

THE PRISON LITIGATION REFORM ACT'S ADMINISTRATIVE EXHAUSTION REQUIREMENT: CLOSING THE MONEY DAMAGES LOOPHOLE

A California prison inmate filed suit against prison officials claiming they had implanted electronic devices in his brain to control his thoughts and broadcast them over the prison's public address system.¹ Another inmate claimed that prison officials violated his Constitutional rights when they refused to let him practice martial arts in prison.² A Utah inmate filed suit after a flood in his cell ruined his pinochle cards.³

Congress enacted the Prison Litigation Reform Act ("PLRA") in 1996⁴ to "curtail the ability of prisoners to bring frivolous and malicious lawsuits" such as these.⁵ The number of prisoner civil rights lawsuits filed annually rose from 8,235 in 1977 to more than 40,000 in 1996.⁶ The

1. See *Examples of Prisoner Lawsuits*, TACOMA NEWS TRIB., Oct. 26, 1995, at D10, available at 1995 WL 5377971.

2. *Id.*

3. See Kristen Moulten, *Utah, U.S. Laws Limit Complaints of Inmates, but Prison Lawyer Says They Punish All for Gripes of a Few*, SALT LAKE TRIB., July 1, 1996, at D3, available at 1996 WL 3038420.

4. Congress considered drafts of the PLRA in 1995; thus, the PLRA is sometimes referred to as the "Prison Litigation Reform Act of 1995." In actuality, it was passed and signed as Title VIII of the Omnibus Public Services Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996).

5. *Alexander v. Hawk*, 159 F.3d 1321, 1324 (11th Cir. 1998), *reh'g en banc denied*, 172 F.3d 884 (11th Cir. 1999). While introducing the PLRA, Senate sponsor Robert Dole summed up the problem Congress perceived by reciting examples of seemingly petty prisoner gripes that prompted civil rights suits. The most famous of the examples Dole used was that of an inmate who filed suit after being served creamy peanut butter instead of the chunky peanut butter he had ordered. 141 CONG. REC. 14,547 (1995) (statement of Sen. Dole).

However, some commentators dispute the accuracy of the underlying facts Dole and others cited in support of the PLRA. For example, one commentator points out that the famous "chunky peanut butter" example arose when prison officials incorrectly debited the inmate's account for \$2.50 for chunky peanut butter. The inmate did not receive the product he paid for, but received creamy peanut butter instead. Although he sent the jar of creamy peanut butter back to the prison canteen, prison officials never restored the debited amount to his account. Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 521 (1996). See also Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1297-99 (1998) (maintaining that the state attorneys general exaggerated their reports of "frivolous" inmate suits to the media). But see Eugene J. Kuzinski, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361, 366-68 (1998) (recounting that certain "frequent filer" inmates created hundreds of frivolous claims and providing specific examples of such "frequent filers").

6. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 442 (Kathleen Maguire & Ann L. Pestore eds., 1997) [hereinafter "SOURCEBOOK"]. The Associated Press reported that although the number of per capita complaints declined between 1980 and 1996, a fourfold increase in the number of inmates resulted in a tripling of inmate petitions. *Inmates Slacked Pace of Lawsuits Before Restrictions*, ASSOCIATED PRESS

PLRA's diverse reforms all share the common aim of curbing this rising tide of prisoner suits.⁷ These reforms include limiting inmates' abilities to bring suit in federal court⁸ and to appear *in forma pauperis*,⁹ and further limiting the federal judiciary's ability to impose consent decrees on state prison systems.¹⁰

The PLRA revised 42 U.S.C. § 1997e, the prisoner's administrative exhaustion requirement.¹¹ Administrative exhaustion requirements generally prevent a party from seeking judicial review of administrative agency actions until the party has first appealed his case to the highest possible level in the agency.¹² Courts do not require administrative exhaustion simply because an administrative process exists; a statute must instruct the court and the party to use the administrative procedures in certain situations before filing for federal court review.¹³ The revised § 1997e(a) now requires inmates asserting civil rights or constitutional claims¹⁴ to exhaust "such administrative remedies as are available" before

POLITICAL SERVICE, Oct. 29, 1997, available at 1997 WL 2558664.

7. See 141 CONG. REC. 26,548 (1995) (statement of Sen. Dole introducing the PLRA).

8. The PLRA amended 42 U.S.C. § 1997e(e) (Supp. IV 1998) to instruct federal district courts to dismiss all actions alleging mental suffering without any showing of prior physical injury. See Daniel J. Sharfstein, Note, *No Cure for a Broken Heart*, 108 YALE L.J. 2451 (1999) (arguing that the physical injury requirement has unduly harsh effects on inmates).

9. See, e.g., 28 U.S.C. §§ 1915(b)(1)-(2) (1994) (establishing a new procedure for courts to use to assess filing fees for prisoner complaints brought *in forma pauperis*). The PLRA also made it more difficult for prisoners to retain an attorney by setting stringent limits on fees attorneys may recover for representing inmates. See 42 U.S.C. § 1997e(d) (Supp. IV 1998).

10. See, e.g., 18 U.S.C. § 3626(a)(1)(A) (Supp. IV 1998) (prohibiting courts from awarding prospective relief to remedy prison conditions if the relief extends "further than necessary to correct the violation of the Federal right of a particular plaintiff"); 18 U.S.C. § 3626(b)(2) (Supp. IV 1998) (allowing states to gain immediate termination of prospective relief unless the original award included a finding that the relief extends "no further than necessary" to remedy a specific Constitutional violation and is "the least intrusive means necessary" to remedy the violation).

11. Congress enacted the original version of the administrative exhaustion requirement as part of The Civil Rights of Institutionalized Persons Act of 1980 ("CRIPA"), PUB. L. NO. 96-247, 94 Stat. 352 (1980).

12. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938) ("[T]he long settled rule of judicial administration [is] that no one is entitled to general relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."). Cf. KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE Vol. 4 § 26:1 (2d ed. 1983) (arguing that exhaustion law is complex because courts determine whether administrative exhaustion applies on a case-by-case basis after weighing numerous competing factors).

13. See *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). See also 2 AM. JUR. 2D *Administrative Law* § 510 (1994).

14. Claims may differ depending on whether the prisoner is incarcerated in a state or federal prison. Both state and federal prisoners rely on the Eighth Amendment, which forbids "cruel and unusual punishment." U.S. CONST. amend. VIII. State prisoners also rely on 42 U.S.C. § 1983, which allows plaintiffs to recover damages for violation of their civil rights by a person acting under color of state law.

In *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, the United States Supreme

bringing suit in federal court.¹⁵

Just what constitutes an “available” administrative remedy?¹⁶ Although the actual language of § 1997e(a) seems straightforward, the circuits are split on this question.¹⁷ Specifically, the circuits disagree regarding whether a prisoner who brings an action for money damages is subject to the administrative exhaustion requirement when the damages remedy is not one the administrative system, such as a prison grievance system,¹⁸ can award.¹⁹ Although the Fifth, Ninth, and Tenth Circuits have determined that a prisoner requesting only money damages should not be required to exhaust administrative remedies prior to bringing suit,²⁰ the Third, Sixth, Seventh, and Eleventh Circuits strictly require administrative exhaustion prior to initiating suit in federal court.²¹

This Note explores the PLRA's administrative exhaustion requirement and the circuit split on the money damages issue.²² Part I of this Note

Court relied on § 1983 to create a similar cause of action for federal prisoners who claim their civil rights were violated by a person acting under color of federal law. 403 U.S. 388 (1971). For a more complete discussion of inmate suits brought under § 1983 and *Bivens*, see *infra*, notes 96 and 98.

15. 42 U.S.C. § 1997e(a) (Supp. IV 1998) now provides: “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.”

16. *Id.*

17. See *Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000); *Hartsfield v. Vidor*, 199 F.3d 305, 308 (6th Cir. 1999) (holding that administrative exhaustion should be applied so long as the prison grievance system attempts to fashion *some* remedy for legitimate complaints); *Massey v. Helman*, 196 F.3d 727, 733 (7th Cir. 1999), *petition for cert. filed*, 69 U.S.L.W. 3045 (U.S. May 30, 2000) (No. 99-1918) (strictly requiring administrative exhaustion); *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) (discussing the emerging circuit split); *Rumbles v. Hill*, 182 F.3d 1064, 1066 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 787 (U.S. 2000) (holding that administrative exhaustion is not required when the prisoner seeks damages only); *Perez v. Wisconsin Dept. of Corr.*, 182 F.3d 532, 535 (7th Cir. 1999) (holding that administrative exhaustion is required despite the fact that an inmate requests money damages only); *Alexander*, 159 F.3d at 1324 (holding that Congress intended that courts strictly require administrative exhaustion); *Whitley v. Hunt*, 158 F.3d 882, 887 (5th Cir. 1998) (holding that the plain language of the statute indicates that Congress did not intend to require administrative exhaustion in cases involving money damages); *Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997).

18. The terms “prison grievance system” and “administrative system” are sometimes used interchangeably during the course of this Note. This is not to confuse the reader, but to reflect the fact that prison grievance systems are specific species of administrative systems. The term “administrative system” may also take in statutory processes such as a tort claims act. For a discussion of the impact of tort claims acts on the administrative exhaustion debate, see *infra* note 109 and accompanying text.

19. See *Nyhuis*, 204 F.3d at 68-69.

20. See *Rumbles*, 182 F.3d at 1069; *Whitley*, 158 F.3d at 887; *Lunsford v. Jamao-As*, 155 F.3d 1178, 1179 (9th Cir. 1998); *Garrett*, 127 F.3d at 1267.

21. See *Nyhuis*, 204 F.3d 65; *Hartsfield*, 199 F.3d at 305; *Wyatt v. Leonard*, 193 F.3d 876 (6th Cir. 1999); *Massey*, 196 F.3d at 727; *Perez*, 182 F.3d at 538; *Alexander*, 159 F.3d at 1321.

22. This Note is confined to the administrative exhaustion requirement and does not discuss other provisions of the PLRA that Congress enacted for similar purposes. This Note also does not address the related issue of whether suits alleging that prison guards have physically abused an inmate are suits

describes the law that existed prior to the PLRA's enactment and explores the Congressional purpose behind the PLRA. Part II addresses the circuit split regarding money damages claims and the underlying issues and philosophies driving the split. Part III proposes that courts use the Seventh Circuit's mid-level approach to the dilemma,²³ and that Congress revise the statutory language to close the money damages loophole. This Note concludes that prisoners should be required to exhaust administrative remedies in all but the most unusual cases before filing suit in court and requesting money damages.

PART I

A. *McCarthy v. Madigan and the Supreme Court's Interpretation of the Original Version of § 1997e.*

Prior to the PLRA's enactment, § 1997e²⁴ gave federal courts broad discretion to determine whether a particular inmate must exhaust administrative remedies.²⁵ The statute allowed courts to grant one hundred and eighty day stays so that inmates could pursue "such plain, speedy and effective administrative remedies as are available" if the court believed such a requirement would be "in the interests of justice."²⁶ The statute also required the United States Attorney General to certify those prison grievance systems that offered "effective" remedies.²⁷

"regarding prison conditions" and therefore subject to the administrative exhaustion requirement. *See Limer*, 196 F.3d at 135; *Beeson v. Fishkill Corr. Facility*, 28 F. Supp. 2d 884, 887-96 (S.D.N.Y. 1998).

23. This "mid-level" approach is articulated in *Perez*, 182 F.3d at 532 (Easterbrook, J.). For a detailed discussion of this approach, see *infra*, notes 120-31 and accompanying text.

24. Prior to 1996, 42 U.S.C. § 1997e(a)(1) read as follows:

... in any action brought pursuant to section 1983 of this title . . . the court shall, if the court believes such a requirement would be appropriate and in the interests of justice, continue such cases for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy and effective remedies as are available.

42 U.S.C. § 1997e(a)(1)(1994).

25. Some commentators have indicated that CRIPA represents the high water mark of Congressional concern for ensuring humane prison conditions. *See Herman, supra* note 5, at 1275 (arguing that Congress enacted CRIPA at the end of the heyday of prisoners' rights, while Congress enacted the PLRA to reflect a national mood disfavoring prisoners as a class); Note, *Resolving Prisoners' Grievances Out of Court*: 42 U.S.C. § 1997e, 104 HARV. L. REV. 1309, 1311 (1991) [hereinafter "*Resolving Grievances*"] (claiming that Congress enacted CRIPA out of concern about both inmates' civil rights and providing state officials some freedom from federal interference in state correctional systems).

26. 42 U.S.C. § 1997e(a)(1) (1994).

27. *See* 42 U.S.C. § 1997e(b) (1994). For a thorough discussion of this provision's success (or lack thereof), see *Resolving Grievances, supra* note 25, at 1311 (arguing that burdensome certification requirements prevented many states from obtaining program certification).

The United States Supreme Court interpreted this pre-PLRA version of the statute in *McCarthy v. Madigan*.²⁸ McCarthy, a federal prisoner, filed suit in federal district court under 42 U.S.C. § 1983.²⁹ McCarthy requested money damages as the sole remedy for his alleged injuries.³⁰ The district court dismissed his claim for failure to file a prison grievance requesting injunctive-type relief prior to bringing suit.³¹

The Supreme Court agreed that § 1997e gave lower courts some discretion to determine whether a particular inmate should be required to exhaust administrative remedies, but disagreed with the manner in which the district court applied the statute to McCarthy's situation.³² The Court found that the language of § 1997e did not require exhaustion in all cases; instead, Congress provided federal courts with considerable discretion in this area.³³ In exercising this discretion, the lower court should balance the inmate's interest in "prompt access" to the court system against the administrative system's "institutional interests."³⁴

The Court focused on three factors that should prompt lower courts to use their discretion to allow inmates to forego administrative exhaustion. First, courts should not require exhaustion when the administrative process might cause "undue prejudice to a subsequent assertion of a court action."³⁵ Second, an exhaustion requirement may be inappropriate where the agency cannot grant effective relief.³⁶ Even when the prison grievance

28. 503 U.S. 140 (1992).

29. *Id.* at 142. McCarthy claimed that prison officials violated his Eighth Amendment rights by showing "deliberate indifference" to his medical and psychiatric problems following a back operation. *Id.*

30. *Id.* at 142. The plaintiff went so far as to write, "This Complaint seeks Money Damages Only," on the first page of his complaint. *Id.*

31. *Id.* The Tenth Circuit affirmed, holding that the true purpose of the administrative exhaustion statute is to allow agencies to narrow the issues and create an administrative record that will aid the court. *Id.* at 144. According to the Tenth Circuit, the exhaustion rule "is not keyed to the type of relief sought, but to the need for preliminary factfinding." *McCarthy v. Maddigan*, 914 F.2d 1411, 1412 (10th Cir. 1990) (The Tenth Circuit, unlike the Supreme Court, spells "Maddigan" with two "d"s).

32. *See* 503 U.S. at 149. *Cf.* DAVIS, *supra* note 12, at 414 (commenting that judicial discretion often overshadows statutory law when courts determine administrative exhaustion questions).

33. 503 U.S. at 150. The Court claimed that Congressional intent was of "paramount importance" to exhaustion inquiries. *Id.* at 144 (*citing* *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 501 (1982)). "Where Congress specifically mandates, exhaustion is required . . . But where Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy*, 503 U.S. at 144 (citations omitted).

34. 503 U.S. at 146. According to the Court, exhaustion serves the institutional interests of "protecting administrative agency authority" and "promoting judicial efficiency." *Id.* at 145. The Court recognized that it should not usurp agency authority over programs Congress mandates, and that agencies should be allowed to "correct [their] own mistakes" before a federal court gets involved. *Id.* *See also* DAVIS, *supra* note 12, at 415.

35. 503 U.S. at 146-47.

36. *Id.* at 147.

system is competent to adjudicate the issue, the Court claimed that relief may not be “effective” when the prison is incapable of granting the type of relief the inmate requests.³⁷ Finally, evidence of agency bias should sway the court to use its discretion and allow the inmate to forego administrative exhaustion.³⁸

In holding that McCarthy should not be forced to exhaust administrative remedies, the Court also cited three problems with § 1997e as applied to McCarthy’s individual circumstances. First, the Court pointed out that the statute did not authorize the district court to dismiss cases, but instead merely authorized a ninety day stay; thus, the dismissal of McCarthy’s case was improper under the existing statute.³⁹ Second, the Court recognized that the statutory language made the provision applicable to state inmates only; the statute, as written, did not affect federal inmates like McCarthy.⁴⁰ Finally, the Court noted that the statute conditioned exhaustion on the existence of an “effective” administrative remedy.⁴¹ The Court claimed that an administrative remedy was clearly not “effective” when the agency lacked authority to award the specific remedy the inmate requested.⁴²

The Court also denounced the futility of McCarthy’s situation.⁴³ According to the Court, McCarthy had “everything to lose and nothing to gain” by following the administrative procedures the prison grievance system required.⁴⁴ After following these procedures, McCarthy still could not obtain the remedy he desired: money damages.⁴⁵ The Court first pointed out this apparent flaw in the statute, and then invited Congress to amend the statute and design an “appropriate” procedure for prisoners to bring administrative claims for money damages.⁴⁶

37. *Id.*

38. *See* 503 U.S. at 148.

39. *Id.* at 150. For the statutory language that existed at the time *McCarthy* was decided, see *supra*, note 24.

40. *Id.* at 150.

41. *Id.* *See also* DAVIS, *supra* note 12, at 464-65 (discussing the basic administrative law premise that one need not exhaust “inadequate” administrative remedies).

42. *See* 503 U.S. at 147-48.

43. *Id.* at 152.

44. *Id.*

45. *Id.*

46. *Id.* at 156. According to the Court:

Congress, of course, is free to design or require an appropriate administrative procedure for a prisoner to exhaust his claim for money damages. Even without further action by Congress, we do not foreclose the possibility that the Bureau [of Prisons] itself may adopt an appropriate administrative procedure consistent with Congressional intent.

McCarthy, 503 U.S. at 1565.

B. Congress's Response To McCarthy: the PLRA.

Congress responded to the Supreme Court's challenge by enacting the PLRA.⁴⁷ During floor debate,⁴⁸ one of the PLRA's sponsors discussed *McCarthy* at some length:

The real problem with [prison condition] cases came with the Court's decision in [*McCarthy v. Madigan*] that an inmate need not exhaust the administrative remedies available prior to proceeding with a *Bivens* action for money damages only . . . [a decision which] was made without the benefit of any legislative guidance, and the Court made that very clear in its opinion, almost to the point of asking that Congress do something.⁴⁹

However, Congress enacted the PLRA to achieve two major goals that transcend administrative exhaustion problems. First, Congress hoped to decrease the number of inmate suits by deterring inmates from filing frivolous claims.⁵⁰ Second, Congress hoped to ease the federal judiciary's stranglehold on state prison systems.⁵¹

Congress was extremely concerned with the explosion in the number of inmate suits filed annually since 1975.⁵² During debate on the PLRA,⁵³ several members of Congress expressed the belief that the vast majority of

47. See *Alexander v. Hawk*, 159 F.3d 1321, 1324-25 (11th Cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263, 1265 (10th Cir. 1997) ("Congress specifically amended the statute to overrule *McCarthy* by requiring federal prisoners to exhaust all administrative remedies."). *But cf.* Herman, *supra* note 5, at 1231 (suggesting that Congress may have passed the PLRA out of animus against prisoners as a class).

48. The bill at issue in the paragraph quoted was a precursor to the PLRA, H.R. 2468, which Rep. Lobiondo, the bill's sponsor, dubbed the Prisoner Lawsuit Efficiency Act ("P.L.E.A."). Congress later included the P.L.E.A. statutory language in the PLRA by amendment. See *Jackson v. District of Columbia*, 89 F. Supp. 2d 48, 62-63 (D. D.C. 2000), *aff'd*, 2000 U.S. App. Lexis 19497 (D.C. Cir. July 19, 2000) (recounting some of the administrative exhaustion requirement's legislative history).

49. 141 CONG. REC. 35,623 (1995) (quoted in *Jackson*, 89 F. Supp. 2d at 62-63).

50. See 141 CONG. REC. 26,548 (1995) (statement of Sen. Dole introducing the PLRA). See also *Alexander*, 159 F.3d at 1324; *Morgan v. Arizona Dept. of Corr.*, 976 F. Supp. 892, 894 (D. Ariz. 1997).

51. See 141 CONG. REC. 26,554 (1995) (statement of Sen. Abraham). See also Kuzinski, *supra* note 5, at 361 (arguing "that the PLRA is a necessary measure . . . designed to rectify serious problems surrounding the federal courts' involvement with state prisons.").

52. See 141 CONG. REC. 14,570 (1995) (statement of Sen. Dole). For exact statistics, see SOURCEBOOK, *supra* note 6 and accompanying text.

53. Critics claim that Congress included the PLRA within a large, hastily passed, and poorly written Omnibus Act. These critics further point out that the PLRA passed without a committee report or mark-up. See Herman, *supra* note 5, at 1277 (attacking the manner in which Congress enacted the PLRA). However, these criticisms reflect a myopic view of the PLRA's history. Legislators introduced and discussed several drafts of the PLRA during 1995. Arguably, the voting legislators knew the PLRA's purposes and its potential effects because the sponsors had introduced several similar bills to Congress over the course of the previous year.

inmate suits were “frivolous,” “malicious,” and “meritless.”⁵⁴ Even so, these suits cost states thousands of dollars to litigate and tied up precious judicial resources.⁵⁵

Further, some members of Congress believed that prisoner suits allowed the federal judiciary to micro-manage state prisons through consent decrees that often imposed considerable burdens on state governments.⁵⁶ The PLRA’s sponsors cited occasions when federal judges ordered states to either build new prisons or release violent offenders to ease overcrowding in state prisons.⁵⁷ Several members expressed their intent to give prison administrators, rather than courts, primary responsibility for running America’s prisons.⁵⁸

54. See 141 CONG. REC. 14,572-73 (1995) (statement of Sen. Kyl); 141 CONG. REC. 26,448-51 (1995) (statement of Sen. Abraham); 141 CONG. REC. 26,553 (1995) (statement of Sen. Hatch).

55. 141 CONG. REC. 26,548 (1995) (statement of Sen. Dole) (“The National Association of Attorneys General estimates that inmate civil rights litigation costs the states more than \$81 million each year.”).

An Associated Press article described several shocking prisoner suits filed in California federal district courts and the total cost of each suit to taxpayers. Sandra Ann Harris, *Prisoners’ Lawsuits Swamp Federal Courts*, TACOMA NEWS TRIB., Oct. 26, 1995, at D10, available at 1995 WL 5377971. An inmate’s claim that he had a right to practice martial arts in prison cost taxpayers \$28,000. See *Examples of Prisoners Lawsuits*, *supra* notes 1-2 and accompanying text. The claim alleging that prison officials implanted electronic devices in the inmate’s brain, mentioned *supra* note 1 and accompanying text, cost the state over \$18,500. The state spent an astonishing \$151,000 defending itself from an allegation that it violated an inmate’s constitutional rights when the inmate did not receive five free stamped envelopes from prison officials. *Examples of Prisoner Lawsuits*, *supra* note 1, at D10.

According to Sen. Hatch, “The huge costs imposed on State governments to defend against these meritless suits is another kind of crime committed against the law-abiding citizens.” 141 CONG. REC. 26,553 (1995). Sen. Kyl echoed this sentiment: “[P]risoners are victimizing society twice—first when they commit the crime that put them in prison, and second when they waste our hard-earned tax dollars while cases based on serious grievances languish on the court calendar.” 141 CONG. REC. 26,553 (1995).

56. See 141 Cong. Rec. 26,554 (1995) (statement of Sen. Abraham). Senator Abraham provided a detailed description of the dangers he perceived in judicial imposition and management of consent decrees. *Id.* His description was based on the various ways that judicial consent decrees had interfered with prison management in his home state of Michigan. According to the Senator, federal courts monitored the warmth of food, the brightness of the lights, whether the state prisons supplied electrical outlets in each cell, and whether the prisons employed licensed barbers. *Id.*

Kuzinski claims that some “activist” federal judges experienced a love-hate relationship with prison inmates prior to the PLRA: “Federal judges have thrust the federal court system into the administration of state prison systems, while at the same time decrying the burden of state inmates’ lawsuits upon their dockets.” Kuzinski, *supra* note 5, at 362.

57. See 141 Cong. Rec. 26,448 (1995) (statement of Sen. Abraham). Sen. Abraham recounted for the Senate the story of a federal judge in Philadelphia who ordered the state of Pennsylvania to release prisoners to ease overcrowding of jails. Because the state did not have the funds to build new prisons, the state did not detain many offenders for long. The city experienced a sharp rise in crime; repeat offenders released under this order were thought to be responsible for a substantial portion of the increase. *Id.*

58. Sen. Abraham claimed that enacting the PLRA would return “sanity and State control” to the

C. The Administrative Exhaustion Requirement's Role in the Overarching Scheme of the PLRA

The PLRA amended § 1997e to state more clearly Congress's intent to require administrative exhaustion in all prisoner civil rights cases.⁵⁹ Senator Kyl, one of the PLRA's sponsors, claimed that Congress added the mandatory administrative exhaustion requirement because most inmates seek relief for relatively minor matters that prison grievance systems could readily handle.⁶⁰ Kyl further stated that such an administrative exhaustion requirement was appropriate because of the burden prisoner cases place on federal court dockets, the availability of redress through prison grievance systems, and the "lack of merit of many of the claims."⁶¹

The administrative exhaustion requirement bears a rational relationship to the PLRA's two main goals of deterring frivolous lawsuits and preventing judicial interference in prison systems.⁶² First, the requirement laces obstacles in inmates' paths to court;⁶³ inmates may not be as eager to

prison systems. 141 CONG. REC. 26,554 (1995). When introducing the PLRA, Sen. Dole claimed that it would "work to restrain liberal Federal judges who see violations of constitutional rights in every prisoner complaint and have used these complaints to micromanage state and local prison systems." 141 CONG. REC. 25,549 (1995).

59. See *Alexander v. Hawk*, 159 F.3d 1321, 1324 (11th Cir. 1998); *Morgan v. Arizona Dept. of Corr.*, 976 F. Supp. 892, 894 (D. Ariz. 1997).

60. 141 CONG. REC. 14,573 (1995) (statement of Sen. Kyl).

61. *Id.* at 14,572-73. The facts surrounding *Washington v. Alaimo*, 934 F. Supp. 1395 (S.D. Ga. 1996), provide an apt, yet humorous example of the ways in which prisoner litigants clogged courts with frivolous claims and burdened them with ludicrous motions prior to the PLRA's enactment. In *Washington*, a Georgia inmate brought several frivolous suits alleging violations of 42 U.S.C. § 1983, leading the court to conclude that the plaintiff had become a "frequent litigant within the federal courts." *Id.* at 1396. The court then described some of the more than seventy-five motions and pleadings that Washington filed in his frivolous civil rights cases. Washington's motions included "Motion to Behoove an Inquisition," "Motion for Restoration of Sanity," "Motion for Publicity," "Motion for Nunc pro Tunc," "Motion to Renounce Citizenship," "Motion to Exhume Body of Alex Hodgson," "Motion for Skin Change Operation" (in which Washington requested a sex change), "Motion for Catered Food Services," and a puzzling "Motion to Invoke and Execute Rule 15-Retroactive Note: The Court's School Days are Over." *Id.* at 1397-99. Washington also filed numerous motions to amend his pleadings, adding notable figures such as Ted Turner, Senator Sam Nunn, and President Clinton as defendants in his civil rights suits. *Id.* at 1398-99. Despite the fact that all these ludicrous motions and pleadings required the time and attention of various federal district court judges, the court hesitated to impose Rule 11 sanctions on Washington until he submitted a "Motion to Kiss My Ass" in which he requested that a federal magistrate judge engage in the action suggested in the motion's title. *Id.* at 1396. The Court then imposed various limits on Washington's ability to commence suit or file motions with the court in the future. *Id.* at 1400. However, the court noted that similar limitations would soon be imposed on all inmate litigants under the recently enacted PLRA. *Id.* at n.5.

62. See *Morgan*, 976 F. Supp. at 894.

63. In *McCarthy*, the Supreme Court noted the existence of obstacles such as the need to appeal

file frivolous lawsuits if they must first run a long gauntlet of prison grievance systems appeals.⁶⁴ Second, the administrative exhaustion requirement delays judicial inquiry into a complaint until after prison administrators have an opportunity to correct the inmate's problem on their own.⁶⁵ If the prison grievance system resolves the problem completely, then courts never have an opportunity to pass on the issue⁶⁶ or to order the state to take action, such as building new prisons or giving inmates more privileges.⁶⁷

PART II

A. *The PLRA Does Not Deprive Federal Courts of Jurisdiction*

Relying on Congress's expressed intent to limit or prevent judicial interference in internal prison matters, one of the first district courts to pass on the new administrative exhaustion requirement held that the PLRA deprived federal courts of jurisdiction over non-exhausted claims.⁶⁸ In *Morgan v. Arizona Department of Corrections*,⁶⁹ a federal district court determined that the revised language of § 1997e(a) made administrative exhaustion "mandatory" rather than "directory."⁷⁰ According to the *Morgan* court, "When the exhaustion of administrative remedies is

grievances and short filing deadlines for appeals. 503 U.S. at 152. The Court noted that the deadlines would not pose much difficulty for a "knowledgeable inmate accustomed to grievances and court actions." *Id.* at 153. However, the deadlines and procedures created a "likely trap for the inexperienced and unwary inmate, ordinarily indigent and unrepresented by counsel, with a substantial claim." *Id.* See also *Resolving Grievances*, *supra* note 25, at 1326 (citing statistics showing that 94.6% of inmates in Virginia knew how to file a grievance under the pre-PLRA procedures).

64. In *Resolving Grievances*, *supra* note 25, at 1326-27, the author cites several prison inmate surveys showing that inmates generally place greater trust in the outcomes of prison grievance procedures at higher levels of the administrative system. *Id.* If this is true, then the inmates have every incentive to keep pursuing appeals in the prison grievance system.

65. See 141 CONG. REC. 14,573 (1995) (statement of Sen. Kyl). See also *Alexander*, 159 F.3d at 1327. According to the Eleventh Circuit, one of the major advantages of administrative exhaustion is "to give the agency a chance to discover and correct its own errors." 159 F.3d at 1327 (quoting *Kobleur v. Group Hosp. and Med. Servs. Inc.*, 954 F.2d 705, 712 (11th Cir. 1992)).

66. See *Alexander*, 159 F.3d at 1327. According to the Eleventh Circuit, one major policy favoring administrative exhaustion is "to conserve scarce judicial resources, since the complaining party may be successful in vindicating rights in the administrative process and the courts may never have to intervene." *Id.* (quoting *Kobleur*, 954 F.2d at 712).

67. See 141 CONG. REC. 26,449 (statement of Sen. Abraham). For a more detailed description of some of Congress's specific complaints regarding judicial activism and intervention, see *supra* notes 56 to 58 and accompanying text. For a general overview of the federal judiciary's role in monitoring prison systems prior to the PLRA, see Kuzinski, *supra* note 5.

68. *Morgan v. Arizona Dept. of Corr.*, 976 F. Supp. 892 (D. Ariz. 1997).

69. *Id.*

70. *Id.* at 894.

required by federal statute, the failure to exhaust is a jurisdictional defect that prevents the district court from hearing the claim.”⁷¹

All federal circuits have overruled the *Morgan* decision, claiming that the new statutory language is still not sufficiently “sweeping” and “direct” to deny jurisdiction.⁷² Instead, the circuits liken § 1997e(a) to a statute of limitations: courts must adhere to the statute to determine whether a cause of action even exists when the defending party asserts the requirement as a defense.⁷³ This conclusion is further supported by the fact that 42 U.S.C. § 1997e(c)(2) specifically allows courts to dismiss an inmate’s suit as frivolous, malicious, or failing to state a claim, even when the inmate does not exhaust administrative remedies.⁷⁴ As the Fifth Circuit concluded from this statutory requirement, “The Court would not be empowered to [dismiss an inmate’s suit as frivolous] if the exhaustion provision deprived the court of jurisdiction over the action.”⁷⁵

Despite their unanimity on the question of jurisdiction, the circuits are split on the issue of whether an inmate’s suit claiming money damages alone should be subject to administrative exhaustion.⁷⁶ Framed another way, should inmates be required to utilize prison grievance procedures when those administrative systems are not authorized to award the

71. *Id.* at 895. State courts, more often than federal courts, subscribe to the idea that failure to exhaust administrative remedies is usually a jurisdictional defect. *See, e.g.,* South Dakota Bd. of Regents v. Heege, 428 N.W.2d 535, 539 (S.D. 1988) (“Failure to exhaust administrative remedies where required is a jurisdictional defect.”).

72. *See* Rumbles v. Hill, 182 F.3d 1064, 1067-68 (9th Cir. 1999); *Perez v. Wisconsin Dept. of Corr.*, 182 F.3d 532, 535 (7th Cir. 1999); *Underwood v. Wilson*, 151 F.3d 292, 294 (5th Cir. 1998); *Wright v. Morris*, 111 F.3d 414, 420-21 (6th Cir. 1997), *cert. denied*, 522 U.S. 906 (1997).

The source of the “sweeping and direct” language is *Weinberger v. Salfi*, 422 U.S. 749 (1975). In *Weinberger*, the United States Supreme Court held that 42 U.S.C. § 405(h) precluded federal courts from hearing social security cases until the claimant appealed his or her claim to the highest possible agency level. 422 U.S. at 757. The Court relied on the statute’s “sweeping and direct” language to reach its conclusion. *Id.*

73. *See Perez*, 182 F.3d at 536; *Jackson v. District of Columbia*, 89 F. Supp. 2d 48, 55-56 (D. D.C. 2000). Like a statute of limitations, the defendant may waive the protections of § 1997e(a). Once the defendant invokes the statute, the judge must address the issue of whether administrative exhaustion should be required before proceeding to the merits or dismissing on other, alternate grounds. *See Perez*, 182 F.3d at 536.

The Sixth Circuit takes a slightly different approach. It requires inmates to attach to the prison’s administrative decision their Complaints to demonstrate that the inmate has exhausted administrative remedies. Thus, the Sixth Circuit treats the administrative exhaustion requirement as a pleading requirement rather than an affirmative defense. *See Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998), *cert. denied*, 525 U.S. 833 (1998).

74. 42 U.S.C. § 1997e(c)(2) (1998). *See also Rumbles*, 182 F.3d at 1068; *Underwood*, 151 F.3d at 295.

75. *Underwood*, 151 F.3d at 295.

76. *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999). For a list of cases, see *supra* notes 20 and 21.

inmate's desired money damages remedy?

B. The Argument Against Requiring Exhaustion in Claims for Money Damages.

The Fifth, Ninth, and Tenth Circuits hold that administrative exhaustion is unnecessary where money damages are the sole requested remedy.⁷⁷ Generally, these circuits argue that the plain language of § 1997e(a), as revised, compels the conclusion that Congress did not intend to require exhaustion in all inmate cases⁷⁸ and that the PLRA did not completely answer the Supreme Court's concerns in *McCarthy*.⁷⁹

The Fifth Circuit promulgated the plain language argument in *Whitley v. Hunt*,⁸⁰ using definitions it had set out in a prior case.⁸¹ The Fifth Circuit defines "available" as "that which is accessible or may be obtained: personally obtainable."⁸² The court defines "exhaust" as "to take complete advantage."⁸³ Using these definitions to interpret the statute, the *Whitley* court determined that damages are not "available" when not "accessible" or obtainable through the prison grievance system.⁸⁴ Because money damages are not "available" under the dictionary definition of the term, inmates are not required to utilize administrative procedures before filing claims for money damages.⁸⁵

These circuits also argue that Congress did not fully respond to the Supreme Court's criticisms in *McCarthy* when Congress fashioned the PLRA.⁸⁶ Although the PLRA eliminated the requirement that a remedy be "effective" and expanded the statute's coverage to include federal inmates as well as state prisoners, these circuits point out that Congress still has not fashioned an administrative procedure that would allow inmates to

77. See *Rumbles*, 182 F.3d at 1069; *Whitley*, 158 F.3d at 887; *Lunsford*, 155 F.3d at 1179; *Garrett v. Hawk*, 127 F.3d 1263, 1267 (10th Cir. 1997).

78. See *Whitley v. Hunt*, 158 F.3d 882, 886 (5th Cir. 1998); *Underwood*, 151 F.3d at 295.

79. See *Whitley*, 158 F.3d at 887; *Garrett*, 127 F.3d at 1267.

80. 158 F.3d 882 (5th Cir. 1998). For a brief overview of the facts in *Whitley*, see *infra*, notes 132 to 141 and accompanying text. As will be discussed later in this Note, prisoners like *Whitley* make it impossible to permit a money damages loophole without destroying the PLRA entirely.

81. In the prior case, *Underwood v. Wilson*, the Fifth Circuit held that an inmate must exhaust administrative remedies before bringing suit for both money damages and injunctive relief. 151 F.3d at 296.

82. *Id.* at 295.

83. *Id.*

84. *Whitley*, 158 F.3d at 886-87.

85. *Id.* See also *Rumbles*, 182 F.3d at 1069.

86. See *Whitley*, 158 F.3d at 887; *Garrett*, 127 F.3d at 1267.

claim money damages.⁸⁷ In effect, these circuits have replaced the old statutory language concerning “effectiveness” with new language concerning “availability” to argue that the statute still does not strictly require exhaustion. Because the PLRA failed to establish a new system through which prisoners may obtain money damages, *McCarthy* still has force.⁸⁸

Finally, these courts distinguish the PLRA's language requiring exhaustion of administrative *remedies* from language requiring the exhaustion of administrative *procedures*.⁸⁹ These courts further emphasize that forcing an inmate to exhaust all the grievance system procedures would result in the inmate's observance of futile formalities that cannot offer the desired relief.⁹⁰

The position adopted by the Fifth, Ninth, and Tenth Circuits has several benefits. Allowing inmates to take money damages claims straight to court minimizes burdens on prison grievance systems.⁹¹ This practice also allows prisoners with meritorious damages claims to avoid suffering the procedural pitfalls and confusion of a futile administrative process.⁹²

87. *Garrett*, 127 F.3d at 1267. According to the Tenth Circuit, “Congress could have set up administrative remedies as a prerequisite to a *Bivens* claim for monetary damages, but to date has not done so.” *Id.* See also *Whitley*, 158 F.3d at 887 (holding that *McCarthy*'s warning against unavailable remedies is still valid).

88. See *Whitley*, 158 F.3d at 887. This concern, however, causes even greater problems when the state does not allow prison grievance systems to award damages, but utilizes a procedure similar to that set out in the Federal Tort Claims Act, which allows inmates to recover damages under separate procedures if they meet certain criteria. There is a split among the circuits regarding whether damages obtained through tort claims procedures are among the administrative remedies Congress intended inmates to exhaust. See *Rumbles*, 182 F.3d at 1069-70 (holding that Congress did not intend that inmates must exhaust state tort claims procedures). Cf. *Whitley*, 158 F.3d at 888 (requiring the inmate to exhaust Federal Tort Claims Act procedures before continuing to seek damages for his denial of medical care claim).

89. See *White v. Fauver*, 19 F. Supp. 2d 305, 317 (D. N.J. 1998).

90. *Id.* See also *McCarthy v. Madigan*, 503 U.S. 140, 152 (1992).

91. See *Garrett*, 127 F.3d at 1266. As the Tenth Circuit emphasized in *Garrett*, the government usually concedes that the prison grievance system may reject the claim if the system cannot address the problem. *Id.*

92. See *McCarthy*, 503 U.S. at 152. One of the greatest criticisms of the PLRA raised during floor debate was the fact that the statute makes *all* prison lawsuits suspect. Opponents claimed that the PLRA placed too many roadblocks in the way of meritorious suits. See 141 CONG. REC. 27,044 (1995) (statement of Sen. Biden).

Several commentators argue that the PLRA's various reforms, taken together, actually go far beyond preventing frivolous claims and keep meritorious claims out of court as well. See *Herman*, *supra* note 5, at 1291 (arguing that the PLRA is so poorly tailored to its goal of deterring only frivolous lawsuits and so overinclusive in its reach that it should fail even rational basis scrutiny under equal protection analysis); Julie M. Riewe, Note, *The Least Among Us: Unconstitutional Changes In Prisoner Litigation Under the Prison Litigation Reform Act of 1995*, 47 DUKE L.J. 117 (1997) (arguing that several PLRA provisions unconstitutionally burden inmates with meritorious claims). See also Kuzinski, *supra* note 5, at 363-64 (describing the benefits inmates derive from meritorious prison

Further, other prohibitions contained in the PLRA adequately protect against abuse of the court system. For example, another section of the PLRA allows a judge to dismiss a case *sua sponte* if the judge, in his or her discretion, determines that the claim is frivolous, malicious, or fails to state a claim.⁹³ Yet another section requires dismissal of all claims for mental or emotional injury unless the inmate can also prove prior physical injury.⁹⁴ These provisions give judges several means for removing frivolous complaints from their dockets.⁹⁵

Finally, prison grievance systems have little value when the inmate wishes to sue a prison guard as an individual.⁹⁶ This problem arises when inmates file a § 1983⁹⁷ or *Bivens*⁹⁸ action against both the prison and several individual prison guards or administrators.⁹⁹ Prison grievance systems and state tort claims acts are usually designed to address the inmate's complaints about the state, not to address problems with individuals.¹⁰⁰ Often, the only way to recover compensation from the

litigation).

93. 42 U.S.C. § 1997e(c)(2) (Supp. IV 1998).

94. 42 U.S.C. § 1997e(e) (Supp. IV 1998). Several commentators have focused on what they perceive to be the harsh effect of this provision. For a discussion of the physical injury requirement and accompanying issues, see Stacey Heather O'Bryan, Note, *Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 VA. L. REV. 1189 (1997); Sharfstein, *supra* note 8 (examining *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998)).

95. See 141 CONG. REC. 26,548 (1995) (statement of Sen. Dole).

96. See *Whitley*, 158 F.3d at 887 (noting the Congress or the Bureau of Prisons remain free to craft rules to permit recovery of monetary relief from individual prison officials). Both § 1983 and *Bivens* claims allow inmates to bring suit against individual prison officials. See *e.g.*, *Hartsfeld*, 1999 U.S. App. LEXIS 31544, at *1 (reciting fact that plaintiff brought his § 1983 action against defendants as individuals); *Rumbles*, 182 F.3d at 1066 (setting forward the fact that *Rumbles* brought his § 1983 action against the defendants individually); *Massey*, 196 F.3d at 729 (reciting the fact that plaintiff brought a *Bivens* action against several defendants as individuals).

97. 42 U.S.C. § 1983, often referred to as the "Ku Klux Klan Act of 1871," prohibits any person from depriving another of his constitutional rights "under color of state law."

98. In *Bivens v. Six Unknown Federal Narcotics Agents*, the United States Supreme Court judicially created a cause of action modeled after § 1983 and intended to prohibit federal actors from depriving others of their constitutional rights. 403 U.S. 388 (1971). When the Tenth Circuit addressed the *McCarthy* case, it claimed that courts could impose reasonable conditions upon the filing of *Bivens* actions because those actions are a creation of the judiciary. 503 U.S. at 143 (*citing McCarthy*, 914 F.2d at 1412).

99. See, *e.g.*, *Massey*, 196 F.3d at 729; *Rumbles*, 182 F.3d at 1066.

100. See *Whitley*, 158 F.3d at 888 (holding that *Whitley* need not exhaust his claim against individual prison officials, but should utilize the Federal Tort Claims Act to exhaust his claim against the Bureau of Prisons); *Garrett*, 127 F.3d at 1266 (explaining that had *Garrett* submitted his claims for money damages to the prison grievance system, the institution would have rejected the claim as improper subject matter for administrative action and informed him of the existence of a remedy under the Federal Tort Claims Act, which does not allow a prisoner to assert personal liability against a prison official).

person who caused the injury is to file suit in court.¹⁰¹

C. *The Argument in Favor of Strictly Requiring Exhaustion*

The Third, Sixth, Seventh, and Eleventh Circuits hold that Congress's purposes in enacting the PLRA compel courts to strictly require administrative exhaustion.¹⁰² Further, these circuits rely on several strong public policy arguments to support their views.¹⁰³ Finally, the Seventh Circuit has construed the PLRA using a novel approach based on that circuit's prior case law.¹⁰⁴

As even the opponents of strict exhaustion recognize, Congress clearly intended the PLRA to overrule *McCarthy* and to insulate courts from prisoner lawsuits that prison grievance systems have not addressed first.¹⁰⁵ The Eleventh Circuit, responding to arguments advanced by the Ninth and Tenth Circuits, claims that the PLRA clearly removed the *McCarthy* considerations of futility and inadequacy from administrative exhaustion analysis in inmate cases.¹⁰⁶ As the Eleventh Circuit notes, determining whether a given remedy is "available" requires courts to embark on a case-by-case evaluation of the prison grievance system involved.¹⁰⁷ Congress specifically intended the PLRA to eliminate such consumption of judicial resources.¹⁰⁸

The case in favor of strictly requiring exhaustion is even more

101. See *Garrett*, 127 F.3d at 1266.

102. See *Nyhuis*, 204 F.3d at 67; *Hartsfield*, 199 F.3d at 309; *Massey*, 196 F.3d at 733; *Alexander*, 159 F.3d at 1327.

103. See *Perez*, 182 F.3d at 537-38; *Alexander*, 159 F.3d at 1326.

104. See *Perez*, 182 F.3d at 538. For a detailed analysis of the Seventh Circuit's approach in *Perez*, see *infra* notes 121 to 131 and accompanying text.

105. See *Whitley*, 158 F.3d at 886 ("[T]hat part of *McCarthy* which relied upon Congress' failure to expressly require exhaustion . . . no longer provides a viable justification for excusing . . . failure to pursue administrative remedies."); *Garrett*, 127 F.3d at 1265 ("Congress specifically amended the statute to overrule *McCarthy* by requiring federal prisoners to exhaust all administrative remedies . . ."). Cf. *Alexander*, 159 F.3d at 1324-25 (noting that Congress sought specifically to overrule *McCarthy* when it enacted the PLRA); *Perez*, 182 F.3d at 537 (noting the removal of the "plain, speedy and effective" language in the earlier statute and that courts treating suits for money damages as unaffected by the change do so in reliance on *McCarthy*).

106. *Alexander*, 159 F.3d at 1325. According to the Eleventh Circuit, "No doubt denial [of the claim] is the likeliest outcome but that is not sufficient reason for waiving the requirement of exhaustion." *Id.*

107. *Alexander*, 159 F.3d at 1326. The court went on to argue that the term "available" reflects Congress's acknowledgement that some states do not have prison grievance systems and allows inmates in those states to petition federal courts directly. *Id.* at 1326-27.

108. See *Nyhuis*, 204 F.3d at 74 ("Congress intended to save courts from spending countless hours, educating themselves in every case, as to the vagaries of prison administrative processes, state or federal."). See generally, Kuzinski, *supra* note 5.

compelling when a state inmate asserts a claim under § 1983. Not only is the federal district court confronted with the difficulty of surveying state administrative law to determine whether the inmate's requested remedy is "available,"¹⁰⁹ but federalism concerns muddy the waters when federal courts attempt to decipher or predict the manner in which state courts would administer state administrative regulations.¹¹⁰ A strict rule holding that every prisoner must exhaust all administrative grievances procedures helps federal courts avoid such dilemmas.

A strict exhaustion requirement also prevents inmates from "pleading around" the administrative exhaustion requirement. The Seventh Circuit wrote in *Perez v. Wisconsin Department of Corrections* that Congress's intent would be frustrated if prisoners could evade the administrative exhaustion requirement simply by claiming money damages.¹¹¹ If the Ninth Circuit approach prevails, prisoners could avoid the effects of § 1997e(a) entirely by carefully crafting petitions to request types of relief that the prison grievance system does not award.¹¹²

In addition to comports with Congress's clear intent, strictly requiring administrative exhaustion also serves a number of public policies.¹¹³ Prison officials should have an opportunity to explain prison policies and rectify problems before courts intervene.¹¹⁴ In this way, strictly enforcing administrative exhaustion furthers Congress's intent to postpone or eliminate the federal judiciary's ability to direct prison management.¹¹⁵ The approach also decreases the court system's burdens

109. See *Booth v. Churner*, 206 F.3d 289, 300 (3d Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3046 (U.S. Jun. 5, 2000)(No.99-1964); *Castillo v. Buday*, 85 F. Supp. 2d 309, 313 (S.D.N.Y. 2000); *Nyhuis*, 204 F.3d 65, 76 n.11.

110. See *Booth*, 206 F.3d at 300 (noting that federalism concerns surrounding § 1983 actions make it difficult for federal courts to know whether a state can or would provide a certain remedy).

111. *Perez*, 182 F.3d at 538 ("This is not the first time we have been asked to hold that by seeking only damages a plaintiff may avoid a statutory exhaustion requirement.")

112. See *Nyhuis*, 204 F.3d at 74 ("Exempting claims for monetary relief from the exhaustion requirement . . . would enable prisoners, as they become aware of such an exemption, to evade the exhaustion requirement, merely by limiting their complaints to requests for money damages.")

Federal Rule of Civil Procedure 8(a)(3) requires a pleader to include ". . . a demand for judgment for the relief the pleader seeks." FED. R. CIV. P. 8(a)(3). To illustrate the problems this presents: in *Whitley*, the inmate originally brought action for both injunctive-type relief and money damages. 153 F.3d at 884. He revised his petition to request money damages alone only after a magistrate judge informed him of the judge's intent to dismiss for failure to exhaust administrative remedies. *Id.* Arguably, the Sixth Circuit allowed Whitley to intentionally "plead around" the administrative exhaustion requirement.

113. See *Alexander*, 159 F.3d at 1326-27. See also DAVIS, *supra* note 12 at 415 (illustrating several advantages of requiring administrative exhaustion in general).

114. See *Alexander*, 159 F.3d at 1327.

115. See *Perez*, 182 F.3d at 537; *Alexander*, 159 F.3d at 1327. See also 141 Cong. Rec. 14,572-73 (statement of Sen. Kyl).

by allowing prison grievance systems to handle minor matters and establish a record to narrow issues for the court.¹¹⁶ Finally, the prison grievance system can provide remedies that will end ongoing harm and freeze damages while the case wends its way through the court system.¹¹⁷

These circuits require administrative exhaustion even when the inmate is pressing a *Bivens* or § 1983 claim against individual prison officials.¹¹⁸ Courts are quick to point out that, at the very least, the prison grievance systems can compel the prison official to “halt the infringing practice.”¹¹⁹

D. The Moderate Exhaustion Approach Articulated in Perez

In *Perez v. Wisconsin Department of Corrections*, the Seventh Circuit used Rule 54 of the Federal Rules of Civil Procedure¹²⁰ to fashion an argument in favor of requiring administrative exhaustion in most inmate cases.¹²¹ Because Rule 54 requires courts to award plaintiffs “all relief to which they are entitled,”¹²² an “available” remedy could include any remedy that might help the plaintiff’s situation.¹²³ The court premised this

116. See generally *Jimmy Swaggert Ministries v. Board of Equalization*, 493 U.S. 378 (1990). According to the Supreme Court, exhaustion rules serve “a legitimate state interest in requiring parties to exhaust administrative remedies before proceeding to court,” because they “prevent having an overworked court consider issues and remedies available through administrative channels.” *Id.* at 397 (citing *Atari, Inc. v. State Board of Equalization*, 170 Cal. App.3d 665, 673 (Cal. 1985)).

117. See *Perez*, 182 F.3d at 537-38.

118. See, e.g., *Massey*, 196 F.3d 727 (requiring the plaintiff to exhaust administrative remedies despite the fact that he was asserting claims for money damages against several defendants as individuals); *Alexander*, 159 F.3d 1321 (requiring the plaintiff to exhaust administrative remedies despite the fact that he brought his claim against individual prison officials).

119. *Alexander*, 159 F.3d at 1327. Additionally, the general purpose of creating a good administrative record for the court is still served when the inmate is bringing claims against individuals. *Id.*

120. Federal Rule of Civil Procedure 54(c) provides, “Every final judgment shall grant the relief to which the party . . . is entitled, even if the party has not demanded such relief in the party’s pleadings.” FED. R. CIV. P. 54(c).

121. *Perez*, 182 F.3d at 537-38. *Perez* slipped and fell in the shower, injuring his back. *Id.* at 533. He brought action to compel the state to approve surgery for his condition. *Id.* at 533-34. *Perez* also included a claim for damages, alleging that the state’s negligence in providing him with medical treatment constituted “cruel and unusual punishment.” *Id.* at 534.

122. FED. R. CIV. P. 54(c).

123. See *Charlie F. v. Bd. of Educ. of Skokie School Dist.* 68, 98 F.3d 989, 992 (7th Cir. 1996). In *Charlie F.*, the Seventh Circuit defined “available” relief as “relief for the events, conditions, or consequences of which the person complains, not necessarily relief of the kind the person prefers.” *Id.* at 992. The Seventh Circuit subsequently incorporated this definition into its PLRA analysis in *Perez*, 182 F.3d at 537-38.

Compare the *Charlie F.* position with the Supreme Court’s position in *McCarthy*:

[T]he grievance procedure does not include any mention of the award of monetary relief.

Respondents argue that this should not matter, because “in most cases there are other things that the inmate wants.” [citation omitted] This may be true in some instances. But we cannot

argument on the idea that prisoners do not petition courts simply because they want money, but instead to change their situations or to receive redress for an injury.¹²⁴ Applying this logic, it should not matter to the prisoner whether a court awards money or other “in-kind” assistance.¹²⁵ If a prison grievance system is capable of awarding “in-kind” assistance or injunctive-type relief to remedy the inmate’s situation, then a viable remedy is “available” and the inmate must pursue that remedy first, even if the inmate would prefer to receive money damages.¹²⁶ Thus, the Seventh Circuit suggested looking beyond the face of an inmate’s petition to envision all the possible remedies that would rectify the inmate’s situation.¹²⁷ If a court can envision any remedy that the prison grievance system could award, then the inmate will be held to administrative exhaustion.¹²⁸

In *Perez*, the Seventh Circuit admitted that there may be rare instances in which the inmate’s injury cannot be recompensed in any way other than with money damages.¹²⁹ However, the court assumed that this would be the exception rather than the rule.¹³⁰ Although later Seventh Circuit panels have moved away from the middle-of-the-road approach articulated in

presume, as a general matter, that when a litigant has deliberately foregone any claim for injunctive relief and has singled out discrete past wrongs, specifically requesting monetary compensation only, that he is likely interested in “other things.”

503 U.S. at 154.

124. See *Charlie F.*, 98 F.3d at 992; *Perez*, 182 F.3d at 537-38. The Seventh Circuit holds that the agency’s ability to provide “in-kind” services that provide their “money’s worth” makes it impossible to draw a bright line between damages and other relief. *Perez*, 182 F.3d at 538.

125. See *Charlie F.*, 98 F.3d at 992.

126. *Perez*, 182 F.3d at 538.

127. *Id.*

128. *Id.* The Sixth Circuit articulated a similar theory in *Hartsfield*, 199 F.3d 305. According to the Sixth Circuit:

[A]lthough it may make sense to excuse exhaustion of the prisoner’s complaint where the prison system has a flat rule declining jurisdiction over such cases, it does not make sense to excuse the failure to exhaust when the prison system will hear the case and attempt to correct legitimate complaints, even though it will not pay damages.

Hartsfield, 199 F.3d. at 308.

129. See *Perez*, 182 F.3d at 538. According to the court, “It is possible to imagine cases in which the harm is done and no further administrative action could supply any ‘remedy.’” *Id.* In such cases, a court would be justified in waiving administrative exhaustion. The *Perez* court posited the following example: “Suppose [a] prisoner breaks his leg and claims delay in setting the bone . . . If the injury has healed by the time the suit begins, nothing other than damages could be a ‘remedy,’ and if the administrative process cannot provide compensation then there is no administrative remedy to exhaust.” *Id.*

130. *Perez*, 182 F.3d at 538. Specifically, the *Perez* court opined that the Ninth Circuit case *Lunsford v. Jamao-As*, 155 F.3d 1178 (9th Cir. 1998), may have been correctly decided. *Id.* For the specific facts of *Jamao-As*, see *infra*, notes 144 to 146 and accompanying text.

Perez,¹³¹ the *Perez* court reached a middle-ground that accommodates the concerns driving both sides of the circuit split.

E. A Study in the Application of the Three Different Positions: Whitley and Jamao-As

An application of each of the three administrative exhaustion approaches to two recent cases illuminates the differences between these approaches.

The facts surrounding the Fifth Circuit's *Whitley* decision would engender some sharp contrasts between the three approaches. *Whitley* brought action requesting \$1,000,000 from the Bureau of Prisons and \$100,000 from each of three individual defendants.¹³² He alleged that the defendants "endangered his health" by making him sleep in a smoking dorm for thirteen weeks.¹³³ Further, *Whitley* claimed that the guards discriminated against him because of his race and "because he [was] from St. Louis."¹³⁴ Finally, he claimed that prison officials willfully increased his security status from minimum to low security on the basis of inaccurate information and retaliated against him for filing administrative grievances.¹³⁵

Interestingly, *Whitley*'s original complaint sought money damages, future medical care, and termination of each of the individual named defendants from their positions.¹³⁶ However, *Whitley* amended his complaint to seek money damages only after the magistrate judge prepared a memorandum order recommending that *Whitley*'s claim be dismissed for failure to exhaust administrative remedies.¹³⁷ After amending the complaint, *Whitley* argued that because he claimed money damages only, he should not be forced to submit to administrative procedures.¹³⁸

The Fifth Circuit, which does not require exhaustion of claims for money damages, held that *Whitley* did not have to exhaust administrative

131. See, e.g., *Massey v. Wheeler*, No. 99-2663, 2000 WL 994940, at *2 (7th Cir. July 20, 2000) ("Massey II") (holding that the Seventh Circuit requires strict exhaustion); *Massey*, 196 F.3d at 733-34 ("Massey I") (distinguishing the *Perez* opinion from the facts in *Massey* and moving the circuit more firmly in the direction of strict exhaustion).

132. 158 F.3d at 883-84.

133. *Id.* at 884.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* Further, *Whitley* attempted to bring his \$1,000,000 claim against the government as a *Bivens* action so that he could bypass the Federal Tort Claims Act processes. *Id.* at 885.

remedies after amending his complaint to seek money damages only.¹³⁹ However, if the Eleventh Circuit or another court that strictly requires exhaustion was deciding Whitley's case, it is likely that Whitley would have been required to submit all of his claims to the prison grievance system and exhaust his administrative remedies before bringing his claim in federal court.¹⁴⁰

Under the *Perez* analysis, the result would be much the same as if the case had come before the Eleventh Circuit: Whitley would not be permitted to litigate in federal court because he failed to submit his complaints to the prison grievance system. The *Perez* court would reach this decision for different reasons. The *Perez* court would claim that the prison grievance system could help resolve several of Whitley's complaints.¹⁴¹ The system could provide medical screening and care related to the time Whitley spent in the smoking dorm.¹⁴² The prison could easily change his security status from low security back to minimum security. Further, the prison could hear his complaints of racial and regional discrimination, determine if any guards acted inappropriately, and take any necessary disciplinary measures against the guards.¹⁴³

The facts in *Jamao-As* provide a crisp contrast to the *Whitley* case. In *Jamao-As*, the plaintiff's only complaint was that the prison had waited a long time before providing him with needed surgery.¹⁴⁴ However, the plaintiff had received the corrective surgery prior to the time he filed suit.¹⁴⁵ The Ninth Circuit permitted *Jamao-As* to bring his money damages claim to federal court without first exhausting administrative remedies.¹⁴⁶ Had this case been decided in the Eleventh Circuit, it is likely that the court would make the plaintiff submit his claims to the prison grievance system and dismiss his case for failure to exhaust administrative remedies.¹⁴⁷

Under the *Perez* analysis, the final decision would be much the same as

139. 158 F.3d at 887.

140. See *Alexander*, 159 F.3d at 1326-28 (strictly requiring administrative exhaustion).

141. See *Perez*, 182 F.3d at 537-38 (discussing *Perez*'s similar medical complaints and concluding, "At a minimum surgical intervention now would terminate the accrual of further damages . . .").

142. *Id.* In the *Perez* case, the Seventh Circuit suggested that the prison system could change *Perez*'s medical regimen. *Id.*

143. As the *Alexander* court noted, at the very least the prison grievance system could "halt the infringing practice" of which the inmate complained. 159 F.3d at 1327.

144. 155 F.3d at 1179.

145. *Id.*

146. *Id.*

147. See *Alexander*, 159 F.3d at 1326-28 (requiring exhaustion in all cases).

the one the Ninth Circuit reached: the plaintiff would be permitted to bring his money damages claim to court.¹⁴⁸ Once again, however, the *Perez* court would further analyze the case. The plaintiff brought action for pain and suffering that occurred during a discrete period of time.¹⁴⁹ No administrative action or injunctive-type relief could take the plaintiff back in time and ease his pain.¹⁵⁰ Because no administrative action could remedy the plaintiff's complaint,¹⁵¹ he would be permitted to seek money damages in federal court.

III. PROPOSAL

A. *Until Congress Can Study the Administrative Exhaustion Requirement Again, Courts Should Follow the Seventh Circuit's Approach in Perez*

The Seventh Circuit's analysis in *Perez* is a moderate, middle-of-the-road approach to the money damages problem. The *Perez* approach asks whether there is anything at all to gain from the prison grievance system,¹⁵² thereby allaying the Supreme Court's futility concerns in *McCarthy*.¹⁵³

Courts should engage in a two-step process to determine whether an inmate should be forced to exhaust administrative remedies. First, the court should ask whether the prison grievance system could award any type of relief that will help the inmate's situation.¹⁵⁴ If meaningful relief is

148. Indeed, the *Perez* court expressly stated that *Jamao-As* may have been correctly decided on its facts. *See Perez*, 182 F.3d at 538.

149. *See Jamao-As*, 155 F.3d at 1179.

150. *See Perez*, 182 F.3d at 538 (providing the broken bone example and noting that, once the bone is set, nothing other than compensation will make the plaintiff any more whole).

151. *See Charlie F.*, 98 F.3d at 992 (defining "relief available" as "relief for the events, conditions, or the consequences of which the person complains . . .").

152. *See Perez*, 182 F.3d at 538. *See also Charlie F.*, 98 F.3d at 992.

153. The Supreme Court claimed that McCarthy had "everything to lose and nothing to gain" by submitting his claim for money damages to the prison grievance system. 503 U.S. at 152. In contrast, the Seventh Circuit urged, "No one can *know* whether administrative requests will be futile; the only way to find out is to try." *Perez*, 182 F.3d at 536.

154. This first inquiry would require courts to engage in the sort of "creative" remedy brainstorming that the Seventh and Eleventh Circuits have already performed. *See Perez*, 182 F.3d at 537-38 (discussing hypothetical remedies the plaintiff in that case could have requested from the prison system); *Alexander*, 159 F.3d at 1327 ("[E]ven if the complaining prisoner seeks only money damages, the prisoner may be successful in having the [Bureau of Prisons] halt the infringing practice, which at least freezes the time frame for the prisoner's damages.").

Admittedly, this step's single greatest drawback is the consumption of judicial time and resources this fact-specific approach requires. Surely, however, this type of common sense analysis will not take the same time and energy as learning an entire prison grievance system to determine whether the system awards any type of money damages. *See Nyhuis*, 204 F.3d at 74.

available, the second step is for the court to ensure that the inmate has exhausted administrative procedures in an effort to obtain such relief.¹⁵⁵ However, if the court determines that no relief is available under the first step, it need not complete the second step; instead, the inmate should be permitted to bring his suit in federal court. Using this approach, only the complaints for which the administrative system provides no meaningful relief will be allowed into court without first wending their way through the administrative process.¹⁵⁶

This approach is fair to prisoners, prison grievance systems, and the courts, while serving several of Congress's underlying goals.¹⁵⁷ Prisoners are not forced to subject themselves to a prison grievance system that cannot offer them any relief as the Supreme Court feared in *McCarthy*.¹⁵⁸ As long as the inmate can gain something from the process, however small, the process should not be deemed futile.¹⁵⁹ The approach is also fair to prison grievance systems. This procedure gives prison grievance systems an opportunity to handle most problems before being subjected to invasive judicial review.¹⁶⁰ However, the prison does not have to expend administrative resources processing completely futile complaints.¹⁶¹

B. Congress Should Revise § 1997e(a) to Close the Money Damages Loophole While Creating Statutory Exceptions for the Most Futile Cases.

In order to effectuate fully its intent that courts should not look into prisoner complaints until prison grievance systems have an opportunity to resolve them, Congress should revise the administrative exhaustion statute to define more carefully the term "available remedies." An "available

155. In other words, the administrative exhaustion requirement should apply if the court can think of a single remedy other than money damages that could improve the inmate's situation.

156. In order to go straight to court, an inmate would have to complain of an injury or condition not of a continuing nature and bring action for damages for the small window of time during which the injury existed. Ideally the court would require the inmate to exhaust Tort Claims Act procedures where applicable; thus, in most jurisdictions, only claims for money damages against individuals could be filed directly in federal court.

157. As already discussed, *supra*, notes 56 to 58 and accompanying text, this approach may further Congress's goal of preventing or putting off federal court interference in prison systems. This approach would still deter inmates from filing frivolous claims, but would allow meritorious claims to be brought, particularly where the inmate is alleging a discrete incident of physical violence or sexual abuse.

158. 503 U.S. at 152.

159. *See Perez*, 182 F.3d at 538.

160. The Eleventh Circuit considers this to be a major advantage of administrative exhaustion requirements generally. *See Alexander*, 159 F.3d at 1327.

161. *See McCarthy*, 503 U.S. at 152.

remedy” should be defined as any possible award or restitution, whether injunctive, in-kind, or monetary, that will help rectify the situation or injury of which the petitioner complains.¹⁶²

To anticipate those cases in which an inmate’s participation in the prison grievance systems would be truly futile, Congress should create a process that allows prison grievance systems to grant permission for inmates to circumvent the administrative process when the subject matter of the claim is not a proper subject for administrative action.¹⁶³ Prison officials would have the first opportunity to determine if their system can offer any remedy. If the prison simply cannot award any sort of useful remedy, the inmate should be able to apply to the prison administration for permission to file suit without first exhausting a futile administrative process that may prejudice later court proceedings. This administrative exhaustion “waiver” would be most helpful where, for example, a prisoner wished to sue an individual prison guard for alleged physical abuse. Such a system would further Congress’s goal of allowing prison administrators to run America’s prisons autonomously and would close the loophole in the current statute permitted by the Fifth, Ninth, and Tenth Circuits.¹⁶⁴

IV. CONCLUSION

The Prison Litigation Reform Act’s changes to the inmate’s administrative exhaustion requirement represent a step in the right direction. However, Congress must revisit the issue in the future to close the money damages loophole created by court decisions in the Fifth, Ninth, and Tenth Circuits. In the meantime, federal courts should carefully follow the model established by the Seventh Circuit in *Perez v. Wisconsin Department of Corrections*¹⁶⁵ by looking beyond the inmate’s petition and

162. This definition is loosely based on the definition of “relief available” in *Charlie F.*, 98 F.3d at 992.

163. This procedure would solve one of the problems mentioned in *Garrett*, 127 F.3d 1263. In *Garrett*, the government conceded that the institutional staff would reject a pure money damages claim as constituting improper subject matter for administrative review and would notify the inmate of the availability of a remedy under the Federal Tort Claims Act. 127 F.3d at 1266. The proposed procedure would allow prison grievance systems to make this judgment call. If the grievance system does not want to waste its time and the inmate’s with formalities, then it should have the power to permit the inmate to take his case to court. After all, Congress enacted the PLRA, in part, to allow states to run their prison systems without judicial interference. *See* 141 CONG. REC. 26,548 (1995) (statement of Sen. Dole).

164. The loophole exists because, as the Third Circuit recognized in *Nyhuis*, inmates will inevitably figure out that they need only craft their petitions to request money damages in order to circumvent the administrative exhaustion requirement. 204 F.3d at 74.

165. 182 F.3d 532.

envisioning all possible types of relief that would help the inmate's situation or, at a minimum, freeze his damages.¹⁶⁶

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166. *Id.* at 537-38.

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