed.Appx. 867 (9<sup>th</sup> Cir. 2001), the court remanded to the district court a motion to terminate a jail consent judgment. Nearly six years later, the court has not resolved the motion, leaving the judgment stayed and the prisoners without its benefits for the entire period, and never determining the extent of current and ongoing violations and the relief if any the prisoners are entitled to.

litigation. Attorneys' fees are awarded only to *winning* litigants, whose claims by definition are not frivolous. The restriction of hourly rates to 150% of Criminal Justice Act rates, 42 U.S.C. § 1997e(d)(3), is completely inappropriate, since CJA lawyers are paid for their work regardless of whether they prevail. The restriction of fee awards to 150% of a damage judgment, 42 U.S.C. § 1997e(d)(2), is even more inappropriate, since many substantial constitutional violations result only in nominal awards, especially under the physical injury requirement of 42 U.S.C. § 1997e(e) discussed above,<sup>18</sup> and since practitioners know well that there is a significant risk that juries' hostility to prisoners will depress damage awards even where the merits are proven.

These provisions clearly have a major inhibiting effect on the availability of private counsel for meritorious prisoner cases—an effect that is cumulative of the pre-existing difficulties in prisoners' obtaining counsel. The private market has never served prisoners well because of the threshold expense and difficulty of assessing the merit of prisoner cases, resulting from prisoners' inability to confer in counsel's offices, the remote locations of many prisons, the usual absence of neutral witnesses to events in prison, and the fact that documentation of prison incidents is often not available to counsel until after suit is filed. The PLRA has merely made a bad situation worse for prisoners with meritorious cases, while doing nothing to advance the supposed concern for frivolous litigation.

#### **5. *Applicability to juveniles, 42 U.S.C. 1997e(h).***

Young people in prison, who are defined as "prisoners" for PLRA purposes under 42 U.S.C. § 1997e(h), should not be subjected to the provisions of the PLRA because they have never been the source of any significant amount of frivolous litigation. Indeed, they are generally unfamiliar with legal and administrative processes and ill-equipped to protect their own legal rights. They are much less likely than adults to be able to comply with prison grievance procedures. Abuse that inflicts mental or emotional injury is much more likely to have a devastating effect on them than on adult prisoners. The law should not place needless impediments in the way of their protecting their legal rights.

#### **6. *The filing fees provisions, 28 U.S.C. § 1915.***

The CJS correctly proposes repeal of the special provisions requiring payment of filing fees by indigent prisoners seeking to proceed *in forma pauperis*. The district court and appellate filing fees, which were \$150 at the time the PLRA was enacted, have ballooned to \$350 and \$450 respectively in the intervening years. Thus the disparate treatment of indigent prisoners compared to other indigent persons has now grown beyond all reason and imposes a heavy financial burden that is likely to dissuade prisoners with meritorious claims from pursuing them.

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<sup>18</sup> See *Pearson v. Welborn*, 471 F.3d 732 (7th Cir. 2006) (holding nominal damages and \$1.50 in fees appropriate where jury found that prison employee had inflicted a year's "supermax" confinement on prisoner in retaliation for his First Amendment-protected complaints about prison conditions).

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Congress should return to the principle that indigent persons should be allowed access to the court system without the payment of these ever-increasing fees.

For the foregoing reasons, I urge the ABA to adopt the resolution of the Criminal Justice Section concerning the Prison Litigation Reform Act.

Yours very truly,

JOHN BOSTON  
Project Director