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NOTES

PRISONERS' SUITS FOR MONEY DAMAGES: AN EXCEPTION TO THE ADMINISTRATIVE EXHAUSTION REQUIREMENT OF THE PRISON LITIGATION REFORM ACT

Allen W. Burton*

INTRODUCTION

Only Russia has a higher incarceration rate than the United States.¹ At year-end 1999, one in every 110 men in the United States was an inmate in either a federal or state prison.² From 1990 to 1999, the total prison population of state, federal, and local institutions increased by more than 742,000 inmates,³ and these inmates are remaining in prison for longer portions of their sentences due to decreased opportunity for parole.⁴ The total number of prisoners in state and federal correctional facilities is rapidly approaching two million.⁵

Along with this dramatic rise in the prison population, and to a large extent because of it,⁶ the number of lawsuits filed by prisoners in

* This Note is dedicated to my parents, my siblings, and my wife, Beth, for their constant support and encouragement. I would also like to thank Professor Katherine Franke, Fordham School of Law, for her guidance.

¹ Ted Conover, Guarding Sing Sing, New Yorker, Apr. 3, 2000, at 55, 57.
² Allen J. Beck, U.S. Dep't of Justice, Prisoners in 1999, at 1, http://www.ojp.usdoj.gov/bjs/pubalp2.htm#prisoners (Aug. 2000) [hereinafter Prisoners in 1999]. Even more striking is the rate at which young black males are incarcerated. As of 1999, one in every eleven black men age twenty-five to twenty-nine was in prison, compared to one in thirty-two Hispanic men and one in ninety-one white men in the same age group. Id. at 9. Approximately one in three “black men... between the ages of twenty and twenty-nine [are] either incarcerated or on probation or parole.” Conover, supra note 1, at 57.
³ Prisoners in 1999, supra note 2, at 2.
⁵ Prisoners in 1999, supra note 2, at 2.
⁶ Michael B. Mushlin, Rights of Prisoners § 2.12, at 98 (2d ed. 1993) (noting that “overcrowding has been a major topic for prison litigation”); see Prisoners in 1999, supra note 2, at 9 (reporting that as of 1999, twenty-two state prison systems were operating at “100% or more of their highest capacity” and federal prisons were operating at 32% above capacity).
federal court has also increased. As the Supreme Court recognized: "What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State." From 1980 to 1996, the number of petitions filed annually by state and federal inmates in federal court increased nearly threefold, from 23,230 to 68,235.

The increase in prisoners' lawsuits has been met with judicial restrictions, media disapproval, and legislative action. While the Supreme Court acknowledged prisoners' rights in the 1960s and 1970s, and lower courts robustly enforced them, the current federal judiciary has returned to the more "hands-off" approach of prior years. Recent decisions have displayed a lack of sympathy for civil rights claims brought by inmates. In addition, because many suits lack colorable legal claims, prisoners' lawsuits on the whole are portrayed as frivolous, serving only to clog the dockets of the federal courts. This portrayal has fueled a perception that prisoners' ability to bring suits has spun out of control and must be curbed.

In response to this outcry, Congress took a far-reaching step to limit prisoners' ability to bring lawsuits into federal court. On April 26, 1996, Congress passed the Prison Litigation Reform Act of 1995 (the "PLRA"). In an effort to ease the burden of prisoners' lawsuits on the federal docket, the PLRA places heavy restrictions on prisoners' access to the courts. Such restrictions include: (1) barring suits by inmate plaintiffs who have previously filed three petitions dismissed as frivolous, malicious, or failing to state a cause of action; (2) revoking a prisoner's earned release credit for filing a frivolous claim; (3)
allowing *sua sponte* dismissals of any claim that fails to state a cause of action;¹⁹ and (4) requiring prisoners to exhaust "available" administrative remedies prior to bringing suit in federal court.²⁰

Although the PLRA’s drafters aimed to reduce the strain of litigation brought by prisoners on federal courts,²¹ there has been considerable litigation regarding its constitutionality and application.²² As a result, the PLRA has also generated significant scholarly commentary, especially among student commentators.²³ More

¹⁹. *Id.* § 1915A(b).

²⁰. 42 U.S.C. § 1997e(a); *infra* Part II.

²¹. 141 Cong. Rec. 19. 26552 (1995); *see also* 141 Cong. Rec. 10, 14572 (1995) (reporting Senator Kyl’s statement that “inmate suits are clogging the courts and draining precious judicial resources”).

²². *See, e.g.*, Madrid v. Gomez, 190 F.3d 990. 996 (9th Cir. 1999) (upholding the provision limiting attorneys’ fees against due process, separation of powers, and equal protection challenges); Imprisoned Citizens Union v. Ridge, 169 F.3d 178, 187 (3d Cir. 1999) (finding that the PLRA does not impermissibly restrict the remedial power of the federal courts); Wilson v. Yaklich, 148 F.3d 596, 604-06 (6th Cir. 1998) (upholding the PLRA’s three strikes provision on equal protection and due process grounds); Taylor v. United States, 143 F.3d 1178, 1181-85 (9th Cir. 1998) (disagreeing with other circuits and finding unconstitutional the PLRA’s provision allowing immediate termination of prison consent decrees), *vacated as moot*, 181 F.3d 1017 (9th Cir. 1999) (en banc); Tucker v. Branker, 142 F.3d 1294, 1297-301 (D.C. Cir. 1998) (finding that the PLRA’s requirement that prisoners proceeding *in forma pauperis* must pay installed filing fees survives due process, access to the courts, and equal protection challenges); Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 652-53 (1st Cir. 1997) (holding that PLRA’s consent decree termination provision survives due process challenge).

specifically, the PLRA’s requirement of administrative exhaustion has caused particular problems for courts, and two situations have generated inconsistent results: (1) prisoners’ suits for money damages where such damages are unavailable in the prison grievance program; and (2) prisoners’ excessive force claims brought under the Eighth Amendment.

This Note addresses the first of these situations and proposes that the PLRA’s exhaustion requirement should not apply where the administrative process cannot provide the prisoner’s only requested

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1189, 1193 (1997) (“This Note concludes that the physical injury requirement does little to halt the filing of frivolous claims by federal prisoners, but may impose impermissible obstacles on the vindication of state prisoners’ constitutional rights.”); Catherine G. Patsos, Note, The Constitutionality and Implications of the Prison Litigation Reform Act, 42 N.Y.L. Sch. L. Rev. 205, 208 (1998) (“This note will argue that the Prison Litigation Reform Act . . . is unconstitutional.”); Ricardo Solano, Jr., Note, Is Congress Handcuffing Our Courts?, 28 Seton Hall L. Rev. 282, 310 (1997) (focusing on the PLRA’s limitation on federal courts’ relief and concluding that “the PLRA deals a heavy blow to the principles of democracy that govern our nation”).

24. See infra Part II.C. One student commentator has directly addressed the exhaustion provision. Fiedler, supra note 23, at 719 (proposing that courts excuse the exhaustion requirement when prisoners sue based on “past wrongs” and the remedy they seek is unavailable in the administrative process). Like Fiedler, this Note also argues for an exception to the exhaustion requirement, but it does not ask courts to determine whether the nature of the claim is “past” or “ongoing.” See infra Part III.

25. See, e.g., Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999) (noting that “[t]he law concerning the PLRA’s exhaustion requirement is in great flux,” with respect to cases involving excessive force and those seeking money damages); Rumbles v. Hill, 182 F.3d 1064, 1068 (9th Cir. 1999) (stating that “[a]uthorities are split” on the question of whether suits for money damages where such damages are not provided by the grievance system are subject to § 1997e(a)); see also infra note 167 (listing cases that illustrate the judicial conflict over § 1997e(a) and prisoners’ suits for money damages).

remedy. This issue is especially acute now because the Supreme Court has granted certiorari on a case that may decide the issue. In Booth v. Churner, the Third Circuit dismissed the inmate plaintiff's civil rights claims for failure to exhaust administrative remedies, even though the administrative process could not have supplied the monetary relief he sought. Booth represents the culmination of a debate that has stewed in the courts since the enactment of the PLRA. The Court’s decision is likely to have a significant impact on future prisoner litigation and federal courts' application of the PLRA.

Part I of this Note explains the justifications for and the enactment of the PLRA. In addition, Part I discusses the scholarly criticism and judicial confusion generated by the PLRA. Part II explores the specific controversy in the courts over the application of the PLRA's requirement that claims be exhausted administratively. This part first explains the underlying doctrine of administrative exhaustion, and then discusses the particular requirement of the PLRA. Further, Part II illustrates the split among the federal circuits on whether the requirement should apply when inmates seek money damages that are unavailable through the administrative procedure. Finally, Part III offers a solution to the problem created by the exhaustion requirement of the PLRA. This Note concludes that the Supreme Court should decide this issue by allowing an exception to the exhaustion requirement of the PLRA.

To be clear, this Note does not argue that required exhaustion is altogether unfair. Indeed, its potential benefits are significant. Prisoners must not, however, be forced to comply with procedures that cannot satisfy their claims. The exhaustion requirement therefore should not apply to cases in which prisoners seek exclusively monetary damages and such damages are not available in the applicable prison grievance procedure.

27. See infra Part III.
28. Fiedler discusses the judicial conflict in cases decided in 1997 and 1998. Fiedler, supra note 23, at 725-33. Since that time, additional circuits have addressed the issue, but still no consensus has emerged. See Nyhuis v. Reno, 204 F.3d 65, 71 (3d Cir. 2000); Wright v. Hollingsworth, 201 F.3d 663, 665 (5th Cir. 2000); Massey v. Helman, 196 F.3d 727, 732-35 (7th Cir. 2000); Freeman v. Francis, 196 F.3d 641, 643 (6th Cir. 1999); infra notes 167-76 and accompanying text.
30. Id.
31. Id.
32. See Wright, 201 F.3d at 666 (characterizing the "exceptional importance" of the issue while requesting an en banc hearing).
33. See infra Part III.
34. See infra notes 120-31 and accompanying text.
I. THE PRISONER LITIGATION REFORM ACT OF 1995

The PLRA represents Congress' latest effort to restrict prisoners' access to federal court. This effort and the current restrictions facing prisoners' lawsuits are part of the evolving area of prisoners' rights. Locating the current status of prisoner litigation within the historical evolution of prisoners' suits more generally in the latter half of the twentieth century enhances an analysis of the PLRA's effect. Accordingly, this part traces the evolution of prisoners' rights up to the enactment of the PLRA. This part also examines the PLRA itself, considering both its justifications and its effect.

A. The Evolution of Prisoners' Civil Rights Claims in Federal Court

Recognition of the constitutional rights of prisoners is a recent development in American law.\(^\text{35}\) In the nineteenth century, convicts were thought of as slaves.\(^\text{36}\) State legislatures enacted civil death statutes, which deprived prisoners of all civil rights and denied criminals even the ability to litigate their own "slave status."\(^\text{37}\) Despite the absence of a federal civil death statute, federal courts imposed a judicial counterpart throughout the first part of the twentieth century by denying all constitutional claims by prisoners.\(^\text{38}\) This approach, termed the "hands-off doctrine,"\(^\text{39}\) denied jurisdiction to such claims because courts saw no room for the judiciary to "supervise prison administration or to interfere with the ordinary prison rules."\(^\text{40}\) The only role seen for the courts was "to deliver from imprisonment those who are illegally confined."\(^\text{41}\) Aside from habeas corpus petitions, even litigants with meritorious constitutional violations were turned away.\(^\text{42}\)

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35. Mushlin, supra note 6, § 1.00, at 4.
36. See Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871) (describing prisoners as slaves "in a state of penal servitude to the State"). Indeed, incarceration was not a primary means of punishment in early American criminal law. Other sanctions such as capital punishment, corporal punishment and banishment were more common. Roberta M. Harding, In the Belly of the Beast: A Comparison of the Evolution and Status of Prisoners' Rights in the United States and Europe, 27 Ga. J. Int'l & Comp. L. 1, 7 (1998).
38. Herman, supra note 11, at 1238.
39. See id.
42. Stroud v. Swope, 187 F.2d 850, 852 (9th Cir. 1951). The Supreme Court's seminal decision in Ex parte Hull marked the Court's first recognition of a prisoner's right, finding that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." Ex parte Hull, 312 U.S. 546, 549 (1941).
43. See, e.g., Ex parte Pickens, 101 F. Supp. 285, 287, 290 (D. Alaska 1951) (denying a claim despite noting that the prison conditions were a "fabulous
In the 1960s, federal courts began to depart from the "hands-off doctrine." During this period, courts overlooked the concerns of separation of powers, federalism, and lack of judicial expertise in the field of prison administration that had supplied the doctrine's legal justifications. The Supreme Court formally rejected the doctrine, recognizing that "there is no iron curtain drawn between the Constitution and the prisons of this country." In response, courts began to enforce the rights of the incarcerated, refusing to turn a blind eye to the inhumane conditions in some prisons. This "prisoners' rights revolution" saw courts treating prisoners as a "discrete and insular minority" and regularly enforcing their newly recognized constitutional rights.

The most basic of these rights was access to the courts. As the Seventh Circuit noted in Adams v. Carlson: "All other rights of an inmate are illusory without it." This recognition of prisoners' access to the courts paved the way for a dramatic increase in litigation brought by prisoners. From 1970 to 1986, the total number of civil rights filings in federal court made by prisoners of state institutions increased nearly tenfold, from 2,030 to 20,072. It is important to note, however, that prisoners were not the only civil rights plaintiffs increasing in numbers. The number of civil rights cases filed by non-prisoners in federal court also increased, from 296 in 1961 to 13,168 in 1979.

obscenity").

44. Kenneth C. Haas, Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine, 1977 Detroit C. L. Rev. 795, 796-97. These traditional legal justifications included: (1) separation of powers; (2) considerations of federalism; (3) the judiciary's lack of expertise; (4) concerns about undermining prison administration; and (5) fear of opening the floodgates to prisoner litigation. Id. at 797.


46. See Hutto v. Finney, 437 U.S. 678, 681-83 (1978) (describing an Arkansas prison as a "dark and evil world" in which up to ten or eleven inmates, some contagious, were confined in an eight by ten foot unfurnished cell, given inadequate food, and punished with leather straps and electrical shocks); Pugh v. Locke, 406 F. Supp. 318, 328-29 (M.D. Ala. 1976) (finding Eighth Amendment violations in Alabama's prison system); Gates v. Collier, 349 F. Supp. 881, 893 (N.D. Miss. 1972) (awarding injunctive relief because the prison was "maintained and operated in a manner violative of rights secured to inmates by the United States Constitution").

47. Herman, supra note 11, at 1239.


49. 488 F.2d 619 (7th Cir. 1973).

50. Id. at 630.


52. Theodore Eisenberg, Section 1983: Doctrinal Foundations and an Empirical Study, 67 Cornell L. Rev. 482, 523 (1982). Further, between 1973 and 1981, nearly 60% of the increase in all civil rights case filings resulted from employment
In the 1980s, the Supreme Court followed a conservative ideological shift and backed away from its rights-enforcing role to adopt one more similar to the "hands-off" approach. The Court's decisions imposed restrictions on inmates' constitutional claims, seeking to enforce rights established by earlier decisions. In *Rhodes v. Chapman,* for example, the Court reversed the Sixth Circuit's finding that a prison's double-ceiling policy violated the inmates' Eighth Amendment rights. While the Court acknowledged that the prison's policies were "harsh," they were simply "part of the penalty that criminal offenders pay for their offenses."

This "modified hands-off" approach exhibited in *Rhodes* continued to be the Court's favored approach into the 1990s. Recently, the Court secured its commitment to this restrictive approach with its 1996 decision in *Lewis v. Casey.* In *Lewis,* twenty-two inmates from Arizona prisons brought a class action suit claiming that the prison libraries were inadequate to ensure their constitutional right of access to the courts. The Court rejected their claim, declaring that prisoners need to have only minimally adequate legal support. Thus, while not disputing that prisoners have a constitutional right of access to the courts, the Court restricted prisoners' ability to exercise that right effectively. This restriction illustrates the contrast between the Court's current approach to prisoners' civil rights claims and the Court's approach in the 1960s and 1970s.

**B. Congress Steps In**

Despite the Court's modern restrictive approach, the volume of prisoners' lawsuits filed annually in federal court ballooned to 68,235 by 1996—an increase of over 426% from 1970. Currently, 15% of civil suits filed in the courts of the United States are filed by discrimination cases. *Id.* at 535.

55. 452 U.S. at 337.
56. *Id.* at 352.
57. *Id.* at 347.
59. *Id.* at 346-47.
60. *See id.* at 351-53.
62. *Prisoner Petitions,* *supra* note 8, at iii.
63. Thomas, *supra* note 51, at 61 (reporting that in 1970 the number of prisoners' petitions filed in federal court was 15,997).
prisoners. As more suits have entered federal court, however, fewer have resulted favorably for prisoners. According to the National Association of Attorneys General, more than 95% of inmate civil rights suits are dismissed in favor of the defendant.

Courts are understandably frustrated by this high number of unsuccessful cases. Courts also complain about the frivolous and seemingly unimportant nature of some of the claims. For example, prisoners have alleged civil rights violations resulting from deprivations of shampoo and deodorant, denial of a second serving of ice cream, the issuance of Converse rather than L.A. Gear brand athletic shoes, and restrictions on the opportunity to pitch horseshoes. An oft-highlighted case is one where an inmate pointed to the prison's failure to serve him his preferred style of peanut butter (chunky, not creamy).

Commentators were justifiably concerned about the effect of increasing numbers of prisoners' suits on the overly-burdened federal docket. Additionally, many, if not most, petitions filed by prisoners are legally frivolous. However, commentary often fails to tell the

64. Hobart, supra note 23, at 981.
66. See Cotner v. Campbell, 618 F. Supp. 1091, 1095 (E.D. Okla. 1985) ("The sheer volume of these prisoners' cases causes extreme frustration and hardship for all who deal with them.").
67. See, e.g., Rudd v. Jones, 879 F. Supp. 621, 622 (S.D. Miss. 1995) (noting that courts are "drowning in frivolous prisoner complaints"); see also Thomas, supra note 51, at 67 (describing the conception that prisoners file frivolous suits and quoting Chief Justice Warren Burger as instructing federal courts to dismiss "minor" complaints by prisoners).
72. See Mark Tushnet & Larry Yackle, Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act, 47 Duke L.J. 1, 19 (1997). More examples of these types of claims are not hard to come by. See Thomas, supra note 51, at 67 (citing examples of extreme cases including complaints of cold toilet seats and a failure to provide outside television antennae).
73. Herman, supra note 11, at 1295 (explaining that the portion of the federal docket occupied by prisoner suits is "hefty"); see also supra notes 62-65 and accompanying text (presenting statistics illustrating the heavy volume of prisoners' petitions in federal court).
74. The difference between legal frivolousness and substantive frivolousness is noteworthy. A legally frivolous complaint lacks an arguable basis in law. Neitzke v. Williams, 490 U.S. 319, 328 (1989). Examples of legally frivolous claims include those where the defendant is obviously immune and those where a claimant alleges infringement of a legal interest that does not exist. Id. at 327. On the other hand, substantive or factually frivolous claims involve "'fanciful,' 'fantastic' and
whole story. The gross number of lawsuits relates directly to the size of the prison population. Any measurement of the litigation increase must therefore include the number of lawsuits filed as a percentage of the prison population. Surprisingly, even though the rise of total prisoners' lawsuits has been startling, the rate at which prisoners file such lawsuits has declined 17% between 1980 and 1996, from 72.7 petitions per one thousand inmates to 60.5.\textsuperscript{75}

Moreover, portrayal of this class of suits as completely devoid of merit is not always accurate. As Judge Newman of the Second Circuit pointed out, frivolous claims characterized as "typical" are often not frivolous at all.\textsuperscript{76} In the famous "chunky peanut butter case," for example, the inmate actually sued because his prison account had been incorrectly debited for a jar of peanut butter he never received.\textsuperscript{77} Likewise, in a case characterized as one where prisoners sued because there were "no salad bars or brunches on weekends and holidays,"\textsuperscript{78} the actual complaint concerned unhealthy prison conditions including overcrowding, forced confinement for prisoners with contagious diseases, lack of proper ventilation, lack of sufficient food, and food contaminated by rodents.\textsuperscript{79} The salad bar claim was included in a broader claim of nutritional deprivation and was mentioned merely "in passing."\textsuperscript{80}

Nevertheless, media attention given to these cases generated public outcry against prisoner litigation.\textsuperscript{81} Coverage accurately revealed that many cases are indeed without merit and only burden the dockets of federal courts.\textsuperscript{82} While this portrayal was often warranted, the coverage consistently failed to mention legitimate claims.\textsuperscript{83} This focus

\textsuperscript{75}Prisoner Petitions, supra note 8, at 5. Further, the filing rate for federal inmates filing civil rights claims declined 53% between 1985 and 1995. Id.


\textsuperscript{77}Id. at 521-22.

\textsuperscript{78}Id. at 520 (quoting Denis C. Vacco et al., Letter to the Editor, Free Courts from Frivolous Prisoner Suits, N.Y. Times, Mar. 3, 1995, at A3).

\textsuperscript{79}Id. at 521.

\textsuperscript{80}Id.

\textsuperscript{81}See, e.g., Harold W. Andersen, Frivolous Jailhouse Lawsuits Cost Nebraska, Omaha World-Herald, Apr. 11, 1999, at 13B (listing examples of frivolous lawsuits and explaining that it is "surely a serious matter").

\textsuperscript{82}See supra notes 66-74.

\textsuperscript{83}In a recent case worth noting, a jury verdict dismissing an Eighth Amendment excessive force claim in the Southern District of New York was held to be "against the weight of the evidence presented at trial." Ruffin v. Fuller, No. 99 Civ. 1679, 2000 WL 1886615, at *4 (S.D.N.Y. Dec. 28 2000). Judge Chin was "convinced" that a
on claims that seem almost humorous\(^{84}\) has distorted the public's view. The result is an overall negative public perception of prisoners' petitions, unbalanced by the lack of attention given to those petitions that are meritorious.\(^{85}\)

In response, Congress developed and enacted the Prison Litigation Reform Act of 1995\(^{86}\) to address the "alarming explosion in the number of lawsuits filed by State and Federal prisoners."\(^{87}\) The PLRA built upon the 1980 Civil Rights of Institutionalized Persons Act\(^{88}\) ("CRIPA"), Congress' first major piece of prisoners' rights legislation. CRIPA sought to enforce prisoners' rights by authorizing the United States Attorney General to litigate claims on behalf of inmates.\(^{89}\) In addition, CRIPA sought to reduce the number of petitions filed in federal court by requiring prisoners to exhaust "plain, speedy, and effective" administrative remedies before bringing suit in court.\(^{90}\)

The PLRA expands CRIPA's goal of reducing the number of federal petitions filed by prisoners by sharply restricting the manner in which prisoners may engage in litigation. Specifically, the PLRA restricts prisoners through: (1) a "three-strikes" provision which bars plaintiffs who have filed three petitions dismissed as frivolous, prison guard had kicked the prisoner in the mouth, shattering the prisoner's teeth. \(\text{id.}\)

84. See, e.g., Andersen, \textit{supra} note 81 (including the 1995 "top 10" list for frivolous lawsuits brought by inmates and their "laughable" contents).

85. Herman, \textit{supra} note 11, at 1230 (noting the effect of "fairly consistent media coverage" on the public perception of prisoners). The public perception of prisoner litigation can generally be compared to that of non-prisoner personal injury tort litigation. \textit{See generally} Mark B. Greenlee, \textit{Kramer v. Java World: Images, Issues, and Idols in the Debate over Tort Reform}, 26 Cap. U. L. Rev. 701, 703 (1997) (discussing the impact of images on the debate over tort reform). The public views prisoners' suits as similar to the McDonald's hot coffee case, in which an elderly woman sued after spilling a cup of hot coffee that she had placed between her legs at a McDonald's drive-thru. \textit{See id.} at 718-24 (discussing Liebeck v. McDonald's Restaurants, No. CV-93-02419, 1995 WL 360309 (D.N.M. Aug. 18, 1994)). The $2.9 million verdict attracted negative media attention, sparked Congressional tort reform debate, and even supplied comic material for the television show \textit{Seinfeld}. \textit{Id.} at 701-02. Prisoners' suits seem even more outrageous, however, because the plaintiff is not seventy-nine-year-old Stella Liebeck, but a convicted criminal.


87. 141 Cong. Rec. 10, 14570 (1995); \textit{see also} 141 Cong. Rec. 19, 26553-54 (1995) (reporting Senator Kyl's concern about the effect of prisoner litigation on the federal docket). In addition to deterring frivolous prisoners' lawsuits, the PLRA was designed to make it more difficult for federal judges to become involved in the administration of state prisons by issuing consent decrees. \textit{Id.} at 26552. For an analysis of the provisions of the PLRA that deal with judicial activism, see Solano, \textit{supra} note 23, at 286-90 (focusing on the PLRA's limitations on judicial intervention in prison litigation and prison administration).


90. \textit{Id.} \S 1997e(a)(1).
malicious, or failing to state a cause of action;\textsuperscript{91} (2) the revocation of a prisoner's earned release credit for filing a frivolous claim;\textsuperscript{92} (3) the allowance of \emph{sua sponte} dismissals of any claim that fails to state a cause of action;\textsuperscript{93} and (4) the requirement that prisoners exhaust "available" administrative remedies prior to bringing suit in federal court.\textsuperscript{94} Therefore, while CRIPA aimed to reduce prisoners' lawsuits in addition to enforcing prisoners' rights, the PLRA focused on keeping prisoners out of court.

\section*{C. The PLRA's Effect: Conflict and Confusion}

The PLRA was generally praised as addressing a problem that had spiraled out of control.\textsuperscript{95} Nevertheless, the provisions that seek to curtail frivolous lawsuits, such as the exhaustion requirement, have generated substantial criticism and confusion.\textsuperscript{96} As a general matter, some commentators have criticized the justifications for enacting the PLRA as inaccurate and misleading.\textsuperscript{97} The legislators who developed the PLRA garnered support for the bill by pointing to dramatic examples of frivolous lawsuits. Former Senator Bob Dole, who introduced the PLRA, explained that "[p]risoners have filed lawsuits claiming such grievances as insufficient storage locker space, being prohibited from attending a wedding anniversary party, and yes, being served creamy peanut butter instead of the chunky variety they had ordered."\textsuperscript{98} As described earlier, however, much of this rhetoric was inaccurate.\textsuperscript{99} Congress relied on images that illustrated the frivolous claims without recognizing any of the legitimate ones. One commentator described the PLRA as "based on myths rather than hearings."\textsuperscript{100}

Further, there is some question as to what the PLRA actually accomplished in light of the federal courts' "modified hands-off" approach, which already placed restrictions on prisoners' civil rights claims.\textsuperscript{101} That is, if the courts had already been acting to restrain lawsuits by denying more claims, why would Congress need to go

\begin{footnotes}
\footnote{91. 28 U.S.C. § 1915(g) (Supp. IV 1998).}
\footnote{92. \textit{Id.} § 1932.}
\footnote{93. \textit{Id.} § 1915A(b).}
\footnote{94. 42 U.S.C. § 1997e(a) (Supp. IV 1998); \textit{infra} Part II.}
\footnote{95. \textit{See}, e.g., Andrew Peyton Thomas, \textit{Congress Revokes Prisoners' Access to Frivolous Appeals}, Wall St. J., July 3, 1996, at A11 (describing the PLRA's requirements as "common-sense restrictions on inmate litigation").}
\footnote{96. \textit{See supra} note 22 (listing cases in which various provisions of the PLRA have been challenged on constitutional grounds).}
\footnote{97. Harding, \textit{supra} note 36, at 20; Herman, \textit{supra} note 11, at 1231.}
\footnote{98. 141 Cong. Rec. 10, 14570 (1995).}
\footnote{99. \textit{See supra} notes 76-80 and accompanying text; \textit{see also} Tushnet & Yackle, \textit{supra} note 72, at 19 n.119 (describing the peanut butter case as an "urban legend").}
\footnote{100. Herman, \textit{supra} note 11, at 1231.}
\footnote{101. \textit{See supra} notes 53-61 and accompanying text (explaining the current "modified hands-off" approach).}
\end{footnotes}
further and enact the PLRA? According to some commentators, the only reason was to score political points with constituents.\textsuperscript{102} Not unlike statutes prohibiting flag-burning enacted \textit{after} the Supreme Court declared them unconstitutional, "symbolic statutes"\textsuperscript{103} such as the PLRA create valuable political points for legislators, while often posing problems of interpretation and administration for courts, government employees, and others affected by the statute.

Criticism that the PLRA lacks substance gains support when one examines the manner in which Congress enacted it. The PLRA’s legislative process was markedly fast and "lack[ed]... any real debate."\textsuperscript{104} Congress passed the PLRA as a rider to an omnibus appropriations bill,\textsuperscript{105} so it was "never the subject of a Committee mark-up, and there [was] no Judiciary Committee report."\textsuperscript{106} There was just one hearing in the Judiciary Committee.\textsuperscript{107} Senator Ted Kennedy noted that this abbreviated process was "hardly the type of thorough review that a measure of this scope deserves."\textsuperscript{108} Probably due to this abbreviated process, the PLRA emerged with areas of ambiguity\textsuperscript{109} and subsequently created judicial conflict.\textsuperscript{110} As critics have pointed out, "even the title could have used editing."\textsuperscript{111} While titled the Prison Litigation Reform Act of 1995, it was passed in 1996. This truncated, slipshod legislative process underscores the degree to which the PLRA represents Congress’ questionable foray into an area already managed by federal courts. The next part examines one provision of the PLRA that has caused conflict in its application: the requirement that prisoners exhaust administrative remedies.

\section*{II. The PLRA's Exhaustion Requirement: How Far Does it Go?}

The PLRA’s requirement that prisoners exhaust their administrative remedies before bringing suit in federal court\textsuperscript{112} supports Congress’ general goal of reducing frivolous prisoner litigation. This provision amended § 1997e(a), the exhaustion

\begin{itemize}
\item \textsuperscript{102} See Tushnet & Yackle, \textit{supra} note 72, at 2-3.
\item \textsuperscript{103} \textit{Id.} at 3.
\item \textsuperscript{104} Herman, \textit{supra} note 11, at 1277 (describing the PLRA as taking a "scattershot approach"); see Pepe, \textit{supra} note 23, at 62.
\item \textsuperscript{106} 142 Cong. Rec. 4, 5193 (1996).
\item \textsuperscript{107} \textit{Id.}
\item \textsuperscript{108} \textit{Id.} Senator Kennedy’s primary concern with the PLRA was its breadth as an “effort to strip Federal courts of the authority to remedy unconstitutional prison conditions.” \textit{Id.}
\item \textsuperscript{109} See Hall v. McCoy, 89 F. Supp. 2d 742, 745 (W.D. Va. 2000) (concluding that § 1997e(a) of the PLRA is “facially ambiguous”).
\item \textsuperscript{110} \textit{Infra} Part II.C.
\item \textsuperscript{111} Herman, \textit{supra} note 11, at 1277.
\item \textsuperscript{112} 42 U.S.C. § 1997e(a) (Supp. IV 1998).
provision that was originally included by Congress in CRIPA.\textsuperscript{113} However, while the CRIPA exhaustion provision allowed for judicial discretion based on considerations of the fairness of the administrative procedure, the PLRA removed such considerations and now forces plaintiffs to exhaust all "remedies as are available."\textsuperscript{114}

The reaction to Congress’ requirement that all prisoners exhaust their administrative remedies before bringing an action in federal court has generally been positive. Commentators and courts view the exhaustion requirement as a step toward preventing frivolous lawsuits from reaching federal court.\textsuperscript{115} Nevertheless, because of the PLRA’s amendments to § 1997e(a), application of this provision has caused considerable confusion.

This part frames the current conflict regarding interpretation of the exhaustion requirement of § 1997e(a). First, this part provides background on the doctrine of administrative exhaustion, explaining its justifications, benefits, and exceptions. It then illustrates the conflict regarding the exhaustion requirement in § 1997e(a) by discussing the different approaches taken by the federal circuits.

A. The Doctrine of Exhaustion

The doctrine of exhaustion of administrative remedies, along with the doctrines of abstention, finality, and ripeness, governs the timing of federal court review\textsuperscript{116} so as to avoid "judicial and administrative conflict and confusion."\textsuperscript{117} An exhaustion requirement is based on the theory that a matter is not ready for judicial review because “there remain administrative procedures that might resolve it, or further develop the facts.”\textsuperscript{118} Accordingly, when exhaustion is required, parties may not appeal to a court "until they have availed themselves of all possible remedies within the [administrative] agency."\textsuperscript{119} Plaintiffs therefore file complaints first with the agency’s dispute resolution system instead of regular judicial channels.

Exhaustion of administrative remedies can be beneficial to administrative bodies, the courts, and the plaintiffs. First, exhaustion requirements benefit the administrative body in question by

\textsuperscript{113} Id. § 1997e(a)(1) (1994).
\textsuperscript{114} Id. § 1997e(a) (Supp. IV 1998).
\textsuperscript{115} Kuzinski, \textit{supra} note 23, at 361, 380-81 (arguing generally that the PLRA will produce necessary and effective reform and that mandatory exhaustion of administrative remedies is a way to solve disputes more immediately and less expensively).
\textsuperscript{117} 5 Stein et al., Administrative Law § 49.01, at 49-22 (2000).
\textsuperscript{118} Peter L. Strauss, \textit{An Introduction to Administrative Justice in the United States} 232 (1989).
\textsuperscript{119} 5 Stein, \textit{supra} note 117, § 49.01, at 49-3; see also Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938) (describing the operation of an exhaustion requirement).
preserving its resources and preventing outside interference into its authority over prison administration.\textsuperscript{120} By preventing litigation in the judicial system, an effective grievance procedure allows an administrative body to avoid the heavy costs of defending civil rights suits in federal court.\textsuperscript{121} Additionally, requiring exhaustion of administrative remedies allows administrative agencies to exercise the authority granted to them by the legislature.\textsuperscript{122} The exhaustion doctrine can therefore be seen as "an expression of executive and administrative autonomy,"\textsuperscript{123} which is required because many of the actions under review involve the administrative body's discretionary power or special expertise.

Second, exhaustion requirements are attractive to courts because they can lighten caseloads by preventing the need for judicial review.\textsuperscript{124} Even where federal court review cannot be avoided after exhaustion of administrative remedies, exhausting remedies "may produce a useful record for subsequent judicial consideration."\textsuperscript{125} Such a record would focus the issues involved in the dispute and streamline the case so as to use fewer judicial resources once the matter landed in federal court. This case development or streamlining is especially important in cases that involve highly specific and complex technical or factual backgrounds.\textsuperscript{126} Exhaustion allows the more expert administrative agency to explain its decision-making process and thus create a helpful record for the reviewing judge.\textsuperscript{127}

Finally, exhaustion of administrative remedies may be beneficial to plaintiffs by making judicial involvement unnecessary.\textsuperscript{128} Litigation in courts can take years, while administrative procedures are generally designed to proceed more quickly.\textsuperscript{129} Federal courts only address


\textsuperscript{122} 5 Stein, \textit{supra} note 117, \S 49.01, at 49-15 (noting that "[a]n agency's enabling legislation often vests it with an exclusive initial responsibility for interpreting and applying the statutes it enforces"); see also Gidumal, \textit{supra} note 120, at 381.

\textsuperscript{123} McKart v. United States, 395 U.S. 185, 194 (1969) (quoting L. Jaffe, \textit{Judicial Control of Administrative Action} 425 (1965)).

\textsuperscript{124} See \textit{McCarthy}, 503 U.S. at 145; see also Donald P. Lay, \textit{Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act}, 71 Iowa L. Rev. 935, 935 (1986) (noting that the number of civil rights suits in federal courts brought by prisoners has "swelled" because of a lack of effective opportunities to exhaust administrative remedies).

\textsuperscript{125} \textit{McCarthy}, 503 U.S. at 145; see also 5 Stein, \textit{supra} note 117, \S 49.01, at 49-15 to 49-17.

\textsuperscript{126} \textit{See McCarthy}, 503 U.S. at 145.

\textsuperscript{127} \textit{Id}.

\textsuperscript{128} 5 Stein, \textit{supra} note 117, \S 49.01, at 49-17 to 49-19.

\textsuperscript{129} J. Michael Keating, Jr. et al., U.S. Dep't of Justice, Grievance Mechanisms in
problems of constitutional dimensions, while grievance procedures are not so limited. A system without the jurisdictional and procedural constraints of federal court can thus provide an "effective, credible machinery to provide an outlet for [prisoners'] complaints and dissatisfaction." 

While administrative exhaustion can confer benefits on all parties, there are situations in which courts will not require it. Where a litigant faces an inadequate or futile administrative procedure, for example, courts provide an exception to the exhaustion requirement. Plaintiffs are not required to enter a grievance system that has no way of satisfying their complaint. As one court explained: "When there is nothing to be gained from the exhaustion of administrative remedies . . . courts have not been reluctant to discard this doctrine." In addition, even where the agency provides an adequate administrative process, the remedy available to the litigant through that process must be an effective one. Where the administrative process provides only remedies that are inadequate in kind or proportion to the particular claim, exhaustion is unnecessary. Courts have found inadequacy where agency review

Correctional Institutions 3-4 (1975).
130. See id. at 3.
131. Id. at 6.
132. While courts may exercise discretion in applying exceptions to the exhaustion doctrine, the Supreme Court has limited that ability when Congress is specific in its requirements. See Weinberger v. Salfi, 422 U.S. 749, 765-66 (1975) (finding that because the requirement in the Social Security Act, 42 U.S.C. § 405(g) (1970), that parties obtain a "final" administrative decision was statutorily mandated, it "may not be dispensed with merely by a judicial conclusion").
133. See 5 Stein, supra note 117, § 49.02[4], at 49-63 to 49-67. In Randolph-Sheppard Vendors of Am. v. Weinberger, 795 F.2d 90, 107 (D.C. Cir. 1986), the District of Columbia Circuit characterized these two exceptions as follows:

Resort to the administrative process is futile if the agency will almost certainly deny any relief either because it has a preconceived position on, or lacks jurisdiction over, the matter. The administrative process is inadequate where the agency has expressed a willingness to act, but the relief it will provide through its action will not be sufficient to right the wrong . . . . Under the futility exception a court must look to the agency's intentions regarding its position on the relevant issue and its statutory authority. When determining whether a remedy will be adequate, a court must consider all potential methods at the agency's disposal to remedy a violation if one is found.

Id.
134. See, e.g., Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 13 (2000) (noting an exception to exhaustion where it "prove[s] futile"); Doe by Gonzales v. Maher, 793 F.2d 1470, 1491 (9th Cir. 1986) (declining to apply an exhaustion requirement where the agency failed to notify the plaintiff of the available avenues of relief); Engwiller v. Pine Plains Cent. Sch. Dist., 110 F. Supp. 2d 236, 245 (S.D.N.Y. 2000) (stating that "excessive or pervasive untimeliness in rendering administrative decisions may provide grounds for finding futility").
137. See 5 Stein, supra note 117, § 49.02[1], at 49-47 to 49-48.
has caused unreasonable delay, where the agency lacks fact-finding procedures, where an agency is biased, and where the agency lacks the power to grant the requested relief. Therefore, the benefits of the exhaustion doctrine are outweighed where its application places an undue burden on the plaintiff.

B. The Exhaustion Requirement of the PLRA

The vast majority of civil lawsuits filed by prisoners in federal court are civil rights actions by state inmates. These suits are filed pursuant to 42 U.S.C. § 1983, which allows suits by individuals against those acting under the color of state law. Similarly, federal inmates alleging constitutional violations may sue in federal court under the judicially-created Bivens doctrine, which provides a remedy for constitutional violations by federal agents.

In general, courts do not require plaintiffs filing suit under § 1983 or Bivens to exhaust administrative remedies before entering court. In

138. See, e.g., Munoz v. Aldridge, 894 F.2d 1489, 1493-94 (5th Cir. 1990) (rejecting the claim of the U.S. Air Force that the plaintiffs had failed to exhaust administrative remedies because the case “languished[d] in the administrative phase”).

139. See, e.g., Plano v. Baker, 504 F.2d 595, 598 (2d Cir. 1974) (reversing the district court’s exhaustion requirement because “nowhere in the administrative process . . . was there a procedure designed to resolve factual issues”).

140. McCarthy, 503 U.S. at 148; Anderson v. Babbitt, 230 F.3d 1158, 1164 (9th Cir. 2000).

141. See, e.g., Heldman v. Sobol, 962 F.2d 148, 159 (2d Cir. 1992) (applying an exception to the exhaustion requirement because the agency had no authority to grant the relief requested); Jorden v. Nat’l Guard Bureau, 799 F.2d 99, 102 n.5 (3d Cir. 1986) (declining to apply an exhaustion requirement because the agency could not reinstate a former national guard as was requested in the claim).

142. Prisoner Petitions, supra note 8, at 2 tbl.1.

143. Section 1983 does not confer substantive rights but provides for the enforcement of rights created by the Constitution or federal statute. See Maine v. Thiboutot, 448 U.S. 1, 4-5 (1980). Section 1983 provides:

Every 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 any 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 . . . .


Patsy v. Board of Regents of Florida, the Supreme Court concluded that the framers of the precursor to § 1983, the Civil Rights Act of 1871, "did not intend that an individual be compelled in every case to exhaust state administrative remedies." The Patsy Court recognized an exception to this general rule, however, where Congress explicitly provides that particular § 1983 plaintiffs must exhaust administrative procedures.

In 1980, Congress passed CRIPA and created such a particularized exhaustion requirement for prisoners. This exhaustion requirement allowed courts to force plaintiffs into administrative procedures where such an action would be "appropriate" and "in the interest of justice." Additionally, because of the limitations on the doctrine of exhaustion, such as futility and inadequacy, this pre-PLRA requirement of § 1997e(a) stipulated that exhaustion was necessary where the administrative remedies available were "plain, speedy, and effective." In order to meet this standard, state prisons could be certified by the Department of Justice (the "DOJ"). Such certification would demonstrate that the state had substantially complied with the DOJ's "minimal acceptable standards" for prison grievance systems. Thus, prior to the PLRA, "§ 1997e imposed a limited and discretionary exhaustion requirement." The statute imposed procedural safeguards which assured that the grievance procedures that prisoners would be required to exhaust were fair.

universally agree that the exhaustion of state administrative remedies is generally not required prior to bringing an action under § 1983 in federal court.

146. 457 U.S. 496 (1982).
147. Id. at 507.
148. Id. at 508.

[1] In any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interest of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

150. Id.
151. See supra notes 132-41 and accompanying text.
153. See id. § 1997e(a)(2). Under this section, the exhaustion of administrative remedies was not required "unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimal acceptable standards promulgated under subsection (b) of this section or are otherwise fair and effective." Id.

154. Id.
The PLRA, however, eliminated this requirement. Under the PLRA, all plaintiffs with claims involving prison conditions must exhaust administrative remedies before bringing an action in federal court.\textsuperscript{157} The PLRA deleted the phrase “plain, speedy, and effective,” and now requires exhaustion of “such administrative remedies as are available.”\textsuperscript{158} In doing so, Congress seemingly did away with any consideration of whether the prison grievance procedure was fair. That is, “Congress no longer wanted courts to examine the effectiveness of administrative remedies but rather to focus solely on whether an administrative remedy program is ‘available’ in the prison involved.”\textsuperscript{159}

Nevertheless, while § 1997e(a) restricts prisoners from filing lawsuits under federal law until “available” administrative remedies are exhausted,\textsuperscript{160} the section is not clear on exactly what needs to be available. Must the inmate’s specific remedy requested be available, or must any remedy be available? In particular, because most prison grievance systems do not provide money damages as an available remedy,\textsuperscript{161} courts have struggled to apply the provision where the plaintiff seeks monetary damages as opposed to injunctive relief.\textsuperscript{162} Where the prisoner brings a claim requesting both monetary and injunctive relief, no court of appeals has recognized a futility exception.\textsuperscript{163} Courts have differed, however, on whether to allow an exception when the petitioner seeks money damages exclusively.\textsuperscript{164}

C. The Judicial Conflict

Because Congress failed to define what was meant by the term “available,” courts have interpreted the provision differently.\textsuperscript{165} A

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\textsuperscript{157} 42 U.S.C. § 1997e(a) (Supp. IV 1998). Section 1997e(a), as amended, reads: “No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” Id.

\textsuperscript{158} Id.

\textsuperscript{159} Alexander v. Hawk, 159 F.3d 1321, 1326 (11th Cir. 1998). The PLRA specifies the type of claims that the statute affects: those involving “prison conditions.” 42 U.S.C. § 1997e(a).

\textsuperscript{160} 42 U.S.C. § 1997e(a).


\textsuperscript{162} An injunction is defined as “[a] court order commanding or preventing an action.” Black’s Law Dictionary 788 (7th ed. 1999).

\textsuperscript{163} Nyhuis v. Reno, 204 F.3d 65, 70 (3d Cir. 2000).

\textsuperscript{164} See infra Part II.C.

\textsuperscript{165} Fiedler, supra note 23, at 725-33 (discussing a “three-way split of authority” in
split among the courts has emerged in cases where an inmate seeks monetary relief that the prison grievance system is unable to provide.\footnote{166} Some courts have read the provision to apply only where the plaintiff's requested remedy is available, while others have held that the prison must merely make available a generalized grievance procedure.\footnote{167}

For example, at the district court level, the Southern District of New York and the Western District of Virginia have held that exhaustion is required under § 1997e(a) even where the plaintiff seeks monetary damages and such damages are not available through the administrative process.\footnote{168} In contrast, the District of New Jersey and the Central District of California held that the PLRA did not require exhaustion in such cases.\footnote{169}

The circuits that have addressed this issue have split as well. The Third Circuit recently overruled the District of New Jersey and found the exhaustion requirement of § 1997e(a) applicable to all situations.\footnote{170} This decision brought the Third Circuit in line with the Sixth,\footnote{171} Seventh,\footnote{172} and Eleventh\footnote{173} Circuits. Nevertheless, the
Fifth,¹⁷⁴ Ninth,¹⁷⁵ and Tenth¹⁷⁶ Circuits have interpreted the PLRA to contain an exception to the exhaustion requirement when money damages are unavailable under the administrative process.

1. The Third Circuit: White v. Fauver and Nyhuis v. Reno

In White v. Fauver, the plaintiffs filed a class action suit alleging that prison officials and guards violated their constitutional rights by subjecting them to physical abuse, threats, and unconstitutional living conditions such as serving rancid food and depriving inmates of showers, bedding, and clothing.¹⁷⁷ The plaintiffs sought damages as well as injunctive relief.¹⁷⁸ The New Jersey Inmate Grievance Procedure, however, does not offer monetary remedies.¹⁷⁹ In response to the state’s motion to dismiss for failure to exhaust administrative remedies, the District of New Jersey held that requiring the prisoner to exhaust an administrative procedure which cannot provide the remedy requested would be nothing more than a “hollow gesture.”¹⁸⁰

The court arrived at this decision by examining how Congress used the word “available” in the statute. The term “available” was not defined in the PLRA, so the court applied the term’s ordinary meaning.¹⁸¹ Because “available” modified “remedy,” Judge Orlofsky, writing for the court, found that “available” meant that the remedy sought could be obtained.¹⁸² According to the court, interpreting “available remedy” to mean that “some procedure is available, the use of which would be but an empty formality” would be “contrary to a commonsense interpretation of the statutory language.”¹⁸³

Further, the court noted that applying the PLRA’s exhaustion requirement in this case would amount to a conclusion that Congress included the provision in order to create purposeless barriers for prisoners.¹⁸⁴ Such a conclusion contradicts the Supreme Court’s instruction. In Stone v. INS,¹⁸⁵ the Supreme Court explained that “[w]hen Congress acts to amend a statute, we presume it intends its

¹⁷⁵. Rumbles v. Hill, 182 F.3d 1064, 1069 (9th Cir. 1999).
¹⁷⁶. Garrett v. Hawk, 127 F.3d 1263, 1267 (10th Cir. 1997).
¹⁷⁸. Id. at 308.
¹⁷⁹. Id. at 317.
¹⁸⁰. Id. at 316.
¹⁸¹. Id. at 317 (“When terms used in a statute are undefined, we give them their ordinary meaning.” (quoting Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995))).
¹⁸². Id. (finding that the “available administrative remedy’ means that the particular relief sought can be obtained through the administrative process”).
¹⁸³. Id.
¹⁸⁴. Id.
amendment to have real and substantial effect." Thus, in White, the
court reasoned that when Congress included the qualification
"available" for those remedies that must be exhausted, it was meant
to have a real effect. If the term was inconsequential, it would not
have been added at all.

In Nyhuis v. Reno, the Third Circuit overturned White. In
Nyhuis, a federal inmate brought suit alleging that prison officials
illegally confiscated several items of his personal property. The
plaintiff here sought compensatory and punitive damages as well as
injunctive relief. The court recognized that because the claim
contained a mixture of injunctive remedies and monetary damages,
the petition must be dismissed under § 1997e(a). Even courts that
have allowed an exception for unavailable money damages have
refused to extend the exception to mixed claim cases such as this
one. The Nyhuis court went further, however, and held that neither
a futility nor an inadequacy exception is applicable "in any case."

The Third Circuit cited four principal reasons for denying an
exception to § 1997e(a) where money damages are not available in the
grievance system. First, contrary to the White court, the Third Circuit
focused on the fact that the PLRA removed the phrase "plain, speedy
and effective," rather than added the qualifier "available." That is,
by removing the requirement that grievance systems be "plain, speedy
and effective," Congress eliminated all considerations of whether
exhausting the procedure would accomplish anything. In other
words, "Congress now conditions prisoner suits on exhaustion of . . .
administrative remedies, without regard to whether those remedies
are "effective," without regard to whether they substantially comply
with "minimum acceptable standards," and without regard to whether
they are "just and effective."

Second, the court reasoned that providing an exception for suits
that seek money damages would run contrary to congressional intent.
As stated above, the PLRA was designed to curtail frivolous

186. Id. at 397.
187. 204 F.3d 65 (3d Cir. 2000).
188. Id. at 71; accord Booth v. Churner, 206 F.3d 289, 293-98 (3d Cir. 2000), cert.
granted, 121 S. Ct. 377 (2000).
189. Nyhuis, 204 F.3d at 71.
190. Id.
191. Id. at 70 (explaining that even those courts that have declined to apply § 1997e
to cases where prisoners seek only unavailable money damages have not extended the
exception to mixed-claim cases).
192. Id.
193. Id. at 71 (emphasis omitted).
194. Id. at 72.
195. Id.
(S.D.N.Y. 1998) (citation omitted)).
Any exemption that might hinder the restrictions placed on prisoners by Congress would be inconsistent with the legislative intent. Allowing prisoners to go directly to federal court simply by requesting money damages would certainly act against the restrictive policies of the PLRA.

The court's third reason for denying an exemption was that requiring courts to examine "the vagaries of prison administrative processes" conflicted with Congress' intent to lighten the load of prisoners' cases on the federal docket. That is, courts would need to examine each particular grievance procedure to determine whether the relief requested was available. Because the PLRA deleted the discretion of the CRIPA exhaustion requirement, the court noted that judicial examination of administrative procedures was "something Congress was plainly guarding against when it enacted the PLRA."

Fourth, the court reasoned that imposing a mandatory exhaustion requirement in all cases accomplished the general goals of the doctrine of exhaustion. In particular, exhaustion furthered the goal of judicial efficiency. Even where the prisoner exhausts the "futile" grievance procedure and continues on into federal court, the "administrative process can serve to create a record for subsequent proceedings, it can be used to help focus and clarify poorly pled or confusing claims, and it forces the prison to justify or explain its internal procedures." The court can therefore benefit from exhaustion even where the grievance procedure does not satisfy the prisoner's claim.


In Garrett v. Hawk, the Tenth Circuit reached a conclusion in opposition to the Third Circuit's decision that the exhaustion requirement should apply across the board. In Garrett, the plaintiff, a federal inmate, sustained head injuries during a fistfight with another inmate. The plaintiff brought suit alleging that the prison officials "exhibited deliberate indifference" to his medical needs, in violation of the Eighth Amendment. The plaintiff exclusively sought

197. See supra notes 87-90 and accompanying text.
198. See Nyhuis, 204 F.3d at 74.
199. Id.
200. See supra notes 150-59 and accompanying text.
201. Nyhuis, 204 F.3d at 74.
202. Id. at 75. For a discussion of the rationales behind the doctrine of exhaustion of administrative procedures, see supra text accompanying notes 116-31.
203. Nyhuis, 204 F.3d at 76.
204. Id.
205. 127 F.3d 1263 (10th Cir. 1997).
206. Id. at 1264.
207. Id.
monetary damages. Under the grievance procedure of the United States Bureau of Prisons, however, any claim seeking such damages would be rejected as "constituting improper subject matter for administrative review." 208

Before addressing the applicability of the exhaustion requirement to the particular grievance system in the case, the court explained the effect of § 1997e(a) on administrative exhaustion in prisoners' civil rights cases. The court stressed that unlike the pre-PLRA § 1997e(a), which provided for discretionary exhaustion, the current provision made exhaustion mandatory. 209 Thus, like the Third Circuit, the Tenth Circuit saw no more room for judges to decide whether exhaustion would be worthwhile. 210

The Garrett court acknowledged Congress' requirement that remedies be available for the prisoner to exhaust under the PLRA. The government conceded that no money damages were available under the Bureau of Prisons grievance procedure, but argued that the plaintiff had administrative remedies available to him under the Federal Tort Claims Act 211 ("FTCA"), which provides for money damages. 212 Therefore, the government argued, all "available remedies" had not been exhausted. 213 Since prisoners have constitutional rights to sue individual prison officials independently of the FTCA, however, the court refused to apply the FTCA administrative remedies to the plaintiff's civil rights claim. 214 The Bureau of Prisons did not make money damages available to plaintiffs through its grievance procedures, 215 and thus, the exhaustion requirement was not applicable to the plaintiff's case. 216

Similarly, in Whitley v. Hunt, 217 the Fifth Circuit decided that Congress' specification of "available" remedies made it unnecessary for prisoners to pursue fruitless administrative procedures. 218 The Fifth Circuit relied heavily on the common definition of the word "available." 219 According to the court, "a remedy is 'available' when it can be availed 'for the accomplishment of a purpose' or 'is accessible or may be obtained.'" 220 This remedy was unavailable because

208. Id. at 1266.
209. Id. at 1265.
210. See id. ("[T]he revised version [of] § 1997e reveals that Congress specifically amended the statute to ... require[e] federal prisoners to exhaust all administrative remedies before bringing a [civil rights claim].").
212. Id. § 2674.
213. Garrett, 127 F.3d at 1266.
214. See id.
215. See id. at 1267.
216. See id.
217. 158 F.3d 882 (5th Cir. 1998).
218. See id. at 886.
219. Id. at 887.
220. Id. (quoting Underwood v. Wilson, 151 F.3d 292, 295 (5th Cir. 1998) (quoting
exhaustion would not accomplish the inmate's stated purpose of obtaining money damages.

The *Whitley* court also highlighted a point made by the Tenth Circuit in *Garrett* by noting that the legislature should be required to specify its intentions. The court explained that "there is nothing to prevent Congress, and perhaps even the Bureau of Prisons, from enacting regulations that would permit the recovery of monetary relief from individual prison officials." Otherwise, the court cannot infer from plain language that requires exhaustion only of *available* administrative remedies, that Congress intended the exhaustion of *unavailable* remedies.\(^{222}\)

It should be noted that in *Wright v. Hollingsworth*,\(^{223}\) a recent panel of the Fifth Circuit pleaded for *en banc* reconsideration of *Whitley* due to the issue's "exceptional importance."\(^{224}\) In *Wright*, the court's conclusion was bound by the circuit precedent set by *Whitley*. The court took note of the conflict in the circuits, however, and lobbied the Fifth Circuit to consider adopting the interpretation of the circuits taking the opposite view.\(^{225}\) As of the date of this writing, no such reconsideration has occurred.

3. The Seventh Circuit: A Mixed Approach

While the Third and Eleventh Circuits adopted a categorical denial of the futility argument against application of § 1997e(a), and the Tenth and Fifth Circuits have permitted it, the Seventh Circuit has taken an intermediary position. In *Perez v. Wisconsin Department of Corrections*,\(^{226}\) a prisoner injured his back in the shower, and the Department of Corrections did not approve the surgery recommended by a physician.\(^{227}\) Rather, the agency prescribed a more natural form of recovery: "exercise, physical therapy, and basic pain control medicine."\(^{228}\) This treatment strategy did not alleviate the inmate's pain, and he subsequently sought damages for deprivation of medical treatment in violation of the Eighth Amendment.\(^{229}\)

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221. *Id.* (footnote omitted); *Garrett*, 127 F.3d at 1267; *see also* *McCarthy v. Madigan*, 503 U.S. 140, 156 (1992) ("Congress, of course, is free to design or require an appropriate administrative procedure for a prisoner to exhaust his claim for money damages.").
222. *See Whitley*, 158 F.3d at 886.
223. 201 F.3d 663, 666-67 (5th Cir. 2000).
224. *Id.* at 666.
225. *Id.* (urging the panel to consider taking the "Sixth, Seventh, and Eleventh Circuits' interpretation of § 1997e(a)" (footnote omitted)).
226. 182 F.3d 532 (7th Cir. 1999).
227. *Id.* at 533-34.
228. *Id.* at 534.
229. *Id.*
The Seventh Circuit found no general futility exception to § 1997e(a). The court framed the question as whether any remedies are available, not the particular one that the prisoner requested. Thus, the exhaustion requirement should apply to all cases because "§ 1997e(a) does not require the prison to use the prisoner's preferred remedy." The court also relied on the familiar "floodgate" reasoning used by other courts denying the futility exception. That is, recognizing such an exception would permit prisoners to "evade [the PLRA] simply by asking for relief that the administrative process is unable to provide."

The Perez court further justified its denial of an exception by pointing to its treatment of similar arguments under different statutory exhaustion requirements. In Charlie F. v. Board of Education of Skokie School District, the Seventh Circuit rejected an argument for an exception to the exhaustion requirement under the Individuals with Disabilities Education Act (the "IDEA"). The court reasoned in Charlie F. that even though the school board did not provide monetary awards, it made available "services in kind" or "money's worth." The school board could therefore offer a form of damages by measuring the cost of the services that a successful claimant could receive. Thus, applying the reasoning of Charlie F., the Perez court concluded that: "It was impossible to draw a bright line between damages and other relief."

Unlike the Third and Eleventh Circuits, however, the Perez court recognized a situation where a futility exception might apply even though the PLRA required exhaustion in Perez's case. According to the court, there may be cases where no further administrative remedy would satisfy the claimant. In these cases, the court suggested that exhaustion would be unnecessary. Such a situation might arise, the court pointed out, where a broken leg is mistreated

230. See id. at 537.
231. Id.
232. Id. (emphasis omitted); accord Massey v. Helman, 196 F.3d 727, 733-35 (7th Cir. 1999).
234. Perez, 182 F.3d at 537.
235. Id. at 538.
236. 98 F.3d 989 (7th Cir. 1996).
237. Id. at 991-92; see 20 U.S.C. § 1415(l) (Supp. IV 1998) (requiring administrative exhaustion of suits brought under the IDEA).
238. Charlie F., 98 F.3d at 992.
239. Id.
240. Perez, 182 F.3d at 538.
241. Id.
242. Id.; see also Fiedler, supra note 23, at 731-33 (discussing cases that distinguish claims alleging past wrongs).
243. Perez, 182 F.3d at 538.
but heals by the time the suit begins.\textsuperscript{244} Nothing other than damages could provide a remedy for the plaintiff.\textsuperscript{245} Thus, exhaustion of an administrative procedure that cannot provide damages would be pointless.\textsuperscript{246} Since the \textit{Perez} decision, at least one district court has used the court's hypothetical to exempt a prisoner's suit from the exhaustion requirement of § 1997e(a).\textsuperscript{247} Therefore, although the Seventh Circuit has taken the position that a futility exception does not exist,\textsuperscript{248} Judge Easterbrook's opinion in \textit{Perez} suggests that one may be applied under just the right circumstances.

The mixed approach of the Seventh Circuit in \textit{Perez} highlights arguments on both sides of the dispute. On the one hand, providing an exception to plaintiffs simply because they seek money damages may provide a loophole that undermines the attempt to alleviate pressure on the federal docket. However, requiring exhaustion of grievance procedures that cannot satisfy the only relief sought may deny plaintiffs any adequate remedy. Prisoners should not be forced to exhaust administrative procedures that are incomplete or inadequate. In Part III below, this Note proposes allowing a limited exception to the PLRA's exhaustion requirement to avoid such an inequitable result. This exception would apply only to lawsuits exclusively seeking unavailable money damages.

\textbf{III. AN EXCEPTION TO § 1997e(a) IS NEEDED FOR SUITS SEEKING UNAVAILABLE MONEY DAMAGES}

Analysis of the most recent PLRA cases shows that courts are increasingly applying the exhaustion requirement to all cases, even when money damages are sought but are unavailable.\textsuperscript{249} The Fifth Circuit, which originally adopted an exception to the exhaustion requirement, has questioned itself and looked longingly towards the circuits that decided the issue differently.\textsuperscript{250} The Fifth Circuit's envy is understandable, considering the heavy pressure on the federal docket.

\textsuperscript{244} Id.
\textsuperscript{245} Id.
\textsuperscript{246} Id.
\textsuperscript{248} Massey v. Helman, 196 F.3d 727, 733 (7th Cir. 1999).
\textsuperscript{249} Nyhuis v. Reno, 204 F.3d 65, 78 (3d Cir. 2000); Hall v. McCoy, 89 F. Supp. 2d 742, 747-48 (W.D. Va. 2000). \textit{Contra} Odumosu v. Keller, No. 99-0215, 2000 WL 241644, slip op. at *2 (2d Cir. Feb. 1, 2000) (holding in an unpublished opinion, without full analysis of the issue, that the prisoner seeking exclusively monetary damages was not required to exhaust administrative procedures because "administrative action could afford [the petitioner] neither meaningful review nor appropriate remedy and the benefits of exhaustion do not obtain in this case").
\textsuperscript{250} See Wright v. Hollingsworth, 201 F.3d 663, 665-66 (5th Cir. 2000) (following the circuit precedent set by \textit{Whitley v. Hunt}, 158 F.3d 882 (5th Cir. 1998), but urging the circuit to reconsider taking the position adopted by circuits that require exhaustion).
As the Wright court explained, requiring exhaustion "will significantly affect the docket . . . in which thousands of prisoner suits are filed." 251

Nevertheless, while courts may be legitimately concerned with the burden on their dockets caused by prisoners (and other tort plaintiffs), this concern does not justify applying the exhaustion requirement of § 1997e(a) to suits in which the only remedy sought is unavailable money damages. The exhaustion requirement will only significantly lighten the load on federal dockets if the administrative process is effective in settling disputes. In mixed cases, where the petitioner seeks both injunctive relief and money damages, exhaustion still serves its purpose by providing a useful record and settling at least the injunctive relief claim. Where only unavailable money damages are sought, however, exhaustion forces plaintiffs to comply with procedures that cannot provide the relief necessary to settle their claim. As a result, parties cannot enjoy the full benefits of exhaustion. 252

This part therefore argues that the Supreme Court should settle the conflict among federal courts by finding the PLRA's exhaustion requirement inapplicable to cases where prisoners seek only money damages and where such damages are unavailable through the administrative process. This conclusion follows from the words of the statute, congressional intent, and policy considerations.

A. The Plain Meaning of the Statute Favors Applying an Exception

The exhaustion requirement of prisoners' civil rights claims is statutorily imposed by § 1997e(a), so analysis should begin with consideration of the statute itself. While approaches to statutory construction continue to develop, 253 the Supreme Court has instructed courts to begin any statutory examination with what the statute actually says. Indeed, as Justice Stevens pointed out, the first canon

251. Id. at 666.
252. See supra notes 120-31 and accompanying text.
253. William N. Eskridge, Jr., Dynamic Statutory Interpretation 1 (1994) (noting that "theories of statutory interpretation have blossomed like dandelions in spring"). Different approaches include: (1) intentionalism, which rests on the reconstruction of the legislature's original intent; (2) purposivism, which resolves statutory ambiguities by applying the general purpose or objective of the statute; and (3) textualism, which looks to the apparent meaning of the statutory language. Id. at 14-47. The question of the propriety of the different statutory approaches is not within the scope of this Note. Rather, this Note applies the textualism-dominated approach currently favored by the Supreme Court. See infra Part III.A.
254. Carter v. United States, 120 S. Ct. 2159, 2170 (2000) ("In analyzing a statute, we begin by examining the text . . . ."); FDIC v. Meyer, 510 U.S. 471, 476 (1994) ("In the absence of . . . a definition, we construe a statutory term in accordance with its ordinary or natural meaning."); Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992) ("In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is
of statutory construction is simple: "Read the statute." In this case, such examination points directly to the conclusion that exhaustion is not required under § 1997e(a) where the sole requested remedy is unavailable.

Looking at the plain meaning of the statute requires looking at the plain meaning of the words used therein. Section 1997e(a) states that no prisoners' suits may be brought into federal court "until such administrative remedies as are available are exhausted." Clearly, the word "available" refers to the term "administrative remedies." Because the term "available" is not defined in the statute, its ordinary meaning applies. Available is defined as something that is "readily obtainable." As the White court correctly recognized, it follows from a logical reading of the language of § 1997e(a) that where money damages are inaccessible or unobtainable, the requirement does not apply.

Courts that apply § 1997e(a) to cases seeking unavailable money damages look not to what the language of the statute says, but to what it does not say. When Congress enacted the PLRA, it amended § 1997e(a) by deleting language. The pre-PLRA § 1997e(a) required "exhaustion of such plain, speedy, and effective administrative remedies as are available." This language was shortened by the PLRA to read, simply, "such administrative remedies as are available." Thus, the language of § 1997e(a) now makes no reference to the effectiveness of the remedy provided by the grievance procedure. As a result, some courts have held, it makes no
difference whether or not prisoners can obtain their desired remedy through the administrative process. In other words, concern over whether prisoners can receive money damages improperly reinstates the effectiveness consideration that Congress deleted.

Under this argument, an exception would apply only if there were no remedies available. As the Seventh Circuit in Perez explained, where the prison system provides remedies other than money damages, the prisoner may still receive an adequate remedy. In Perez, the Seventh Circuit reasoned from an analogous situation involving exhaustion of administrative remedies under the IDEA. This reasoning rests on the fact that the agency is able “to provide money’s worth” in the form of some sort of injunctive relief. Adequate relief relates to the “events, condition, or consequences of

administrative remedies).

265. See, e.g., Perez, 182 F.3d at 537 (“[W]hen these words left the statute so did any warrant to inquire whether exhaustion would be unavailing.”).

266. See Nyhuis, 204 F.3d at 72-73 (“By eliminating the ‘effective’ language in Section 1997e(a), Congress saved federal courts from inquiring into whether the particular administrative remedies available comported with inmate-plaintiff’s individualized and immediate desires for relief.”).

267. Id. at 73.

268. See Perez, 182 F.3d at 537-38; see also Fiedler, supra note 23, at 744-45 (arguing that even if a prisoner sues for money damages, injunctive relief may be an available remedy).

269. See Perez, 182 F.3d at 538 (citing Charlie F. v. Skokie Bd. of Ed. Sch. Dist. 68, 98 F.3d 989 (7th Cir. 1996)); supra notes 235-40 and accompanying text. However, the question of exhaustion of “unavailable” remedies is also in great flux in the context of the IDEA. The IDEA requires that plaintiffs exhaust their claims when “seeking relief that is also available under this subchapter.” 20 U.S.C. § 1415(l) (Supp. IV 1998). Money damages are not available under the IDEA. Thus, like the PLRA, plaintiffs suing under the IDEA for monetary relief cannot obtain their requested remedy through the administrative process. There is a split among the federal courts about whether to apply the statutory exhaustion requirement in all cases. Compare Witte v. Clark County Sch. Dist., 197 F.3d 1271, 1276 (9th Cir. 1999) (holding that exhaustion is not required where money damages are sought), and W.B. v. Matula, 67 F.3d 484, 496 (3d Cir. 1995) (same), with Charlie F., 98 F.3d at 992-93 (holding the opposite).

In other non-IDEA cases, where an exhaustion requirement is not statutory but has been judicially imposed, the lack of availability of the particular relief sought weighs against the application of the exhaustion doctrine. See, e.g., McCarthy v. Madigan, 503 U.S. 140, 148 (1992) (holding that a pre-PLRA inmate plaintiff did not need to exhaust his claim for money damages because the agency “lack[ed] authority to grant the type of relief requested”); McNeese v. Bd. of Ed. for Cmty. Unit Sch. Dist. 187, 373 U.S. 668, 675 (1963) (finding no need to exhaust administrative remedies because the agency had no power to order “corrective action”); Barbara v. N.Y. Stock Exch., 99 F.3d 49, 57 (2d Cir. 1996) (finding exhaustion unnecessary because the administrative review provisions of the Securities Exchange Act of 1934 did not provide money damages “and this fact counsels strongly against requiring exhaustion”).

270. Perez, 182 F.3d at 538.

271. However, Judge Easterbrook recognized a weakness in his own rationale. In some cases, no remedy other than money damages will be sufficient, such as where a prisoner sues for a past physical injury that no longer requires medical attention. See id.; supra text accompanying notes 241-46.
which the person complains, not necessarily relief of the kind the person prefers."\(^{272}\) In other words, a remedy fashioned from the available options is satisfactory no matter what the plaintiff seeks.\(^{273}\)

Nonetheless, focusing on what Congress took out of the language should not negate the words that, more importantly, remain. It makes little sense to ignore the fact that the provision still specifically qualifies the remedies that need to be exhausted as those which are available. If the statute merely required that any remedy be available, the language would refer more generally to available procedures.\(^{274}\) However, the language refers only to available remedies. The term "remedies" illustrates that specific, requested relief is required to be available and not simply a grievance system in which a petitioner may file a complaint.

B. Congressional Intent Does Not Support Applying the Exhaustion Requirement in These Cases

Beyond the textual analysis of a statute, courts look to secondary sources, such as legislative history, to provide helpful context for the bare language of statutes.\(^{275}\) Courts examine legislative history when statutory language is ambiguous.\(^{276}\) Courts have also looked to legislative history when a literal interpretation of the statute results in a conflict with the perceived statutory intent.\(^{277}\)

Accordingly, despite the apparent clarity of the word "available" in § 1997e(a), courts have consulted the legislative history of the PLRA.\(^{278}\) Congressional testimony and speeches by legislators indicate that the PLRA was enacted at least partly in response to the growing number of prisoners' petitions filed in federal court.\(^{279}\) One of its goals was to preserve "valuable legal resources" by keeping suits out of court.\(^{280}\) Thus, courts such as the Eleventh Circuit in *Alexander*...
and the Third Circuit in Nyhuis have held that providing an exception to the exhaustion requirement would frustrate Congress' intention to quell the tide of frivolous lawsuits brought by prisoners.\textsuperscript{281} Inmates could evade the administrative procedures "merely by limiting their complaints to requests for money damages."\textsuperscript{282}

While this reasoning is somewhat appealing, it does not compel rejecting an exception when the words of the statute favor applying one. First, as a general matter, using legislative history to perceive Congress' collective intent is dangerous because such intent can never be "completely 'reconstructed.'"\textsuperscript{283} This criticism rings especially true with a statute such as the PLRA, where there is virtually no legislative history to examine.\textsuperscript{284} Extracting congressional intent from legislative history that contains no committee mark-up or reports, and one committee hearing with only limited debate, is highly questionable.\textsuperscript{285} Leaning on legislative intent in this situation lends credence to the theory that "one generally finds in the legislative history only that for which one is looking."\textsuperscript{286}

Even where a general intent is clear from statements in the legislative history, legislatures usually have no collective expectations about concrete issues in the statute.\textsuperscript{287} Thus, the fact that individual lawmakers mentioned curtailing frivolous lawsuits as a general purpose of the PLRA does not mean that Congress meant to require exhaustion even in cases where the requested remedy is unavailable. Indeed, Congress' retention of the word "available" points to the opposite conclusion.\textsuperscript{288}

Moreover, allowing an exception does not necessarily run contrary to the PLRA's stated purpose of reducing frivolous lawsuits. Courts that rely on the legislative intent justification posit that an exception to the exhaustion requirement will result in an onslaught of lawsuits brought by plaintiffs taking advantage of the loophole.\textsuperscript{289} There is no

\textsuperscript{281} See, e.g., Nyhuis, 204 F.3d at 73-74 (noting that Congress sought to stop inmates from filing frivolous lawsuits); Alexander, 159 F.3d at 1326 n.11 ("Congress amended section 1997e(a) largely in response to concerns about the heavy volume of frivolous prison litigation in the federal courts.").

\textsuperscript{282} Nyhuis, 204 F.3d at 74.

\textsuperscript{283} See supra note 275, at 644.

\textsuperscript{284} See supra notes 104-07 and accompanying text.

\textsuperscript{285} See Herman, supra note 11, at 1277 ("The legislative process leading to the passage of the PLRA was characterized by haste and lack of any real debate."); supra notes 104-08 and accompanying text.

\textsuperscript{286} Kenneth W. Starr, Observations About the Use of Legislative History, 1987 Duke L.J. 371, 376.

\textsuperscript{287} See Eskridge, supra note 275, at 642.

\textsuperscript{288} See Whitley v. Hunt, 158 F.3d 882, 886 (5th Cir. 1998) ("We infer from [the] term [available] that Congress did not intend to require the exhaustion of unavailable remedies.").

\textsuperscript{289} See, e.g., Beeson v. Fishkill Corr. Facility, 28 F. Supp. 2d 884, 893 (S.D.N.Y. 1998) (noting that prisoners would be able to enter federal court "easily" and this would "do little to stem the tide of meritless prisoner cases" (internal quotation marks
evidence, however, of such an effect arising from this narrow exception. First, a high percentage of prisoners’ suits seek at least some injunctive relief. Since the exception applies only to those cases seeking solely monetary relief, it would thus apply to a low percentage of prisoners’ suits. In addition, even if the “flood-gate” fear becomes reality and prisoners begin to modify their claims so as to qualify for the exception, the PLRA’s other safeguards against frivolous lawsuits would still have effect. The Supreme Court recently listed these safeguards against frivolous litigation (without mentioning the exhaustion requirement):

[T]he statute requires all inmates to pay filing fees; denies in forma pauperis status to prisoners with three or more prior “strikes”...; bars suits for mental or emotional injury unless there is a prior showing of physical injury; limits attorney’s fees; directs district courts to screen prisoners’ complaints before docketing and authorizes the court on its own motion to dismiss “frivolous,” “malicious,” or meritless actions; permits the revocation of good time credits for federal prisoners who file malicious or false claims; and encourages hearings by telecommunication or in prison facilities to make it unnecessary for inmate plaintiffs to leave prison for pretrial proceedings.

It is hard to imagine that, with all of these restrictions on prisoners’ ability to file frivolous lawsuits, allowing the proposed limited exception would create the apocalyptic result feared by some courts. Not only is there no evidence to suggest that providing an exception to the exhaustion requirement in these limited cases will result in an increase in frivolous lawsuits, the exception may eventually reduce the

omitted)).

290. Turner, supra note 51, at 623.
291. See Nyhuis v. Reno, 204 F.3d 65, 70 (3d Cir. 2000) (noting that “[n]o court of appeals interpreting the PLRA has recognized a futility exception to § 1997e(a)’s exhaustion requirement in a mixed claim case”).
292. See 28 U.S.C. § 1915(a)(1), (g) (Supp. IV 1998) (requiring affidavit affirming belief in entitlement to redress and barring suit where three previous claims have been dismissed as frivolous); id. § 1932(1)-(3) (allowing courts to revoke inmates’ earned release credit for filing malicious or false suits); 42 U.S.C. § 1997e(c)(1) (Supp. IV 1998) (prescribing dismissal of actions the court deems frivolous); see also Nicholas v. Tucker, 114 F.3d 17, 19 (2d Cir. 1997) (“Congress concluded that one means of deterring frivolous lawsuits would be to require prisoners seeking in forma pauperis appellate status to pay... the normal filing fee...”); Zehner v. Trigg, 952 F. Supp. 1318, 1321 (S.D. Ind. 1997) (addressing § 1997e and noting that it is one of “various ways civil litigation filed by prisoners” is limited); Kuzinski, supra note 23, at 385 (describing the three strikes provision as preventing frivolous lawsuits by creating a disincentive to sue).
294. See, e.g., Perez v. Wis. Dep’t of Corr., 182 F.3d 532, 537 (7th Cir. 1999) (musing that if an exception were allowed “§ 1997e would not be worth much”); Vasquez v. Artuz, No. 97 Civ. 8427, 1999 WL 440631, at *6 (S.D.N.Y. June 28, 1999) (“[E]xempting monetary relief claims from the exhaustion requirement would render the PLRA’s exhaustion requirement meaningless.”).
number of lawsuits by making administrative procedures more efficient. Prisoners' suits that enter federal court burden the defendant governments with a tremendous cost. An exhaustion requirement is therefore in the best interests of the correctional institutions. Thus, if an exception exists for cases in which the grievance system provides no money damages, agencies may seek to modify their programs to include some form of monetary relief.

As long as prisoners have access to some monetary relief, the exhaustion requirement should apply. Prisoners would be required to exhaust grievance mechanisms even if potential awards are capped below the amount sought. In Hessbrook v. Lennon, for example, the Fifth Circuit applied the exhaustion requirement of the FTCA despite the plaintiff's claim of money damages exceeding the Federal Bureau of Prison's $2,500 limit on monetary awards. The court explained that the "mere allegation of a larger amount of money damages on the face of a complaint does not of necessity preclude the possibility, were an administrative remedy first pursued, that a satisfactory settlement within the limitations amounts would be reached." Thus, hypothetically, even if a state prison grievance system's limit on monetary awards were as low as $150 or $200, simply claiming a higher amount in damages would not permit a sidestep of the requirement. Including some money damages would, however, provide the possibility that the petitioner's claim could be settled at the administrative level.

Such modifications will also benefit courts because fair and effective grievance procedures maximize the advantages of the exhaustion doctrine. When grievance procedures provide effective remedies, plaintiffs are able to obtain more meaningful relief and thus more claims are satisfied. Fewer cases will then have cause to continue subsequently into court.

295. See 142 Cong. Rec. 16, 23255 (1996) (citing the estimation of the National Association of Attorneys General that states spend eighty-one million dollars on prisoner litigation); Kuzinski, supra note 23, at 368 (asserting that defending frivolous lawsuits brought by prisoners "consumes time and wastes precious state resources").

296. Donald P. Lay, Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act, 71 Iowa L. Rev. 935, 954 (1986) (concluding that "[s]tates and state correctional institutions have much to gain by adopting a fair and effective grievance system"); Resolving Prisoners' Grievances, supra note 156, at 1327 (stating that effective exhaustion schemes "offer[... an opportunity to reduce the expense of defending prisoner suits in court, limit interference by federal courts in the operation of their corrections systems, and achieve 'greater self-determination'"").

297. See Hessbrook v. Lennon, 777 F.2d 999, 1004 (5th Cir. 1985).

298. Id.

299. Id.

300. Id.

301. Id.

302. See Resolving Prisoners' Grievances, supra note 156, at 1327; see also supra notes 120-31 and accompanying text (discussing the benefits of the exhaustion doctrine).
Further, because prisoners perceive more complete grievance procedures as being more fair, they may be less likely to bring their suit to court after exhaustion even when unsuccessful at the administrative level. Commentators have argued that the most important aspect of a productive grievance system is the level of trust between the prisoners and the administration. As the Nyhuis court observed, a "cooperative ethos" between inmates and the prison administration will make the administrative process most effective. However, "to serve these purposes, grievance procedures must be understandable to the prisoner, expeditious, and treated seriously." Providing an incentive for correctional institutions to make their grievance procedures more inclusive of prisoners' damages claims can therefore reduce the number of suits in court—a result consistent with the stated legislative purpose behind the PLRA.

C. The Exception Can Be Applied With Efficiency

Some courts have suggested that a more narrow exception should apply when, after determining the nature of the underlying wrong, no remedies available in the grievance system can effectively cure the violation. One student commentator has specifically advocated this exception. Under this exception, prisoners may avoid exhausting their claims only if the underlying wrong no longer continues to occur and money damages are the only satisfactory remedy. If injunctive relief can satisfy the claim, the claim must be exhausted administratively, even if the plaintiff exclusively seeks unavailable money damages.

For example, a prisoner who has been beaten by a guard may seek injunctive relief (an order dismissing the guard), or money damages, or both. Because this suit arises from a "past wrong," an exception

303. See Resolving Prisoners' Grievances, supra note 156, at 1324; see also Keating, supra note 129, at 13-15 (discussing the importance of credibility in prison grievance systems).
305. Nyhuis v. Reno, 204 F.3d 65, 77 (3d Cir. 2000). The Nyhuis court, however, reasoned that requiring all plaintiffs to exhaust their claims, whether or not they can obtain their requested relief, will result in a cooperative relationship between "inmate and jailer." Id. at 76-77. Intuitively, it seems more likely that inmates will trust the administrative procedure if it does not ignore the remedy that they seek.
306. Id. at 77.
307. Perez v. Wis. Dep't of Corr., 182 F.3d 532, 538 (7th Cir. 1999); Lunsford v. Jumao-As, 155 F.3d 1178, 1179 (9th Cir. 1998).
308. Fiedler, supra note 23, at 719 (proposing that "courts apply a futility exception to the exhaustion requirement for both state and federal prisoners that seek damages for past wrongs").
309. Id. at 741-42.
310. Id. at 741.
311. Id. at 741-42.
would apply if the prisoner sues for money damages alone.\textsuperscript{312} If the prisoner sued for denial of medical attention, however, injunctive relief (provision of proper medical care) may provide a remedy.\textsuperscript{313} Denial of medical attention is an "ongoing wrong" and therefore administrative remedies must be exhausted.\textsuperscript{314} Thus, this alternative exception asks the court to determine first whether the nature of the underlying wrong is "past" or "ongoing" before considering application of an exception to the exhaustion requirement of § 1997e(a).

Distinguishing whether the alleged wrong is "past" or "ongoing," however, undesirably forces courts to make a new determination for each claim within a prisoner's complaint. First, courts sometimes struggle to determine what the plaintiff alleges.\textsuperscript{315} Categorizing the claims would be even more difficult. Additionally, because most complaints contain multiple claims, courts would have to allow an exception for some claims while forcing the plaintiff to pursue other claims in the administrative procedure, even though none of the claims sought available relief. In \textit{Whitley},\textsuperscript{316} for example, the prisoner alleged, among other things, that the prison officials had denied him needed medical attention for thirteen weeks and had subjected him to racial discrimination.\textsuperscript{317} The prisoner sought money damages exclusively—relief he could not obtain from the Bureau of Prisons grievance procedure.\textsuperscript{318} In \textit{Whitley} the "denial of medical attention" would be categorized as a "past wrong" because the prison eventually corrected its alleged violation (albeit after thirteen weeks).\textsuperscript{319} The racial discrimination claim, however, appears to be based on an "ongoing" wrong. Racial discrimination could theoretically be cured by an order firing the responsible administrators and requiring any racist practices to stop. Thus, even though the plaintiff sought only money damages for both claims, he could pursue only one claim in federal court while the other must be exhausted.

An exception to the exhaustion requirement should not create additional considerations for already-overloaded federal judges. Courts should allow or decline an exception based on which remedies the prisoner seeks and what is available in the grievance system. Therefore, the exception should simply apply when prisoners sue exclusively for unavailable money damages, regardless of whether the alleged wrong is "past" or "ongoing."

\textsuperscript{312} \textit{Id.}
\textsuperscript{313} \textit{See id. at} 741.
\textsuperscript{314} \textit{See id. at} 747.
\textsuperscript{315} Nyhuis v. Reno, 204 F.3d 65, 74 (3d Cir. 2000) ("Inmate-plaintiffs often file claims which are untidy, repetitious, and redolent of legal language.").
\textsuperscript{316} 158 F.3d 882 (5th Cir. 1998).
\textsuperscript{317} \textit{Id. at} 884.
\textsuperscript{318} \textit{Id. at} 885.
\textsuperscript{319} \textit{Id. at} 884.
Finally, reading § 1997e(a) to be inapplicable where prisoners seek unavailable money damages is consistent with sound policy for the protection of prisoners' rights. Although recognition of prisoners' rights has generally expanded significantly over the last century, the recent trend has been toward restriction. These restrictions have aimed to reduce the high number of non-meritorious suits in federal court.

The heavy volume and frivolousness of prisoners' suits notwithstanding, prisoners' rights to enforce their constitutional guarantees should not be restricted in the interest of easing the federal dockets. Although liberty and privacy rights held by prisoners are limited, prisoners retain significant constitutional protections, such as the right to be free from cruel and unusual punishment under the Eighth Amendment. It is true, as courts have noted, that many constitutional claims can be satisfied with injunctive relief provided by prison grievance procedures. As the Seventh Circuit explained in Perez, however, injunctive relief may not be enough in all cases, such as where a prisoner has been harmed and the injury has already healed. An exhaustion requirement that prevents a plaintiff from pursuing the only appropriate remedy restricts his ability to enforce his legal rights. Recognizing a limited exception would therefore safeguard the rights of prisoners by requiring that the administrative procedures that prisoners must exhaust are more complete.

In addition, more complete and responsive administrative systems may reduce hostility towards prisoner litigation by satisfying more claims before they reach court (and the public eye). As the Supreme Court places restrictions on prisoners' legal rights, the view that prisoners do not deserve our attention proliferates. Current public sentiment toward prisoners characterizes them as litigation-happy freeloaders "inundat[ing] the beleaguered federal courts with

320. See supra notes 53-61 and accompanying text.
322. See O'Bryan, supra note 23, at 1201.
324. See, e.g., Perez v. Wis. Dept' of Corr., 182 F.3d 532, 537-38 (7th Cir. 1999) (rejecting an exhaustion requirement exception where money damages were sought because the agency can provide "money's worth" in injunctive relief); Alexander v. Hawk, 159 F.3d 1321, 1327 (11th Cir. 1998) (noting that even if money damages are sought, the administrative procedure can "halt the infringing practice, which at least freezes the time frame for the prisoner's damages").
325. Perez, 182 F.3d at 538.
326. See Resolving Prisoners' Grievances, supra note 156, at 1328 ("An unfair system will be effective neither in resolving complaints nor in reducing federal court filings, but will operate merely as a barrier that prisoners must overcome to get to court.")
frivolous lawsuits complaining about whether the peanut butter they are served is chunky or creamy.” 327 This perception of prisoner litigation has resulted in hostility toward the entire category of lawsuits, even though accounts of volume and frivolousness are misrepresented, exaggerated, and sometimes wrong. 328

Congress’ deletion of the requirement that administrative procedures be “plain, speedy, and effective” 329 is a by-product of the “animus” 330 toward prisoners’ rights. In its haste to enact a symbolic statute addressing the overloaded federal docket, Congress was willing to forgo requirements that administrative procedures be fair. In general, “[t]he PLRA drafters seem to favor the risk that substantial claims will be kept out of court over the risk that non-substantial claims will be let in.” 331 Sound public policy demands, however, that administrative exhaustion requirements be subject to considerations of fundamental fairness, including the existence of available remedies. 332 While the doctrine of exhaustion of administrative remedies can have a positive impact on prisoners’ civil rights litigation, “[a]n unfair [grievance] system will be effective neither in resolving complaints nor in reducing federal court filings, but will operate merely as a barrier that prisoners must overcome to get to court.” 333

CONCLUSION

In enacting the PLRA, Congress responded to overblown images of frivolous lawsuits brought by prisoners, and the resulting negative public perception of prisoner litigation in general. 334 By relying on

327. Herman, supra note 11, at 1230.
328. See Newman, supra note 76, at 520-22 (debunking myths about prisoners’ lawsuits); supra Part I.B.
330. Herman, supra note 11, at 1231.
331. Id. at 1284.
332. A comparison to alternative dispute resolution mechanisms proves helpful here. See Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997) (applying minimum requirements for lawful mandatory arbitration agreements between an employer and employee, including, inter alia, provision of all the types of relief that would otherwise be available in court). Like prisoners, employees subject to mandatory arbitration agreements must enter the employer’s grievance mechanism instead of filing suit in court. However, courts will not enforce such agreements if plaintiffs cannot obtain, through arbitration, the remedies available to them in court. See Armendariz v. Found. Health Psychcare Servs., 6 P.3d 669, 683 (Cal. 2000) (declaring a mandatory arbitration clause against “public policy” because the employees were subject to the employer’s limited range of available remedies). For an analysis of mandatory arbitration clauses, see David Sherwyn et al., In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing A New Sink in the Process, 2 U. Pa. J. Lab. & Emp. L. 73, 75 (1999).
333. See Resolving Prisoners’ Grievances, supra note 156, at 1328.
334. See supra Part I.B.
inaccuracies and myths, Congress avoided a thorough legislative process, and consequently, the statute emerged with areas of ambiguity and conflict.\textsuperscript{335} As one court has noted: "[C]oncerns with this new legislation are myriad."\textsuperscript{336}

The Supreme Court should settle the current conflict concerning the PLRA's exhaustion requirement by allowing a limited exception for suits seeking only one type of remedy—that which is unavailable in the administrative procedure. The Court should clarify that the statute means what it says: only "available" remedies must be exhausted.\textsuperscript{337} Reading the PLRA's exhaustion requirement to apply where the plaintiff's requested remedy is not available is not supported by the statutory language, specific legislative intent, or sound public policy.\textsuperscript{338} Requiring prisoners to exhaust inadequate prison grievance procedures places before them an obstacle that is unwarranted and unsupported by the PLRA.

Providing an exception to the PLRA's exhaustion requirement where money damages are unavailable will protect prisoners' rights by allowing courts to ensure that the requirement is fairly applied and will create an incentive for prisons to make their grievance procedures more equitable for inmates.\textsuperscript{339} Application of the requirement to unavailable remedies overextends the statute and adds to the numerous obstacles prisoner litigants already face. As Justice Brennan explained: "Prisons are too often shielded from public view; there is no need to make them virtually invisible."\textsuperscript{340}

\textsuperscript{335} See supra Part I.C.
\textsuperscript{337} See supra notes 253-74 and accompanying text.
\textsuperscript{338} See supra Part III.
\textsuperscript{339} See supra notes 295-306 and accompanying text.