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EVISCERATION OF THE FIRST AMENDMENT: THE PRISON LITIGATION REFORM ACT AND INTERPRETATION OF 42 U.S.C. § 1997e(e) IN PRISONER FIRST AMENDMENT CLAIMS

I. INTRODUCTION

In 1998, Jeff Royal was tried and convicted for cattle rustling.¹ Before his five-year prison term commenced, however, he injured his spinal cord in a farming accident and was thereafter confined to a wheelchair.² As a result of this physical disability, the state incarcerated Royal as an inmate at the Iowa Medical and Classification Center (IMCC).³ There, prison officials subjected him to retaliation and humiliation.⁴ Specifically, the facility's medical director confiscated his wheelchair, which forced him to crawl on the floor.⁵ This retaliatory conduct was in response to Royal's filing of a complaint in federal court alleging, among other things, that "he could not turn his wheelchair in his cell," that "he was unable to get to the toilet or shower," and that "he had to lay on the floor after using the toilet to pull on his prison-issue jumpsuit."⁶ After Royal filed a petition to recover his wheelchair, IMCC's security director "issued a memorandum stating that any inmate seen crawling on the floor would be subject to discipline."⁷ Royal's wheelchair was returned to him only after a neurosurgeon determined that the crutches he was given as a substitute were exerting pressure on his ulnar nerve.⁸

1. *Royal v. Kautzky*, 375 F.3d 720, 726 (8th Cir. 2004) (Heaney, J., dissenting). "Cattle rustling" denotes theft of bovine cattle. *Galeppi v. C. Swanston & Son*, 290 P. 116, 119 (Cal. Ct. App. 1930).

2. *Royal*, 375 F.3d at 726 (Heaney, J., dissenting).

3. *See id.* at 726–27.

4. *See id.*

5. *Id.* at 726.

6. *Id.*

7. *Id.* at 726–27.

8. *Id.* at 727. The ulnar nerve runs along the arm, from the shoulder to the

When Royal sought redress in federal court, IMCC officials placed him in isolation (or “lock up”) for nearly two months to prevent him from prosecuting his claims and thereafter transferred him to another facility.⁹ After Royal was released on parole, he brought a *successful* suit against IMCC and its officials under 42 U.S.C. § 1983.¹⁰ Although a federal judge held that by placing him in isolation prison officials had violated his First Amendment right to petition for redress of his grievances,¹¹ the only remedy the law afforded Jeff Royal was \$1.00 in nominal damages and \$1.50 in attorney fees.¹²

Jeff Royal’s case is not unique, nor will it be the last of its kind. It is the product of a broad reading of 42 U.S.C. § 1997e(e), a single subsection of the Prison Litigation Reform Act (PLRA), which became law in 1996 upon President Clinton’s signature.¹³ Congress enacted the PLRA to curtail what it perceived as a flood of frivolous prisoner lawsuits in the federal courts.¹⁴ While it appears there was little debate in Congress regarding the potential impact of § 1997e(e),¹⁵ there were many anecdotal references to the most

hand. The portion of the ulnar nerve that passes along the elbow is what is commonly known as the funny bone. See Wikipedia, Ulnar Nerve, http://en.wikipedia.org/wiki/Ulnar_nerve (last visited Feb. 15, 2006).

9. See *Royal*, 375 F.3d at 727 (Heaney, J., dissenting). The penal system uses many euphemisms to describe the punitive measure of isolation. Isolation generally entails twenty-three hours per day of cell confinement, narrow limitations on human contact, denial of the usual activities of prison life, and endless hours of monotony and boredom. John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 438 (2001).

10. *Royal*, 375 F.3d at 727 (Heaney, J., dissenting).

11. See *id.* The First Amendment to the United States Constitution reads: “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.” U.S. CONST. amend. I.

12. See *Royal*, 375 F.3d at 726 (Heaney, J., dissenting).

13. Julie M. Riewe, *The Least Among Us: Unconstitutional Changes in Prisoner Litigation Under the Prison Litigation Reform Act of 1995*, 47 DUKE L.J. 117, 119 (1997).

14. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1578 (2003). In introducing the legislation, Senator Bob Dole referred to a “litigation explosion now plaguing our country.” 141 CONG. REC. S14,413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole).

15. See *infra* notes 27 & 28 and accompanying text.

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.¹⁶

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.¹⁷ Section 1997e(e), entitled “Limitation on recovery,” provides that “[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for *mental* or *emotional* injury suffered while in custody without a prior showing of physical injury.”¹⁸ This language is the subject of multiple judicial interpretations, and in the words of one commentator, § 1997e(e) “may well present the highest concentration of poor drafting in the smallest number of words in the entire United States Code.”¹⁹

This Note addresses the current circuit split regarding application of § 1997e(e), and argues that the subsection should not operate so as to bar compensatory damages for prisoners’ meritorious First Amendment claims. Part II presents a brief overview of the PLRA. Part III describes the two divergent readings that circuit courts currently apply to § 1997e(e), and presents a series of arguments counseling against an application of § 1997e(e) that would limit First Amendment prisoner claims. Finally, Part IV concludes that § 1997e(e) should not be applied to bar those claims.

II. BACKGROUND: THE PLRA, A PRIMER

The PLRA is a sweeping piece of legislation comprised of many provisions, each aimed at inhibiting prisoner civil rights claims either by erecting barriers to access, removing incentives to file claims, or imposing punitive consequences for filing claims found to be abusive

16. Daniel J. Sharfstein, Case Note, *No Cure for a Broken Heart: Davis v. District of Columbia*, 108 YALE L.J. 2451, 2452–53 (1999) (citing 141 CONG. REC. S14, 413–14 (daily ed. Sept. 27, 1995) (statement of Sen. Dole)).

17. See, e.g., *Royal* 375 F.3d at 722; Jennifer Winslow, *The Prison Litigation Reform Act’s Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant to?*, 49 UCLA L. REV. 1655, 1666 (2002).

18. 42 U.S.C. § 1997e(e) (2000) (emphasis added).

19. Boston, *supra* note 9, at 434.

or meritless.²⁰

For example, the legislation requires that indigent prisoners, unlike other indigents, pay the full amount of filing fees—regardless of their ability to pay and regardless of how long it may take to earn the money to pay.²¹ This represents a significant barrier to access because prisoners are often paid little or nothing for their labor.²² Prisoners are also required to exhaust all administrative remedies before filing suit.²³ Additionally, courts are severely restricted in the amount of attorney fees they can award successful prisoner litigants.²⁴ The PLRA also incorporates a “three strikes” provision that prohibits prisoners from proceeding *in forma pauperis* if three or more suits brought by that prisoner have been dismissed on grounds of being frivolous or malicious—unless the prisoner can show “imminent danger of serious physical injury.”²⁵ Finally, the Act allows for revocation of prisoners’ good time credits if the court finds that the prisoner has filed a claim for purposes of harassment or other malicious purposes—thus effectively extending incarceration for prisoners found to have filed such claims.²⁶

Proponents of the PLRA characterized it as a necessary measure to curtail massive abuse of the judicial process by prisoners filing meritless claims.²⁷ This “claim of ‘deluge,’” as Professor Margo Schlanger points out, necessarily implies a trend of increasing prisoner litigiousness.²⁸ However, the numbers do not support this

20. See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (codified as amended in scattered sections of 28 U.S.C. & 42 U.S.C.).

21. 28 U.S.C. § 1915(a)–(b) (2000).

22. Boston, *supra* note 9, at 430. A filing fee of in excess of \$100, for example, could require months of labor to pay off. See, e.g., Tourscher v. McCullough, 184 F.3d 236, 239 (3d Cir. 1999) (indicating that a prisoner laboring in the cafeteria was paid twenty cents per hour).

23. 42 U.S.C. § 1997e(a).

24. See *id.* § 1997e(d) (providing that fees must be incurred in proving an actual violation of prisoner’s rights and must be proportionate to the relief obtained); cf. *id.* § 1988(b) (providing that nonprisoner litigants may be awarded “reasonable” fees in civil rights cases).

25. 28 U.S.C. § 1915(g).

26. *Id.* § 1932. The provisions set forth here are by no means exhaustive. For a more complete listing and discussion, see Schlanger, *supra* note 14, at 1627–33.

27. Schlanger, *supra* note 14, at 1578.

28. *Id.* at 1585.

proposition. Congressional proponents of the Act frequently cited the statistic that prisoner filings had increased from 6,606 in 1975 to 39,065 by 1994.²⁹ An argument based on absolute numbers alone fails to take into account the explosion in the prisoner population during those years. Between 1975 and 1994, the total population in state and federal prisons increased from 253,816 to 990,147.³⁰ When jail inmates are factored in, the total prisoner population in 1994 fell just short of 1.5 million.³¹

Thus, while prison litigation increased more than five fold between 1975 and 1994, litigation rates per prisoner had actually plateaued and begun to fall slightly by the time the PLRA was enacted in 1996. In fact, litigation rates among prisoners had fallen seventeen percent between 1980 and 1996.³²

Other aspects of PLRA's passage call into question the scrutiny it received in Congress. The legislation was passed as a rider to an appropriations bill and, as the Seventh Circuit noted, "[i]ts provisions were never seriously debated," nor was it the subject of a committee mark-up or a committee report.³³ As one commentator observed, the PLRA's passage was "characterized by haste and lack of any real debate."³⁴ Further, while the PLRA as a whole appears to have received only cursory congressional review, § 1997e(e) seems to have received the least scrutiny. One scholar commented, "No aspect of the PLRA received less congressional deliberation than § 1997e(e)."³⁵

29. Winslow, *supra* note 17, at 1662–63; *see also* Walter Berns, Editorial, *Sue the Warden, Sue the Chef, Sue the Gardner*. . . , WALL ST. J., Apr. 24, 1995, at A12 (discussing these statistics).

30. *See* Schlanger, *supra* note 14, at 1583 (tbl. 1A).

31. *See id.*

32. JOHN SCALIA, U.S. DEP'T OF JUSTICE, PRISONER PETITIONS IN THE FEDERAL COURTS, 1980–96, at iii (1997); *see also* Schlanger, *supra* note 14, at 1585, 1583 tbl. 1A, 1585 (demonstrating that litigation rates had begun to fall off before dropping dramatically after PLRA's passage).

33. *McCoy v. Gilbert*, 270 F.3d 503, 510 n.4 (7th Cir. 2001) (citing Geoffrey C. Rapp, Note, *Low Riding*, 110 YALE L.J. 1089, 1092–93 (2001)).

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

35. James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105, 114 (2000). Judge Heaney also noted, "[T]here is almost nothing in the legislative history as to § 1997e(e) at all." *Royal v. Kautzky*, 375 F.3d 720, 729 n.5 (8th Cir. 2004) (Heaney, J., dissenting).

A review of the Senate record confirms these observations. Discussing the PLRA as a whole, Senator Dole merely stated, "it prohibits prisoners from suing the Government for mental or emotional injury, absent a prior showing of physical injury."³⁶ The record does not define the scope of the proposed legislation, nor does it discuss its intended effects upon meritorious First Amendment prisoner claims.³⁷

Given the lack of any serious scrutiny of the subsection's purpose, meaning, or intended effect, it is hardly surprising that § 1997e(e) has produced inconsistent judicial application and has served to stifle not only frivolous litigation, but meritorious constitutional claims as well.

III. ANALYSIS

A. *The Current Circuit Split: Two Divergent Readings of § 1997e(e)*

The prisoner claims that the PLRA was designed to curtail are those primarily brought under 42 U.S.C. § 1983, which grants an express right of action to any person whose rights under the U.S. Constitution are violated under the auspices of state law, against the person who violates those rights.³⁸ Prisoner § 1983 claims are typically brought in federal court against state correctional facilities and their officials or employees.³⁹ Litigants bringing suit under § 1983 may seek remedies similar to those available to common law tort litigants.⁴⁰ These include compensatory damages, punitive

36. 141 CONG. REC. S14,414 (daily ed. Sept. 27, 1995) (statement of Sen. Dole).

37. *See id.*

38. The statute reads, in pertinent part:

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983 (2004).

39. *See, e.g., Royal*, 375 F.3d at 726 (Heaney, J., dissenting); *Canell v. Lightner*, 143 F.3d 1210, 1211 (9th Cir. 1998) (discussing prisoner § 1983 claim for free exercise violation).

40. *See, e.g., Carey v. Phipus*, 435 U.S. 247, 253–57 (1978).

damages, and injunctive relief, where appropriate.⁴¹

Section 1997e(e), however, has been universally construed to limit the types of remedies available to prisoner-litigants for particular claims.⁴² Typically, § 1997e(e) is applied to bar compensatory damages in prisoner suits while leaving punitive damages and injunctive relief available—provided the prerequisites for those remedies are alleged and proved by the prisoner-plaintiff.⁴³

There is no consensus among the federal circuits, however, as to which types of claims § 1997e(e) ought to apply. By its terms, § 1997e(e) may appear to limit remedies for claims “brought by a prisoner . . . for mental or emotional injury . . . without a prior showing of physical injury.”⁴⁴ In other words, § 1997e(e) appears to require a showing of prior physical injury when the prisoner-plaintiff seeks compensatory damages for mental or emotional injury. Courts, however, disagree about which types of claims are for mental or emotional injury.

When a prisoner’s claim alleges violation of a constitutional right involving bodily integrity, such as an Eighth Amendment claim, the physical injury requirement appears reasonable in light of the PLRA’s purpose of curtailing frivolous prisoner suits.⁴⁵ This is because these types of suits, if meritorious, are likely to have demonstrated some physical injury. However, when courts characterize violations of intangible rights, such as those protected by the First Amendment, as suits “for mental or emotional injury,” prisoner-plaintiffs with meritorious claims are left without meaningful remedy because such claims can rarely, if ever, demonstrate the required physical injury.⁴⁶

41. *Id.* at 256–257.

42. *See Royal*, 375 F.3d at 723.

43. *See, e.g., id.* *But see* *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998) (holding that § 1997e(e) bars both compensatory and punitive damages without a prior showing of physical injury).

44. 42 U.S.C. § 1997e(e) (2000).

45. *See Shaheed-Muhammad v. Dipaolo*, 138 F. Supp. 2d 99, 107 n.21 (D. Mass. 2001) (“Because Eighth Amendment claims are akin to conventional actions for tort damages (though the duty is imposed by the Constitution and federal statute rather than the common law), it is more appropriate to require a causal connection between the state’s breach and the plaintiff’s demonstrable injury.”); *see also Royal*, 375 F.3d at 730 (Heaney, J., dissenting) (discussing the purpose of PRLA).

46. *See Royal*, 375 F.3d at 730 (Heaney, J. dissenting); *Dipaolo*, 138 F.

Currently, there is a split among the federal circuits regarding whether the limitation on recovery provision found in § 1997e(e) should enjoy a broad or narrow reading.⁴⁷ Circuits preferring a broad reading have interpreted § 1997e(e) to encompass constitutional claims of a typically nonphysical nature (primarily First Amendment).⁴⁸ Courts in these circuits have, therefore, held that prisoners who bring suit for First Amendment violations are precluded from compensatory damage awards without a “prior showing of physical injury.”⁴⁹ Other circuits, in contrast, have applied a narrow reading of § 1997e(e) that does not view the statute as imposing a bar to compensatory damages for First Amendment claims.⁵⁰

This split in authority can largely be traced to the ambiguity of § 1997e(e)’s language, and the lack of legislative history surrounding its passage.⁵¹ Yet, no court has applied the language of § 1997e(e) literally, as such a reading would completely bar *any* “Federal civil action . . . brought by a prisoner . . . for mental or emotional injury . . . without a prior showing of physical injury,”⁵² and would

Supp. 2d at 108 (“The First Amendment . . . is not concerned with preventing physical abuse by government agents, but rather with the invasion of the sphere of intellect and spirit which it is the purpose of the First Amendment . . . [to] reserve from all official control.”) (internal quotes omitted).

47. The “broad” and “narrow” classifications used in this Note are derived from Molly R. Schimmels, *First Amendment Suits and the Prison Litigation Reform Act’s ‘Physical Injury Requirement’: The Availability of Damage Awards for Inmate Claimants*, 51 U. KAN. L. REV. 935 (2003) (arguing that § 1997e(e) is properly construed to bar compensatory damage awards for First Amendment prisoner claims).

48. Section 1997e(e) has also been applied to bar claims for compensation for Fourteenth Amendment discrimination and equal protection violations. *See, e.g.*, *Todd v. Graves*, 217 F. Supp. 2d 958 (S.D. Iowa 2002) (holding that § 1997e(e) barred compensatory damages when African-American inmate alleged intentional discrimination in furlough program).

49. 42 U.S.C. § 1997e(e) (2000).

50. *See, e.g.*, *Canell v. Lightner*, 143 F.3d 1210, 1213 n.3 (9th Cir. 1998) (allowing plaintiff’s Free Exercise claim to proceed without showing of “mental or emotional injury.”); *Amaker v. Haponik*, No. 98 Civ. 2663 (JGK), 1999 U.S. Dist. LEXIS 1568, at *22–23 (S.D.N.Y. Feb. 17, 1999) (“The injury occasioned by a violation of a plaintiff’s First Amendment rights is not a ‘mental or emotional’ injury.”).

51. *See, e.g.*, *Royal*, 375 F.3d at 729–30 (Heaney, J., dissenting).

52. 42 U.S.C. § 1997e(e); *Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002)

likely render it unconstitutional.⁵³ As the Seventh Circuit noted, “there is a point beyond which Congress may not restrict the availability of judicial remedies for the violations of constitutional rights.”⁵⁴ Such a limitation would render those rights empty promises without meaningful value.

To side step this difficulty, courts have looked to the subsection’s title, “Limitation on recovery,” to determine that § 1997e(e) limits the types of recovery available for claims falling within its purview, not the types of claims that prisoners may bring.⁵⁵ Because § 1997e(e) is not construed to bar punitive damages, nominal damages, or injunctive relief, prisoner litigants are, at least theoretically, left with some prospect for remedy. Section 1997e(e) has been held constitutional on these grounds.⁵⁶

B. The Broad Reading of § 1997e(e)

Circuits interpreting § 1997e(e) broadly include the Third, the Tenth, the D.C. Circuit, and now, with its decision in *Royal*, the Eighth Circuit.⁵⁷ Each of these courts has held that the subsection precludes compensatory damages for prisoner-plaintiffs alleging First Amendment violations absent a preliminary showing of physical injury.⁵⁸ Additionally, they generally hold that § 1997e(e) does not bar either punitive damages or injunctive relief.⁵⁹

(noting that § 1997e(e) can be read so as to preclude any prisoner suit alleging only emotional injury).

53. See *Zehner v. Trigg*, 133 F.3d 459, 461 (7th Cir. 1997) (“Congress may not effectively nullify the rights guaranteed by the Constitution by prohibiting all remedies for the violation of those rights.”).

54. *Id.* at 462.

55. See, e.g., *Thompson*, 284 F.3d at 418 (“[A]lthough title of statute cannot limit the statute’s plain meaning, it can shed light on otherwise ambiguous language.”); see also *Calhoun v. Detella*, 319 F.3d 936, 940 (7th Cir. 2003) (“As its title suggests, § 1997e(e) is a ‘limitation on recovery.’”).

56. *Zehner*, 133 F.3d at 462.

57. See *Royal v. Kautzky*, 375 F.3d 720, 722–23 (8th Cir. 2004); *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001); *Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000); *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998).

58. See, e.g., *Allah*, 226 F.3d at 250 (“Under § 1997e(e), however, in order to bring a claim for mental or emotional injury suffered while in custody, a prisoner must allege physical injury.”).

59. The one dissenter from this group is the D.C. Circuit, which has held that § 1997e(e) not only bars compensatory damages but punitive damages as

1. The Underpinnings of the Broad Reading—
Remedies Available Under § 1983 Are Linked to Those
Available for Common Law Torts.

Tort law requires that a plaintiff allege “actual injury” in the form of physical injury or mental or emotional harm.⁶⁰ This principle, and its application by the Supreme Court in two decisions, is the basic rationale of the circuits applying a broad interpretation of § 1997e(e).⁶¹ The Supreme Court has stated that in enacting § 1983, Congress created a “species of tort liability.”⁶² Thus, the principles governing remedies for § 1983 claims are tied to those applied in the common law of torts.

In the first of these cases, *Carey v. Piphus*,⁶³ the Supreme Court considered a § 1983 claim brought by students alleging they were suspended from public schools without adequate procedural due process.⁶⁴ The Court of Appeals for the Seventh Circuit held that the students could recover substantial compensatory damages upon a mere showing that their rights had been denied, even without proof of actual injury.⁶⁵ The Supreme Court reversed, holding that the students could not recover compensatory damages without proof that the denial of their rights had, in fact, caused mental or emotional harm.⁶⁶ Accordingly, the students were only entitled to nominal

well. *Davis*, 158 F.3d at 1348. Thus there is actually a three-way split among the circuits. The rationale provided by the D.C. Circuit is that “Congress’s evident intent [to curtail frivolous prisoner suits] would be thwarted if prisoners could surmount § 1997e(e) simply by adding a claim for punitive damages.” *Id.* This reasoning appears particularly dubious given that a plaintiff must first establish a valid claim before being awarded punitive damages. Since the claim must be meritorious to be compensable, it follows that Congressional intent would not be thwarted if that intent is in fact curtailment of frivolous claims. See RESTATEMENT (SECOND) OF TORTS § 908 cmt. c (1979) (“It is essential . . . that facts be established that, apart from punitive damages, are sufficient to maintain a cause of action.”).

60. RESTATEMENT (SECOND) OF TORTS § 907 (1979).

61. See, e.g., *Royal*, 375 F.3d at 724 (“*Royal* may not recover some indescribable and indefinite damage allegedly arising from a violation of his constitutional rights.”); *Allah*, 226 F.3d at 250 (“[S]ubstantial damages may only be awarded to compensate for actual injury suffered as a result of the violation of a constitutional right.”).

62. *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976).

63. 435 U.S. 247 (1978).

64. *Id.* at 248.

65. *Id.*

66. *Id.*

damages.⁶⁷

In the second case, *Memphis Community School District v. Stachura*,⁶⁸ the Court reviewed a jury charge in a § 1983 case. There, the plaintiff claimed he had been unconstitutionally deprived of property without due process and that his First Amendment right to academic freedom had been abridged when he was suspended from his teaching position.⁶⁹ The United States District Court for the Eastern District of Michigan had instructed the jury that it could award compensatory damages upon finding that the plaintiff's constitutional rights had been violated.⁷⁰ The district court further instructed jurors that,

[t]he precise value you place upon any Constitutional right which you find was denied to Plaintiff is within your discretion. You may wish to consider the importance of the right in our system of government, the role which this right has played in the history of our republic, [and] the significance of the right in the context of the activities which the Plaintiff was engaged in at the time of the violation of the right.⁷¹

The Supreme Court held this instruction to be inconsistent with *Carey*, and therefore improper, because it did not square with common law tort principles.⁷² Instead of addressing "compensation for provable injury," the instructions focused "on the jury's subjective perception of the importance of constitutional rights as an abstract matter."⁷³

While the *Carey* plaintiffs were precluded from recovering a wholly arbitrary amount in compensation for deprivation of their rights, they were entitled to nominal damages.⁷⁴ The *Carey* court explains that nominal damages are appropriate when a plaintiff proves a *prima facie* claim for deprivation of rights but is unable to

67. *Id.*

68. 477 U.S. 299 (1986).

69. *Id.* at 301-302.

70. *Id.* at 302.

71. *Id.* at 303.

72. *Id.* at 308.

73. *Id.*

74. *Carey v. Phipus*, 435 U.S. 247, 248 (1978). Nominal damages generally consist of a trivial award, frequently \$1.00. DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* 221 (2d ed. 1993).

prove “actual injury.”⁷⁵ Nominal damages are awarded to vindicat[e] deprivations of certain “absolute” rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed.⁷⁶

Thus, an award of nominal damages recognizes that a violation of rights has occurred, but avoids a jury award of compensatory damages amounting to a theoretical or arbitrary valuation of the deprived right.⁷⁷

2. Courts Reading § 1997e(e) Broadly Do Not Recognize that First Amendment Violations Are Compensable, Notwithstanding Actual Injuries

The broad reading of § 1997e(e) rests, to a large extent on the proposition that *Carey* and *Stachura* effectively limit § 1983 litigants to compensation for actual injuries—either monetary, physical, or mental/emotional.⁷⁸ These courts hold this to be true, notwithstanding the character of the underlying violation. For example, a prisoner who alleges an Eighth Amendment violation, after being sexually assaulted and suffering cuts and bruises as a result of being placed in a cell with another inmate, is entitled to compensation for his physical and emotional injuries.⁷⁹ However, a prisoner who brings a First Amendment free exercise claim and does not allege “actual injury” in the form of physical or mental/emotional injuries is precluded from recovering compensatory damages under *Carey* and *Stachura*.⁸⁰

75. *Carey*, 435 U.S. at 266.

76. *Id.* (citation omitted).

77. *See id.*

78. *See, e.g.,* *Kemner v. Hemphill*, 199 F. Supp. 2d 1264, 1265 (N.D. Fla. 2002) (“*Carey* and *Stachura* plainly require that compensatory damages in a § 1983 suit be based on actual injury caused by the defendant rather than the abstract value of the constitutional rights that may have been violated. . . . Actual injuries typically are physical, emotional or fiscal in character.”) (internal quotes omitted).

79. *See id.* at 1266–70.

80. *See, e.g.,* *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (noting that “damages other than nominal damages require compensable

Accordingly, this approach holds that § 1983 plaintiffs cannot recover regardless of the fact that First Amendment violations by their nature do not typically produce “actual injuries.” In fact, it is difficult to imagine a First Amendment violation that, standing alone, would produce such injuries.

3. Once § 1997e(e) Is Applied Broadly, § 1983 Prisoner Litigants Are Left with Only Nominal Damages

When these courts apply § 1997e(e) over the limitations they construe *Carey* and *Stachura* to impose on § 1983 claims, the remedies available to prisoner litigants bringing First Amendment claims become even more restricted. Because these courts read *Carey* and *Stachura* to prohibit recovery of compensatory damages without a showing of “actual injury,” when the plaintiff fails to plead physical injury, a prayer for compensatory damages is treated as one for “mental or emotional injury.” Because these courts do not recognize that the plaintiff can be compensated for the violation itself,⁸¹ and because § 1997e(e) precludes recovery “without a prior showing of physical injury,”⁸² he or she is left with only nominal damages; a result that the Seventh Circuit has conceded is wholly inadequate.⁸³

4. The Broad Reading Misconstrues the Law Governing Remedies for First Amendment Violations

This line of reasoning, however, construes the case law governing damages for § 1983 claims too narrowly and completely ignores an entire body of law holding that First Amendment violations are, themselves, compensable injuries exclusive of any

injury.”) (citing *Cary v. Phipus*, 435 U.S. 247, 255 (1978)).

81. *Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000) (“Allah seeks substantial damages for the harm he suffered as a result of defendants’ alleged violation of his First Amendment right to free exercise of religion. . . . [T]he only actual injury that could form the basis for the award he seeks would be mental and/or emotional injury.”).

82. 42 U.S.C. § 1997e(e) (2000).

83. *See Zehner v. Trigg*, 133 F.3d 459, 462 (7th Cir. 1997) (denying compensation to prisoners for mental/emotional injury caused by fear of potential cancer due to asbestos exposure while working in the prison kitchen since, “[f]or the[se] plaintiffs, injunctive relief offers no comfort whatsoever. . . . If these plaintiffs are to be compensated for that fear at all, it must be by damages”).

physical, mental or emotional harm. Writing in a separate, concurring opinion in *Stachura*, Justice Marshall remarked that, “[A] First Amendment-protected interest could itself constitute compensable injury wholly apart from any ‘emotional distress, humiliation and personal indignity, emotional pain, [or]. . . anguish suffered by plaintiffs.’”⁸⁴ This rule squares with the majority’s holding since such “injury could be compensated with substantial damages only to the extent that [they are] reasonably quantifiable; damages should not be based on the so-called inherent value of the rights violated.”⁸⁵

In other words, all that *Carey* and *Stachura* require is that the compensatory “award . . . be proportional to the actual loss sustained.”⁸⁶ Because courts recognize that a “wooden” application of common law actual injury requirements cannot typically remedy First Amendment violations, they have continued to allow plaintiffs to recover for the violation of First Amendment and other intangible rights themselves.⁸⁷

When compared to a similar case previously decided by the same court, *Royal* vividly illustrates the effect a broad reading of § 1997e(e) has on First Amendment cases. Five years prior to *Royal*, the Eighth Circuit handed down a decision in *Trobaugh v. Hall*,⁸⁸ a prisoner case with facts strikingly similar to those in *Royal*. In that case, the Eighth Circuit reversed the district court’s award of nominal damages even though, like *Royal*, *Trobaugh* had been placed in isolation to prevent him from filing claims against prison authorities and was subsequently found to have been subjected to retaliation by prison officials.⁸⁹ The *Trobaugh* court did not address § 1997e(e),⁹⁰ and instead concluded that the “[d]istrict [c]ourt abused

84. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 315 (1986) (Marshall, J., concurring) (quoting *Hobson v. Wilson*, 737 F.2d 1, 62 (D.C. Cir. 1984)).

85. *Id.*

86. *Id.*

87. *See, e.g., id.* at 314–16; *Bell v. Little Axe Indep. Sch. Dist. No. 70 of Cleveland County*, 766 F.2d 1391, 1408–1413 (10th Cir. 1985); *Hobson*, 737 F.2d at 57–63; *Mickens v. Winston*, 462 F. Supp. 910, 913 (E.D. Va. 1978).

88. 176 F.3d 1087 (8th Cir. 1999).

89. *Id.* at 1088.

90. *See id.* at 1088–89. Although *Trobaugh* was decided after the

its discretion by awarding only \$1 in damages for Hall's violation of Trobaugh's First Amendment rights."⁹¹ The circuit court remanded, suggesting that a more appropriate award would be in the range of \$100.00 per day for each of the days Trobaugh spent in isolation.⁹²

It is important to note that the *Trobaugh* court did not characterize the damage award as being for mental or emotional injury, but rather as being for the First Amendment violation itself.⁹³ Of equal importance is the fact that this characterization is outside the traditional "actual injury" construct applied in tort law, as addressed in *Carey*,⁹⁴ but is consistent with Justice Marshall's concurrence in *Stachura*.⁹⁵

The *Royal* court, when presented with facts that were essentially identical to *Trobaugh*, albeit far more egregious,⁹⁶ declined to follow its holding.⁹⁷ The *Royal* court, however, did not meaningfully distinguish the cases, except to say that *Trobaugh* did not consider § 1997e(e) in its decision.⁹⁸ The *Royal* court focused on the statute's phrase "no [f]ederal civil action," and concluded that since the language does not distinguish between the types of federal claims to which the subsection should apply, Congress must have intended First Amendment claims to be included within its reach.⁹⁹

In *Trobaugh*, the damages were not awarded for emotional injury but, as the court explicitly stated, for "violation of Trobaugh's First Amendment rights."¹⁰⁰ Similarly, Royal did not sue for mental or emotional injury; he sued for violation of his First Amendment rights. In other words, § 1997e(e), by its terms, does not mandate

enactment of § 1997e(e), the court curiously does not mention the statute or any other provision of the PLRA.

91. *Id.* at 1088 (emphasis added).

92. *Id.* at 1089. The court not only reversed the nominal compensatory award, but also asked the district court to reconsider its denial of punitive damages because the prison officials' denial of Trobaugh's First Amendment right to file grievances amounted to "reckless or callous indifference." *Id.*

93. *Id.* at 1088.

94. See *Carey v. Piphus*, 435 U.S. 247, 254–57 (1978).

95. See *supra* note 84 and accompanying text.

96. While Trobaugh was placed in segregation for only three days, *Trobaugh*, 176 F.3d at 1088, Royal spent fifty-six days in isolation, *Royal v. Kautzky*, 375 F.3d 720, 727 (8th Cir. 2004) (Heaney, J., dissenting).

97. *Royal*, 375 F.3d at 724 n.2.

98. *Id.*

99. *Id.* at 723.

100. *Trobaugh*, 176 F.3d at 1088.

preclusion of compensatory damages in First Amendment cases because, as *Trobaugh* demonstrates, some measure of damages can be awarded to compensate the violation of the constitutional right itself. Damages for these infringements need not be characterized as strictly “actual,” or fit within neat categories of monetary, physical, or emotional harms. This is the reasoning Justice Marshall advanced in *Stachura* and which the *Trobaugh* court followed.

C. *The Narrow Reading*

1. Supreme Court Jurisprudence Governing Damages for § 1983 Does Not Mandate Characterizing First Amendment Claims As Seeking to Remedy Mental or Emotional Injury

Courts that read § 1997e(e) narrowly tend to focus on the underlying nature of the claim itself. They recognize that First Amendment suits are not brought “for mental or emotional injury,” but rather to remedy the deprivation of the constitutional right itself.¹⁰¹ This reading of the statute is consistent with Justice Marshall’s concurrence in *Stachura*, and appreciates the fundamental difference between claims for deprivation of intangible rights and those more closely aligned with common law tort claims for physical injury or mental or emotional harm.¹⁰² Thus, under a narrow reading, prisoners bringing First Amendment claims need not meet § 1997e(e)’s physical injury requirement since they are not suits “for mental or emotional injury.”

The Ninth Circuit was the first appellate court to consider the application of § 1997e(e) to a First Amendment claim. In *Canell v. Lightner*,¹⁰³ the court reasoned that § 1997e(e) did not bar the plaintiff’s free exercise claim because he was “not asserting a claim for mental or emotional injury,” but rather “for violation of his First

101. See, e.g., *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998); *Waters v. Andrews*, No. 97-CV-407A(F), 2000 U.S. Dist. LEXIS 16004, at *24 (W.D.N.Y. Sept. 15, 2000).

102. See, e.g., *Barnes v. Ramos*, No. 94 C 7541, 1996 U.S. Dist. LEXIS 15260, at *7–8 (N.D. Ill. Oct. 11, 1996) (Plaintiff “has not brought this suit to recover damages for mental or emotional injuries suffered as a consequence of defendants’ actions. Rather, he alleges that his constitutional rights were violated . . .”).

103. 143 F.3d 1210 (9th Cir. 1998).

Amendment rights.”¹⁰⁴ Moreover, the court observed that “[t]he deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred.”¹⁰⁵ As a result, “§ 1997e(e) does not apply to First Amendment Claims [sic] regardless of the form of relief sought.”¹⁰⁶

This approach does not altogether ignore *Carey* and *Stachura*, but recognizes that constitutional claims brought to vindicate intangible rights are fundamentally different from common law tort claims redressing physical or emotional injury. The Ninth Circuit’s approach in *Canell*, in the earlier words of Justice Marshall, recognizes that a “wooden application of common-law damages rules”¹⁰⁷ is not appropriate where intangible rights have been violated, and that the rule should be “tailored to the interests protected by the particular right in question.”¹⁰⁸

After *Canell*, the Seventh Circuit,¹⁰⁹ as well as district courts within the First¹¹⁰ and Second¹¹¹ Circuits adopted similar reasoning in holding that § 1997e(e) does not bar First Amendment claims. The Seventh Circuit stated that, “It would be a serious mistake to interpret section 1997e(e) to require a showing of physical injury in all prisoner civil rights suits. The domain of the statute is limited to

104. *Id.* at 1213 (internal quotes omitted).

105. *Id.*

106. *Id.*

107. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 314 (1986) (Marshall, J., concurring).

108. *Id.* (quoting *Cary v. Phipus*, 435 U.S. 247, 259 (1978)).

109. *Robinson v. Page*, 170 F.3d 747, 748 (7th Cir. 1999).

110. *See, e.g., Shaheed-Muhammad v. Dipaolo*, 138 F. Supp. 2d 99 (D. Mass. 2001).

111. *See, e.g., Lipton v. County of Orange*, 315 F. Supp. 2d 434, 457 (S.D.N.Y. 2004) (“[A] First Amendment deprivation presents a cognizable injury standing alone and the PLRA does not bar a separate award of damages to compensate the plaintiff for the First Amendment violation in and of itself.”) (internal quotes omitted); *Amaker v. Haponik*, No. 98 Civ. 2663 (JGK), 1999 U.S. Dist. LEXIS 1568, at *22–23 (S.D.N.Y. Feb. 17, 1999) (“The injury occasioned by a violation of a plaintiff’s First Amendment rights is not a ‘mental or emotional’ injury in the same sense as [the types of claims that traditionally involve the terms mental or emotional] injuries. Thus § 1997e(e) does not bar the plaintiff’s First Amendment claims . . .”).

suits in which mental or emotional injury is claimed.”¹¹² Because First Amendment plaintiffs do not claim mental or emotional injury, but seek redress for the denial of the right itself, § 1997e(e) is not implicated.¹¹³

2. The Language of § 1997e(e) Does Not Mandate Inclusion of First Amendment Claims

Courts have also refused to apply § 1997e(e) to First Amendment claims based on the language of the statute itself. Several courts have noted that if § 1997e(e) applies to all federal claims by prisoners, then the phrase “for mental or emotional injury” is superfluous.¹¹⁴

In other words, if Congress intended the statute to apply to *all* federal claims it should simply read, “no [f]ederal civil action may be brought by a prisoner without a prior showing of physical injury.” Instead, Congress specifically identified claims that are “for mental or emotional injury” as requiring a showing of physical injury.¹¹⁵ Since First Amendment claims are not “for mental or emotional injury,” the intent of Congress must not have been to impede such claims. This reading comports with the notion that all words in a statute should be read to have meaning.¹¹⁶

3. There Is Nothing in the Congressional Record Suggesting that First Amendment Claims Are Covered by § 1997e(e)

Another justification for the narrow interpretation of § 1997e(e) is the absence in the PRLA’s legislative history of any intent by Congress to limit otherwise actionable First Amendment claims. When a statute may be interpreted in more than one way it is ambiguous, and thus it is appropriate to look to legislative history to determine the intent of the lawmakers.¹¹⁷ Section 1997e(e) is properly characterized as ambiguous given the multiplicity of interpretations applied to it.¹¹⁸ It is therefore proper to look to the

112. *Robinson*, 170 F.3d at 748.

113. *See id.*

114. *Royal v. Kautzky*, 375 F.3d 720, 729 (8th Cir. 2004) (Heaney, J., dissenting); *Amaker*, 1999 U.S. Dist. LEXIS 1568, at *21–22.

115. *See* 42 U.S.C. § 1997e(e) (2000).

116. *Amaker*, 1999 U.S. Dist. LEXIS 1568, at *22.

117. *See Royal*, 375 F.3d at 729 (Heaney, J., dissenting).

118. *Id.*

legislative history of the statute to divine the likely intent of Congress.

Because Congress focused on claims concerning conditions of confinement, one example of which concerned the type of peanut butter an inmate was served, it is unlikely that lawmakers intended § 1997e(e) to serve as a bar for meritorious First Amendment claims.¹¹⁹ It is also unlikely that Congress intended to immunize state prison officials from suits for violations of prisoners' intangible rights.¹²⁰ Although the congressional record is sparse,¹²¹ there is no evidence that Congress intended § 1997e(e) to result in the virtual elimination of all effective remedies for inmates with meritorious claims.¹²²

4. Judicial Nullification, Notwithstanding § 1997e(e)

While some courts distinguish First Amendment claims from those that allege physical or emotional injury, other courts that construe § 1997e(e) narrowly simply refuse to apply the statute to First Amendment cases. These courts recognize that applying § 1997e(e) to intangible rights claims effectively immunizes state prison officials from suit. Finding this result unconscionable, they have held that § 1997e(e) does not apply to First Amendment claims even if the statute is read to encompass them. A prime example of this phenomenon is *Warburton v. Underwood*,¹²³ a New York district court decision:

[T]he Court recognizes that some highly significant constitutional claims, such as those addressing an inmate's rights under the Establishment Clause, may not strictly comply with the requirements of 42 U.S.C. § 1997e(e). . . . However, the Court finds that such claims nevertheless deserve to be heard, and thus the Court declines to dismiss the Establishment Clause claim under 42 U.S.C. § 1997e(e) despite the fact that the only injury plaintiff could

119. See *Mason v. Schriro*, 45 F. Supp. 2d 709, 718–19 (W.D. Mo. 1999).

120. See *id.* at 718.

121. *Royal*, 375 F.3d at 729 n.5 (Heaney, J., dissenting).

122. See *Royal*, 375 F.3d at 729 (Heaney, J., dissenting) (“There is nothing in the legislative history of § 1997e(e) . . . to suggest that Congress’s intent was to prevent legitimate constitutional claims simply because the prisoner suffered no physical injury.”); *Mason*, 45 F. Supp. 2d at 718–19.

123. 2 F. Supp. 2d 306 (W.D.N.Y. 1998).

experience as a result of a constitutional violation under the Establishment Clause would be mental or emotional.¹²⁴

New York is not the only state in which district court judges engage in nullification. Prior to the Eighth Circuit's decision in *Royal*, district courts within the Eighth Circuit were split on the application of § 1997e(e).¹²⁵ In *Mason v. Schriro*,¹²⁶ now likely implicitly overruled by *Royal*,¹²⁷ the court quoted a commentator who wrote, "[w]here constitutional rights are at stake and where Congress leaves the federal courts with authority to grant only plainly inadequate relief, it sets itself against the Constitution."¹²⁸ Instead of excluding intangible rights from § 1997e(e) on the basis of the injury alleged, the *Mason* court simply refused to apply the statute because doing so would license prison officials' wholesale violation of prisoners' intangible rights: "The court would, in effect, interpret section 1997e(e) as granting prison officials immunity from suit even where there is blatant and systematic racial or religious discrimination."¹²⁹ This would, in effect, deny those rights entirely by "rendering them utterly hollow promises."¹³⁰

5. Application of § 1997e(e) to First Amendment Claims Is Not Necessary to Effectuate Congressional Intent

A further justification for declining to apply § 1997e(e) to First Amendment claims is that other provisions of the PLRA provide federal courts with sufficient tools to weed out meritless First Amendment suits.¹³¹ These include the power of the court to *sua sponte* dismiss a claim brought *in forma pauperis* "at any time if the court determines that—the action or appeal—is frivolous or

124. *Id.* at 315.

125. Compare *Mason*, 45 F. Supp. 2d at 719 (adopting narrow interpretation), with *Todd v. Graves*, 217 F. Supp. 2d 958, 961 (S.D. Iowa 2002) (adopting broad interpretation).

126. 45 F. Supp. 2d 709 (W.D. Mo. 1999).

127. *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004).

128. *Mason*, 45 F. Supp. 2d at 719 (quoting Lawrence Gene Sager, *Constitutional Limitations on Congress Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV L. REV. 17, 88 (1981)).

129. *Id.* at 719.

130. *Id.*

131. *Royal*, 375 F.3d at 730–31 (Heaney, J., dissenting); see also Winslow, *supra* note 17, at 1671–72.

malicious.”¹³² Dismissal can occur even before service is made on defendants so that any expense or inconvenience they would otherwise incur is avoided.¹³³ This provision, in force prior to the passage of the PLRA,¹³⁴ exists in addition to the many other hurdles the PLRA places before prisoner litigants.¹³⁵

These provisions, without § 1997e(e)’s application to First Amendment claims, are sufficient to give effect to Congress’ intent to curb frivolous prisoner litigation.¹³⁶ It is, therefore, wholly unnecessary to apply § 1997e(e) in circumstances where its application effectively licenses disregard of prisoners’ intangible rights. This is particularly true where there is no direct evidence, either in the statute or in the congressional record, that Congress intended § 1997e(e) to apply to such claims.¹³⁷

D. The Insufficiency of Remedies Under a Broad Reading

Section 1997e(e)’s effective denial of rights by limitation of remedy is not ameliorated by the theoretical possibility that a prisoner-plaintiff might obtain either punitive damages or injunctive relief. A broad reading not only deprives successful suits of any deterrent value, but it generally leaves plaintiffs with no effective remedy. As previously discussed, most courts construing § 1997e(e) broadly have held that the subsection bars compensation for claims deemed to be “for mental or emotional injury,” but leaves punitive damages and injunctive relief available.¹³⁸ The effect of this application is not limited to depriving prisoner-plaintiffs compensation for violations of their First Amendment rights. It also robs prisoners’ First Amendment claims of any deterrent value they may otherwise carry.

Compensatory damages awarded in § 1983 cases are not solely intended to compensate the victim. They are also designed to deter further constitutional violations.¹³⁹ Unlike compensatory damage

132. 28 U.S.C § 1915(e)(2)(B)(i) (2000).

133. See Winslow, *supra* note 17, at 1671 (quoting *Neitzke v. Williams*, 490 U.S. 319, 324 (1989)).

134. See *id.*

135. See discussion *supra* Part II.

136. See *Royal*, 375 F.3d at 730–31 (Heaney, J., dissenting).

137. See *id.* at 729 n.5.

138. See discussion *supra* Part III.B.

139. See *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310 (1986)

awards, the nominal damages awarded as a substitute, in cases such as *Royal*, carry no deterrent value. The ultimate effect of this is the *de facto* immunization of prison officials who violate prisoners' First Amendment rights.

This fact is further compounded by the insufficiency of punitive damages and injunctive relief that are rarely available to prisoner litigants. The purpose of punitive damages is to both "punish the defendant for his willful or malicious conduct and to deter others from similar behavior."¹⁴⁰ Such damages are available when a "defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."¹⁴¹ While theoretically available to plaintiffs bringing First Amendment claims, punitive damages are rarely awarded.¹⁴² This barrier to relief is heightened by the fact that juries are likely to be suspicious of prisoner litigants in the first place, and therefore unlikely to find for prisoner-litigants except where the facts are unusually compelling.¹⁴³

In addition to the rarity of punitive awards, injunctive relief is similarly illusory because prisoners are often transferred to other facilities or released before their claims are fully adjudicated, thus rendering moot any prayer for injunctive relief.¹⁴⁴ This was the case for Jeff Royal, as upon his release from IMCC, his claim for

("Section 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations.").

140. *Id.* at 306 n.9.

141. *Smith v. Wade*, 461 U.S. 30, 56 (1983).

142. Michael L. Wells, *Section 1983, The First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. 939, 974-975 (2001) ("Punitive damages are rarely available in First Amendment retaliation cases, for they may be awarded only where the defendant's conduct was highly improper. These limits on relief suggest that a plaintiff who wins on the merits may find that the victory is not worth much as a practical matter.").

143. *See Schlanger*, *supra* note 14, at 1606-07.

144. Under Article III of the U.S. Constitution, the power of federal courts to adjudicate depends upon "the existence of a case or controversy. . . . [W]here intervening events resolve a potential controversy with 'no reasonable expectation that the wrong will be repeated,' a case becomes moot and a federal court is stripped of its authority to exert jurisdiction over the matter." *Shaheed-Muhammad v. Dipaolo*, 138 F. Supp. 2d 99, 105 (D. Mass. 2001) (holding that "transfer from an institution under the aegis of [one correctional facility to another] renders [plaintiff's] request for injunctive relief . . . moot").

injunctive relief was moot.¹⁴⁵ In other cases, prisoners' claims for prospective relief are often rendered moot by a transfer from one facility to another, or by personnel changes following the alleged rights violations.¹⁴⁶

Because the prospect for punitive damages and injunctive relief are largely illusory for prisoner-litigants, when § 1997e(e) is applied to bar compensatory damages for First Amendment claims, these plaintiffs are left with no remedy save nominal damages. Were injunctive relief available, such plaintiffs would still be left without compensation for deprivation of their rights as injunctive relief concerns only future violations.¹⁴⁷ In this way, a broad application of § 1997e(e) denies prisoner-litigants whose First Amendment rights have been violated any meaningful remedy, and effectively licenses state prison officials to violate such rights without fear of civil consequences.

IV. CONCLUSION

By construing § 1997e(e) broadly so as to encompass legitimate First Amendment claims, courts deprive prisoners of the civil recourse granted to them under the Constitution and by Congress under § 1983. This "limitation on recovery"¹⁴⁸ has the effect of rendering the rights embodied in the First Amendment, and so highly valued in our society, "hollow promises."¹⁴⁹ Furthermore, the denial of these rights is likely to result in no more than one dollar in civil liability.¹⁵⁰

This result is by no means necessary—the Supreme Court's

145. See *Royal v. Kautzky*, 375 F.3d 720, 727 (8th Cir. 2004) (Heaney, J., dissenting). Additionally, any claim for prospective relief Royal may have had against the individual official named in the suit was rendered moot upon that official's retirement. See *id.* at 722, 725.

146. See, e.g., *Dipaolo*, 138 F. Supp. 2d at 105; *Allah v. Al-Hafeez*, 226 F.3d 247, 249 (3d Cir. 2000) (transfer of prisoner from one facility to another rendered moot a claim for injunctive relief in free exercise case); *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (denying declaratory relief on standing grounds because rights violation was unlikely to recur).

147. See *Dipaolo*, 138 F. Supp. 2d at 105.

148. 42 U.S.C. § 1997e(e) (2000).

149. *Mason v. Shriro*, 45 F. Supp. 2d 709, 719 (W.D. Mo. 1999).

150. See, e.g., *Royal*, 375 F.3d at 726 (affirming district court's award of \$1 nominal damages and denial of punitive damages).

jurisprudence on § 1983 damages does not require it, the text of § 1997e(e) does not compel it, and there is nothing in the Congressional record suggesting that Congress intended it. Moreover, federal courts have other, more appropriately tailored, tools at their disposal to achieve the PLRA's objective of curtailing frivolous prisoner lawsuits.

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